

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

SECOND APPEAL NO. 502 OF 2000

1. Gangaram s/o Vishwanath Survase
Age : 21 Yrs., Occ. Labour,
R/o : Belkund, now at Chiplun,
Dist.: Ratnagiri.
2. Kondiba s/o Vishwanath Survase
Age : 19 Yrs., Occ. Labour,
R/o : Belkund, now at Chiplun,
Dist.: Ratnagiri.
3. Laxmibai w/o Vishwanath Survase
Age : 21 Yrs., Occ. Household,
R/o : Belkund, Tq. Chiplun, **APPELLANTS/**
Dist.: Ratnagiri. **[ORI. PLAINTIFFS]**

V E R S U S

1. Vishwanath s/o Gangaram Survase
Age : Major, Occ. Labour,
R/o : Belkund, Tq. Ausa,
now at Chiplun, Dist.: Ratnagiri.
2. Govind s/o Kondiba Survase
Age : Major, Occ. Agril.,
R/o : Belkund, Tq. Ausa,

Dist. Latur.

3. Narayan s/o Kondiba Shinde
Age : Major, Occ. Agril.,
R/o : Belkund, Tq. Ausa,
Dist. Latur.
4. Padmanathcharya s/o
Govindcharya
Age : Major, Occ. Religious
work, R/o : Belkund, Tq.
Ausa, Dist. Latur. [Abated]
5. Namdeo s/o Rahiba Kamble
Age : Major, Occ. Agril.,
R/o : Belkund, Tq.
Ausa, Dist. Latur. [Abated].
6. Imam s/o Ghudu Saheb
Age : Major, Occ. Agril.,
R/o : Belkund, Tq. Ausa,
Dist. Latur.
7. Mahmad Hamid Ghudu Saheb
Age : Major, Occ. Agril.,
R/o : Belkund, Tq. Ausa,
Dist. Latur.
8. Prayagbai w/o Kondiba Shinde
Age : Major, Occ. Agril.,

R/o : Belkund, Tq. Ausa, **RESPONDENTS/**
Dist. Latur. [Abated]. **[ORI. DEFENDANTS]**

WITH
SECOND APPEAL NO. 368 OF 2001

1. Gangaram s/o Vishwanath Survase
Age : 21 Yrs., Occ. Labour,
R/o : Belkund, now at Chiplun,
Dist.: Ratnagiri.
2. Kondiba s/o Vishwanath Survase
Age : 19 Yrs., Occ. Labour,
R/o : Belkund, now at Chiplun,
Dist.: Ratnagiri.
3. Laxmibai w/o Vishwanath Survase
Age : 21 Yrs., Occ. Household,
R/o : Belkund, Tq. Chiplun, **APPELLANTS/**
Dist.: Ratnagiri. **[ORI. PLAINTIFFS]**

V E R S U S

1. Vishwanath s/o Gangaram Survase
Age : Major, Occ. Labour,
R/o : Belkund, Tq. Ausa,
now at Chiplun, Dist.: Ratnagiri.
2. Govind s/o Kondiba Survase
Age : Major, Occ. Agril.,

R/o : Belkund, Tq. Ausa,
Dist. Latur.

3. Narayan s/o Kondiba Shinde
Age : Major, Occ. Agril.,
R/o : Belkund, Tq. Ausa,
Dist. Latur.
4. Padmanathcharya s/o
Govindcharya
Age : Major, Occ. Religious
work, R/o : Belkund, Tq.
Ausa, Dist. Latur. [Abated]
5. Namdeo s/o Rahiba Kamble
Age : Major, Occ. Agril.,
R/o : Belkund, Tq.
Ausa, Dist. Latur. [Abated].
6. Imam s/o Ghudu Saheb
Age : Major, Occ. Agril.,
R/o : Belkund, Tq. Ausa,
Dist. Latur.
7. Mahmad Hamid Ghudu Saheb
Age : Major, Occ. Agril.,
R/o : Belkund, Tq. Ausa,
Dist. Latur.
8. Prayagbai w/o Kondiba Shinde
Age : Major, Occ. Agril.,

R/o : Belkund, Tq. Ausa, **RESPONDENTS/**
Dist. Latur. [Abated]. **[ORI. DEFENDANTS]**

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Mr. S.V.Jadhav Patil, Advocate for Appellants.

Mr. S.N.Lale Yelwatkar, Advocate for R – 1.

Mr. B.N.Patil, Advocate for R – 2 & 3.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 21/07/2016

JUDGMENT :

1. Second Appeal No. 502 of 2000 is filed against the Judgment and decree of R.C.A. No. 90/1994 which was pending in the Court of the District Judge, Latur. Second Appeal No. 368 of 2001 is filed against the Judgment and decree of R.C.A. No. 89/1994 which was pending before the same learned Judge of the District Court, Latur. Both the first Appeals were filed against the Judgment and decree of R.C.S. No. 257/1985 which was pending in the Court of the Civil Judge [Jr. Division], Ausa, district Latur. The Suit filed by the present appellants was decreed in their favour, but the

first appellate Court has set aside the decree given in favour of the appellants in the aforesaid 2 Appeals filed by the defendants of the Suit. Heard learned counsels for both sides.

2. Plaintiff Nos. 1 and 2 are real brothers interse and plaintiff No. 3 is their mother. In the Suit, plaintiff No. 1 had given his age as 21 years and the age of plaintiff No. 2 was given as 19 years. Defendant No. 1 Vishwanath is their father. Defendant Nos. 2 and 3 Govind and Narsing are real brothers of defendant No. 1. It is the case of the plaintiffs that defendant No. 1 was given in adoption to Gangaram Surwase, who was father of Prayagbai, defendant No. 8. Defendant No. 8 is the mother of defendant Nos. 1 to 3. One Krishnabai was sister of defendant No. 8 and Rahibai was mother of defendant No. 8.

3. It is the case of the plaintiffs that the suit properties were owned by Gangaram, the adoptive father of defendant No. 1 and after his death, Rahibai widow of Gangaram adopted defendant No. 1 as he was a son of daughter of Gangaram and Gangaram had not left behind

son. It is contended that due to adoption, defendant No. 1 became absolute owner of the suit properties. It is contended that one Suit was filed by Krishnabai, daughter of Gangaram in the year 1952-53 against defendant No. 1, Prayagbai and Rahibai for partition of the properties left behind by Gangaram. It is contended that natural father of defendant No. 1 viz. Kondiba had acted as next friend of defendant No. 1 in the said Suit and in the said Suit, the Court below held that defendant No. 1 Vishwanath was adopted by Rahibai and so the Suit of Krishnabai, a daughter of Rahibai was dismissed. It is contended that the said decision has become final as the Appeal against the said decision was also dismissed.

4. It is the case of the plaintiffs that in view of the aforesaid circumstances, the suit properties are ancestral properties of plaintiff Nos. 1 and 2 and these plaintiffs together have 3/4th share in the suit properties. It is contended that defendant No. 1 has given the property to defendant Nos. 2 to 8 when there was no legal necessity and so the Suit was required to be filed.

5. Defendant Nos. 2 and 3, brothers of

defendant No. 1, filed Written Statement. Defendant No. 1 did not turn up to contest the matter. Defendant Nos. 2 and 3 contended that there is collusion between plaintiffs and defendant No. 1. They contended that in the past, Suit was filed in respect of the suit properties and as per the decision of the said Suit, the property was partitioned and since then defendant Nos. 2 and 3 are enjoying the respective shares as absolute owners. They alternatively contended that they have become owners by adverse possession as they have been enjoying their shares separately for more than 12 years.

6. Defendant Nos. 6 and 7, the purchasers of some suit property contended that defendant No. 1 has sold one of the suit properties under registered sale deed dated 13/07/1976 to defendant No. 6 for lawful consideration and for legal necessity of joint Hindu family. It is contended that defendant No. 1 wanted to pay loan taken from a co-operative society. It is contended that false contentions are now made to harass the defendants. They have contended that defendant No. 1 had never used the name of Gangaram as adoptive father and on the basis of the record showing the

ownership of defendant No. 1, the property was purchased. It is contended that from the consideration amount of ₹ 8,000/-, the amount of ₹ 5,000/- was paid to the co-operative society.

7. On the basis of the aforesaid pleadings, issues were framed. Trial Court had decreed the Suit and had held that plaintiffs together were entitled to get 3/4th share. It was held that defendant No. 1 was adopted son of Gangaram and the property had come from Gangaram to defendant No. 1.

8. First appellate Court has held that defendant No. 1 was adopted by Gangaram but after the decree of R.C.S. No. 384/1970, defendant Nos. 2 and 3 had started enjoying their respective shares shown in the decree separately as owners and so they have become owners due to adverse possession. It is also held by the first appellate Court that some portion of S.No. 119 purchased by defendant No. 6 was purchased for lawful consideration and without notice and he is bonafide purchaser. It is also held that the said transaction was for legal necessity.

9. This Court '**admitted**' the Appeals by order dated 28/07/2003 on following substantial questions of law.

[i] Whether defendant Nos. 2 and 3 have become owners due to adverse possession in view of the decree given in civil Suit and their possession over the portions in their possession for more than 12 years prior to the date of filing of Suit and whether such defence could have been taken by them if there was joint Hindu family ?

[ii] Whether there was sufficient material to hold that the property sold to defendant No. 6 was sold for legal necessity ?

10. Second substantial question of law was not formulated by this Court [other Hon'ble Judge] at the time of admission, but the said point needs to be considered as 2 Appeals are filed to challenge the decisions given by the District Court.

11. Learned counsel for appellants/plaintiffs submitted that defendant Nos. 2 and 3 were members of joint Hindu family and so they could not have taken

defence of ownership due to adverse possession. This proposition is not at all acceptable. In the previous Suit, which was decided prior to 1955, natural father of defendant Nos. 1 to 3 has acted as guardian of defendant No. 1 and he had contended that defendant No. 1 was given in adoption to Gangaram, the grand-father of defendant No. 1 on maternal side. This contention was accepted by the Civil Court and as he was treated as son of Gangaram, no relief of partition was given to the daughter of Gangaram. It appears that Rahibai, widow of Gangaram, who had taken defendant No. 1 in adoption was party to the said Suit and she had supported the case of adoption. Defendant Nos. 2 and 3 had no *locus standi* to challenge that contention as they were not to loose anything in the said Suit and the interest of only the successors of Gangaram would have been affected due to the decision of the said Suit. In view of these circumstances, both the Courts below have held that defendant No. 1 was adopted by Rahibai, widow of Gangaram, and so defendant No. 1 was entitled to succeed to the properties left behind by Gangaram. In view of these circumstances, it further needs to be held that defendant No. 1 had left the family of his natural

father Kondiba and since the date of adoption, he was not the member of joint family of Kondiba and defendant Nos. 2 and 3. Thus, against defendant Nos. 2 and 3 also, it can not be contended that they were members of joint family of defendant No. 1 and other successors of Gangaram.

12. It can be said that in the Suit filed by defendant Nos. 2 and 3 against defendant No. 1 in the year 1970, no partition could have been effected as apparently the property was of absolute ownership of defendant No. 1, if the other successors of his adoptive father were not claiming any share in the property. It needs to be kept in mind that as successors of Gangaram, in the year 1970, Prayagbai – natural mother of defendant No. 1 and Krishnabai, if she was alive as other daughter of Gangaram, were entitled to get some share, if Rahibai who could have claimed ownership over the property was not there. Thus, at least some property would have gone to the share of defendant No. 8 Prayagbai. In any case, defendant Nos. 2 and 3 could not have claimed share in the property left behind by Gangaram in view of the aforesaid facts and

circumstances and the position of Hindu Law. However, the decree was made and there is finding of the Courts below that since the year 1969-70, defendant Nos. 2 and 3 have been in separate possession of the shares which are shown to be given to defendant Nos. 2 and 3 in the said decision. Thus, defendant Nos. 2 and 3 came in possession of some suit property and since then they have been in continuous possession of the said property. The revenue record is to that effect and that circumstance is not disputed.

13. The evidence on record shows that plaintiff Nos. 1 and 2 were not born in the year 1971, when the decree was prepared in R.C.S. No. 384/1970. The evidence of plaintiff No. 1 shows that he was born in the year 1972. At one place, trial Court has observed that ages of plaintiff Nos. 1 and 2 were shown as 17 years and 15 years respectively. The Suit was filed in the year 1985, the previous suit was filed in the year 1970 and the decree was prepared on 27/07/1971. The submission was made by the learned counsel for the plaintiffs/appellants that probably plaintiff No. 1 was in the womb of mother and his right needs to be protected

in respect of ancestral property. There is no such pleading. On the contrary, there is admission of plaintiff No. 1 that he was born in the year 1972. Thus, rightly or wrongly the disposition of property made by defendant No. 1 was done prior to the birth of plaintiff Nos. 1 and 2. Whether the title really passed to defendant Nos. 2 and 3 is a different question. Defendant Nos. 2 and 3 are claiming ownership due to adverse possession and so only the date of starting of adverse possession can be considered on the basis of this record. As the present Suit was filed in the year 1985, the first appellate Court has held that defendant Nos. 2 and 3 have become owners due to adverse possession. The first appellate Court placed reliance on the observations made by this Court in the case reported as **A.I.R. (32) 1945 Bombay – 63** **[Rachappal Totappa and another Vs. Madivalawa Rachappa]**, which read as under.

“ In case where it is clear that, the person entering into possession was under no duty to the minor and entered into possession for his/her own benefit and in assertion of his/her title hostile to that of the minor, limitation would begin to turn from

*the date when she took possession
 By the express
 terms of Section of the Limitation Act,
 the extended period of 3 years after
 majority can be claimed only by a
 person entitled to institute a Suit at
 the time from which the period of
 limitation to be reckoned. The person
 who was not in existence at the time
 does not come within that description
 and, therefore, he is not entitled to the
 years extension.”*

14. In the above case, this Court has discussed the provisions of Section 6 of the Limitation Act and it is held that only if the person having disability like minority is in existence on the date of disputed transaction or incident, the benefit of provisions of Section 6 can be claimed. There can not be any dispute over this proposition. The things can be looked from other angle also. If the property was sold by defendant No. 1 or he had parted with the property in any way prior to the birth of plaintiff Nos. 1 and 2, he had right to do so as he was the sole co-parcener, as successor of Gangaram. In view of these circumstances, there was no right to plaintiff Nos. 1 and 2 to challenge the disposition of property

made by defendant No. 1. In that view of the matter, the decree of possession in respect of the property given by the trial Court could not have been given.

15. So far as the property sold to defendant No. 6 is concerned, it can be said that the evidence is given to prove that there was legal necessity. Admittedly, there was loan of ₹ 5,000/- taken from the co-operative society and the evidence is given to show that the said loan was paid after selling the property to defendant No. 6. This finding is on question of fact. There is evidence of one Manohar, employee of a co-operative society. Account extract was produced of the loan account of defendant No. 1. There is one circumstance that the sale deed was executed in the year 1976 and the account extract shows that till the year 1973, the loan was repaid. The evidence of witness No. 2 of defendant shows that some record was produced at Exh. 65 regarding repayment of loan and it was the certificate issued by Vivid Sahakari Society, Belkund. It shows that on 16/06/1976 the amount of ₹ 5,000/- was deposited towards repayment of loan with the society. It needs to be kept in mind that defendant No. 1 did not turn up to contest the Suit and it is clear

that he wants to get back the properties from defendant Nos. 2 and 3. The plaintiff has admitted in his cross examination that there was severe drought in the year 1976-77 and they had shifted to Chiplun for doing the labour work. He has shown ignorance that from the sale proceeds, loan of the society was paid.

16. In view of the aforesaid material, this Court holds that there is no possibility of interfering the findings given and they are on the question of facts. The reasoning given by the trial Court was not convincing.

17. Learned counsel for the appellants placed reliance on some cases reported as AIR 1963 Madhya Pradesh – 100 (V 50 C 33) [Sardar Vijaysingh Rao Chorpade Vs. Jeewan Lal Ram Das Jaiswal], AIR 1984 Gujarat – 32 (1) [Patel Meghji Dayal (deceased by L.Rs.) & Ors. Vs. Patel Jivraj Pragji & Ors.] and AIR 1966 Bombay – 64 (Vol. 53, C.12) [Smt. Indubai w/o Pandhari Naik Vs. Vyankati Vithoba Sawadha & Ors.].

18. On the basis of the observations made,

learned counsel for the appellants submitted that the Court below could not have held that defendant Nos. 2 and 3 have become owners due to adverse possession. This point is already discussed and it is already discussed that defendant Nos. 2 and 3 were not the members of joint Hindu family of defendant No. 1. Other cases are in respect of the period of limitation when during minority of plaintiff, alienation is made by father. This point is also discussed. Thus, there are no merits in the Appeals. Both the points are accordingly answered against the appellants.

19. In the result, both Second Appeals stand dismissed. In view of dismissal of the Second Appeals, all Civil Applications and Cross Objection stand disposed of.

[T.V.NALAWADE, J.]