

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

**Second Appeal No.745 of 2012
With
Civil Application No. 12901 of 2012**

Zaibunnisa Begum d/o Abdul Rehman
And Another.

.. Appellants.

Versus

Sajed Khan s/o Salimuddin Khan
And Another.

.. Respondents.

Shri. Rajendraraa Deshmukkh, Advocate, for appellants.

Shri. P.F. Patni, Advocate, for respondent No.1 - caveator.

CORAM: T.V. NALAWADE, J.

DATE : 6th OCTOBER 2015

ORDER:

1) The appeal is filed to challenge the judgment and decree of Regular Civil Suit No.945/1997 which was pending in the Court of the Civil Judge, Junior Division, Aurangabad and also to challenge the judgment and order of Regular Civil Appeal No.161 of 2008 which was pending in the Court of the District Judge-6, Aurangabad. The suit filed for relief of possession and injunction is decided in favour of the present respondents. Both the sides are heard.

2) The suit was filed in respect of property bearing CTS No.1669 situated at Khadakeshwar, Aurangabad. The area of this property is around 233.6 square meters. It is the case of the plaintiffs that this property was owned by one Salimuddin Khan, father of the plaintiffs. It is contended that defendant No.1 was put in possession of the property by Salimuddin Khan under lease document of 6-5-1966. It is contended that as per the written agreement of lease rent was to be paid before 10th of every month in advance & receipt was to be taken.

3) It is the case of the plaintiffs that till the year 1982 father of the plaintiff was collecting rent. It is contended that from the year 1983 defendant No.1 stopped making payment of rent and on the date of the suit the defendant was in arrears of rent for 14 years and 10 months. It is contended that under the agreement of lease, on the ground of default landlord was entitled to claim back the possession. It is the case of the plaintiffs that without taking their permission some construction was made by defendant No.1 and then defendant No.1 inducted defendant No.2 in the property as sub lessee.

4) Some pleading was made with regard to opening of doors and windows in the lane by the defendants and relief of injunction was claimed in respect of that activity of the defendants. There is no need to discuss the said pleading or the defence in that regard as the suit was for the relief of possession, which was the main relief.

5) It is the case of the plaintiffs that due to the aforesaid activities of the defendants a notice was given by the plaintiffs to forfeit the right of the defendants. It is contended that first notice was refused but the second notice was accepted by defendant No.1. On the aforesaid two grounds relief of possession was claimed.

6) The defendants filed written statement. They admitted that they had taken the property from Salimuddin Khan. It was also not disputed that it was open space. They have, however, disputed that the plaintiffs are successors of Salimuddin Khan. They contended that mother of the plaintiffs was already married, in the year 1972, and there was no question of her marriage with

Salimuddin Khan. They also contended that Salimuddin Khan had married with another lady in the year 1968 and he had issues from the first wife. They contended that the plaintiffs have no right to file the suit against them.

7) Issues were framed by the trial Court. Both the sides gave evidence. The document like lease deed was produced on the record and copies of notices given to forfeit the rights of the defendants under the Transfer of Property Act were also produced.

8) In view of the defence taken that the plaintiffs are not successors of Salimuddin Khan, plaintiffs produced some record like the decision given in their favour in Suit Nos.387/1989 and 797/1992. this record shows that plaintiff No.1 Sajed Khan was required to file suit against Marathwada Wakf Board (Suit No.797/1992) for getting declaration that he was Mutawalli as he was successor of Salimuddin Khan. The said matter was decided in his favour. The other record like Civil Suit No.387/1989 shows that the plaintiffs and their mother Surayya Begum had filed proceeding for declaring civil

death of Salimuddin Khan as his whereabouts were not known for more than 7 years. This proceeding was also decided in favour of the plaintiffs. The learned counsel for the present appellants, defendants, submitted that the proceeding which was filed and the decision given by the Civil Court cannot be used against present appellants. It was also submitted that the decision given against the Wakf Board also cannot be used against the present appellants. Both these submissions are not acceptable. The defendants, present appellants, did not come with specific case and did not give evidence to show that Salimuddin Khan has left behind other heirs and virtually no evidence in rebuttal was given by the defendants.

9) The record was produced by the plaintiffs which was to the effect that in January 1974 marriage between Surayya Begum and Salimuddin Khan was solemnised. The record is also produced to show that the plaintiffs have been using the name of Salimuddin Khan as their father and further there are decisions of the Civil Court of aforesaid nature in their favour. In the proceeding like present one, the plaintiffs are required to

prove their case only on preponderance of probabilities. They have proved that in January 1974 marriage between their mother and Salimuddin Khan took place and plaintiff No.1 was born on 20-10-1974. In view of this evidence not much was required to be considered by the Courts below like legality of the marriage etc.

10) The defence taken shows that it is not disputed that defendant No.2 had come in possession due to defendant No.1. They did not produce any record to show that they had paid rent of the suit property. On the other hand, due to nature of defence taken by the defendants it can be said that they had never paid rent to the plaintiffs. Thus, the grounds of default and subletting were not disputed by the defendants. Notice of forfeiture was given and there is no specific denial in respect of the fact that the defendant No.1 was served with the notice.

11) Both the Courts below have come to the conclusion that as successors of Salimuddin Khan the plaintiffs are entitled to get back the possession. No other finding was possible in view of the material available.

There is no material on the basis of which substantial questions of law can be formulated. One discrepancy was brought to the notice of the Court. It appears that in the proceeding filed for declaration of civil death of Salimuddin Khan the year of the marriage was mentioned as 1979. However in the same proceeding age of one of the sons was mentioned as 13 years and the proceeding was filed in the year 1989. It appears that due to oversight the mistake was committed in mentioning the year of marriage. In the present matter certificate of marriage is proved and that evidence is accepted by the Courts below.

12) In the result, the appeal stands dismissed. Civil Application No.12901 of 2012 stands disposed of.

Sd/-
(T.V. NALAWADE, J.)

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