

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

APPEAL FROM ORDER NO.121/2014

- 1] Shankar s/o Mudrik Khose
Age 62 years, Occ-Pensioner
& Agrilm R/o Vaishalnagar
Tq. Latur
- 2] Digambar s/o Mudrik Khose
Age 50 years, Occ-Agril
R/o Matefal, Tq. Latur
- 3] Balu @ Balasaheb s/o Mudrik Khose
Age 57 years, Occ-Agril
R/o Matefal, Tq. Latur, Dist.Latur. .. APPELLANTS

VERSUS

Shivaji s/o Mudrik Khose
Age 65 years, Occ-Agri
R/o Matefal, Tq. Latur
Dist.Latur .. RESPONDENT

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Shri R.P.Adgaonkar, Advocate for appellants

Shri S.D.Kotkar, Advocate for respondent.

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CORAM : T.V.NALAWADE**DATED : 26TH FEBRUARY,2016****ORAL ORDER :-**

The appeal is filed against judgment and order of Regular Civil Appeal No.64/2013 which was pending before Principal District Judge, Latur. Both sides are heard.

2] Regular Civil Suit No.628/1993 was filed for relief of partition and separate possession of some immovable ancestral property by Shivaji Khose. The Suit property was agricultural lands. The Suit for partition was decided in favour of Shivaji and 1/5th share is given to him. That decision has become final. Miscellaneous Civil Application No.88/2004 was filed for deciding mesne profit in respect of the share of the plaintiff in the suit property. The Civil Judge, Junior Division, Latur dismissed the proceedings by observing that the respondents who were co-parceners were not in wrongful possession and so proceeding for mesne profit was not tenable. It was also held that no evidence was given by the decree holder to prove that some income was received by judgment debtor and so the decree holder is entitled to mesne profit.

3] The District Court has considered relevant provisions of Civil Procedure Code and has held that the plaintiff is entitled to get the mesne profit. Matter is remanded to the trial Court for fresh enquiry regarding the mesne profit. Permission is given to the decree holder to lead evidence to prove the income from the lands.

4] The learned counsel for appellants-defendants submitted that the matter could not have been remanded back for enquiry as no preliminary point as such was decided by Civil Judge, Junior Division, Latur. It took this Court through provisions of Order 41 Rule 23 of C.P.C. This Court has gone through that provision and also the provision of Section 107 of C.P.C. The aforesaid circumstances of present case show that the Civil Court has not considered the matter on merit by observing that the possession of defendant co-parcener cannot be treated as a wrongful possession for giving mesne profit to the plaintiff. This proposition is not acceptable as the possession was admittedly with the defendant and plaintiff was not getting any income from the land in respect of his share.

5] The order made by the Civil Judge shows that the Civil Court felt that entire burden was on the decree holder to prove that defendant was making some income from the land. This proposition is not at all acceptable. When the defendant was in possession of

the suit property, it was upto him to show as to what income he was making from the land. He was not expected to keep the land barren and if he had kept the land barren, in that case also plaintiff was entitled to get mesne profit. Plaintiff can prove that from such land particular income can be made on the basis of the average yield collected by the agricultural department of State Government for that area. Thus, the Civil Court had committed grave error in dismissing the proceedings filed for deciding mesne profit. This Court holds that District Court has not committed any error in setting aside that decision and remanding the matter back to the Civil Court. In the result, Appeal stands dismissed.

(T.V.NALAWADE,J.)

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