IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

APPEAL FROM ORDER NO.86 OF 2007

1) Shaikh Abdullah S/o- Shaikh
Mohammadsaheb Munshi,
Age-65 years, Occu:Agriculture,
R/o-Momin Mohalla (Khadkadi),
Udgir, Tq-Udgir, Dist-Latur,

1-A) Shaikh Saifullah S/o- Shaikh
Mohammadsaheb Shaikh Munshi,
Age-58 years, Occu:Agriculture,
R/o-Hyderabad (A.P.),

1-B) Shaikh Samiullah S/o- Shaikh
Mohammadsaheb Shaikh Munshi,
Age-52 years, Occu:Business,

2) Shaikh Attaullah S/o- Shaikh
Mohammadsaheb Shaikh Munshi,
Age-41 years, Occu:Agriculture,
Udgir, Tq-Udgir, Dist-Latur,

3) Fatimabee W/o- Shaikh
Mohammadsaheb Munshi,
Age-78 years, Occu:Agriculture,
Udgir, Tq-Udgir, Dist-Latur,

4) Ahemadi-begum W/o- Syed Khurshid
Ahmed Saheb,
Age-37 years, Occu:Agriculture,
R/o-Momin Mohalla (Khadkadi),
Udgir, Tq-Udgir, Dist-Latur.

...APPELLANTS
(Orig. Defendant Nos. 1 to 4)

VERSUS

1) Sakharam S/o- Wasaram Pawar,
Age-60 years, Occu:Agriculture,
R/o-Nagalgaon Road, Durga-Nagar,
Udgir, Tq-Udgir, Dist-Latur,
(Orig. Plaintiff)

2) Munshi Mohammad Taki S/o- Latif,
Age-65 years, Occu:Agriculture,
R/o-Kumbhargalli, Udgir,
Tq-Udgir, Dist-Latur,

3) Mehtabee W/o- Abdul Latif Munshi,
Age-82 years, Occu:Labour,
R/o-As Above,

4) Chandpasha S/o- Abdul Latif Munshi,
Age-27 years, Occu:Labour,
(Died, Through LR.s)

4-A) Taharunisa Begum W/o- Chandpasha,
Age-35 years, Occu:Nil,
R/o-Dabirpura, Udgir,
Tq-Udgir, Dist-Latur,
(Deleted vide Court's order dated
26th September 2013),

5) Taher Pasha S/o- Abdul Latif Munshi,
Age-25 years, Occu:Labour,
R/o-Kumbhargalli, Udgir,
Tq-Udgir, Dist-Latur,

6) Kurshidbegum D/o- Abdul Latif Munshi,
Age-82 years, Occu:Household,
R/o-As Above,

7) Raziyabegum D/o- Abdul Latif Munshi,
Age-82 years, Occu:Household,
R/o-As Above,

8) Jajerabegum D/o- Abdul Latif Munshi,
Age-82 years, Occu:Household,
R/o-As Above,

9) Munshi Abdul Basid S/o- Abdul Latif Munshi,
Age-70 years, Occu:Nil,
R/o-As Above,

10) Ashabee W/o- Shaikh Dastgir Ahmedsaheb,
Age-77 years, Occu:Household,
R/o-Ranegeen Bungalow, Nideban Road,
Udgir, Tq-Udgir, Dist-Latur,
(Died, Through LR.s)

10-a) Bahudeen Shaikh Ahmed,
Age-64 years, Occu:Nil,
R/o-Rangeen Bangala, Udgir,
Tq-Udgir, Dist-Latur,

10-b) Mamunnisa W/o- Shaikh Ahmed,
Age-60 years, Occu:Household,
R/o-Church Road, Udgir,
Tq-Udgir, Dist-Latur,

10-c) Khaja Shaikh Ahmed,
Age-55 years, Occu:Nil,
R/o-Rangeen Bangala, Udgir,
Tq-Udgir, Dist-Latur,
(Deleted vide Court's order
dated 26th September 2013),

10-d) Shijuddin Shaikh Ahmed,
Age-52 years, Occu:Nil,
R/o-Jalkot Naka, Udgir,
Tq-Udgir, Dist-Latur,

10-e) Allauddin Shaikh Ahmed,
Age-50 years, Occu:Nil,
R/o-Mhada No.1-5-647,
House No.21/269, Labour Colony,
Nanded, Tq. & Dist-Nanded,

10-f) Mohammad Ikramaddin Shaikh Ahmed,
Age-45 years, Occu:Nil,
R/o-Alamin Nagar, Udgir,
Tq-Udgir, Dist-Latur,
(Deleted vide Court's order
dated 26th September 2013)

...RESPONDENTS
(Respondent NOs.2 to 10 Orig. Defendants)

...

Mr.R.N. Dhorde, Senior Counsel with
Mr. M.H. Shaikh Advocate for Appellants.
Mr.K.G. Khader Advocate holding for Mr. Y.M. Khan Advocate for Respondent No.1.
Mr. A.R. Rathod Advocate for Respondent Nos. 2 to 7 - **Absent.**
Respondent No.4 Dead.
Respondent Nos.4-a, 10-c and 10-f Deleted.
Respondent Nos. 8, 9 10-a, 10-b, 10-d and 10-f served.

...

WITH

APPEAL FROM ORDER NO.96 OF 2007

1) Shaikh Abdullah S/o- Shaikh
Mohammadsaheb Munshi,
Age-65 years, Occu:Agriculture,
R/o-Momin Mohalla (Khadkadi),
Udgir, Tq-Udgir, Dist-Latur,

1-A) Shaikh Saifullah S/o- Shaikh
Mohammadsaheb Shaikh Munshi,
Age-58 years, Occu:Agriculture,
R/o-Hyderabad (A.P.),

1-B) Shaikh Samiullah S/o- Shaikh
Mohammadsaheb Shaikh Munshi,
Age-52 years, Occu:Business,

2) Shaikh Attaullah S/o- Shaikh
Mohammadsaheb Shaikh Munshi,
Age-41 years, Occu:Agriculture,
Udgir, Tq-Udgir, Dist-Latur,

3) Fatimabee W/o- Shaikh
Mohammadsaheb Munshi,
Age-78 years, Occu:Agriculture,
Udgir, Tq-Udgir, Dist-Latur,

4) Ahemadi-begum W/o- Syed Khurshid
Ahmed Saheb,
Age-37 years, Occu:Agriculture,
R/o-Momin Mohalla (Khadkadi),
Udgir, Tq-Udgir, Dist-Latur.

...APPELLANTS
(Orig. Defendant Nos. 1 to 4)

VERSUS

1) Zimmabai W/o- Sakharam Pawar,
Age-60 years, Occu:Agriculture,
R/o-Nagalgaon Road, Durga-Nagar,
Udgir, Tq-Udgir, Dist-Latur,
(Orig. Plaintiff)
(Died through LR.s)

1-A) Sakharam S/o- Wasaram Pawar,
Age-67 years, Occu:Agriculture,
R/o-Bortala Tanda, Nagalgaon,
Tq-Udgir, Dist-Latur,

1-B) Shantabai W/o- Babu Aade,
Age-45 years, Occu:Household,
R/o-Pimpri, Tq-Udgir, Dist-Latur,

1-C) Shivaji S/o- Sakharam Pawar,
Age-40 years, Occu:Agriculture,
R/o-Bortala Tanda, Nagalgaon,
Tq-Udgir, Dsit-Latur,

1-D) Devidas S/o- Sakharam Pawar,
Age-40 years, Occu:Service,
R/o-Venutai Kanya Vidyalaya,
In Front of Bus Stand, Ambejogai,
Tq-Ambejogai, Dist-Beed,

1-E) Subhash S/o- Sakharam Pawar,
Age-38 years, Occu:Service,
R/o-D.S.B. Police, S.P. Office,
Latur, Tq. & Dist-Latur,

1-F) Pralhad S/o- Sakharam Pawar,
Age-36 years, Occu:Agriculture,
R/o-Bortala Tanda, Nagalgaon,
Tq-Udgir, Dist-Latur,

1-G) Babita W/o- Chitamani Rathod,
Age-35 years, Occu:Agriculture,
R/o-Hothi Tanda, Zahirabad,
Tq-Zahirabad, Dist-Medak (AP),

1-H) Laxman S/o- Sakharam Pawar,
Age-34 years, Occu:Agriculture,
R/o-Bortala Tanda, Nagalgaon,
Tq-Udgir, Dist-Latur,

1-I) Bali W/o- Murli Rathod,
Age-33 years, Occu:Household,
R/o-Savargaon Tanda, Ahmedpur,
Marshivani Tanda, Tq-Ahmedpur,
Dist-Latur,

1-J) Sanjay S/o- Sakharam Pawar,
Age-32 years, Occu:Agriculture,
R/o-Bortala Tanda, Nagalgaon,
Tq-Udgir, Dist-Latur,

1-K) Balu S/o- Sakharam Pawar,
Age-31 years, Occu:Agriculture,
R/o-Bortala Tanda, Nagalgaon,
Tq-Udgir, Dist-Latur,

1-L) Pappu S/o- Sakharam Pawar,
Age-30 years, Occu:Agriculture,
R/o-Bortala Tanda, Nagalgaon,
Tq-Udgir, Dist-Latur,

1-M) Sandip S/o- Sakharam Pawar,
Age-29 years, Occu:Agriculture,
R/o-Bortala Tanda, Nagalgaon,
Tq-Udgir, Dist-Latur,

1-N) Gout S/o- Sakharam Pawar,
Age-27 years, Occu:Agriculture,
R/o-Bortala Tanda, Nagalgaon,
Tq-Udgir, Dist-Latur,
(Deleted as per Court's Order
dated 21st January 2014),

1-O) Sunita D/o- Sakharam Pawar,
Age-22 years, Occu:Household,
R/o-Bortala Tanda, Nagalgaon,
Tq-Udgir, Dist-Latur,

2) Munshi Mohammad Taki S/o- Latif,
Age-65 years, Occu:Agriculture,
R/o-Kumbhargalli, Udgir,
Tq-Udgir, Dist-Latur,

3) Mehtabee W/o- Abdul Latif Munshi,
Age-82 years, Occu:Labour,
R/o-As Above,

4) Chandpasha S/o- Abdul Latif Munshi,
Age-27 years, Occu:Labour,
(Deleted vide Court's Order
dated 26th September 2013)

5) Taher Pasha S/o- Abdul Latif Munshi,
Age-25 years, Occu:Labour,
R/o-Kumbhargalli, Udgir,
Tq-Udgir, Dist-Latur,

6) Kurshidbegum D/o- Abdul Latif Munshi,
Age-82 years, Occu:Household,
R/o-As Above,

7) Raziyabegum D/o- Abdul Latif Munshi,
Age-82 years, Occu:Household,
R/o-As Above,

8) Hajerabegum D/o- Abdul Latif Munshi,
Age-82 years, Occu:Household,
R/o-As Above,

9) Munshi Abdul Basid S/o- Abdul Latif Munshi,
Age-70 years, Occu:Nil,
R/o-As Above,

10) Ashabee W/o- Shaikh Dastgir Ahmedsaheb,
Age-77 years, Occu:Household,
R/o-Ranegeen Bungalow, Nideban Road,
Udgir, Tq-Udgir, Dist-Latur,
(Deleted vide Court's Order
dated 26th September 2013)

...RESPONDENTS
(Respondent NOs.2 to 10 Orig. Defendants)

...

Mr. S.V. Chillarge Advocate for Appellants.
Mr. K.G. Khader Advocate holding for Mr. Y.M. Khan Advocate for Respondent No.1.
Respondent Nos.1-A to 1-E, 1-F, 1-G, 1-H, 1-I 1-J, 1-K, 1-L, 1-M, 2, 3, 5, 6, 7, 8, 9 served.
Respondent Nos. 1-N, 4, 10 Deleted.

...

CORAM: A.I.S. CHEEMA, J.

DATE OF RESERVING JUDGMENT : 12TH FEBRUARY,2015.

DATE OF PRONOUNCING JUDGMENT: 17TH MARCH, 2015.

JUDGMENT :

1. These Appeals From Order have been filed by original Defendant Nos. 1 to 4 being aggrieved by the Common Judgment dated 7th October 2006 passed by District Judge, Udgir allowing the Appeals and remanding matters, in Regular Civil Appeal No. 72 of 2006 and Regular Civil Appeal No.71 of 2006, which Appeals were filed by Respondent No.1 Sakharam Vasaram Pawar (in Appeal From Order No.86 of 2007) and Zimmabai w/o Sakharam Pawar (in Appeal From Order No.96 of 2007) respectively as their Suits being Regular Civil Suit No.133 of 2005 (filed by Sakharam) and Regular Civil Suit No.135 of 2005 (filed by his wife Zimmabai) had been dismissed as hit by provisions of R*es-Judicata*.

. By the Common Judgment dated 7th October 2006, District Judge, Udgir has allowed the Appeals of the original Plaintiffs and remanded back the matters to the Civil Judge, Junior Division for decision according to law and has also directed the parties to maintain status-quo.

. Trial Court had found the Regular Civil Suit No.133 of 2005 and Regular Civil Suit No.135 of 2005 filed by above Respondent Nos.1 (referred herein after as Present Plaintiffs) as hit by principles of Res-Judicata in view of decision in former Suit - Regular Civil Suit No.198 of 1986. District Judge, reversed the Judgment and Order and remanded matters.

2. Brief reference needs to be made to the facts of the matter and history of litigation:-

(A). Munshi Mohammad Saheb S/o Faijuddin had

filed former Regular Civil Suit No.198 of 1986 against Munshi Abdul Latif Saheb and others. The suit for declaration of ownership of Survey No.205 and injunction. In this former suit, present Plaintiff Sakharam was arrayed as Defendant No.3. The dispute related to Survey No.205 situated at village Udgir. Copy of the plaint shows that Munshi Mohammad claimed that Defendant No.1 Munshi Abdul Latif of that suit was owner and in possession of Survey No.203. Survey Nos.205 and 203 earlier belonged to one Mohammad Khamruddin, the uncle of Munshi Mohammad Saheb and Munshi Abdul Latif. He gifted the lands to Munshi Mohammad Saheb and Abdul Latif. Subsequently, according to (earlier) Plaintiff Munshi Mohammad, Survey No.203 was given to (earlier) Defendant Munshi Abdul Latif and Survey No.205 was given to Munshi Mohammad. Former plaint claimed that in or about 1962 under misconception (earlier) Defendant Munshi Abdul Latif applied for correction of entries by way of Mutation, to change Survey

Numbers representing that the land which was in his possession was Survey No.205 and land in actual possession of (earlier) Plaintiff Munshi Mohammad was Survey No.203. Accordingly, Mutation Entry No.15 dated 9th August 1962 was done. However the parties had never exchanged the actual possession of the respective lands and the record of rights showed correct position up to 9th August 1962 as per the possession and title of respective parties. In the former suit, it was pleaded that subsequently (earlier) Defendant Munshi Abdul Latif had sold land which was in his possession to Defendant Nos. 2 to 4 of that suit (which includes present Plaintiff Sakharam arrayed therein as Defendant No.3) under misconception and mis-belief that he was having possession of Survey No.205 and under misconception he had mentioned in the sale deed that he was selling land from Survey No.205 to those Defendant Nos.2 to 4. Earlier plaint mentioned that on or about 6th February 1985 Defendant No.1 Abdul Latif had himself applied and

got land measured and the cadastral surveyor guided the parties that the land which was in possession under the sale deeds executed by Abdul Latif was Survey No.203 and not 205. The former suit claimed that the Defendants on the basis of false documents and record of right, were trying to interfere with the possession of Munshi Mohammad Saheb, in his Survey No.205. The (earlier) Plaintiff Munshi Mohammad claimed declaration of ownership of Survey No.205 as described in the suit and also claimed permanent injunction against Munshi Abdul Latif, the vendor of (earlier) Defendant Nos. 2 to 5 of that suit as well as against Defendant Nos. 2 to 5.

(B). Munshi Abdul Latif, the vendor of Sakharam and other defendants of the former suit filed written statement in the former suit and contested the litigation on its merits. However, Defendant Nos. 2 to 5 of Regular Civil Suit No.198 of 1986, inspite of service of summons, remained

absent and suit proceeded ex-parte against them. Civil Judge, Junior Division, Udgir by his Judgment dated 13th March 1996 decided the former Civil Suit No.198 of 1986 in which Issue No.1 related to the question, - whether the Plaintiffs were the owners and in possession of the suit land Survey No.205 and Issue No.2 - whether the Plaintiffs had proved obstruction by Defendant Nos. 1 to 5 of that suit. The issues were answered in favour of the Plaintiffs (by this time Munshi Mohammad had expired and his Legal Representatives were on record). In the Judgment of earlier suit the trial Court had considered the defence put up by Munshi Abdul Latif where he claimed that the Mutation Entry No.15 had not been challenged and claimed that he had rightly sold Survey No.205 and had put those Defendant Nos. 2 to 4 and other persons in possession of Survey No.205. He had claimed that the Defendants were in adverse possession over Survey No.205. The trial Court discussed and the issue regarding adverse

possession was answered in negative. Former Trial Court discussed that Defendant Abdul Latif has admitted his application for Mutation for Entry No.15 and because of which, from 1962 name of Defendant Abdul Latif had been entered for Survey No.205. After considering the revenue entries, the former trial Court had gone into the question of actual possession of the parties and after considering the evidence which had been brought, (specially the evidence of Cadastral Surveyor PW-4 Ram) found that the then Plaintiff Munshi Mohammad Saheb was in possession of Survey No.205. The former trial Court observed that Defendant No.1 Abdul Latif was actually in possession of Survey No.203 but was under impression that his land was bearing Survey No.205. The then trial Court noticed that in the measurement done by Cadastral Surveyor, in the records of D.I.L.R., there was Panchnama which had been signed by Defendant Abdul Latif as well as his witness DW-3 Prabha Rathod which disclosed knowledge of Abdul Latif that

although he had mentioned Survey No.205 while executing the sale deeds, he had actually sold Survey No.203. The then trial Court took judicial cognizance of the certified copies of the sale deeds which had been executed by Abdul Latif who was accepting execution of sale deeds but wanted to deny the boundaries mentioned in the sale deed executed by he himself. Considering the material, the earlier trial Court had decreed the suit and declared Munshi Mohammad Saheb Faijuddin through legal representatives as owner of Survey No.205 and even recorded boundaries in the Decree itself.

(C). The Record and Proceedings disclose that against former Judgment in Regular Civil Suit No.198 of 1986, the then Defendant Nos. 2 to 4 filed Regular Civil Appeal No.95 of 2001 before Additional District Judge, Udgir. This included present Plaintiff Sakharam. Munshi Abdul Latif, vendor of Sakharam was added as Respondent in that Appeal. It also appears that Munshi Abdul Latif

had also filed Regular Civil Appeal No.94 of 2001. The Regular Civil Appeal No.95 of 2001 was subsequently contested only by Sakharam and he claimed that he should be given opportunity to contest the suit and the suit should be remanded. The then Additional District Judge considered the claim of Sakharam and Judgment shows that he considered the claim of Sakharam for opportunity to contest the suit and to set aside the ex-parte order. Then Additional District Judge considered the merits of the matter referring to the other Appeal as sister Appeal No.94 of 2001 in which he claimed to have discussed the factual and legal aspects in details. The then Additional District Judge for detailed reasons - proceeded to dismiss the Appeal of Sakharam.

(D). Against dismissal of the earlier Appeals, present Plaintiff Sakharam had filed Second Appeal No.298 of 2003 and Munshi Abdul Latif filed Second Appeal No.405 of 2004. Both the Appeals came to be

dismissed on 6th May 2004.

(E). It has been submitted that against the orders passed by the High Court, in the earlier litigation, Sakharam filed S.L.P. (Civil) No.2644 of 2004 to the Hon'ble the Supreme Court of India, which came to be dismissed on 13th December 2004. It has been submitted that even Munshi Abdul Latif had filed S.L.P. (Civil) No.625 of 2005 to the Hon'ble the Supreme Court and even his S.L.P. was dismissed on 6th January 2005. The copy of S.L.P. which had been filed by Sakharam is available in the Record and Proceedings of the present Regular Civil Suit No.133 of 2005 which has been filed.

3. Sakharam having lost the litigation up to the Hon'ble Supreme Court, has subsequently filed Regular Civil Suit No.133 of 2005 and his wife Zimmabai filed Regular Civil Suit No.135 of 2005 against legal representatives of Munshi Mohammad Saheb and legal representatives of Abdul Latif

Munshi. If the plaints in both the Suits are compared, they are verbatim similar except for where reference is being made to Sakharam or his wife Zimmabai. The present Suits filed by Sakharam and Zimmabai claim declaration of ownership of same Survey No.205 and claim that they are in possession and injunction should be given against the Defendants, legal representatives of Munshi Mohammad Saheb and others. If the plaint filed by Sakharam is considered, he claimed that he and one Manmatha Hawgirao Deorai had jointly purchased Survey No.205 to the extent of 9 Acres with the boundaries as shown in the plaint from Abdul Latif (the Defendant No.1 of earlier litigation) by registered sale deed dated 29th January 1982. Sakharam claimed that he and Manmatha were joint owners of this property and as per oral negotiation between him and Manmatha, Manmatha sold his share out of the property to Zimmabai, the wife of Sakharam vide registered sale deed dated 2nd July 1987. Plaints, in both the Suits,

claimed that the Plaintiffs are owners and absolute possessors of the land Survey No.205 of 1 Hectare 82 R with boundaries as per the sale deed. In both the Suits then there is claim of boundaries “as per current situation” in which one part is shown to be with wife Zimmabai and one part with Sakharam. With this difference, the Suits again referred to the same history of the properties that the properties were obtained by Abdul Latif and one Faijuddin by way of Hibanama and that they had exchanged properties and had then been in possession of respective shares and that Abdul Latif was in continuous possession of Survey No.205. In this litigation, Plaintiffs Sakharam and Zimmabai have joined the legal representatives of Abdul Latif also as Defendants. Reference is made to the earlier litigation of Regular Civil Suit No.198 of 1986 and how the matter went up-to the Supreme Court and came to be dismissed. Then present Suits claim that the Defendant Nos. 1 to 4 played fraud on Court. It is

claimed that in the earlier suit inspite of Mutation Entry No.15, the earlier Plaintiff had brought fraudulent case that he was owner and in possession of Survey No.205 and allegations have been made of collusion with T.I.L.R. Authorities.

. In both the Suits, Sakharam and his wife Zimmabai claim declaration of ownership of the same Survey No.205 admeasuring 1 Hectare and 82 R with same boundaries as claimed to be as per sale deed and have then added boundaries "as per current situation" showing within the same property land of Zimmabai to the North and that of Sakharam to the South. Both the Plaintiffs have sought declaration that Judgment and Decree in Regular Civil Suit No.198 of 1986 was obtained by playing fraud.

4. In both the suits, Plaintiffs claimed that after disposal of the former litigation, they had decided to take criminal action against

Defendant Nos.1 to 4, the legal representatives of earlier plaintiff Munshi Mohammad Saheb, for playing fraud on the Court, but as Panchas intervened, they did not take that action as Defendant Nos. 1 to 4 had agreed to the ownership and possession of the Plaintiffs and to execute necessary documents. However, they subsequently backed out and challenged the ownership of Plaintiffs and thus the Suits.

5. The separate but similar Judgments of the trial Court dated 29th April 2006 in Regular Civil Suit No.133 of 2005 and Regular Civil Suit No.135 of 2005 show that it considered the claim of the Plaintiffs of both the Suits and contention of Defendant Nos.1 to 4 regarding the earlier litigation wherein they claimed that allegations of fraud were made even in the earlier litigation before the First Appellate Court as well as Second Appellate Court and the Supreme Court also. Considering the defences raised and also the claim

being made by the Plaintiffs for injunction, the trial Court framed preliminary issues. The issue relevant for present Appeals is regarding the issue, whether present Suits filed by Sakharam and Zimmabai are barred by the principles of *Res-Judicata*. The trial Court discussed this issue in details referring to the earlier litigation and various arguments which were raised before it and came to the conclusion that the Suits were liable to be dismissed as barred under principle of *Res-Judicata*. The trial Court by separate but similar Judgments, dismissed both the Suits and saddled the respective Plaintiffs with costs of Rs.10,000/-.

6. Against dismissal of their suits, Zimmabai filed Regular Civil Appeal No.71 of 2006 and Sakharam filed Regular Civil Appeal No.72 of 2006. The District Judge-1 Udgir heard both sides and disagreed with the trial Court and remanded back the matters to the trial Court for decision

according to law, setting aside the findings regarding R*es-Judicata*.

7. In view of the remand of the matters, the present Appeals From Order have been filed.

8. Learned counsel for Appellants referred to the details of the earlier litigation and as to how the matter was maintained till the Hon'ble Supreme Court. It has been submitted that on baseless grounds the District Judge has remanded the matters and on the face of record, the present Suits filed are hit by principles of R*es-Judicata*. It has been argued that Sakharam and Manmatha were joint owners of the land they had purchased and were co-owners in the same sale deed. Sakharam, was party to the earlier litigation and Abdul Latif, through whom Sakharam and Manmatha both claimed their rights, was also party to the former litigation and he fought the litigation right up-to the Supreme Court. Manmatha could not give

better title to Zimmabai and even if Zimmabai had stepped into the shoes of Manmatha, she would be still only the co-owner with Sakharam who was party to the earlier litigation and thus it has been argued that Zimmabai cannot maintain separate suit and both the Suits are hit by principles of R*es-Judicata*.

9. Against this, the learned counsel for original Plaintiffs Sakharam and Zimmabai submitted that Zimmabai was not party to the earlier litigation and even Manmatha was not arrayed as party. Zimmabai purchased share of Manmatha by sale deed dated 2nd July 1987 and thus according to the counsel even if question of R*es-Judicata* was to be considered for Sakharam, there was no reason why Zimmabai could not maintain her Suit. It has been argued that when the Plaintiffs have filed the present Suits, as per Order XIV Rule 2 of the Code of Civil Procedure, it was necessary to decide all the issues and Suits

cannot be dismissed at the stage of preliminary issue. It is claimed that the earlier decree was obtained by fraud and thus the present Suits are maintainable.

10. Point for consideration is – Whether the present respective Suits filed by Respondents No.1 - Plaintiff Sakharam and his wife Plaintiff Zimmabai are hit by the principles of R*es-Judicata* in view of the decision in Regular Civil Suit No.198 of 1986?

11. I have already referred to the earlier litigation in some details. It is quite apparent that Munshi Mohammad Saheb had filed the Regular Civil Suit No.198 of 1986 for declaration that he was the owner of Survey No.205 and that he was in possession and so Munshi Abdul Latif as well as his purchasers, Defendant Nos. 2 to 5 should not obstruct the possession of Munshi Mohammad Saheb in Survey No.205 with the given boundaries. The

Suit was contested by Munshi Abdul Latif and was decided after going into the merits. Present Plaintiff Sakharam was Defendant No.3 in that Suit but when the suit was pending, he preferred to remain absent. In fact the Judgment in earlier Regular Civil Appeal No.95 of 2001 filed by Sakharam and others shows in Para 17 of that Judgment that Sakharam had even appeared before the trial Court but subsequently for reasons known to him failed to avail further opportunities to contest the Suit. Thus, although Sakharam had remained ex-parte earlier in the trial Court, still Munshi Abdul Latif, through whom Sakharam is claiming his rights, did contest the suit. The claims of Sakharam were considered in the appeal filed by him to the District Court and even in the High Court. His S.L.P. to the Supreme Court wherein he claimed that fraud had been played, came to be dismissed. Thus Sakharam in former litigation did try his best to secure Judgment in his favour. Thus, when former suit has been

finally decided that Munshi Mohammad Saheb was the owner and in possession of Survey No.205 and Sakharam and others should not interfere with his possession, the present Suit is filed relating to the same subject matter wherein Sakharam is claiming that he is in possession of Survey No.205 and the legal representatives of Munshi Mohammad Saheb should not disturb his possession. When the plea of fraud was raised even earlier and has not been answered in favour of Sakharam, the same cannot be now again raised. Ex-parte Decree unsuccessfully tried to be shaken off by Sakharam would operate as *Res-Judicata* against him in present suit.

12. As regards Zimmabai, she is claiming rights through Manmatha whose original vendor Abdul Latif was already defending earlier Regular Civil Suit No.198 of 1986. Regular Civil Suit No.198 of 1986 was filed on 22nd July 1986. Sakharam and Manmatha had jointly purchased land

from Abdul Latif on 29th January 1982. Copy of that sale deed from the Record and Proceedings of Regular Civil Suit No.133 of 2005 shows purchase of property mentioning the Survey Number to be 205 and giving the concerned boundaries the sale deed was executed. The sale deed shows Sakharam and Manmatha to be co-owners of the land which they claimed to have purchased from Abdul Latif. When Regular Civil Suit No.198 of 1986 came to be filed, Sakharam was arrayed as the Defendant. During the pendency of that suit, what happened on 2nd July 1987 was that Zimmabai purchased the share of Manmatha in the same property which was in dispute. If the sale deed dated 2nd July 1987 (copy of which is available in Record and Proceedings of Regular Civil Suit No.135 of 2005) is perused, it shows transfer of the share of Manmatha to Zimmabai with boundaries as mentioned. The boundaries as mentioned do not show any separate portion of Sakharam on any side. If the plaint filed by Zimmabai herself is perused, the same

itself mentions in Para 1 that Zimmabai's husband and Manmatha had purchased land jointly from Abdul Latif on 29th January 1982. The plaint mentions "thereafter the said Manmatha, one of the joint owner of the above property as per oral negotiations with his co-owner i.e. Sakharam sold his share out of the said property to the Plaintiff i.e. Zimmabai (wife of Sakharam) under registered sale deed dated 2nd July 1987". Thus, Zimmabai does not claim to have even negotiated with Manmatha and that it is Sakharam himself who has brought about the sale deed during the pendency of the earlier litigation, getting the sale deed executed in the name of his wife.

13. It is quite apparent from the record that the Suits filed by Sakharam and Zimmabai are relating to matter which was directly and substantially in issue in the former suit. Sakharam was himself party to the earlier litigation and Zimmabai has stepped into the shoes

of Manmatha who was co-owner of the property which was already in dispute and even who was claiming his rights only through Abdul Latif who was already facing the litigation. Thus, merely because a sale deed was brought into existence in the name of Zimmabai, the rigours of R*es-Judicata* cannot be avoided when already co-owner was added in the Suit and the predecessor-in-title was also facing the same litigation. The earlier litigation was before competent Court of Civil Judge, Junior Division and has been heard and finally decided. The decree passed in the earlier suit has been confirmed and in view of this, the present Suits filed by Sakharam and Zimmabai are not maintainable being hit by principles of R*es-Judicata*. If the prayer clauses of both the suits are perused, it can be seen that both the Plaintiffs are claiming declaration of title of the same property giving same boundaries as per sale deed and then claiming boundaries within the same land by showing themselves in different parts

claiming it to be current situation. It is apparent that what is claimed "as per current situation" is not part of any records. On the face of record, husband and wife are not only co-owners but the property is one and the same regarding which claim is being made and which Survey No.205 has been subject matter of former suit. Now during pendency of these Appeals, Zimmabai has expired and Sakharam himself and other legal representatives have come on record, on her behalf. Thus Sakharam wants to litigate same dispute as Legal Representative of his co-owner, which he litigated earlier and lost.

14. Counsel for Respondent No.1 relied on the case of **Nagnath vs. Kishan, reported in 1972 Mh. L.J. 334,** where there was observation that plea of R*es-Judicata* should not ordinarily be disposed of as preliminary issue. If Section 11 of the Code of Civil Procedure is perused, the opening wordings are “No Court shall try any suit or issue in which

the matter directly and substantially in issue has been directly and substantially in issue in a former suit.....". Thus, in each such matter it would be for the Court to consider the pleadings and material available to see whether on preliminary issue the matter can be disposed or matter should be allowed to proceed further to trial.

. After amendment of the Code of Civil Procedure in 1976, Order XIV Rule 2 (1) provides that, notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. Sub-rule (2) of Rule 2 of Order XIV of C.P.C. reads as under:

> "(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue

relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

15. The bar of Res-Judicata as provided in Section 11 constitutes the bar contemplated by above sub-clause (b) and thus the trial Court was right in taking up the issue as preliminary issue looking to the fact that all necessary material was available in the records. If required, reliance can be placed also on the case of **Smt. Laxmi Mani Dasi vs. Manik Chandra Das, A.I.R. 1991 Calcutta, 231,** on this count.

16. Counsel for Respondent No.1 further

relied on the case of **Kasa Krishna Ghorpade vs. Vinayak Gangadhar, reported in A.I.R. (35) 1948 Bombay 193.** That Judgment is not helpful to the Respondent No.1 – original plaintiffs as in that matter it was found that the purchaser was not bound by decree passed in suit against his vendor, commenced after the date of his purchase. In the present matter Zimmabai had purchased share in property, co-owner of which was already in litigation.

17. Looking to the fact that Manmatha was co-owner with Sakharam and Zimmabai entered into the foot steps of Manmatha, it would be appropriate to refer to the Judgment in the matter of **Narayana Prabhu Venkateswara Prabhu vs. Narayana Prabhu Krishna Prabhu (dead) by L.Rs., reported in A.I.R. 1977 Supreme Court, 1268.** That Judgment was in the context of partition suit in which Explanation VI of Section 11 of C.P.C. was considered. Before referring to the observations of the Hon'ble

Supreme Court, it would be appropriate to reproduce Explanation VI of Section 11 of C.P.C., which reads as under:

> "Explanation VI.- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."
>
> (Emphasis supplied)

. Now reference needs to be made to Para 20 of the Judgment of the Hon'ble Supreme Court in the matter of **Narayana Prabhu (supra).** It was observed:

> "In a partition suit each party claiming that the property is joint, asserts a right and litigates under a title which is common to others who make identical claims. If that very issue is litigated in another suit and decided we do not see why the

> others making the same claim cannot be held to be claiming a right "in common for themselves and others." Each of them can be deemed by reason of explanation VI, to represent all those the nature of whose claims and interests are common or identical. If we were to hold otherwise, it would necessarily mean that there would be two inconsistent decrees. One of tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied. We think this will be the case here."

18. Explanation VI of Section 11 of C.P.C. was also discussed by the High Court of Kerala in the matter of **Velayudha Pillai Raman Nair vs. Krishnan Asari Many, reported in A.I.R. 1989 Kerala 263.** That was the matter in the context of redemption of mortgage. High Court of Kerala referred to the above Judgment in the matter of **Narayana Prabhu** and other Judgments of the

Hon'ble Supreme Court and observed in Para 9 as under:

> "Explanation VI enacts a presumption that where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating. A co-owner of the equity of redemption obtaining possession of the property on redemption of the mortgage should hold the same for benefit also of the other co-owners, vide S. 90 of the Indian Trust Act. If the suit for redemption prosecution bona fide ends in failure, there is no reason why the decree will not be binding on the other co-owners. Explanation VI to S. 11, C.P.C. provides for such a contingency if it is shown that the plaintiff was bona fide litigating in respect of a right common to himself and to the other co-owners."

19. If the above observations are kept in

view and the present suit filed by Zimmabai is considered, it was not a case of hers that the co-owner Sakharam had not bona fide litigated the earlier suit or that there was a fraud or collusion between the earlier plaintiffs and Sakharam. Had the co-owner Sakharam succeeded in his defence, the co-owner Manmatha and subsequently Zimmabai would have taken the benefit. There is no reason why the earlier decree passed against Sakharam should not bind his co-owner Manmatha and subsequent purchaser Zimmabai.

20. For above reasons, keeping in view provisions of Section 11 of C.P.C. as well as General Principles of *Res Judicata*, the present Suits are not maintainable and trial can not be allowed to proceed.

21. I have gone through the reasonings recorded by the trial Court for finding that the principles of R*es-Judicata* applied. The trial

Court duly discussed all the aspects and dismissed the Suits. The Appellate Court, however, appears to have resorted to sentimental reasons which are irrelevant. The District Judge mentioned that, this is a battle or fight in between two parties out of them one is rich and another is poor; one is powerful and other is weak and feeble; one is mighty and literate and other is backward and rustic class of Banjara and that under such disparity, justice demands that one should not be too technical to deny the legal and rightful claim of downtrodden illiterate rustic person. With such start in the reasons recorded by the District Judge, he went on to consider the matter and observed that prima facie there was grave injustice to the poor, illiterate, backward and rustic lady and even for Sakharam went on to observe that by the Judgment of the earlier Additional District Judge in Regular Civil Appeal No.95 of 2001 though ex-parte decree was there, still no opportunity could be given to Sakharam.

Present District Judge went on to observe that this happened though there was alleged fault of lawyer of Sakharam for not communicating stages of suit to him. In the impugned Judgment the District Judge has observed that the earlier Additional District Judge has not touched the merits of the case in depth. In Para 31 of the Judgment, he went on to observe that claim of Sakharam ought to have been heard afresh in the interest of justice and added that Sakharam was Adiwasi, illiterate etc. It is apparent that the District Judge, Udgir in the present impugned Judgment has sat over in Appeal over the Judgments of District Court and higher Courts as confirmed in the earlier litigation and for sentimental reasons found that the Suits should be allowed to proceed and interfered with well reasoned Judgment of the trial Court dismissing both the Suits as hit by principles of R*es-Judicata*. The present impugned Common Judgment in both the Regular Civil Appeal Nos. 71 of 2006 and 72 of 2006 is not

maintainable.

22. For reasons mentioned above, I pass following order:

O R D E R

(A) Both the Appeals From Order i.e. Appeal From Order No.86 of 2007 and Appeal From Order No.96 of 2007 are allowed with costs.

(B) The impugned Common Judgment & Order in Regular Civil Appeal No.71 of 2006 and Regular Civil Appeal No.72 of 2006 passed by District Judge-1, Udgir, dated 7th October 2006, is quashed and set aside.

(C) The Judgments and Orders passed by Joint Civil Judge, Junior Division, Udgir in Regular Civil Suit No.133 of 2005 and

Regular Civil Suit No.135 of 2005, dated 29th April 2006, dismissing both the Regular Civil Suits with costs, are restored.

[A.I.S. CHEEMA, J.]

asb/MAR15