

(1985) 10 BOM CK 0048
In the Bombay High Court
Case No : Second Appeal No. 586 of 1979

Yasin Imambhai Shaikh (deceased by L.R."s)	APPELLANT
Vs	
Hajarabi and Others	RESPONDENT

Date of Decision : 21-10-1985

Acts Referred:

Citation : AIR 1986 Bom 357 : (1986) 1 BomCR 557

Hon'ble Judges : Parekh, J

Bench : Single Bench

Advocate : S.D. Kulkarni, for the Appellant; A.P. Vaze, for the Respondent

Final Decision : Dismissed

Judgement

Parekh, J.—The Appellants herein are the heirs of one Yasin Imambhai Shaikh, who was the original Plaintiff in Regular Civil Suit No. 188 of 1971 on the file of the Court of the Civil Judge, Junior Division, at Kopergaon. The said suit having been decreed, (dismissed?) an appeal came to be preferred being Regular Civil Appeal No. 250 of 1975 on the file of the Extra Assistant Judge, Ahmednagar. The appeal was prosecuted by the heirs of the said Yasin Imambhai Shaikh, who are the present Appellants. The said Appeal was however dismissed on 15th of March, 1978. Being aggrieved by the said order and judgment the appellants have filed the present appeal.

2. The facts that give rise to this appeal are that one Yasin Imambhai Shaikh filed a suit against the Respondents being Regular Civil Suit No. 188 of 1971 in the Court of the Civil Judge, Junior Division, Kopergaon. In this suit the said Yasin Imambhai Shaikh alleged that one Mariyambi died leaving behind her a Will. That under the Will the said Yasin Imambhai Shaikh was entitled to 1/3 of the property and of which he was in possession. That the other heirs being the Respondents were trying to interfere with his possession. That he Yasin Imambhai Shaikh hence sought an injunction to restrain the Respondents from interfering or disturbing his possession of that portion of the property

bequeathed to him. In the alternative, the said Yasin Imambhai Shaikh contended that should it be found that he was not in de facto possession of the property, then the property should be carved out in accordance with the Will and he Yasin Imambhai Shaikh be given possession of that portion of the property which was bequeathed to him. The Respondents contested the suit. By an order and judgment dt. the 27th June, 1975, the learned trial Judge dismissed the suit. Being aggrieved by the same, an appeal came to be preferred which was presented by the heirs of the said Yasin Imambhai Shaikh and who are the appellants in this Second Appeal. By an order and judgment dt. the 15th of March, 1978, the learned Extra Assistant Judge dismissed the appellants' appeal. Hence this Second Appeal.

3. At the hearing of this matter, Mr. Kulkarni argued that in so far as the Will is concerned, the Will is that of a Mohamaden Lady. That the Mahomedan Law does not require the Will to be attested. That in this case there is the evidence of two witnesses who state that they had attested the Will. But nonetheless, their evidence goes to show that Mariyambi, the deceased, had not affixed her thumb-impression in their presence. But in view of the fact that this is a Will by a Mahomedan lady, this is of no moment.

4. Mr. Kulkarni argued that however under Mahomedan Law it is necessary for the heirs to consent to the bequest that has been made by the deceased. That in so far as the Appellants are concerned, since they claim under the Will their consent was implied. That in so far as the Respondents were concerned, they have admittedly not given any consent in writing, but then they had made a statement in some revenue matter for mutation of entries. That this must tantamount to their consenting to the bequest. That the Appellants for some reason or the other did not produce this evidence in the trial Court. Hence an application was made to the lower Appellate Court to afford the Appellants an opportunity to produce this evidence. That the lower Appellate Court erred in turning down this application on the ground that the application was belated and would amount to reopening of the case. That the lower Appellate Court ought to have allowed this Application.

5. I am unable to accept this contention since Yasin Imambhai Shaikh, the original Plaintiff, was claiming under a Mahomedan Will and the Will is said to be in writing, it was in the very nature of things for the original Plaintiff to establish that the other heirs had consented to the bequest. The original Plaintiff could not have succeeded in the suit without establishing this fundamental position. Despite this, it appears that Yasin Imambhai Shaikh, the original Plaintiff, did not choose to lead any evidence at the trial on this point, and the said Yasin Imambhai Shaikh hence failed in the suit. The Application to adduce the evidence has only been made belatedly at the appellate stage, and if in these circumstances, the Appellate Court has rejected the application, it would be proper. Not only this, it is also an admitted position that some of the Respondents have been examined in support of their defence. Significantly no

questions have been put to the Respondents as regards the said Revenue proceedings or as to their statements said to have been made in the said proceedings, which could easily have been done. In other words, their testimony to the effect that there was absence of consent has gone unchallenged. If this is so, then the lower Appellate Court was right in rejecting the application, for it would have meant introducing fresh evidence and reopening of the entire case. In view of this, the contention now canvassed must be negatived.

6. But be that as it may, Mr. Vaze has contended that Mahomedan Law provides that a Mahomedan cannot by Will dispose of more than $\frac{1}{3}$ of the surplus of his estate after payment of funeral expenses and debts. That a bequest in excess of $\frac{1}{3}$ cannot take effect, unless the heirs consent thereto after the death of testator. In this case admittedly the Will disposes of more than $\frac{1}{3}$ of the estate after the payment of funeral expenses and debts, and there is no evidence that the heirs have consented to such a bequest. In view of this also the Appellants' claim under the Will must fail, whatever may be their other rights as heirs to the property of the deceased which they may agitate in an appropriate forum. Mr. Vaze's contention is substantial.

7. In the result, the appeal must fail and the same is dismissed. The Appellants to pay the costs throughout.