

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

**SECOND APPEAL NO. 166 OF 2014
WITH
CIVIL APPLICATION NO. 2265 OF 2014**

1. Janabai w/o Waman Nikumbh,
Age: 62 years, Occu: Household,
2. Shobhabai w/o Ananda Shijare,
Age: 43 years, Occu: Household

Both R/o Gusardi, Post Takli,
Tq. Pachora, Dist. Jalgaon.

...Appellants

versus

Vishram Mahadu Nikumbh,
Age: 73 years, Occu: Agri.,
R/o Gusardi, Post Takli,
Tq. Pachora, Dist. Jalgaon.

...Respondent

.....
Mr. H. H. Padalkar, Advocate for Appellants.
Mr. Pramod D. Patil, Advocate for Respondent.

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CORAM : N.W. SAMBRE, J.

DATE : 30TH JANUARY, 2015

ORDER :

. Heard learned Counsel for appellants and learned Counsel for respondent. The appellants to the present appeal are mother and sister interse and are related to the respondent. Respondent to the appeal is original plaintiff, whereas the appellants are the defendants.

The original plaintiff filed suit for possession bearing Regular Civil Suit No. 81 of 2004 against the defendants-appellants in relation to land bearing Grampanchayat Gat No. 161 of village Gusardi, Tal. Pachora, District Jalgaon.

2. The said suit was based on title, as such, came to be decreed by the learned trial Court by its judgment and decree dated 03/03/2010, which was further confirmed in appeal by the District Judge-4, Jalgaon by its judgment and decree dated 04/12/2013 passed in Regular Civil Appeal No. 62 of 2010. As such, present second appeal.

3. The appellants-defendants, have sought to raise two legal submissions, which according to him, could be given colour of substantial question of law.

(a) Whether the suit simplicitor for possession was maintainable in absence of relief of declaration of title, when the title of the plaintiff was denied by the appellants?

(b) Second contention that is sought to be raised is, whether the lower appellate Court has committed

an error apparent on the face of record in not adhering to the scheme of the Order 41 Rule 31 of the Civil Procedure Code by not framing appropriate points for his consideration ?

4. So far as first contention is concerned, the appellants herein has invited my attention to the defence raised by present appellants in the written statement. It was case of present appellants before the trial Court that the relations between the plaintiff and defendants were admitted, however, contentions raised by the plaintiff that the suit property was given for temporary residence to the husband of present appellant was denied by them. The appellants have come out with case of adverse possession, as according to them, prior to filing of the suit i.e. 2004 for more than 15 years, they were in possession of the suit property. In the light of pleadings raised by respective parties, learned trial Court has framed following issues with finding thereon.

1.	Whether the plaintiff prove the title over the suit property?	Yes.
2.	Whether the plaintiff further prove that the property was permitted to be used by Waman (husband of appellant No. 1 and father of	Yes.

	appellant No. 2)	
3.	Whether exchange of properties as is claimed by the defendants between the plaintiff and defendants is proved?	No.
4.	Whether the defendants prove that they are in adverse possession of the suit property?	No.
5.	Whether plaintiff prove that license of the defendants is cancelled?	Yes.
6.	Whether the plaintiff is entitled for possession?	Yes.

5. Learned trial Court has noted that, the plaintiff in support of his claim for possession has examined himself at Exhibit-20 and has also filed documentary evidence.

6. Defendant Nos. 1 and 2 i.e present appellants have examined defendant No. 1 at Exhibit-45 and also examined Prakash D.W.2, Vasant D.W. 3 and Raghunath D.W. 4 at Exhibits-97, 100 and 102. The defendants have also filed documentary evidence.

7. Learned trial Court, while evaluating the evidence brought before it in the light of pleadings, noted that, the plaintiff has placed on record an extract in form No. 8 which is at Exhibit-33 demonstrating that, he is the owner of the property, perusal of which reflects that the property is mutated in the name of plaintiff as owner and the said document is of the year 2003-04. House property No. 161,

which is the suit property, is mutated in the name of plaintiff as owner. Defendants have placed on record the extract in the form No. 8 at Exhibit-71 and 72, which pertains to the suit property and plaintiff is shown to be owner, so also possessor of the suit property.

8. Learned trial Court was right in shifting burden on the present appellants-defendants so as to prove the point of adverse possession. The trial Court, while examining the said issue, has sought to look into, whether the defendants are in continuous possession of the suit property for more than 12 years and noticed that, though the defendants have claimed that they are in possession of the suit property since last more than 15 years, however, evaluation of the evidence of the defendant No. 1 and that of D.W.4 reflects that, husband of the defendant No. 1 namely Waman was put in the possession of property in question in 1996. The learned trial Court has, as such, inferred that, undisturbed possession of the defendants over the property is not for the period of more than 12 years, as such, the plea of adverse possession was not established. Learned trial Court also examined the claim that, since 1988-89, defendants claimed to be in possession

of the suit property, however noticed that evidence to that effect is brought on record. The learned trial Court has also noticed that, sale deed Exhibits-57 and 88 are placed on record and Exhibit-88 is original sale deed whereas Exhibit-57 is copy of the same. Perusal of the said sale deed reflects that, there is no mention as regards exchange of properties by the plaintiff with that of husband of defendant No. 1, whereas it is for consideration of Rs. 5000/-, as agreement entered into 15 years back. Defendants witness has admitted that, while preparing the document Exhibit-88, they were not present, so also, defendant No.2 was examined herself, who stated that she was not present at the time of execution of sale deed Exhibit-88. As such, learned trial Court inferred that present respondent is owner of the suit property. Learned lower appellate Court has endorsed the same and dismissed the appeal.

9. So far as the contention of the present appellants that the suit for possession simplicitor is not tenable is concerned, learned trial Court, from the above discussion, reflects that, has framed issue as regards ownership, possession of the plaintiff and answered the same in the affirmative based on Exhibit-88, evidence of the

plaintiff and that of defendants. Once it was established that the plaintiff is owner of the suit property, by virtue of Exhibit-88, both the Courts below were right in holding that respondent is entitled for possession of the suit property.

10. Reliance placed by learned Counsel for the appellants upon the judgment in the matter of ***Muddasani Sarojana vs. Muddasani Venkat Narsaiah and others*** reported in ***AIR 2007 A.P. 50*** is concerned, the High Court of Andhra Pradesh while considering issue of tenability of suit for possession without seeking declaration has observed that if there is serious dispute as to the existence of title in the plaintiff and same doubt exists as to the title of the predecessors and transferors, the necessity to seek declaration of title exists. In the present case, as is observed herein above, the issue as regards title of the plaintiff was very much framed and same was answered in the affirmative based on Exhibit-88 sale deed executed in favour of plaintiff in relation to the suit property. As such, in my opinion, said case law has hardly any applicability to the case of the appellant. Learned lower appellate Court has also given anxious consideration to the said issue. Learned lower appellate Court has observed that, the suit property

was given to Waman-husband of appellant No. 1 and father of appellant No.2 for temporary use in 1996 and has termed the same as permissible possession.

11. The lower appellate Court has also considered the issue as regard exchange of property claimed by the defendants and has reached to conclusion that, appellant No. 2 herself admitted that she was present at the time of execution of sale deed, as such, based on the revenue record, has rightly held that the suit in question was very much tenable.

12. The said case law has hardly any applicability to the facts of the present case as issue as regards ownership is already answered.

13. So far as next contention in relation to non-adherence to the scheme under Order 41 Rule 31 of the Civil Procedure Code is concerned i.e. non-framing of points for consideration by learned lower appellate Court as regards exchange of property between the plaintiff and husband of defendant No. 2 is concerned, the perusal of judgment of the lower appellate Court reflects that the lower

appellate Court has framed in all 5 points for his consideration. The trial Court, after taking into pleading has proceeded to evaluate the documentary and oral evidence. The trial Court has looked into consideration paid towards execution of sale deed Exhibit-88 and has also looked into revenue entries, evidence of P.W. 1, D.W. 2 Prakash, Vasant and Raghunath and has inferred that the suit property was purchased by the plaintiff out of valid consideration and not in exchange.

14. In my opinion, the reliance placed by learned Counsel for the appellants upon the judgment of the Apex Court in the matter of **G. Amalorpavam & Ors vs R. C. Diocese of Madurai & Ors** reported in **(2006) 3 SCC 224** so as to canvass the contention that, there has to be adherence to Order 41 Rule 31 of Civil Procedure Code. In my opinion, learned lower appellate Court has rightly looked into the claim put forth before it and has also discussed the evidence in details.

15. As such, present second appeal which is against the concurrent findings, in my opinion, does not call for any interference. Same is devoid of any merit, same

stands dismissed.

16. In view of dismissal of second appeal, civil application does not survive, same stand disposed of.

[N.W. SAMBRE, J.]