

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

939 SECOND APPEAL NO.747 OF 2012

WITH

CIVIL APPLICATION NO.12903 OF 2012

in SA/747/2012

RASOOL SAHEB S/O HUSSAINSAHEB INAMDAR

VERSUS

OSMANSAHEB S/O HUSSAINSAHEB INAMDAR DIED THR LRS AND

OTHERS

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Mrs. A.N. Ansari, Advocate for the appellant

Mr. H.T. Gaikwad, Advocate for the respondent No.1 - **absent**

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 03rd AUGUST, 2021

ORDER :

1 Present appeal has been filed by the original plaintiff challenging the concurrent part of the Judgment and Decree, which has gone against him. He had filed Regular Civil Suit No.50/2005 (old No.293/1997) for partition and separate possession as well as mesne profit, in respect of agricultural land and house property before Civil Judge Senior Division, Omerga, Dist. Osmanabad. The suit was partly decreed on 02.12.2006. It

was held that the plaintiff is having 2/9th share in agricultural lands bearing Sy.No.202/3, 202/1 and 202/6 as well as Grampanchayat House No.150 situated at village Tugaon, Tq. Omerga, Dist. Osmanabad. The claim of the plaintiff in respect of other properties was rejected. The said suit was challenged by the plaintiff in Regular Civil Suit No.5/2007 before Additional District Court, Omerga, in which the respondent No.1 therein had also filed cross objection. Learned District Judge-1, Omerga partly allowed the appeal and modified the share. It was held that plaintiff, defendant Nos.1 and 2 are having 1/4th share each and defendant Nos.3 and 4 have 1/8th share each in suit lands bearing Sy.No.202/1, 202/3, 202/6 and Grampanchayat House No.150 of village Tugaon, Tq. Omerga, Dist. Osmanabad. The claim of the plaintiff in respect of other properties was rejected. The cross objection filed by the defendant No.1 was dismissed. Now, the original plaintiff has come in appeal challenging the part of the decree which has gone against him in respect of other properties. It is to be noted that the other properties are Gat No.202/5 admeasuring 00 H 90 R, Gat No.202/7 admeasuring 02 H 05 R, Gat No.202/4 admeasuring 00 H 91 R, Gat No.199/A admeasuring 01 H 72 R, Gat No.196/1 admeasuring 09 H 29 R and C.T.S. No.886 (old Grampanchayat No.151) admeasuring 75-02 sq.ft. situated in the same village and also land bearing Gat No.19/B admeasuring 01 H 61 R situated in village Tapse Chincholi, Tq. Ausa, Dist. Latur.

2 Heard learned Advocate Mrs. A.N. Ansari for the appellant.

3 At the outset, in view of the decision in **Kirparam (since deceased through LRs) and others vs. Surender Deo Gaur and others, 2021 (3) Mh.L.J., 250**, unless the appellant herein is able to show that there is substantial question of law arising for determination as contemplated under Section 100 of the Code of Civil Procedure, 1908, it is not necessary that any question of law should be framed at the time of dismissal of the appeal. The appeal can be dismissed if no such substantial question of law is arising.

4 The relationship between the parties is not denied. Plaintiff, defendant Nos.1 and 2 are the real brothers and defendant Nos.3 and 4 are their real sisters. They are from Hannafi Mohammedan community. One Hussainsaheb Bandeali Inamdar was their ancestor father, who died in Police Action. Their mother Lalbee expired on 24.09.1980. It is also not in dispute that land Block No.202/3 admeasuring 02 H 35 R was the property of Hussainsaheb. After death of Hussainsaheb, name of his widow came to be mutated vide Mutation Entry No.898 dated 05.05.1981 in the name of defendant No.1. It is also not in dispute that Lalbee purchased land Block No.202/1 admeasuring 00 H 63 R and Block No.202/6 admeasuring 00 H 40 R. After the death of Lalbee, name of defendant No.1 has been shown vide Mutation Entry No.898. Important point to be noted is that he has been

shown as a Karta of the family, however, the position of land is very much clear that for Mohammedans there is no concept of joint family and their cannot be a Karta. We may take it as that the elder son. Defendant No.1 was representing the entire family and they were cultivating the lands. Now, the plaintiff has come with the case that out of the said family income the other properties have been purchased, but on facts and assessment of law both the Courts have come to the conclusion that only land Sy. No.202/1 is the part of legacy left by deceased Hussainsaheb and the other two properties purchased by Lalbee. They are Matraka properties. All the defendants can be said to be the tenants-in-common in respect of those properties including the Grampanchayat House No.150 situated at village Tugaon. The fact, which has been brought on record further, reveals that defendant No.1 had purchased Gat No.202/4 in a Court decree bearing Regular Civil Suit No.163/1982 dated 17.02.1984. However, defendant No.1 has been held to have proved that he was possessing the said land since 1974-75 as tenant and he has paid amount of Rs.12,000/-, that is, consideration amount, which was from his own income. Thereafter, it also appears that in another suit i.e. Regular Civil Suit No.369/1986 defendant No.1 arrived at a compromise with the rival party therein and by virtue of compromise decree he got that land. Both the said compromise decrees passed in Regular Civil Suit No.163/1982 and Regular Civil Suit No.369/1986 have not been got set aside by the

plaintiff. Further, it is also required to be noted that during the pendency of the suit it appears that defendant No.1 had sold land Sy.No.196/1 to defendant No.5.

5 As per the Mohammedan Law, the partition would open upon the death of the common ancestor. Here, the exact date of death of Hussainsaheb appears to have not come on record. Even Lalbee expired on 24.09.1980. The right arose for the plaintiff to get his share separated after death of Lalbee also. But it appears that no such suit was filed prior to 1997. Plaintiff joined the service in 1970. That means, he could have started earning only after joining the service. Prior to that even if he would have cultivated the properties left by the parents; yet, there is no concept of putting that amount or income in the hotch pot. The learned Trial Judge has definitely considered all the aspects relating to the inheritance under Mohammedan Law, and in fact, even the tenants-in-common or co-tenants cannot be said to be trustees of the co-tenant. Under such circumstance, except the three agricultural lands and one house property, plaintiff cannot get any share in other property, as he has failed to prove that it is acquired from the so called joint family of himself and his brothers.

6 Both the Courts below have considered the oral as well as documentary evidence properly together with the law point involved. No

substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, 1908, is arising in this case requiring admission. Hence, the Second Appeal together with Civil Application stands dismissed.

(Smt. Vibha Kankanwadi, J.)

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