

(2014) 09 BOM CK 0011

In the Bombay High Court

Case No : First Appeal Nos. 1155 and 505 of 2013

Khairunnisabegum

APPELLANT

Vs

Nafeesunisa Begum
 Nafeesunisa Begum Vs
Khairunnisabegum

RESPONDENT

Date of Decision : 22-09-2014

Acts Referred:

Citation : (2014) 09 BOM CK 0011

Hon'ble Judges : M.T. Joshi, J

Bench : Single Bench

Advocate : P.V. Mandlik, Senior Advocate, instructed by L.D. Vakil, Advocate and A.D. Kasliwal, Advocate for the Appellant; A.D. Kasliwal, Advocate and P.V. Mandlik, Senior Advocate, instructed by L.D. Vakil, Advocate for the Respondent

Judgement

M.T. Joshi, J.—Aggrieved by the passing of partial decree in favour of the plaintiffs as well as partially granting counter claim in the same suit, both the plaintiffs and defendants have filed the present appeals.

2. Special Civil Suit No. 229 of 2009 was filed by Nafeesunisa Begum and her two sisters. During the pendency of the suit itself, as they have died, their legal representatives were brought on record. They are now appellants in First Appeal No. 505 of 2013. Similarly, the defendants have preferred First Appeal No. 1115 of 2013. In the circumstances, in order to avoid the confusion, the parties would be termed as "plaintiffs" and "defendants", as arrayed before the learned trial Court.

3. The Suit as well as the counter claim were filed for partition of certain immovable as well as movable properties. One Faiz and his wife Rabiyaabee are the ancestors of the parties. Said Faiz left behind him Farooq Mohammad Khan and the three plaintiffs as a son and daughters. Farooq Mohammad Khan had also died before the filing of the suit. Defendant No. 1 Khairunnisa Begum is the widow while defendant No. 2 Nabegha is the daughter of late Farooq Mohammad Khan. The plaintiffs claimed that following suit properties were owned by Farooq

Mohammad Khan i.e. their brother and therefore upon his death, they being his sisters, are entitled for partition and separate possession from these suit properties. The suit properties are as under:-

(d) Amount lying in Saving Account of Various banks at Aurangabad

(e) Plot Nos. 1 to 7 of Gat No. 80, situated at Mitmata, Aurangabad

4. Farooq Mohammad Khan died on 1st June, 2008. Since there are no male issues left behind him, the plaintiffs claimed that after share to the wife and daughters, the defendants are entitled for the remaining share as residuaries. According to them, since defendants got their name mutated in the revenue record regarding some of the property and threatened to create third party interest, the present suit for partition and separate possession alongwith perpetual injunction came to be filed.

5. The defendants by their written statement, besides admitting the relationship as detailed supra, disputed that some of the properties were ever held by deceased Farooq Mohammad Khan or the right of the plaintiffs in the same. They submitted that so far as gat numbers 43 totally admeasuring 66 H and 20 R, 49 and 1 are concerned, deceased Farooq had double share than claimed by the plaintiffs who are female heirs. They further submitted that the property No. (e) was not owned by Farooq and plot No. (c) has nothing to do with the joint family. They further came with a case that plaintiff No. 1(a) Mohammad Zaherodin Shaikh, after demise of Farooq Mohammad Khan has fraudulently withdrawn an amount of Rs. 4,90,000/- from the account of the deceased and, therefore, they claimed refund of the said amount in their counter claim.

6. The counter claim was opposed by filing written statement by the plaintiffs. They submitted that in fact properties i.e. gat numbers 43, 49 and 1 were owned by deceased Rabiya Begum i.e. the mother of the deceased Farooq and plaintiffs. Therefore, after her death, by way of family arrangement, the property was distributed and partition by mutual consent has taken effect long back. Deceased Farooq did never challenge the revenue record. As regards the money claimed, it was pleaded that there were number of monetary transactions between deceased Farooq and the plaintiffs and as such, the amount was towards the refund of the amount and hence the claim was denied.

7. Before the learned trial Court, it was found that the properties bearing gat numbers 43, 49 and 1 were originally owned by Faiz and thereafter Rabiya Begum. As regards the case of family arrangement and/or partition long back during the lifetime of Farooq, the plaintiffs have only the documents to show that their names are recorded as holder and occupier of these properties. The learned trial Court therefore held that unless and until there is proof regarding the partition, mere possession for more than twelve years against a co-owner would not take us to believe that there was partition unless it is specifically proved. Therefore, it was held that the entire property will be available for partition between deceased Farooq and the present plaintiffs.

8. As regards the properties, which were owned by deceased Farooq separately, it was held that upon death of deceased Farooq, his natural heirs would be the sharers i.e. widow and daughter. The plaintiffs being the sisters, according to Mohammedan law, would be entitled for a residue.

9. Hence in whole Gut Nos. 43, 49 and 1, the plaintiffs were held entitled for 1/3rd share. As regards some of the properties, i.e. property at serial No. (c) i.e. CTS No. 15298/175 and 9816, it was observed by the learned trial Court that the plaintiffs have not produced any documentary evidence. Further, as regards the suit properties at (e) i.e. plot Nos. 1 to 7 of gat No. 80, there was no documentary evidence to show that those properties belong to deceased Farooq and, therefore, claim in this regard was negatived. As regards the movables, amount lying in the account with Bank of Maharashtra and other banks, as detailed in paragraph No. 19 of the judgment of the learned trial Court, those were held to have been left by deceased Farooq and, therefore, that claim was accepted.

10. As regards withdrawal of the amount by plaintiff No. 1 (a), it was observed that the plaintiffs could not prove that there were any monetary transactions or hand loan to deceased and, therefore, finding that on the day of death of the deceased, a specific amount was lying in the bank, the same will have to be held as the property left behind by the deceased and subsequent withdrawal thereof by plaintiff No. 1(a) thereafter will have to be ignored. On the basis of these observations, the decree came to be passed, as detailed supra.

11. Mr. A.D. Kasliwal, learned counsel for the plaintiffs submitted that the learned trial Court has wrongly dismissed the partial claim of the present plaintiffs. He submitted that in another proceedings, the defendants have clearly admitted the existence of some of the immovable properties, claim regarding which has been rejected by the learned trial Court, as detailed supra. He further submitted that the amount was withdrawn by plaintiff No. 1(a) from the account of the deceased after his death, on the basis of the cheque which was issued by the deceased towards repayment of a hand loan. Therefore, the same ought to have been considered by the learned trial Court.

? Mr. Kasliwal further submitted that the whole gut No. 43 ought not have been considered for partition as deceased Faiz i.e. father of deceased Farooq had already partitioned the same as exhibit 128 would show that as successors, the names of the plaintiffs are included. As regards rejection of the claim regarding house properties as detailed supra, he submitted that some documents were submitted on record and merely those were not proved, same were negatived. Regarding plot Nos. 1 to 7 of gat No. 80, there were oral admissions but those were not considered by the learned trial Court. In the circumstances, Mr. Kasliwal submitted that the First Appeal filed by the plaintiffs be allowed.

12. On the other hand, Mr. P.V. Mandlik, learned Senior Counsel instructed by Mr. L.D. Vakil, learned counsel for the defendants submitted that as per the settled

principles of inheritance of Mohammedan law, regarding Hanafi, as the deceased Farooq Mohammad Khan has left behind him a child, the sisters of the deceased would not have any share in the property. Therefore, the learned trial Court ought not to have granted any share to the plaintiffs upon death of deceased Farooq. He submitted that the sisters of deceased Farooq are merely residuaries within the meaning of Hanafi law and therefore, when the deceased has left a widow and a daughter i.e. present defendants, the right of inheritance of such residuaries is extinguished. He therefore submitted that the reliance of the learned trial Court on the ratio laid down in the case of Maqsooda Begum and Others Vs. Shahnawaz Khan and Others, , is misplaced. As regards the other part of the decree in favour of the defendants, Mr. Mandlik supported the reasoning of the learned trial Court.

13. On the basis of above material, following points arise for my determination:

I) Whether the plaintiffs were entitled for a share in the property either owned or inherited by deceased Farooq Mohammad Khan ?

II) Whether the defendants are entitled for a share in the properties i.e. whole gut numbers 43, 49 and 1?

III) Whether the learned trial Court has wrongly held that house property i.e. CTS No. 15298/175 and CTS No. 9816 as well as plot Nos. 1 to 7 in gat number 80 are not available for partition?

IV) Whether the plaintiffs are entitled for refund of the amount withdrawn by plaintiff No. 1(a)?

My findings to the above points No. (I), (II) and (IV) are in the affirmative and to No. (III) in the negative and hence both the appeals are dismissed without any order as to costs, for the reasons to follow.

REASONS

14. The undisputed facts are that Faiz Mohammad was the father while Rabiyaabee was the mother of the plaintiffs and deceased Farooque Mohd. Khan. Thus, the plaintiffs are female heirs while Farooque Mohd. Khan would be the male heir of Faiz Mohammad Khan and Rabiyaabee. While the plaintiffs claimed share inter alia in Gut No. 43, admeasuring only 13 H and 12 R, as per the defendants, Gut No. 43, totally admeasures 66 H and 20 R and this entire property is available for partition between the present parties. The plaintiffs answer that the rest of the area was already divided, by way of family arrangement, in the lifetime of Faiz Mohammad. He never objected when mutation entries were carried as regards this property and therefore, the rest of the area of Gut No. 43 would not be available for partition. In this scenario, taking into consideration the evidence on record i.e. only mutation entry regarding the alleged partition during the lifetime of Faiz Mohammad, the learned Civil Judge Senior Division has held that mere entry in the revenue record would not be evidence of partition. No fault can be found with the reasoning as there is

no other evidence on record regarding this earlier alleged partition. Therefore, it will have to be held that the entire property would be available for partition.

15. The next of the issue is regarding right of the plaintiffs as the sisters of deceased Faiz Mohammad in the portion that would be allotted to Faiz Mohammad.

16. There is no dispute that Hanafi Law of Succession is applicable to the parties. While learned counsel for the plaintiffs relied on the table of shares after section 63 of Mulla's Principles of Mahomedan Law, the learned counsel for the defendants placed reliance on the table of residuaries in order of succession as found below section 65 in the same Principles of Mahomedan Law.

17. Mr. A.D. Kasliwal, learned Counsel, for the plaintiffs placed reliance on the ratio laid down in the case of Maqsooda Begum and Others Vs. Shahnawaz Khan and Others, as before the trial court and now on the ratio laid down in the case of Newanness alias Mewajannessa Vs. Shaikh Mohamad and others, .

18. Before appreciating the rival contentions, it is necessary to look into the scheme of inheritance as per the Hanafi Law of Inheritance applicable to Sunnis. As per the law, after the demise of the owner, three classes of heirs would be entitled for inheritance. Those are:-(i) Sharers, (ii) Residuaries and (iii) Distant Kindreds. Sharers are those relatives who have right of ipso facto inheritance. The share of residuaries depends on the existence or non-existence of the sharers. The distant kindreds are considered in absence of sharers or residuaries. Amongst them, residuaries succeed to the residue after the claims of sharers are satisfied. The term "residuary" is a relative term. In a given set of existing sharers, while a person may be a sharer, in presence of certain sharers, the very same relative would be termed as `residuary".

19. While the table below section 63 provides regarding table of shares between normal sharers with a prescription as to in which conditions, the normal sharer is inherited, the table of residuaries in order of succession provides that if there are no sharers or if there are sharers, but there is a residue left after satisfying their claim, the sharer devolves upon residuaries in order that is given in the table.

20. The entry No. 11 in the table of sharers below Section 63 and entry No. 6 in the table of residuaries below section 65 are material so far as the present controversy is concerned.

21. The entry No. 11 below section 63 is as under:-

22. The entry No. 6 below section 65 is as under:-

"6. FULL SISTER-In default of full brother and the other residuaries, above-named, the full sister takes the residue if any, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h.l.s., or even if there be (3) one daughter and a son's daughter or daughters h.l.s. See. Sir. pp. 24-25."

23. The entry No. 11 in the table of sharers would thus show that the Full Sister

is a sharer in case there is no child or child of son, etc. The entry No. 6 of table of residuaries would show that Full Sister in default of full brother takes the residue, if any, if there be a daughter or daughters, etc.

24. Thus, in case, no child is left by the person holding the property, then Full Sister would be normal sharer. However, in case he leaves behind him daughter or daughters as per Entry No. 6 of the relevant table, she/they would take the residue.

25. In the case of "Maqsooda Begum and others V. Shahnawaz Khan and others" (cited supra), the High Court of Jammu and Kashmir while dealing with the issue regarding the legal representative of the deceased to be brought on record, has observed that according to Muslim Law, upon the death of a Sunni Muslim, sister has residuary interest in estate even in presence of wife and children. The reliance was placed by the High Court on the extract from the treatise of Mr. Imtiaz Hussain, titled "Muslim Law and Customs".

26. In the case of "Newanness alias Mewajannessa V. Shaikh Mohamad and others" (cited supra), the Hon"ble Supreme Court of India relying on section 61 of Mulla's Principles of Mahomedan Law, at paragraph No. 3, has observed as under:-

"Section 61 in Chapter VII of the Mulla's principles of Mohammedan Law, edited by M. Hidayatullah, former Chief Justice of this Court, postulates three classes of heirs, namely, (1) sharers, (2) residuaries and (3) distant kindred. Sharers are those who are entitled to a prescribed share in inheritance; residuaries are those who take no prescribed share, but succeed to the `residue' after the claims of the sharers are satisfied; and distant kindred are all those relations by blood who are neither sharers nor residuaries. The Table at page 72-A of the 18th Edition prescribes that a father who is under Item No. 1, gets 1/6th share, where there is child or children of son; and when there is no child or children of a son, the father inherits as residuary. Since Sabul Hassan left behind D-4 son, Kisabul Ali got 1/6th share. Out of this 16th share got from the estate of Sabul Hassan, his widow (P-1) and P-2 the daughter would get equal respective share under law, which would be determined by the Trial Court."

Bull&; In the situation the partition was claimed in the property of a widow, who left behind her only two daughters and one sister. In those circumstances, the Full Sisters were held to be residuaries by the Hon"ble Supreme Court and entitled for 1/3rd share while each of the daughters was held entitled for 1/3rd share of the estate of the widow. Reliance was placed on the table below section 65 of the Mulla's Principles of Mahomedan Law, as detailed supra.

27. Mr. P.V. Mandlik, learned Senior Counsel for the defendants, however, took me through the iyats of the Holy Quran and various treatise of the interpretation of Mahomedan Law of Succession in various countries. We are not required to dwell upon the said issue in view of the clear pronouncement of law by the Supreme Court as corroborated by the observations of the High Court of Jammu

and Kashmir and the Principles of Inheritance by the Mulla on the basis of the undisputed authority of Al-Sirajiyyah.

28. The partition, therefore, directed by the learned Civil Judge, Senior Division in the property will have to be accepted.

29. As regards the property mentioned in paragraph No. 9 above, no evidence was produced that the immovable properties were left behind by the deceased. Learned counsel Mr. A.D. Kasliwal submits that there are certain admissions in the succession proceeding or certain documents filed on record. Neither these admissions were pressed as evidence in the trial court nor any document is proved. In the circumstances, the claim in this regard cannot be accepted.

30. As regards the amount taken away from the bank account by plaintiff No. 1A, it is an admitted fact that on the basis of the cheque signed by the deceased Faiz during his lifetime, the amount was withdrawn by this plaintiff after the death of Faiz. It was claimed before the trial court that the said amount was towards repayment of hand loan obtained by Faiz Mohammad. However, various bank accounts as proved in the trial court would show that the deceased had left very substantive amount behind him thereby nullifying the allegations of hand loan. In the circumstances, on the date of death of the deceased, Faiz Mohammad whatever amount was lying in the bank account, as detailed in the trial court, would have to be held as property left by him available for the partition, as detailed by the learned Civil Judge, Senior Division.

31. In the result, both the First Appeals are hereby dismissed, without any order as to costs.

32. In view of dismissal of both first appeals, Civil Application No. 7724/2013 (in First Appeal No. 1155/2013) and Civil Application No. 9912/2013 (in First Appeal No. 505/2013) and Civil Application No. 2250/2013 (in First Appeal St. No. 5489/2013) stand disposed of.