

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

Second Appeal No. 0576 of 2015

District : Aurangabad

1. Smt. Sk. Meherubi w/o. Sk. Aziz,
Age : 61 years,
Occupation : Household.
2. Sk. Siddiq s/o. Sk. Aziz,
Age : 34 years,
Occupation : Labour.
3. Ayshabi d/o. Sk. Farooq,
Age : 19 years,
Occupation : Education.
4. Ashjfaq s/o. Sk. Farooq,
Age : 18 years,
Occupation : Education.
5. Sk. Mukhtar s/o. Sk. Aziz,
Age : 33 years,
Occupation : Labour.

All above R/o. Vivhamandwa,
Taluka Paithan,
Dist. Aurangabad.

6. Nasiba w/o. Mukhtar,
Age : 32 years,
Occupation : Household,
R/o. Aurangpurwadi,
Taluka Paithan,
Dist. Aurangabad.

.. Appellants
(Original
plaintiffs)

versus

1. Nanda w/o. Sk. Aziz,
Age : 44 years,
Occupation : Labour,
R/o. Vivhamandwa,
Taluka Paithan,
Dist. Aurangabad.

2. The Executive Engineer,
Jaikwadi Irrigation Division,
Nath Nagar N.,
Taluka Paithan,
Dist. Aurangabad.

3. The State of Maharashtra,
Through Collector,
Aurangabad.

4. Sk. Farooq s/o. Sk. Aziz
(Died through L.Rs)

4-A) Surraya w/o. Sk. Farooq,
Age : 37 years,
Occupation : Household,
R/o. At Post Karadi,
Taluka Gangapur,
Dist. Aurangabad.

4-B) Summya d/o. Sk. Farooq,
Age : 15 years,
Occupation : Education,
R/o. as above.

4-C) Afrin d/o. Sk. Farooq,
Age : 13 years,
Occupation : Education,
R/o. as above.

4-D) Ashraf s/o. Sk. Farooq,
Age : 11 years,
Occupation : Education,
R/o. as above.

(Respondents no.4-B to 4-D
minor under guardianship of
respondent no.4-A)

.. Respondents
(Original
defendants)

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Mr. Arvind S. Kale, Advocate, for the appellants.

Mr. D.K. Kulkarni, Advocate, for respondent no.01.

Respondents no.02 served (Absent).

*Mr. S.M. Ganachari, Assistant Government Pleader,
for respondent no.03.*

*Mr. Govind A. Kulkarni, Advocate, for respondent
no.4-A to 4-D.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 25TH APRIL 2019

ORDER :

01. Present appellants are the original plaintiffs who had filed Regular Civil Suit No. 821 of 2010 before Vth Joint Civil Judge (Senior Division), Aurangabad, for declaration and perpetual injunction. They had sought declaration that they are the legal heirs of deceased Sk. Aziz Mohd. Isaq and restraining defendant no.01 permanently from withdrawing the amount of provident fund and gratuity laying with defendant no.02. [Parties are referred as per their nomenclature before the trial Court.]

02. The plaintiffs had come with a case, that plaintiff no.01 is the widow of the deceased. Plaintiffs no.02 to 04 are the sons and plaintiff no.05 is the married daughter of deceased Sk. Aziz. Sk. Aziz was serving as operator in the office of defendant no.02. He expired on 08-02-2003 at Vihamandva, Taluka Paithan, District Aurangabad. The plaintiffs had filed MARJI No.281 of 2003 to secure heirship certificate. Accordingly, it came to be

allowed by the Court of Civil Judge (Senior Division), Aurangabad. The application for withdrawal of the amount on the basis of heirship certificate filed by them with defendant no.02 was objected by defendant no.01 who claimed to be second wife of deceased Sk. Aziz. She filed MARJI No.607 of 2003 for revocation of the heirship certificate granted to the plaintiffs. Alternatively, it was prayed that the certificate be modified and she be recognized as heir to the properties left by Sk. Aziz. It is stated that after hearing the said petition, the said petition was allowed and the certificate granted in favour of plaintiffs was revoked. It is stated that defendant no.01 never married to deceased but she is taking disadvantage of the order of dismissal of MARJI No.607 of 2003 and is intending to secure the benefits left by Sk. Aziz. Hence, the suit.

03. The suit was resisted by defendant no.01 by filing written statement. She has stated that in view of the decision in MARJI No.607 of 2003, the suit is hit by principles of *res judicata*. Plaintiffs are the only heirs left by Sk. Aziz. Her status has been declared by competent Court and, therefore, she prayed for dismissal of the suit.

04. The suit proceeded *ex parte* against defendant no.03 - State of Maharashtra and without

written statement against defendant no.02, the Executive Engineer, Jayakwadi Irrigation Division.

05. After considering the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence and hearing both sides, the suit was dismissed by the learned trial Court on 11-07-2011. The original plaintiffs approached District Court, Aurangabad, by filing Regular Civil Appeal No. 282 of 2011. The appeal was heard by the learned District Judge-4, Aurangabad and it was dismissed on 20-04-2015. Hence, this second appeal challenging the concurrent judgment and decrees.

06. Heard learned Advocate Mr. A.S. Kale for the appellants, learned Advocate Mr. D.K. Kulkarni for respondent no.01, learned Assistant Government Pleader Mr. S.M. Ganachari for respondent no.03 and learned Advocate Mr. G.A. Kulkarni for respondents no.4A to 4D.

07. It has been vehemently submitted on behalf of the appellants, that both the Courts below have not considered the legal aspects involved in the matter based on the factual matrix. There was no status granted to defendant no.01 as widow of deceased Sk. Aziz because she being Hindu, could not have succeeded to the property left by Sk. Aziz.

Only on that count, it ought to have been held that the plaintiffs are the only heirs left by Sk. Aziz. The decision in MARJI No.607 of 2003 was misinterpreted by both the Courts below. The learned trial Court had held properly that the suit was within limitation. However, the learned first appellate Court committed error in coming to the conclusion that the suit is not within limitation. Therefore, both these are the substantial questions of law involved in this case.

08. Per contra, learned Advocate appearing for respondent no.01 supported the reasons given by both the Courts below, as regards status of respondent no.01 and as regards limitation to the reasonings given by the learned first appellate Court. It was specifically pointed out that the present plaintiffs, who were respondents in MARJI No.607 of 2003, did not prefer any appeal to challenge the findings given therein. Therefore, that decision is binding on the plaintiffs.

09. The first and the foremost fact that is required to be considered is that initially plaintiffs had filed MARJI No.281 of 2003 for securing heirship certificate. It was allowed but later on the decision in this proceedings was set aside in MARJI No.607 of 2003 filed by defendant no.01. Perusal of the judgment in MARJI No.607 of

2003 would show that since it was a contested application, issues came to be framed. First issue was, whether applicant i.e. present defendant no.01 has proved that she got married to Sk. Aziz as per Muslim rites and she has daughter by name, Asha Bano from him. The finding to issue no.01 is given in the affirmative. Based upon that issue, the application was allowed and the heirship certificate granted to the plaintiffs herein was annulled. It is to be noted that this decision was never challenged by plaintiffs which was given on 31-07-2010. The learned trial Court, in this case, had framed specific issue, as to whether the suit is hit hit by the principle of *res judicata*. It was answered in the negative; whereas no such point was framed by the first appellate Court. However, the note has been taken regarding the said decision. Here, it is to be noted that though it is held that it will not operate as *res judicata*, yet, we cannot forget that the Court of a limited jurisdiction had given a finding and that is a piece of evidence which is in favour of defendant no.01. When she is held to be one of heir left by Sk. Aziz, then definitely both the Courts below have held that the plaintiffs are not the only legal heirs left by deceased. If at all the plaintiffs were aggrieved by the findings in MARJI No.607 of 2003, they ought to have preferred an appeal.

10. As regards point of limitation is concerned, the learned first appellate Court has reversed the finding of the trial Court. The heirship which was granted to the plaintiffs in MARJI No. 281 of 2003 was annulled in MARJI No.607 of 2003 on 31-07-2010 and the suit i.e. R.C.S. No.821 of 2010 was filed before the trial Court on 21-09-2010. The learned first appellate Court has relied on Article 58 of the Limitation Act and it is held that since Sk. Aziz expired in 2003, reliance of the learned trial Judge on Article 63 of the Limitation Act was not proper. Even if we take Article 58 of the Limitation Act as the provision which is applicable to the suit herein, yet, it is to be noted that the cause of action for filing suit arose when MARJI No.607 of 2003 came to be decided. Till then, the decision in MARJI No.281 of 2003 was in favour of plaintiffs. Therefore, as regards limitation point is concerned, it appears that the learned first appellate Court has committed wrong but that finding will not affect the fact that the plaintiffs have failed to prove that they are the only legal heirs left by Sk. Aziz. When the competent Court having jurisdiction to decide status of a party has come to the conclusion that even defendant no.01 is the heir of Sk. Aziz, apart from the plaintiffs, then plaintiffs are not entitled to get that declaration as well as the injunction. Therefore, no substantial question of law is arising in this case.

11. In the light of above, the second appeal is disposed of as '**Not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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