

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

SECOND APPEAL NO.: 884 OF 2006

1. Shaikh Gulab S/o Shaikh Sardar,
Age: 85 years, Occ: Agriculture,
R/o: Loni, Tq. Khultabad,
District: Aurangabad.

2. Shaikh Musa S/o Shaikh Gulab,
Age: 40 years, Occ: Service,
R/o: C/o Harsul Central Jail,
District Ayurangabad.

... **APPELLANTS**
[ORIG.DEFT.NOS.1 & 2]

VERSUS

1. Shaikh Shabbir S/o Shaikh Lal,
Age: 55 years, Occ: Agriculture,
R/o: Loni, Tq. Khultabad,
District Aurangabad.

2. Shaikh Baba S/o Shaikh Lal,
Age: 45 years, Occu: Household,
R/o: Rasulpura, Tq. Khultabad,
District: Aurangabad.

3. Zainabbee W/o Haneef,
Age: 65 years, Occ: Household,
R/o: Rasulpura, Tq. Khultabad,
District Aurangabad.

4. Zugrabee W/o Shaikh Mehboob,
Age: 47 years, Occ: Household,
R/o: Gondesar, Tq. Khultabad,
District Aurangabad.

5. Naseembee W/o Shaikh Ismail,
Age: 48 years, Occu: Household,
R/o: Shingi, Tq. Gangapur,
District Aurangabad.

6. Zohrabee W/o Shaikh Amir,
Age: 42 years, Occ: Household,
R/o Village Bargaon,
Tq. & District Aurangabad.
7. Shaikh Taher S/o Shaikh Amir,
Age: 20 years, Occ: Agriculture,
R/o: Village Bargao,
Tq. & District Aurangabad.

... **RESPONDENTS**
[Nos.1 to 5 ORI.
PLTFFS. AND NO.6
TO 7 ORIG. DEFT.
NOS. 3 & 4]

Advocate for the Appellants: Mr. H. D. Deshmukh.
Advocate for the Respondent Nos.1 to 5: Mr. A. D. Kasliwal.
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CORAM:- T. V. NALAWADE, J.
DATED:- 23rd OCTOBER, 2015.

ORAL JUDGMENT:

1. This appeal is filed to challenge the judgment and decree of Regular Civil Appeal No. 303 of 2004 which was pending in the Court of 2nd Adhoc Additional District Judge, Aurangabad. The first Appellate Court has set aside the judgment and decree of dismissal of Regular Civil Suit No. 839 of 2002 which was filed by present Respondents for relief of partition and

possession of their share from land Gat No.111 (Old Survey No.35/1/2) situated at Loni, Tahsil Khultaba, District Aurangabad. The total area of this land is 87 Are and it is the case of the plaintiffs that they have $\frac{1}{2}$ share in this land. Such share is given by the first Appellate Court. Both the sides are heard.

2. The appeal was admitted on following points and they were considered as substantial questions of law:

- (i) Whether on the facts and in the circumstances of the present case, the plaintiffs are entitled to claim share in the suit property as legal heirs of deceased Tarabi and if yes, to what extent?
- (ii) Whether on the facts and in the circumstances of the present case, the defendants have proved ouster of the plaintiffs in respect of the suit properties and have established plea of adverse possession, whereby they claimed to have perfected title by prescription?"

3. It is the case of the plaintiffs that one Shaikh Sardar was the common ancestor of plaintiffs and defendant and he was survived by a widow and 2 sons. It is contended that defendant No.1 Shaikh Gulab is a son of widow Tarabee and Shaikh Lal, the predecessor in title of plaintiffs was a son of the first wife of Shaikh Sardar. It is contended that after the death of Shaikh Sardar, Tarabee started living with defendant No.1 and the names of both Shaikh Gulab and Shaikh Lal were entered in the revenue record of the aforesaid property. It is contended that after year 1978-79 the name of defendant Shaikh Gulab came to be entered in the crop cultivation column as he was allowed to cultivate the land. It is contended that he misused his position and he got entered his name as the owner of entire area when consolidation scheme was implemented and Gat No.111 was formed. It is contended that though the name of defendant Shaikh Gulab was entered, he did not become owner and Shaikh Lal continued to own $\frac{1}{2}$ portion of this land.

4. It is the case of the plaintiff that behind the back of plaintiffs the names of successors of Shaikh Gulab were entered in the revenue record of this land by showing false partition amongst them. It is contended that plaintiffs realised about this mischief first time in the year 1989 when they saw the revenue record. In the suit filed on 30th August, 2002 they claimed the aforesaid relief.

5. Defendants filed joint written statement and contested the matter. They admitted the relationship of plaintiffs with them. They contended that there was oral partition and in the partition entire Survey No.35/1/2 was given to the share of Tarabee. It is contended that Tarabee died in the year 1987-88 and before her death she had given the land to her son Shaikh Gulab and so the land was entered in the name of Shaikh Gulab. It is contended that Shaikh Lal had given consent to Tarabee for giving the land to Shaikh Gulab.

6. The defendants contended that the suit is barred

by law of limitation. It is contended that partition was effected in the year 1965 and since then the property was standing in the name of Tarabee and Tarabee gave the land to defendants and the defendants have been enjoying this land as the owner.

7. On the basis of aforesaid pleadings issues were framed. The evidence of plaintiff No.2 Shaikh Baba is consistent with the aforesaid pleading. He denied that there was partition and the property was given to the share of Tarabee. Some witnesses were examined by plaintiffs to show that the property was owned by both the sons of Shaikh Sardar.

8. Defendant No.2 gave evidence as per the defence taken in the written statement. He has deposed that when the land Gat No.111 came to be entered in revenue record in the name of Shaikh Gulab he became owner of this land and that was done in the year 1981. He has given evidence about the partition which was effected amongst the successors of Shaikh Gulab.

9. The revenue record of Survey number and Gat number was produced by both the sides. It shows that initially the land was standing in the name of Shaikh Sardar and after his death the names of Shaikh Gulab and Shaikh Lal were entered for 8 Annas share each. Entry shows that they started cultivating the land after entry of their names in the revenue record and the entries were continued till the year 1963-64. After year 1963-64 in crop cultivation column the name of Tarabee was entered but the names of Shaikh Gulab and Shaikh Lal were continued in the ownership column. The name of Tarabee was continued in crop cultivation column till the year 1979-80 and afterwards the name of Shaikh Gulab Shaikh Sardar was entered in crop cultivation column.

10. The defendants took many defences including the partition amongst Tarabee, Shaikh Lal and Shaikh Gulab. There is no such record. Then the defendants took the defence that Tarabee had gifted the property to Shaikh Gulab. The name of Tarabee was entered

only in the crop cultivation column and so there was no question of giving such gift. In any case no evidence is given on such gift.

11. The aforesaid oral evidence and relevant record show that first time in the year 1981 during implementation of consolidation scheme name of Shaikh Gulab came to be entered as owner of entire portion. Prior to that, name of plaintiffs' predecessor was present in ownership column. It is not the case of defendants that Shaikh Lal or plaintiffs gave this property to Shaikh Gulab or to his successors. It cannot be disputed that the entry in the revenue record including the entry in the record created during implementation of consolidation scheme cannot confer title.

12. The defence of ownership by adverse possession was taken but the aforesaid record shows that the name of Shaikh Lal was continued in the ownership column at least till year 1981 and after that his name was deleted. Plaintiffs have come with a specific case

that Tarabee was cultivating the land for the family. Though, from the year 1981 the name of Shaikh Gulab was entered in crop cultivation column, his possession cannot be said as possession for himself. It needs to be presumed that his possession was for the other co-owners also. So, there was no question of creation of adverse interest in favour of Shaikh Gulab in or after the year 1981.

13. From the aforesaid pleading it can be said that there was no specific pleading regarding ownership by adverse possession. It was joint possession and for proving that the plaintiff was ousted, it was necessary to have specific pleading but there was pleading of other kind. The suit was filed on the basis of title and so Article 65 of Limitation Act applies. In view of these circumstances, it cannot be said that the defendants proved that they acquired the title due to adverse possession. The first Appellate Court has considered this position of law and no other view is possible.

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14. In view of the aforesaid discussion, both the points are answered against the Appellants.

15. In the result, the appeal stands dismissed.

[T. V. NALAWADE, J.]

Dated:23/10/2015.
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