

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

**Second Appeal No. 268 of 2016
With
Civil Application No.4606 of 2016**

Mahemod Kamalsab Ansari. **.. Appellant.**

Versus

Bebi Yasinsab Jamadar (Narona)
And Others. **.. Respondents.**

Shri. S.Y. Mahajan, Advocate, for appellant.

CORAM: T.V. NALAWADE, J.

DATE : 22 JUNE 2016

ORDER:

1) The appeal is filed to challenge the judgment and decree of Regular Civil Suit No.272/2001 which was pending in the Court of the Civil Judge Junior Division Tuljapur, District Osmanabad and also to challenge the judgment and decree of Regular Civil Appeal No.22/2008 which was pending in the Court of the District Judge-2 Osmanabad. The suit filed by the present respondent No.1

Smt. Bebi Yasin for relief of partition and separation possession of her share is decided in her favour. Heard learned counsel for the original defendant.

2) The suit was filed in respect of land Block Nos.5,7 and 17. The plaintiff is real sister of defendant No.1 and defendant Nos.2 and 3 are her cousins. One Nabulal was their common ancestor. Nabulal was succeeded by Turab and Kamal, two sons. Plaintiff and defendant No.1 are successors of Turab and other defendants including present appellant are successors of Kamal.

3) It is the case of the plaintiff that Nabulal died in the year 1956 and he was the owner of the suit property. It is contended that after the death of Nabulal his two sons became owners of the suit property and after the death of Turab, plaintiff and defendant No.1 became entitled to get the share of Turab which was one-half. Thus, it is the case of the plaintiff she is entitled to get 1/4th share and defendant No.1 is entitled to get 1/4th share in the suit property.

4) Defendant Nos.1 to 3 filed joint written statement and they contested the matter. They admitted that Nabulal died in the year 1956 but they contended that Turab had died in the year 1940. It is contended that as Turab died prior to Nabulal, the entire property was succeeded by Kamal and accordingly mutations were made in the names of Kamal and then in the names of defendant Nos.2 and 3 as owners of the property. Alternatively they contended that they have become owner due to adverse possession.

5) Both the Courts below have held that the defendants have failed to prove that Turab died prior to Nabulal. In view of this finding, share as claimed by the plaintiff is given to her.

6) Learned counsel for the appellant submitted that in the evidence, witness of the plaintiff, has admitted that Turab died prior to police action i.e. prior to the death of Nabulal and due this circumstance, both the Courts below ought to have dismissed the suit. This Court has carefully gone through the evidence of the said

witness which was there in the paper book supplied by the learned counsel for the appellant. Said witness has given evidence in examination-in-chief that Nabulal was succeeded by Turab and Kamal. After that in the cross-examination he admitted the aforesaid thing. Evidence as a whole needs to be considered. Due to stray admission, like quoted above, the matter cannot be decided. Further, the plaintiff has given evidence which is consistent with the pleadings in the plaint. In view of the contentions raised by the defendants that Turab died prior to his father, burden was on the defendants to prove this contention. They could have produced some record to prove this contention on preponderance of probability. The parties are from District Osmanabad and some record like entry in the register maintained under the Birth and Death Register etc. could have been produced. No such record is produced.

7) The judgments show that no attempt was made to produce record by defendants. Finding given by the Courts below is a question of fact and on oral evidence. In view of these circumstances, this Court holds that it is not

possible to interfere in the decisions given by the Courts below. No substantial questions of law as such is involved in the matter. The appeal stands dismissed. Civil Application is disposed of.

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

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