



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 473 OF 2025
WITH
CIVIL APPLICATION NO. 13907 OF 2025

DWARKABAI W/O DYNANESHWAR PAWAR

Versus

1. MAIMUNABEE W/O SHAIKH NOOR
2. SAMINABEE W/O SAYYED RASHID
3. SAFIYABEE W/O SAYYED MUSA
4. MAHEBOOBEE W/O SHAIKH SAMAD
5. JAMIL KHAN S/O UMAR KHAN
6. KHALIL KHAN S/O UMAR KHAN
7. AJIJABEE W/O JAMIL KHAN
8. NOORJAHAN BANO D/O MAHETAB SHAIKH

- * Advocate for the Appellants : Mr. V. P. Narwade
- * Senior Advocate for the Respondents : Mr. V. D. Sapkal
a/w Ms. Priyanaka Kale
- * Advocate for the Respondent No.1 : Mr. Arvind R. Kawade

CORAM : MEHROZ K. PATHAN, J.

Date of Reserving the Judgment : **26th MARCH 2026**

Date of Pronouncing the Judgment : **20th APRIL 2026**

J U D G M E N T :

1. The Second Appeal is filed by the Appellant challenging the judgment dated 17.03.2022 passed by the learned Civil Judge Junior Division, Aurangabad in Regular Civil Suit No.29/2016 as well as the judgment and decree dated 27.11.2025 passed by the learned District Court, Aurangabad in Regular Civil Appeal No. 136/2022.

2. Facts of the case are as under :

. The Plaintiffs Nos. 1 to 4 are the sisters of Defendants Nos. 1 and 2, being the daughters of Umar Khan. Defendant No. 3, Azizabi, is the wife of Defendant No. 1, Jameel Khan. Defendant No. 4, Noor Jaha, is the daughter of the brother-in-law of Defendant No. 1. Defendant No. 5 is the subsequent purchaser of the suit property from Defendant No. 2, Khaleel Khan, and his father, Umar Khan.

3. The suit property, Gut No. 152, Old Survey No. 76, admeasuring 5H 36R (equivalent to 13 acres), situated at Village Pimpri, Taluka Khurd, District Aurangabad, was originally owned by Jugan Khan, the grandfather of the Plaintiffs and Defendants Nos. 1 and 2. After the death of Jugan Khan, Umar Khan, the father of the Plaintiffs and Defendants Nos. 1 and 2, inherited the suit property. Umar Khan died intestate on 15.08.2011. It is the case of the Plaintiffs that during his lifetime, Umar Khan had handed over the suit property to Defendants Nos. 1 and 2 for the purpose of better cultivation. However, Defendants Nos. 2 and 3 recorded their names in the revenue records on the basis of an illegal partition deed, vide mutation entry dated 16.12.1985. Defendant No. 1 illegally transferred the entire land standing in his name to Defendants Nos. 3 and 4. Defendant No. 2 sold a portion of the land to Nawab Pathan and Kalyan Sheshrao, and later repurchased part of that land. Defendant No. 5 purchased a total of 2 acres from Defendant No. 2 and 11 gunthas of land from Nawab. Defendant No. 5 also purchased 11 gunthas of land from Umar Khan. The Plaintiffs have a share in a total of 91 gunthas of land

purchased by Defendant No. 5. They have no objection to the alienation made by Umar Khan.

4. Defendants Nos. 3 and 4 filed their separate written statements at Exhibit 20, whereas Defendant No. 5 filed her written statement at Exhibit 31. According to Defendant No. 5, Umar Khan became the absolute owner of the suit property after the death of Jugan Khan. During the lifetime of Umar Khan, he allotted 4 acres 20 gunthas each to Defendants Nos. 1 and 2, and retained 4 acres 10 gunthas for himself. The Plaintiffs had consented to such arrangement and allotment, which resulted in the mutation entry. During Umar Khan's lifetime, the Plaintiffs never objected to these arrangements. Umar Khan had further gifted the remaining 3 acres 39 gunthas to Defendants Nos. 1 and 2 and put them into possession of the land by way of oral gift. It was further stated in the written statement that the Plaintiffs had consented to such gift made by Umar Khan during his lifetime. Thus, Defendants Nos. 1, 3, and 4 claim ownership of the suit property and contend that the Plaintiffs have no share therein. Accordingly, they submit that the suit for partition is liable to be dismissed.

5. The learned trial Court has considered the evidence led by the Plaintiffs and Defendants and have decreed the suit with costs. The learned trial Court declared that the Plaintiff sisters, being the daughters of Umar Khan, were entitled to 1/8th share each in the suit property, whereas Defendants Nos. 1 and 2 were entitled to 2/8th share each, being the sons of Umar Khan. The learned Trial Court further declared that the sale deeds dated 27.04.2001,

08.05.2001, and 16.04.2003 are not binding on the shares of the Plaintiffs. The Collector was directed to effect partition of the suit property in accordance with Section 54 of the Civil Procedure Code. The Collector was further directed to adjust the shares of Defendants Nos. 1 and 2 against their transferees, so far as practicable.

6. Defendants Jameel Khan, his wife Azizabi, and their daughter Noor Jahan Bano filed Regular Civil Appeal No. 136 of 2022 before the District Judge at Aurangabad. The learned District Judge, vide judgment dated 27.11.2025, dismissed the appeal with costs. The judgment and decree passed by the learned Trial Court in R.C.S. No. 29 of 2016, dated 17.03.2022, was confirmed.

7. The Appellants, namely Jameel Khan, Khaleel Khan, Azizabi, Noor Jahan Bano, Sofiyabi, and Mehboobabi, have filed the accompanying appeal being Second Appeal No. 474/2025 challenging the judgment and decree dated 17.03.2022 passed in R.C.S. No. 29 of 2016 by the learned 12th Joint Civil Judge, Junior Division, Aurangabad, as well as the judgment and decree dated 27.11.2022 passed in R.C.A. No. 136 of 2022 by the learned District Judge, Aurangabad.

8. After hearing the learned Counsel R.R. Shaikh holding for Mr. Ingle for the Appellants in Second Appeal No. 474/2025 and Mr. Narwade learned Counsel for the Appellants in Second Appeal No. 473/2025 and Mr. V.D. Sapkal learned Senior Counsel along with Ms. Priyanka Kale for the Respondents. The following substantial

questions of law were framed in the accompanying appeal :

(A) When Father of defendant Nos. 1 and 2 and plaintiffs allotted suit property to defendant Nos. 1 and 2 and himself in the year 1985 and the share of father i.e. 11 R land being sold in the year 2004? In this background, whether suit filed for partition and possession in the year 2016 is within limitation?

(B) Whether, Ex.46 (Mutation Entry) is a proof of partition, in absence of Deed of Partition or Notes of Partition when Parties are governed by Muslim Personal Law and as per Muslim Personal Law, partition is not permissible during life time of father, though , Hiba is permitted?

9. Insofar as the question of law (A) on the point of limitation is concerned, it is pertinent to note that Umar Khan, the father of Plaintiffs Nos. 1 to 4 and Defendants Nos. 1 and 2, died in the year 2011. Under Muslim Law, rights devolve upon the legal heirs only upon the death of the ancestor. In the present case, the Plaintiffs claim their rights through their father Umar Khan, who died in 2011. The Plaintiffs have denied any partition in the years 1985 or 2004, as well as any gift alleged to have been made in those years. Similarly, there was no evidence on record before either the Trial Court or the Appellate Court to establish the Defendants' theory of oral gift or partition in 1985 or 2004. Accordingly, the plea of limitation raised by the Appellants before the First Appellate Court was rejected.

. A perusal of the plaint shows that the Plaintiffs specifically stated the cause of action for the suit as 16.11.2015, and the suit was filed on 04.01.2016. In a common suit for partition, there is no fixed limitation period for filing; joint owners through a common ancestor may claim their shares in the property as per their legal

rights whenever they realize such rights, and once such claim is made and denied by the person in possession, the suit for partition can thereafter be filed within limitation. In the present case, the cause of action, as stated by the Plaintiffs in their plaint, arose upon receipt of notice issued by the Sub-Divisional Officer against the order passed by the Tahsildar dated 19.08.2015, directing mutation of the names of the Plaintiffs as well as Defendants Nos. 1 and 2 in respect of 4 acres of land out of Gut No. 152. The said appeal was filed by the Defendants against the order of the Tahsildar directing mutation of the names of the legal heirs of the common ancestor, namely Umar Khan. Thus, the cause of action is shown to be 16.11.2015, and the suit filed on 04.01.2016 was within limitation. I find no error in the findings arrived at by the learned Trial Court and the First Appellate Court on the point of limitation. The facts remain that the common ancestor, Umar Khan, expired in 2011. Thereafter, the mutation process was undertaken from 2014, and the Tahsildar passed an order on 19.08.2015. Defendants Nos. 1 and 2 filed an appeal before the Sub-Divisional Officer, and upon receipt of such notice, the present suit came to be filed. In my opinion, no error has been committed in the findings of both the Courts below on the point of limitation. Thus, Question of Law No. 1, as framed above on the point of limitation in Second Appeal No.474/2025 is answered, accordingly holding that there is no error in the findings of both the Courts below and that the suit was filed within limitation.

10. Insofar as the other questions of law (B) pertaining to mutation entry no. 46 is concerned, though, the affidavit of

evidence of defendant no.1 shows that in 1985, Umar Khan gifted the suit property to defendant nos. 1 and 2 and retained some part with him, there is no pleading to that effect in the written statement (Exh.20). The defendant no.1 has only contended in paragraph no.1 (D) that Umar Khan, in 1985, allotted the suit land to defendant nos. 1 and 2 and retained some portion with him. The defendant no.2 has not filed written statement and did not contest the suit. His silence is material. Under such circumstances, the evidence tried to be led by the DW-1 Jamil Khan that the part of the suit property was gifted to him in 1985 cannot be considered in the absence of specific pleadings. He tried to put forth the case that the part of the suit property was allotted to him in 1985. However, except the aforesaid mutation entry (Exh.46) and names in the revenue records, there is no other evidence in support of such allotment. The learned trial Court not at all considered the cross-examination of PW-1 Maimunabee and PW-2 Saminabee. Both of them have admitted that the suit property was so allotted to the defendant nos. 1 and 2 by Umar Khan in 1985 and they started cultivating their share separately. According to PW-2 Saminabee, the said division was so done only for their maintenance. They have also admitted that they have not raised any objection. The cross-examination of DW-1 Jamil Khan shows that he used to give agricultural produce to plaintiffs and his relations were good with them for 4 to 5 years even after death of father and they were on visiting terms. He further admitted that there is no pleading in the written statement that father had gifted him an area 4 Acre 20 Gunthe.

. Even, the case put forth by the defendants about the division of the suit property is considered as it is, in view of the ratio laid

down in the case of Mansoor Saheb vs. Salima (AIR Online 2024 SC 833), to the effect that when a Muslim person is alive, partition of property between him and his heirs is impermissible under Mohammedan Law. It is permissible to such Muslim person to give the part of his property to his sons by way of Hiba. The fact of the aforesaid case are much similar to the facts in hand. Even, it is led down that if the case of Hiba is put forth, the legal requirements to prove Hiba must be fulfilled by a person putting forth such plea. Since there was no pleading in the written statement filed by Defendant No.1 about a valid Hiba, the substantial question of law (B) is answered in negative in Second Appeal No. 474/2025.

11. Insofar as present appeal is concerned, the Appellant/original defendant No. 5 is a subsequent purchaser, who has purchased 2 acres of land from defendant No. 2, 11 gunthas of land from Nawab Khan, and 11 gunthas of land from Umar Khan. Insofar as the transfer made by Umar Khan is concerned, the plaintiff did not object to the transfer of 11 gunthas of land in favour of defendant No. 5. However, the plaintiff objected to the transfer made by defendant No. 2 in favour of defendant No. 5 of 2 acres of land and 11 gunthas from Nawab Khan, to whom defendant No. 2 had sold some land.

12. The Appellant/Defendant No. 5 contended that she has purchased the suit property by a registered sale deed and that she is a bona fide purchaser after verifying the title and possession of the suit property as per the revenue record. After hearing the learned counsel for the appellant and the respondents, the

following substantial question of law arises in the present appeal:

“Whether the plaintiff was entitled to seek partition of the land already transferred in the name of the appellant herein by defendant No. 2 and Nawab Khan, to whom defendant No. 2 had already alienated his share?”

13. The perusal of the record shows that defendant No. 5 has stated that she is a bona fide purchaser of 2 acres of land from defendant No. 2 Khalil Khan and 11 gunthas of land from Nawab Khan. However, defendant No. 5 has failed to enter the witness box and has not put forward her defence in the cross-examination of the plaintiff. The Defendant No.2 also did not file any written statement and as such the suit has gone uncontested against Defendant No.2.

14. A bona fide purchaser may be entitled to retain the property if the title is defective. However, where the vendor does not have title to sell the property, the plea of bona fide purchaser is not available to the subsequent purchaser. It is a settled position under Muslim Law that as long as a person is alive, he is the absolute owner of his property, and legal heirs, including sons, have no right in such property. It is only upon the death of the owner that rights devolve upon the legal heirs, who may then deal with the property.

15. In the present case, though the learned Trial Court has considered the transfer in favour of defendant No. 5 as defective and has held that the sale deed is not binding on the share of the plaintiff, the learned Trial Court has directed the Collector to adjust the shares of defendant Nos. 1 and 2 against their transferees i.e. Defendant No.5/Appellant herein, as far as practicable.

16. In the absence of any evidence led by defendant No. 5 or any effective cross-examination of the plaintiff, the conclusions arrived at by the learned Trial Court as well as the First Appellate Court cannot be faulted. The substantial question of law involved in the present appeal is answered accordingly.

17. There is no error committed either by the Trial Court or the First Appellate Court in declaring that the sale deed in favour of defendant No. 5 (appellant herein) as not binding on the share of the plaintiff. No other substantial question of law arises in the present appeal. The appeal is, therefore, devoid of substance and merit and is hereby rejected. The Civil Application is also disposed of.

**[MEHROZ K. PATHAN]
JUDGE**

Najeeb..