

(1982) 04 BOM CK 0034
In the Bombay High Court
Case No : Second Appeal No. 226 of 1976

Imam Mohamed Pendhari

APPELLANT

Vs

Rahimatabai Allabaksha Pendhari

RESPONDENT

Date of Decision : 30-04-1982

Acts Referred:

Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955 — Section 7(3)
Limitation Act, 1963 — Article 110

Citation : (1983) 1 BomCR 291

Hon'ble Judges : V.S. Deshpande, C.J

Bench : Single Bench

Advocate : Ranjana S. Samant, for the Appellant; S.M. Mahamane, for respondent Nos. 1 to 5 and Ajit P. Shah, for the Respondent

Judgement

V.S. Deshpande, C.J.—This is plaintiff's second appeal. The plaintiff claims to be heir of one Mohamed. The said Mohamed died in the year 1949, leaving behind him the plaintiff-Inam Allabaksha, ancestor of defendants Nos. 1 to 5 and daughter Chandhi-defendant No. 6. Admittedly, the suit properties are Inam lands and non-Inam lands. The Inams came to be abolish in the year 1955 under the provision of the Bombay Merged Territories Miscellaneous Alienation Act, 1955 (hereinafter referred to as "the Act"). The lands were ultimately regranted in favour of the son of Allabaksha, defendant No. 1 on 21-7-1971. The land appears to have been so regranted to the son of Allabaksha on the hypothesis that he was entitled to the same by rule of primogeniture and also by right of inheritance accrued to him after the death of his father under rule of primogeniture, though the inam lands were held by Mohamed during his life time since the death of his ancestor. This suit was decreed by the trial Court by its judgement and decree dated 7th December, 1973, to the extent of 2/5th share both in inam land and non-inam land. The decree contained certain other consequential directions as to the partition and mesne profits. The Court also directed that defendant No. 6 to be put in possession of the land to the extent of

her 1/5th share as the daughter of the said Mohamed. Defendants Nos. 1 to 5 preferred an appeal to the District court. The said appeal is allowed by the learned Assistant Judge by his judgment and decree dated 30th January, 1976, only to the extent of inam land. It is the validity of this order of the Assistant Judge which is challenged in this second appeal by the original plaintiff as also by the defendant No. 6, who virtually happens to be the plaintiff in suit like this. The only point that was urged before the learned Assistant Judge was whether plaintiff's right can be said to have been extinguished because of the abolition of the inams.

2. The Assistant Judge appears to have thought that impartible property such as Inam lands is like self-acquired property and separated property of the person holding it. Under the Mohammedan Law, there is no rule of survival ship and impartible property cannot be considered as a family property for any purpose. It must be considered as separate property of the person holding it. He therefore, though that on the death of his father, the property would go to Allabaksha as the eldest son and it should be considered as a separate property of Allabaksha alone. It is on this hypothesis that the plaintiff was found to have been excluded from inheriting the suit land on the death of Mohamed.

3. I do not think this view of the learned Assistant Judge is correct. It is true that Inam property was impartible till Inam came to be abolished in the year 1955. Thereafter, the impartible character of the land ceased to be in existence. But for its impartibility, the plaintiff and defendant No. 6 could have claimed share in the property left by Mohamed. Their claim to such partition had not become time-barred on the date when Inams came to be abolished with their impartible character. They were thus entitled to claim share in the property in the same manner as any other property left by Mohamed. It is obvious that while regranteeing the land on 21-7-1971, the Revenue Authority did not bother to go into the question as to legal title to the suit property. Babu can be said to be a person amongst many other persons who claimed occupancy rights on payment of occupancy price. The Revenue Officers may be justified in stating Babu as a person entitled to deposit occupancy price and regrant of occupancy rights. Such an order by the Revenue Officers cannot be conclusive of the title to the land. Plaintiff and defendant no. 6 were as much entitled to the property left by Mohamed as the defendants Nos. 1 to 5 are. Their title was not extinguished by the time, the inam character of the property had to come to an end and rule of primogeniture ceased to be applicable to such property with abolition of inam and impartibility thereof. Merely because, Revenue Officers ignored the interest and claim of the plaintiff in the land, they cannot be prevented from claiming title and their share in the land, if otherwise, the same exists. To this extent the finding of the learned Assistant Judge is not correct and decree passed by him is liable to be set aside.

4. It is necessary to mention the question as to rights of the heirs of the Inamdars in such property abolished as a result of the Inam Abolition Act had

come before some judges of this Court. The matter has been finally decided by a judgement of the Full Bench in the case of Laxmibai Sadashiv Date v. Ganesh Shankar Date, reported in 79 Bom.L.R. 234 . This view of the Full Bench has been affirmed by the Supreme Court in the case of Nagesh Bisto Desai and Others Vs. Khando Tirmal Desai and Others, . A Division Bench of this Court took the view that the said Full Bench judgment will not be applicable to the Inams in the erstwhile Kolhapur State. Another Division Bench consisting of myself held on 22-8-1977 in First Appeal No. 291 of 1968 that the said view runs counter to the ratio of the Full Bench judgment and ration of Full Bench judgment was applicable to the inams in Kolhapur State in the same manner as it applies to several other inams which came to be abolished under several abolition enactments of the Bombay and Maharashtra Legislature.

5. Mr. Mhamane, the learned Advocate appearing for the respondents-defendants Nos. 1 to 5, contends that the judgment of the Full Bench will have no application whatsoever to the inams left by Mohamedans. Suffice it to observed that such contention is rejected in the judgment of Kantawala, J., dated 1st December 1977 in Second Appeal No. 216 of 1971. Another learned Single Judge viz., Pendse, J., also rejected this contention on 31st March 1982 in Second Appeal No. 339 of 1976. I respectfully agree with their view. It shall have to be held that all the properties held by Mohamedans are as much inheritable as property of any other Hindu. Ration of the Full Bench judgment in Date's case (supra) as not depended whether the property belongs to the joint family or the same is self-acquired property. Even if it is assumed in the present case that the property was self-acquired property of Mohamed, the same is liable to be partitioned amongst all the heirs of Mohamed. The fact that the eldest son of Mohamed was accepted as inamdar by itself cannot be conclusive of rights of the plaintiff, when Inam character of the property came to be abolished in the year 1955 before their claim to the petitioner to the property cannot be said to be time barred.

6. Mr. Mhamane, then contends that in other case, the suit must be held to have been time-barred. It is true that the suit was instituted on 22-3-1972. The inam stood abolished in the year 1955. Suit no doubt, was filed long after the expiry of 12 years from the date of abolition of Inam. This circumstance, to my mind, is absolutely irrelevant. In cases where several persons are held to have joint rights to property, the person claiming limitation shall have to plead and prove that claiming co-sharer was not ousted from the property. Unless such other ouster is pleaded, and proved, the question of such suit being time-barred cannot arise. Mr. Mhamane relied on Article 110 of the Limitation Act. The said Article deals with the claim of the plaintiff in the estate of joint family property. Suffice it to there note that the said Article can have no application whatsoever to claim of the co-sharer to the property left by his ancestor.

7. It, however, may be made clear as been made in the Full Bench judgment in Date's case that this partition is subject to the collector's sanction in terms of

section 7(3) of the Abolition Act does not permit petitioner on the reported property without permission of the Collector. The question came before the Full Bench. In the event of the permission not being granted, all the parties will be entitled to the joint possession; plaintiff having 2/5th share and other defendants having 2/5th share.

The decree passed by the learned Assistant Judge, therefore, cannot be upheld and is liable to be set aside.

I accordingly allow the appeal as above and set aside the decree and judgment of the District Court and restore that of the trial Court. In the circumstances of the cases, there will be no orders as to costs.