

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

**SECOND APPEAL NO. 46 OF 2015
WITH
CIVIL APPLICATION NO. 1883 OF 2015**

Hirasing Bhika Rathod,
Age: 54 years, Occ: Agri.,
R/o. Deolgaon Gujar,
Tq. Jamner, Dist. Jalgaon.

...Appellant

versus

1. Sau. Najubai Mamraj Rathod,
Since deceased, thr. legal heirs

1-A) Mamraj Bhika Rathod,
Age: 55 years, Occu: Agril.,

1-B) Prakash Mamraj Rathod,
Age: 35 years, Occu: Agril.,

1-C) Iswar Mamraj Rathod,
Age: 33 years, Occu: Agril.,

1-D) Sanjay Mamraj Rathod,
Age: 31 years, Occu: Education,

1-E) Pintu Mamraj Rathod,
Age: 25 years, Occu: Education,

1-F) Latabai Mamraj Rathod (Amended)
@Latabai Rajmal Chavan,
Age: 30 years, Occu: Household,

All R/o. Moygaon, Tq. Motala,
Dist. Buldhana

...Respondents

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Mr. G. V. Wani, Advocate for appellant.

Mr. A. R. Rathod, Advocate for respondents.

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CORAM : N.W. SAMBRE, J.

DATE : 14th JULY, 2015

ORAL ORDER :

Present appeal is by original defendant.

2. Respondents-plaintiffs filed Regular Civil Suit No. 39 of 1997 in the Court of Civil Judge, Junior Division, Jamner praying therein decree for possession and declaration in relation to the suit property. The suit came to be decreed by the judgment and order dated 30/09/2005, which was further confirmed in Regular Civil Appeal No. 198 of 2005 on 02/09/2014 by the Principal District Judge, Jalgaon at the behest of the present appellant. As such, present second appeal.

3. A few facts, as are necessary for deciding the present appeal, are as under :

It is claimed that the appellant and respondent No. 1 Mamraj are real brothers.

4. The wife of Mamraj by name Najubai filed suit based on partition effected long back for possession and declaration of two rooms admeasuring 40'x15' having tin roof and wooden roof situated on southern portion of eastern side of House No. 313 new House

No. 367 out of CTS No. 64 and 63 admeasuring 235.8 sq. meter bounded as east and south road, west portion of Mulchand Bhika, north portion of Narayan Bhika.

5. The suit was based on the fact that the suit property is ancestral property of the plaintiff, which was initially owned by Tola Rathod and was subsequently partitioned amongst his sons i.e. plaintiff No.1a and defendant. The defendant claimed that the suit property was allotted to the share of father in law of plaintiff which consists of 12 rooms. The father of plaintiff and defendant partitioned it prior to 15 years and suit portion two rooms were allotted to the share of husband of plaintiff and was in possession of the same.

6. Based on the above referred theory, possession and declaration was sought.

7. The defendant resisted the suit by filing written statement at Exhibit-26 and denied the contentions, as according to him, the property in question was agreed to be sold by Mamraj with the consent of original plaintiff for a consideration of Rs.10,000/- and accordingly on 15/01/1985 agreement for sale was scribed in presence of respectable persons. Mamraj accepted amount of Rs.8000/- and thereafter possession of the suit property was handed

over to the defendant.

8. It is claimed by the defendant that by virtue of same, he has become owner of the property and as such, is in possession of the same.

9. Learned trial Court, based on the claim brought before it, framed issues and observed that the suit property is joint family property and two rooms were allotted to the share of husband of plaintiff by her father in law. Learned trial Court further observed that the loan was obtained by plaintiff for amount of Rs.3000/- from the defendant and the defendant was inducted as licensee for monthly license fee of Rs. 400/-. It is also proved by the plaintiff that it was agreed that the suit property was to be reconveyed after repayment of the amount to the defendant and as such, decreed the suit for possession.

10. Learned lower appellate Court, upon contentions raised by the appellant, framed points as regards *locus* of the plaintiff to file suit and proceeded to dismiss the appeal. Learned lower appellate Court noted that as per Section 5 of the Specific Relief Act, it is not necessary that owner of the property is required to file suit for possession since the language of Section entitles the person for

possession of specific movable property, in the manner provided in Code of Civil Procedure and relied upon the judgment of the Apex Court in the matter of **Somnath vs. Raju** reported in **A.I.R. 1970 SC 846**. Learned lower appellate Court, as such, proceeded to record that since possession of the plaintiff was not disputed over the suit property, answered issue of *locus* of the plaintiff in her favour.

11. Learned lower appellate Court also noticed that the defendant cannot become owner of the suit property as the document in question is for a consideration of more than Rs.100/- and is not registered document i.e. document of sale deed. Learned lower appellate Court inferred that it has no evidentiary value. It is further noticed by the Court below that though the suit in question was filed in 1997 and written statement was filed on 17/06/1997, the appellant hereto has chosen to file suit for specific performance in 2011. The lower appellate Court refrain itself from giving finding on limitation.

12. Learned Counsel for the appellant, while questioning the legality and validity of the concurrent findings, would raise grounds as regards the findings recorded by both the Courts below, as according to him, the finding will come in his way in the suit for specific performance by him in 2011. In addition to above, he would

urge that the findings as regards loan transaction were uncalled for and according to him, perverse findings recorded by the Courts below are liable to be set aside.

13. At the outset, it is required to be noted that said grounds cannot be given colour of substantial question of law in the wake of observations made by the Courts below as discussed in foregoing paragraphs.

14. Apart from above, it is required to be noted that the suit in question was initiated by the plaintiff in 1997 and the defendant was well aware about existence of agreement in his favour for which he has formed his basis for defence. Once it was within knowledge of the defendant that he was required to file suit for specific performance, the defendant on his own, in my opinion, has invited finding of alleged loan transaction. It was always open for the defendant to file counter claim in the said suit which he has not done so. Apart from above, it is required to be noted that once issue of locus pursuant Section 5 of the Specific Relief Act is answered in favour of the plaintiff and both the Courts having concurrently held that the plaintiff is entitled for possession by virtue of ancestral status of the property, which was received in partition, in my opinion, no case for interference is made out. No substantial question of law is

involved in the present appeal. As such, the appeal fails, same stands dismissed. Consequently, the civil application stands disposed of.

[N.W. SAMBRE, J.]