

(2013) 01 BOM CK 0271

In the Bombay High Court

Case No : S.A. No's. 334 of 1995 and 508 of 2006

Mohammed Jaheer and Others

APPELLANT

Vs

M.V. Mohammed Hussain Walayata (Since Deceased) and
Others

RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:

Hindu Succession Act, 1956 — Section 15, 8

Citation : (2013) 2 ABR 1257 : AIR 2013 Bom 81 : AIR 2013 Bom 77 : (2013) 2 ALLMR 615 : (2013) 7 BomCR 669 : (2013) 2 MhLj 294

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : M. Hussain, for the Appellant; V.R. Mundra, for the Respondent

Judgement

R.K. Deshpande, J.—Heard Shri M. Hussain, the learned counsel appearing for the appellants; and Shri V.R. Mundra, the learned counsel appearing for the respondents. In Regular Civil Suit No. 201 of 1983, the learned Joint Civil Judge, Senior Division, Gondia, passed a decree on 13-11-1991 declaring the plaintiffs as the owners in respect of their 1/3rd share in the suit property. The further declaration is granted that the sale-deed dated 24-1-1983 in respect of the suit property executed in favour of the original defendant M.V. Mohammad Hussain Walayata is inoperative and does not give a complete title of the suit property. A decree for permanent injunction is also passed restraining the defendant from disturbing the possession of the plaintiffs to the extent of their respective share in the suit property.

2. Since the claim of the plaintiffs was for half of the share in the suit property and the trial Court granted only 1/3rd share in the suit property, the plaintiffs preferred Regular Civil Appeal No. 14 of 1992. The defendant preferred Regular Civil Appeal No. 18 of 1992 challenging the judgment and decree passed by the trial Court. Both these appeals are decided by a common judgment and order dated 22-12-1994 by the learned Additional District Judge, Gondia. The appeals

are partly allowed and a decree passed by the trial Court is modified and substituted. It is held that the plaintiffs are the owners of 1/7th share in the suit property, whereas the defendant is the owner of 6/7th share in the suit property. The sale-deed dated 24-1-1983 is held to be invalid to the extent of 1/7th share of the plaintiffs in the suit property and the order of permanent injunction is passed restraining the defendant from obstructing the possession of the plaintiffs over 1/7th share in the suit property.

3. The original defendant M.V. Mohammad Walayata seems to have died, and hence on the basis of the aforesaid common judgment and order dated 22-12-1994, his legal heirs, who are the respondents herein, filed Special Civil Suit No. 96 of 1998 (reregistered as Regular Civil Suit No. 185 of 2000) for partition and separate possession of 6/7th share in the suit property. The appellants herein were joined as the defendants in the said suit. The learned Civil Judge, Senior Division, Gondia decreed the said suit for partition and separate possession in respect of 6/7th share in the suit property. The direction to appoint the Commissioner for effecting partition is passed and the permanent injunction is granted restraining the defendants therein from demolishing or changing the nature of the suit property in any manner.

4. In Regular Civil Appeal No. 71 of 2003 therefrom preferred by the appellants herein, challenging the decision in Special Civil Suit No. 96 of 1998, the learned Additional District Judge, Gondia, by his judgment and order dated 16-1-2006, modified the decree. A decree for partition and separate possession of 6/7th share in the suit property passed by the trial Court is maintained, whereas the claim for permanent injunction is dismissed.

5. Second Appeal No. 334 of 1995 is preferred by the original plaintiffs in Regular Civil Suit No. 201 of 1983. The respondents in the said Second Appeal are the legal heirs of the original defendant M.V. Mohammed Hussain Walayata. The trial Court granted 1/3rd share to the appellants/plaintiffs, whereas the Appellate Court reduced it to 1/7th share. Hence, this Second Appeal is filed by the original plaintiffs to claim half share in the suit property. The original defendant in the said suit was held entitled to 6/7th share in the suit property by the ultimate common judgment and order of the Appellate Court delivered on 22-12-1994. The legal heirs of the original defendant are satisfied with the said judgment and order of the Appellate Court and hence they have not preferred any appeal against it before this Court.

6. Second Appeal No. 508 of 2006 has been preferred by the plaintiffs in Regular Civil Suit No. 201 of 1983, who were the defendants in Special Civil Suit No. 96 of 1998 challenging the concurrent findings of fact recorded by the Courts below in Special Civil Suit No. 96 of 1998 and in Regular Civil Appeal No. 71 of 2003, arising therefrom, holding the respondents entitled to possession of 6/7th share on the partition.

7. Both these Second Appeals are connected, in the sense that the Second

Appeal No. 508 of 2006 arises out of a decree for partition and separate possession passed by the Courts below on the basis of the common judgment and order dated 22-12-1994 passed in Regular Civil Appeal Nos. 14 of 1992 and 18 of 1992, which is the subject-matter of challenge in Second Appeal No. 334 of 1995. The appellants and the defendants in both these appeals are same. The controversy to be decided in Second Appeal No. 334 of 1995 shall also govern the decision in Second Appeal No. 508 of 2006. Hence, basically the Second Appeal No. 334 of 1995 is heard and it is now taken up for decision first.

8. The undisputed factual aspects of the matter are stated below :

One Sharifanbee had two husbands. The first was Sk. Karim and the second was Sk. Kalu. Sharifanbee had three sons, viz. Gulam Nabi, Gulam Haider and Gulam Mohammad, from her first husband Sk. Karim. She had one daughter Johrabee from her second husband Sk. Kalu. The appellants in both these appeals are the descendants of Johrabee and they are the plaintiffs in Regular Civil Suit No. 201 of 1983. The original defendant M. V. Mohammad Hussain Walayata in the said suit was the purchaser of the suit property by a registered sale-deed dated 24-1-1983 from Gulam Nabi and his descendants. The original defendant has died and his legal representatives are brought on record as the respondents in both these appeals. Thus, the basic dispute is about the inheritance of the suit property by the two divisions of the uterine brothers and sister - one of Sk. Karim and the other of Sk. Kalu.

9. The trial Court has held that the plaintiffs have failed to establish a case that the suit property was purchased by Sk. Kalu in the name of Sharifanbee and the defendants have also failed to establish that it was the property purchased in the name of Sharifanbee by Sk. Karim. On the basis of Exhibits 39 and 40, the record of rights, it is held that the suit property was owned exclusively by Sharifanbee. On the basis of section 63 in the Principles of Mahomedan Law by M. Hidayatullah, it is held that Johrabee, Gulam Nabi and Gulam Haider were the children of Sharifanbee and hence they fall in the category of "Residuaries". On the basis of rule of double share to the male, the trial Court has held that the sons will take 2/3rd, whereas the daughter will take 1/3rd share. The Appellate Court has agreed with the finding of the trial Court that Johrabee, Gulam Nabi and Gulam Haider were the children of Sharifanbee. However, it has held that seven shares are required to be carved out in the suit property and the sister will get one share and each brother will get double than the sister's share, i.e. 2/7th share. The Appellate Court has, therefore, reduced the share of the plaintiffs from 1/3rd to 1/7th, whereas the share of the predecessors-in-title of the defendant has been increased from 2/3rd to 6/7th.

10. In the background of the concurrent finding of fact that Johrabee, Gulam Nabi and Gulam Haider are to be treated as the real brothers and sister and they fall in the category of "Residuaries", a detailed order was passed by this Court on 5-10-2006, framing the substantial questions of law for determination as under:

(I) Whether each uterine brother has equal share and all uterine brothers and sister be treated as real brothers and sister?

(II) If they are uterine brothers and sister, whether the shares determined by the Courts below were proper?

11. The learned counsel appearing for the parties have tried to reopen all the questions decided by the Courts below. Shri M. Hussain, the learned counsel appearing for the appellants, has urged that the suit property was owned by Sk. Kalu, the second husband of Sharifanbee, who purchased it in the name of Sharifanbee. According to him, Johrabee, being the only daughter of Sk. Kalu from Sharifanbee, would be treated as "Sharer" at Serial No. 7 in the Table of Shares annexed to section 63 under The Principles of Mahomedan Law by M. Hidayatullah, and hence she would be entitled to half share in the suit property. After going through the judgments and orders delivered by both the Courts below and the evidence on record, with the assistance of the learned counsels, I do not find any perversity in the finding recorded by the Courts below that the plaintiffs have failed to establish that the suit property was purchased by Sk. Kalu in the name of Sharifanbee and the defendant has also failed to establish that it was purchased by Sk. Karim in the name of Sharifanbee. Hence, this finding of fact cannot be reopened and it, therefore, follows that the suit property exclusively belonged to Sharifanbee.

12. Shri M. Hussain, the learned counsel appearing for the appellants, has invited my attention to the definition of "Uterine Blood" in Clause (viii) of Rule 215 read with Item (7) under The Principles of Mohammedan Law by Purohit, which is reproduced below :

(viii) Uterine Blood.- When two persons have the same mother but different fathers they are related to each other by uterine blood.

(7) Uterine Blood (Rule 215(viii)) - When two persons, (male and female) have the same mother but different fathers, they are related to each other by uterine blood. For example if B, a female marries A, a male and a son Q is born to B, A dies and B remarries C is male and a daughter R from C is born to B.Q. and R are related to each other as brother and sister by uterine blood. See the diagram No. 6.

Diagram (6)

Here, P is related to MHS as his brother through uterine blood.

He has also invited my attention to the other provisions contained in various books of Mohammedan Law, which state that uterine brothers and sisters take equal share and the rule of male taking double share does not apply to them.

13. Shri Hussain submits that Johrabee, Gulam Nabi and Gulam Haider have the same mother but different fathers, and hence they are related to each other by uterine blood and shall fall in the category of "Sharers" at Serial Nos. 9 and 10 in

the Table of Shares annexed to section 63 of the Sharers. According to him, the condition of "no child" mentioned in column No. 3 in the said Table for inheritance by uterine brothers and sisters, exists. He submits that in such situation, the uterine brothers and sister of two divisions - one led by Sk. Karim and the other led by Sk. Kalu - will take half share in the property of Sharifanbee.

14. Shri Mundra, the learned counsel appearing for the respondents, submits that the property is the property of a Mohammedan female, viz. Sharifanbee, and though Johrabee, Gulam Nabi and Gulam Haider are covered by the definition of uterine brothers and sister, they are the real sons and daughter of Sharifanbee. According to him, they will fall in the category of "Residuaries" u/s 65, and both the Courts below were right in holding that the principle of son taking double portion, is attracted. He submits that the real sons and daughter of Sharifanbee cannot be classified as "Sharers" u/s 63. He submits that the uterine brothers and sister are the children of Sharifanbee, Sk. Karim and Sk. Kalu, and hence the condition of "no child" in column No. 3 of the said Table, does not exist. He, therefore, submits that the claim as uterine brothers and sister is totally excluded. Shri Mundra, however, does not dispute the legal position that if Johrabee, Gulam Nabi and Gulam Haider are to be treated as uterine brothers and sister, then the principle of son taking double portion u/s 65 of Residuaries, does not apply. He also concedes to the position that in such eventuality, Johrabee will be entitled to equal share in the suit property.

15. None of the learned counsel have addressed this Court on the question of allotment of shares, if Johrabee, Gulam Nabi and Gulam Haider are to be treated as uterine brothers and sister. The position that in such eventuality, Johrabee will be entitled to equal share in the suit property, is not disputed. It is also not disputed that in such eventuality, the rule of son taking double portion, does not apply. Hence, out of the two substantial questions of law framed by this Court on 5-10-2006, only the substantial question of law at Serial No. (1) survives. After hearing the learned counsels for the parties, the said substantial question of law is reframed as under :

In respect of the property of a female Mohammedan, whether the sons and daughter born to her from different husbands are to be classified as "Sharers" u/s 63 or as "Residuaries" u/s 65 of the Mohammedan Law ?

16. Section 61 under the Principles of Mahomedan Law by M. Hidayatullah deals with the classes of heirs and the same is reproduced below :

61. Classes of heirs. - There are three classes of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred :

(1) "Sharers" are those who are entitled to a prescribed share of the inheritance;

(2) "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied;

(3) "Distant Kindred" are all those relations by blood who are neither Sharers nor

Residuaries.

17. Section 63 of the said Mohamedan Law deals with the "Sharers" and it states that the first column in the accompanying Table contains a list of Sharers, the second column specifies the normal share of each Sharer, the third column specifies the conditions which determine the right of each Sharer, and the fourth column sets out the shares as varied by special circumstances. At Serial No. 7 in the list of Sharers in the Table is the daughter. If there is only one daughter, in the absence of son, she will take half share, and if there are more than one daughter, then they will collectively take 2/3rd share in the absence of son. At Serial Nos. 9 and 10 in the said Table are the uterine brother or sister. The normal share of one in the second column is 16th, whereas two or more will take collectively 1/3rd share. They are entitled to inherit the property of a Mohamedan only when there is no child, child of a son h.l.s., father, or true grandfather. Clause (b) below the said Table states that the collective share is always divided equally among those to whom it is allotted. Clause (c) states that a Mahomedan can have as many as four wives at a time.

18. Section 65 of the said Mahomedan Law deals with "Residuaries" and it is reproduced below:

65. Residuaries. -If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue as the case may be, devolves upon Residuaries in the order set forth in the annexed table (p.54A).

At Serial No, 1 below section 65 are the sons and daughters entitled to 2/3rd and 1/3rd share respectively as "Residuaries". In the Table of Residuaries in Order of Succession, u/s 65, it is stated that a daughter takes as a Residuary with the son, the son taking a double portion. The property of a Mahomedan devolves upon "Residuaries" either wholly or the residue, as the case may be, in the order set forth in the annexed Table, if there are no Sharers or if there are Sharers but there is a residue left after satisfying their claims.

19. The Mohammedan Law contemplates a situation where a Mohammedan can have as many as four wives at a time. Hence, the children born from all such four wives being the children of the same father, would be treated as his real sons and daughters entitled to inherit his estate as "Residuaries". There is no prohibition under the Mohammedan Law for a Mohammedan female to perform a second marriage, if her earlier marriage does not subsist. The children born out of such marriages from different husbands, shall be the legitimate children called as uterine brothers and sisters entitled to be classified as "Sharers" at Serial Nos. 9 and 10 in the Table of Shares u/s 63; to inherit the estate of a deceased Mohammedan. Significantly, the Mohammedan Law does not make any distinction for the purposes of inheritance in respect of a property owned by a Mohammedan female or male, like one which exists under the provisions of sections 8 and 15 of the Hindu Succession Act, prescribing different modes of

succession to the property of a Hindu male and female. The property of a Mohammedan female dying intestate will, therefore, be governed by the same rules of inheritance and succession, as if it is a property owned by a Mohammedan male dying intestate. In view of this, though the uterine brothers and sisters are the real sons and daughters of the same mother, they can not be classified as "Residuaries" u/s 65 of the Mohammedan Law to inherit the estate of their mother, but they are to be classified as "Sharers" u/s 63 of the Mohammedan law, as if they are inheriting the estate of putative father. Hence, the substantial question of law is answered accordingly.

20. Now coming to the factual aspects involved in the matter, Gulam Nabi, Gulam Haider and the other son of Sharifanbee born from the first husband Sk. Karim and Johrabee, a daughter from the second husband Sk. Kalu, will have to be treated as uterine brothers and sister, having the same mother, but different fathers. They are, therefore, required to be classified as "Sharers" u/s 63 and not as "Residuaries" u/s 65 of the Mohammedan Law. In view of this position, both the Courts below have committed an error of law in holding that the uterine brothers and sister are to be treated as real brothers and sister, and hence are required to be classified as "Residuaries" u/s 65 of the Mohammedan Law.

21. Column No. 3 in the Table of Shares u/s 63 prescribes the condition under which normal share by the uterine brother and sister is inherited. The condition is that "when no child exists". The argument of Shri Mundra is that this condition is attracted in the present case, as Sk. Karim, the first husband, had three sons, and Sk. Kalu, the second husband, had a daughter. The contention cannot be accepted, for the reason that the method to determine right of inheritance under the Mohammedan Law is to first see the Table of sharers. If any of the heirs are sharers, to find out in what circumstance, they would succeed as sharers and what share they would get. It is only if there are no sharers or if the sharers do not exhaust the estate, the question of finding out Residuaries shall arise. As per this method, if the sons and daughter in this case are classified as "Sharers" u/s 63, the question of again classifying them as "Residuaries" u/s 65, does not arise. Hence, the condition of "no child" exists, which makes the uterine brother and sister entitled to inherit the suit property.

22. The learned counsel appearing for the parties agree that if Gulam Nabi, Gulam Haider. Gulam Mohammed and Johrabee are to be treated as uterine brothers and sister, then the principle of son taking double portion u/s 65 of Residuaries, does not apply. The position is conceded that in such eventuality, Johrabee will be entitled to a share equal to that of her uterine brothers. Hence, Regular Civil Appeal No. 71 of 2003, decided by the lower Appellate Court, will have to be sent back for decision afresh in the light of this judgment to carve out the exact share of the plaintiffs and the defendants in Special Civil Suit No. 96 of 1998 (Reregistered as Regular Civil Suit No. 185 of 2000) and for passing appropriate decree in accordance with law. In the result, both the second appeals are allowed as under :

(I) The judgment and decree dated 13-11-1991 passed in Regular Civil Suit No. 201 of 1983 by the learned Joint Civil Judge, Senior Division, Gondia, as well as the common judgment and order dated 22-12-1994 passed in Regular Civil Appeals Nos. 14 of 1992 and 18 of 1992 by the learned Additional District Judge, Gondia, are quashed and set aside.

(II) The judgment and decree dated 10-3-2003 passed in Special Civil Suit No. 96 of 1998 (Reregistered as Regular Civil Suit No. 185 of 2000) as well as the judgment and order dated 16-1-2006 passed in Regular Civil Appeal No. 71 of 2003 by the learned Additional District Judge, Gondia, are also quashed and set aside.

(III) Regular Civil Suit No. 201 of 1983 filed by the appellants/ plaintiffs is hereby allowed, declaring the appellants/plaintiffs as the owners of share equal to that of uterine brothers of Johrabee in the suit property.

(IV) The sale-deed dated 24-1-1983 in respect of the suit property executed in favour of the original defendant M. V. Mohammad Walayata, is held to be inoperative to the extent of the share of the appellants (plaintiffs in Regular Civil Suit No. 201 of 1983), in the suit property.

(V) The defendants in Regular Civil Suit No. 201 of 1983, either by themselves or through their agents, are restrained permanently from obstructing the possession of the appellants/plaintiffs over the suit property without due process of law.

(VI) Regular Civil Appeal No. 71 of 2003 is remanded back to the Appellate Court at Gondia for decision afresh in the light of the decision in Second Appeal No. 334 of 1995 in accordance with law, within a period of six months from the date of receipt of writ from this Court.

(VII) No order as to costs.