

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 715 OF 2013
WITH
CIVIL APPLICATION NO. 9580 OF 2013

Shri. Pundalika Dhanji Koli **....Appellant.**

Versus

Shri. Tukaram Shamu Koli & Ors. **....Respondents.**

Mr. M.M. Bhokarikar, Advocate for appellant.

Mr. Shaikh Naseer, Advocate for respondent No. 1.

WITH
SECOND APPEAL NO. 767 OF 2012
WITH
CIVIL APPLICATION NO. 11785 OF 2014

Shri. Pundalika Dhanji Koli **....Appellant.**

Versus

Shri. Tukaram Shamu Koli & Ors. **....Respondents.**

Mr. M.M. Bhokarikar, Advocate for appellant.

Mr. Shaikh Naseer & Mr. C.P. Patil, Advocate for respondent No. 1.

CORAM : T.V. NALAWADE, J.
DATED : 2nd April, 2016.

ORDER :

1. The first proceeding is filed against judgment and decree of Regular Civil Appeal No. 78/2004 and judgment and decree of Regular Civil Suit No. 111/1992. The second proceeding is filed against judgment and decree of Regular Civil

Appeal no. 79/2004 and judgment and decree of Regular Civil Suit No. 151/1994. Both the suits were decided by common judgment by the learned Civil Judge, Junior Division, Raver, District Ahmednagar and the appeals filed against the said common judgment were decided together by District Judge, Ahmednagar. One Tukaram Koli had filed Regular Civil Suit No. 151/1994 against the appellant for the relief of injunction and the said suit is decreed in his favour. Present appellant had filed Regular Civil Suit No. 111/1992 for relief of declaration and possession in respect of the some suit property against Tukaram Koli and his suit is dismissed. Both the sides are heard.

2. The suit was filed in respect of agricultural land bearing Gat No. 164, admeasuring 75 R. situated at village Puri, Tahsil Raver. In Regular Civil Suit No. 111/1992, it was contended by the appellant, plaintiff that the suit property was ancestral and Inam property of Shenfadu Tayde and after the death of Shenfadu, the property was owned by his widow Nathabai. Nathabai died on 6.11.1984. It is the case of these plaintiffs that Nathabai and Shenfadu have not left behind any issue and as Totaram was brother of Shanfadu and as plaintiffs are successors of Totaram, plaintiffs and some of the defendants (defendant Nos. 2 to 5 of R.C.S. No. 111/1992) are entitled to succeed to the

property of Nathabai. It is their case that after the death of Nathabai, they came in possession of the suit property and their names were entered in the revenue record as owners. It is their case that defendant No. 1 - Tukaram has no concern with Nathabai or the suit land, but he was trying to disturb the possession of the plaintiffs over the suit property and R.T.S. proceedings were pending between parties. It is contended by these plaintiffs, appellants that after the decision of R.T.S. proceedings in the year 1996, Tukaram took the possession of the property forcibly. Initially suit was filed for declaration of ownership and injunction and then relief of possession was claimed.

3. In R.C.S. No. 151/1994 Tukaram contended that after the death of Shenfadu, Nathabai married with Shamu Koli, father of Tukaram and he was born to Nathabai from Shamu. It is his case that after the death of Nathabai, as successor of Nathabai, he has become owner of the suit property. It is his case that even during lifetime of Nathabai, he was cultivating the suit land and after the death of Nathabai, he continued to cultivate the suit land and accordingly, his name was entered in the crop cultivation column. It is his case that behind his back, the plaintiffs of R.C.S. No. 111/1992 got mutated their names in the

revenue record, but due to such entry in the revenue record, they have not become the owners of the suit property. Tukaram had filed application for temporary injunction in R.C.S. No. 111/1992, but then he filed separate suit like R.C.S. No. 151/1994 for relief of injunction. In his suit, he has given particulars of crops taken by him in the suit property. Relief of temporary injunction was granted in favour of Tukaram in R.C.S. No. 151/1994.

4. Issues were framed by the Trial court on the basis of aforesaid pleadings. The title of the plaintiffs of R.C.S. No. 111/1992 was denied by Tukaram. On the other hand, plaintiffs of R.C.S. No. 111/1992 have admitted that Tukaram is in possession. Tukaram has contended that he is son of Nathabai and so, he is entitled to succeed to the property of Nathabai. This relationship was denied by present appellants in their written statement filed in R.C.S. No. 151/1994. However, plaintiffs of R.C.S. No. 111/1992 have admitted that Khatebook of the suit land was with Tukaram. In view of these circumstances, it was necessary for the plaintiffs of R.C.S. No. 111/1992 to prove their title over the suit property and only after that they could have got the relief of possession. As there was the dispute with regard to the relationship of Tukaram with

Nathabai, such issue was also framed in R.C.S. No. 111/1992.

5. Both the sides gave evidence in the Trial Court. Both the Courts below have held that plaintiffs of R.C.S. No. 111/1992 have proved that Shenfadu was brother of Totaram and plaintiffs are successors of Totaram. Such proof is not sufficient for plaintiffs of R.C.S. No. 111/1992 to get the decree of possession or decree of declaration of ownership. They have admitted that Nathabai was absolute owner of the suit property and it is their case that only after her death, they became the owner of the suit property. The Courts below have given finding that Tukaram, plaintiff of R.C.S. No. 151/1994 was in possession and his possession started atleast from the date of death of Nathabai. In view of the nature of dispute, it was necessary for plaintiffs of R.C.S. No. 111/1992 to explain as to how Tukaram had come in possession of suit property.

6. This Court has carefully gone through the record of both the cases. In substantive evidence, in cross examination of plaintiff No. 1 of R.C.S. No. 111/1992 (PW No. 1 - Pundalika) some record was confronted with him. The record was of say filed by Pundalika in chapter proceeding bearing No. 3/1992, which was filed against Pundalika at the instance of Tukaram.

This say is exhibited by the Trial Court as Exh. 103. The say was signed not only by Pundalika, but also by his advocate. In the say, Pundalika had contended that Tukaram is illegitimate son of Nathabai. It is not disputed that a proceeding under section 145 of Criminal Procedure Code was also started between the parties. Tukaram produced Khatebook of the suit property in the Trial Court. Tukaram has given evidence as per the aforesaid contention made by him viz. he is the son of Nathabai.

7. The plaintiffs of R.C.S. No. 111/1992 have examined one Sampat Patil, adjacent owner as witness. This witness had initially filed affidavit in support of case of Tukaram, but he gave evidence in support of case of plaintiffs of R.C.S. No. 111/1992. To show that Sampat is not reliable witness. Defendants of R.C.S. No. 111/1992 examined Officer of the Court before whom this witness had sworn affidavit in support of case of Tukaram and the learned counsel, who had signed to identify Sampat was also examined. In view of this record, the Trial Court held that Sampat Patil is not believable.

8. In view of the admission given by Pundalika, plaintiff of R.C.S. No. 111/1992 in previous proceeding and in view of the aforesaid record and circumstances, the Courts below have

given finding on pre-ponderance of probability that Tukaram is son of Nathabai. This finding is finding of fact and there are concurrent finding of the Courts below on this relationship. In the case reported as **AIR 2010 SUPREME COURT 2685 [Bharatha Matha and Anr. Vs. R. Vijaya Renganathan & Ors.]**, the Apex Court has laid down that the finding in respect of relationship is finding of fact. In view of these circumstances, it is not possible for this Court to interfere in the finding given by the Trial Court. The finding is on the basis of both, the admission given in previous proceeding by Pundalika and also oral evidence given in the Trial Court.

9. The learned counsel for appellant submitted that substantial question of law is involved like, "Whether the Courts below have committed error in placing reliance on so called admission mentioned in say filed in Chapter proceeding which was proceeding of criminal nature ?". It is already observed that the admission is duly proved. There is nothing in law, preventing party like Tukaram from proving such admission. There is not only the admission, but there are surrounding circumstances already mentioned, in support of the relationship. Thus, it is not possible to formulate the substantial question of law on the point suggested by the learned counsel for appellant.

10. The learned counsel for appellant submitted that it is the case of plaintiffs of R.C.S. No. 111/1992 that the suit property was held by Shenfadu as ancestral property and it was Inam property. It was submitted that if the property was Inam property, as a brother, Totaram was entitled to have share in the property and so, atleast to that extent, the right of plaintiffs from R.C.S. No. 111/1992 ought to have been considered and accepted. It needs to be observed that this is totally new case. The relevant pleadings already quoted show that plaintiffs of R.C.S. No. 111/1992 came with the case that suit property was property of absolute ownership of Nathabai and only as successor of Nathabai, plaintiffs have become the owner of the property. Thus, such new case cannot be considered. Further, there is no record at all in support of the contention that the property had come to Shenfadu from his father.

11. Some argument was advanced by the learned counsel for appellant on the basis of revenue entry like mutation made in favour of plaintiffs of R.C.S. No. 111/1992. He submitted that in view of such mutation made in favour of plaintiffs after the death of Nathabai, the Court ought to have held that necessary inquiry was made and the authority had come to the

conclusion that only appellants are entitled to succeed the property of Nathabai. This submission is not at all acceptable. Such entry cannot confer title.

12. Reliance was placed on some reported case by the learned counsel for appellant and they are as under :-

(i) 2008 (5) Bom.C.R. 42 (AURANGABAD BENCH) [Chinda Manji Koli & Ors. Vs. Manga Daga Koli],

(ii) AIR 2003 SUPREME COURT 1754 [Chandramohan Ramchandra Patil & Ors. Vs. Bapu Koyappa Patil (dead) thr. L.Rs. & Ors.]

(iii) AIR 1982 SUPREME COURT 887 (1) [Nagesh Bisto Desai etc. Vs. Khando Tirmal Desai etc.].

This Court has carefully gone through the facts of the reported cases. The facts of the present matters are altogether different. Relevant facts and circumstances are already quoted by this Court. These reported cases are of no use in the present matter. No substantial question of law as such is involved in the present matters and it is not possible to interfere in the findings which are concurrent of the Courts below.

13. In the result, both the appeals are dismissed. Civil Applications are disposed of.

[T.V. NALAWADE, J.]

ssc/