

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

39 SECOND APPEAL NO. 114 OF 2016
WITH CA/1661/2016 IN SA/114/2016 WITH CA/3386/2016 IN
CA/1661/2016

ABIDABI SUBHEDAR SHAIKH AND ANR
VERSUS
SHAIKH YUSUF HASAN AND ORS

...
Advocate for Appellants : Bhide Vinod Y
Advocate for Respondents 2A to 2E : Devakate Anant R
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CORAM : T.V. NALAWADE, J.
DATED : 4th April, 2016.

ORDER :

1. The appeal is filed against decree given on counter claim filed in Regular Civil Suit No. 188/2000, which was pending in the Court of Civil Judge, Junior Division, Akoke, District Ahmednagar and against the judgment and decree of Regular Civil Appeal No. 35/2007, which was pending in the Court of District Judge -2, Sangamner, District Ahmednagar. Both the sides are heard.

2. The suit was filed by present appellants against respondents in respect of house property which is given number 2/1 in the record of Village Panchayat, Akole. The plaintiffs are sisters *inter-se*. It is their case that the suit property was purchased by their mother Jamrutbi Shaikh in the names of her

sons. It is the case of plaintiffs that they were living with their mother and as the property was jointly owned, they are entitled to keep the possession of the property. It is contended that they are running a shop in the suit premises, but defendants, who are their brothers are trying to take possession forcibly from them. Alternatively, they had contended that they were in possession of suit property for more than 25 years and they have become owners due to adverse possession. They had claimed the relief of declaration of ownership as successors of their mother and they had prayed for relief of injunction to protect their possession.

3. Defendant No. 1 filed written statement and he denied that the property was purchased by mother of the parties. He contended that to provide a source of income to mother, he had started a shop in the suit premises and he was running the business. It is contended that the plaintiffs forcibly took possession and so, their possession is not legal. He contended that in the past, Special Civil Suit No. 202/1994 was filed for partition in respect of this property and other properties and in that suit, the Court had held that the present suit property was not the property of the family and relief of partition was refused in that suit. Defendant No. 1 then made counter claim

and claimed the relief of possession from plaintiffs of the suit property.

4. During pendency of suit, defendant No. 1 sold the property to defendant No. 2, his brother and defendant No. 2 filed a counter claim and written statement after coming on the record as defendant and he claimed the possession of portion of 4 x 8 ft. of House No. 2/1.

5. Issues were framed on the basis of aforesaid pleadings by the Trial Court. Both the sides gave evidence.

6. The pleadings show that plaintiffs are not disputing that the property was purchased in the name of sons of their mother. The original sale deed was not produced by the defendants though its copy was produced. Thus, it is not disputed that House No. 2 of which the suit property is part was purchased by defendant Nos. 1 and 2 and their one more brother - Shaikh Gulab. It is also not disputed that in the past, defendant No. 2 - Abdul Gani had filed Special Civil Suit No. 202/1994 for relief of partition. Copy of judgment and also the decree are on the record and they show that defendant No. 2 had claimed that the present property was purchased in the name of three

brothers and so, House No. 2 also needs to be partitioned. Such relief was refused in that suit by holding that the property was already given to Shaikh Yousuf and Abdul Gani Hasan though the property was purchased by three brothers. It needs to be kept in mind that the parties are of Muslim community. The said decision became final. The record like assessment record prepared by Village Panchayat and City Survey Office show that right from the beginning the name of purchasers were entered in the record and the names of defendant Nos. 1 and 2 were then entered in respect of two houses which were given separate numbers like House Nos. 7 and 8. In city survey record these two houses are shown as separate properties. But, initially the names of three brothers were entered in assessment record as owners.

7. In view of the aforesaid record, there was not much scope to the plaintiffs to prove that the property was belonging to their mother, plaintiffs and also the defendants. The suit was already decided in respect of that claim in the past and that decision has become final. For proving the ownership due to adverse possession, there was no specific pleading. On the other hand, the defendants had come with specific case that the property was given to the mother to earn for livelihood and for

that one shop was started there. Considering the relationship between the parties, the Courts below have held that the case of defendants is more probable in nature. As defendants are title holders, counter claim of defendant No. 2 on the basis of sale deed executed in his favour by defendant No. 1 is decreed.

8. The learned counsel for appellants submitted that initially counter claim was filed by defendant No. 1 and in that, possession of entire area of House No. 2/1 was claimed, but in the counter claim, defendant No. 2 as purchaser has contended that only some area was shown and so. This circumstance need not be considered in the present matter. Defendant No. 2 wants to take possession of shop premises which is mentioned by defendant No. 1 in his written statement and counter claim.

9. One more point was argued by the learned counsel for appellants. He submitted that the Trial Court had dismissed the counter claim of defendant No. 1 and in view of that circumstance, the counter claim of defendant No. 2 could not have been allowed. This submission is not at all acceptable. Though it is true that the Trial Court ought to have held that the issue with regard to counter claim of defendant No. 1 did not survive as the property was sold to defendant No. 2. Due to the

mistake committed by Trial Court of answering this issue in negative against defendant No. 1, plaintiffs cannot gain anything. The findings given by the Courts below are findings on facts. This Court sees no reason to interfere in the decision of the Trial Court. In the result, the appeal stands dismissed. Civil Applications are disposed of.

[T.V. NALAWADE, J.]

ssc/