IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 274 OF 2007

1. Appa s/o Bhaurao Kale
Age : 73 Yrs., Occ. Nil,
R/o : Tajnapur, Tq. Kannad,
Dist. : Aurangabad.

2. Shivaji s/o Apparao Kale
Age : 41 Yrs., Occ. Service,
& Agril., R/o : Tajnapur,
Tq. Kannad, Dist. :
Aurangabad.

3. Kakasaheb s/o Apparao Kale
Age : 39 Yrs., Occ. Nil,
R/o : Tajnapur, Tq. Kannad,
Dist. : Aurangabad.

4. Raosaheb s/o Apparao Kale
Age : 39 Yrs., Occ. Nil,
R/o : Tajnapur, Tq. Kannad,
Dist. : Aurangabad.

5. Prayagbai w/o Apparao Kale
Age : 63 Yrs.,Occ. Household,
R/o : Tajnapur, Tq. Kannad, **..... APPELLANTS/**
Dist. : Aurangabad. **[ORI. DEFENDANTS]**

V E R S U S

1. Vishwanath s/o Bajirao Adhik
[since deceased Thr. L.Rs.]

[a] Tulsabai w/o Vishwanath Adhik
Age : 82 Yrs., Occ. Household,
R/o : Dabhadi, Tq. Kannad,
Dist.: Aurangabad.

[b] Supdu s/o Vishwanath Adhik
Age : 47 Yrs., Occ. Agriculture,
R/o : Dabhadi, Tq. Kannad,
Dist.: Aurangabad.

[c] Raosaheb s/o Vishwanath Adhik
Age : 37 Yrs., Occ. Nil,
R/o : Dabhadi, Tq. Kannad,
Dist.: Aurangabad.

[d] Nirmalabai w/o Rangnath
Age : 61 Yrs., Occ. Household,
R/o : Sapkal jalgaon, Tq.
Bhokardan, Dist.: Jalna.

[e] Shakuntalabai w/o Ramesh
Age : 52 Yrs., Occ. Household,
R/o : Mohadi, Dist.: Dhule.

[f] Pushpabai w/o Suresh Nikam

Age : 54 Yrs., Occ. Household,
R/o : Mohadi, Dist.: Dhule.

[g] Mangalabai w/o Suresh
Age : 41 Yrs., Occ. Household,
R/o : Lodhare, Tq. Nandgaon,
Dist.: Nashik.

[h] Ujwalabai w/o Ramrao Tupe
Age : 33 Yrs., Occ. Household,
R/o : Bodhagaon, Tq. Vaijapur,
Dist.: Aurangabad.

[i] Shashikalabai w/o Balu Nikam
Age : 58 Yrs., Occ. Household,
R/o : Indapur, Tq. Vaijapur,
Dist.: Aurangabad.

Through G.P.A.
Sahebrao s/o Dagdu Kale
Age : 52 Yrs., Occ. Agril.,
R/o : Indapur, Tq. Vaijapur,
Dist.: Aurangabad.

2. Dhondabai w/o Ramrao Kale
[since deceased Thr. L.Rs.]

2-a] Laxmibai w/o Ramrao Gaikwad
Age : 25 Yrs., Occ. Household,
& Business, R/o : Mhada colony,

Opp. Dhoot Hospital,
Chikalthana Road,
Aurangabad.

2-b] Jaishree @ Priyanka Sandu Kale
Age : 12 Yrs., Minor, u/g of
her aunt Laxmibai w/o Ramrao
Gaikwad [2-a].

3. Sahebrao s/o Dagdu
Age : 47 Yrs., Occ. Agril.,
R/o : Mhada colony,
Opp. Dhoot Hospital,
Chikalthana Road, ... **RESPONDENTS/**
Aurangabad. **[ORI. PLAINTIFFS]**

WITH

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.....

Mr.Shailendra Gangakhedkar, Advocate for Appellants.

Mr. A.S.Bajaj, Advocate for Respondents.

.....

CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 08/08/2016

JUDGMENT :

1. Both the Appeals are filed by original defendants of R.C.S.No. 8/1997 which was pending in the Court of the Civil Judge [Jr.Division], Aurangabad. The Suit filed for relief of injunction in respect of one agricultural land, was partly decreed and relief of injunction was given in respect of 11 Acres 25 gunthas of the suit land S.No. 12 and it was northern portion. The Suit of plaintiff Nos. 2 and 3 in respect of remaining portion, northern portion, was dismissed. The counter claim of defendants that they are the owners of northern portion of 11 Acres 25 gunthas was decreed in their favour and perpetual injunction was granted against the plaintiffs in respect of that portion. This decision was challenged by original defendants and also plaintiff Nos.

2 and 3 by filing 2 Appeals viz. R.C.A. Nos. 154/2004 and 169/2004 in the District Court, Aurangabad. District Court allowed the Appeal of plaintiff Nos. 2 and 3 bearing R.C.A. No. 169/2004 and set aside the decision of the trial Court, by which the counter claim was allowed. Relief of injunction was given in favour of these plaintiffs also by the first appellate Court and the Appeal of original defendants bearing R.C.A. No. 154/2004 is dismissed by the District Court. Heard both sides.

2. Suit property is G.No. 12 [old S.No. 50] admeasuring 9 H. 30 R. situated at Tajnapur, Tahsil Khultabad, district Aurangabad. It is the case of the plaintiffs that the suit property was owned by Asrabai and her 2 daughters viz. Sundrabai and Anusayabai became owners of the suit property after the death of Asrabai. It is contended that Asrabai died on 29/09/1959. Plaintiff No. 1 Vishwanath is son of Anusayabai and plaintiff Nos. 2 and 3 are purchasers of the share from Sundrabai.

3. It is the case of the plaintiffs that after the death of Asrabai, names of her successors were entered in the revenue record of the suit property and they came in

possession also. It is contended that before sale of the property by Sundrabai, she and plaintiff No. 1, the 2 branches of Asrabai, had filed Suit against Nobaji and Dagdu for recovery of possession, as they had taken possession illegally of the suit property and the suit was decided in their favour. It is contended that in the year 1971 by executing the decree, they had taken possession of the suit property. It is contended that as successor of Asrabai, Sundrabai had 8 ana share and plaintiff No. 1 Vishwanath had 8 ana share in the suit property and their names were entered in the revenue record accordingly. It is contended that during implementation of consolidation scheme also, the plaintiffs were found in possession and the record was created accordingly and Gat was formed.

4. It is the case of the plaintiffs that defendant No. 1 is father of defendant Nos. 2 to 4 and he is husband of defendant No. 5. It is contended that father of defendant No. 1 was real brother of husband of Asrabai. It is contended that the defendants are trying to grab the suit property. It is contended that R.C.S. No. 790/1974 was filed by defendant No. 1 against Dhondiba, the plaintiff – purchaser, but the Suit was dismissed for

default. It is contended that at different times the defendants are making different contentions and in the Suit of 1974, different contention was made from the contention which the defendants are making at present. It is contended that even after the dismissal of the Suit, the dispute was continued and so the proceeding u/s 145 of the Code of Criminal Procedure was started in the year 1982. It is contended that the said proceeding ended in favour of plaintiff No. 1 and it was noticed that plaintiff No. 1 was in possession of his share. It is contended that in the said decision, finding was given that plaintiff Nos. 2 and 3 are in possession of the portion purchased by them from other daughter of Asrabai.

5. It is the case of the plaintiffs that even after the decision of the proceeding filed u/s 145 of the Code of Criminal Procedure, defendant No. 1 continued the dispute and he filed R.C.S.No. 689/1992 against the plaintiffs. It is contended that this Suit was also dismissed for default. It is contended that on the date of the present Suit, restoration application filed by the plaintiffs was pending. It is contended that the entries made in crop cultivation column in favour of the plaintiffs

were challenged under the provisions of the Maharashtra Land Revenue Code, but they did not succeed there also. It is contended that defendants are influential persons and by using force they are trying to dispossess the plaintiffs and so the Suit was required to be filed. The date of cause of action is mentioned as 08/12/1996.

6. The defendants filed Written Statement and contested the matter. They admitted the relationship. They denied that the suit property was owned by Asrabai and after Asrabai, her 2 daughters became owners of the suit property. They contended that the suit property was owned by Bhaurao Waman, father of defendant No. 1. It is contended that he had given the property to Asrabai for her maintenance, but the possession was not given and he had agreed to give 12 mans of food grains and clothes under oral contract. It is contended that due to this act of Bhaurao, entry was made in revenue record in favour of Asrabai in the year 1344 Fasli.

7. The defendants contended that if one Suit was filed by the plaintiffs against 2 persons viz. Nobaji and Dagdu in the year 1967, the decision of that Suit is

not binding on the defendants. They denied that Sundrabai was owner of 8 ana share and and they have contended that no title has passed to plaintiff Nos. 2 and 3 from Sundrabai.

8. It is the case of the defendants that as there was only limited interest in favour of Asrabai and as she died in the year 1953, the property came back to the family of Bhaurao and the defendants are successors of Bhaurao. It is contended that the property was always in possession of Bhaurao and after him the property came in possession of the defendants.

9. It is the case of the defendants that R.C.S. No. 320/1975 was filed by plaintiff Nos. 1 and 2 in respect of suit property against the defendants, but the said Suit came to be dismissed in the year 1977 and the civil Court has given finding that the plaintiffs failed to prove their title. It is contended that another Suit bearing No. 110/1976 was filed for relief of injunction, but the said Suit was also dismissed in the year 1982 and so the Suit is barred by the principle of res-judicata. It is contended that false record was created and proceeding

was started u/s 145 of the Code of Criminal Procedure and at that time plaintiffs had joined hands with the concerned authority to create false record.

10. It is the case of the defendants that in the year 1993, enquiry was made by revenue authority and at that time they found that the defendants were in possession of the suit property. In the counter claim they contended that they are in possession of the suit property for more than 12 years and so they have become owner due to adverse possession. This was alternate relief claimed and initial claim was that they are owners as the successors of Bhaurao. The reliefs of declaration and injunction were claimed by the defendants on the basis of aforesaid contentions.

11. In the first Written Statement at para (Xiii), defendants had contended that Bhaurao was tenant of Asrabai under the provisions of the Hyderabad Tenancy and Agricultural Lands Act and one proceeding was filed by Asrabai against Bhaurao, but the said proceeding bearing No. LR/1/AR/316/59 was rejected by the Tenancy Court on 20/11/1959.

12. The plaintiffs had filed Written Statement to the aforesaid counter claim and the contentions made by the defendants were denied by them. On the basis of aforesaid pleadings, issues were framed by the trial Court. Both sides gave evidence before the trial Court. The trial Court considered the admission given by defendant No. 1 in the cross examination that Asrabai died in the year 1959 and the record of giving of the property to Asrabai by Bhaurao was also considered by the trial Court. There was no record to show that the property was of absolute ownership of Bhaurao and on the other hand there is admission that husband of Asrabai was real brother of Bhaurao. Though the provisions of Hindu Womens' Right to Property Act were not referred by the trial Court, on the basis of the provisions of Hindu Succession Act, 1956 Section 14 (1), trial Court had held that the property which was given for maintenance of Asrabai, had become the property of her absolute ownership. Then the trial Court considered the case of defendants of ownership due to adverse possession. Due to the circumstance like in the previous Suit No. 320/1975 filed by plaintiff Nos. 2 and 3 decision was given against plaintiff Nos. 2 and 3, the purchasers from

Sundrabai, trial Court held that they are not entitled to the relief of injunction. So, the Suit was partly allowed in favour of plaintiff No. 1 and the Suit of plaintiff Nos. 2 and 3 was dismissed.

13. The first appellate Court has held that the previous Suit was filed by plaintiff Nos. 2 and 3 only for the relief of injunction and so the decision of the said Suit can not be used as res-judicata against plaintiff Nos. 2 and 3 and as in the present matter relief of declaration is claimed by the defendants, that issue needs to be considered. The first appellate Court has held that in view of the provisions of Section 14 (1) of Hindu Succession Act, Asrabai had became absolute owner and so there was no question of giving declaration in favour of the branch of her daughter-in-law of ownership. First appellate Court held that the possession was also with the successors of Asrabai, the plaintiffs.

14. This Court [other Hon'ble Judge] '**admitted**' the Appeals on 12/06/2007 on following substantial questions of law.

[i] Whether in the facts and circumstances of the present case, the causes of action of the plaintiffs could be clubbed together though are distinct or severable and whether the suit is bad for misjoinder of such causes of action ?

[ii] Whether in the facts and circumstances of the present case, the first appellate Court committed patent error while omitting to frame the necessary points and, therefore, the impugned Judgment is not in accordance with Order 41, Rule 31 of the Civil Procedure Code and, therefore, liable to be interfered with ?

15. Both sides were allowed to argue on one more substantial question of law, viz.

" Whether the counter claim for declaration of the defendants was within limitation if Asrabai died in the year 1959 and in revenue record the property was shown to be entered in the names of her 2 daughters in the year 1960 and when one daughter Sundrabai had sold the property to plaintiff Nos. 2 and 3 before the year 1975 [counter claim was filed in the year 1997] ? "

16. The relationship is not disputed and it is already observed that there is no record to show that the suit property was self-acquired property of Bhaurao. In the Written Statement itself, it is admitted by the successors of Bhaurao that the suit property was given to Asrabai by Bhaurao though for enjoying the income of the property for maintenance and she was not allowed to alienate the property. They relied on one document viz. Exh. 104/6 which is of the year 1349 Fasli i.e. 1939 A.D. to show that property was given for maintenance. Name of one third party was shown as a person in possession. There is revenue record at Exhs. 101 and 102 showing that the name of Asrabai, widow of Rakhamaji, was entered in ownership column and after her death the names of her 2 successors viz. Sundrabai and Vishwanath were entered in the revenue record. Name of Bhaurao was entered in the crop cultivation column for the years 1959 – 60 to 1964 – 65. In the Written Statement, defence was taken by the successors of Bhaurao that Bhaurao was tenant of Asrabai. In Exhs. 101 and 102 in other rights column, name of Bhaurao was mentioned as simple tenant [साधे कुळ]. This record shows that the property was entered in the name of Asrabai and she was

shown as owner in the revenue record of the suit property and Bhaurao was not claiming ownership of this property.

17. Copy of sale deed executed by Sundrabai in favour of plaintiff Nos. 2 and 3 shows that in the year 1973 Sundrabai sold her 8 ana share to these plaintiffs and so their names were entered in the revenue record. That can be seen from Exh. 102/C. Other 7/12 extract at Exh. 143/C to 146/C shows that name of Apparao Bhaurao, successors of Bhaurao was again entered in the crop cultivation column for the years 1993-94, 2001-02 and 2002 – 03.

18. The evidence given by the parties is in accordance with the aforesaid pleadings. In the evidence also, defendants have stated that Bhaurao had agreed to make arrangement for maintenance of Asrabai. He has tried to say that Bhaurao was giving food grains and clothes to Asrabai as per the agreement, but that evidence is not consistent with the aforesaid record.

19. The aforesaid record and admission of

defendants that Bhaurao was cultivating the land as tenant of Asrabai and absence of convincing evidence from the side of defendants to prove that Asrabai had died prior to coming into force of Hindu Succession Act, are sufficient to prove that Asrabai had become owner of the suit property in view of the aforesaid admitted position and in view of the provisions of Section 14 (1) of Hindu Succession Act, 1956. If the property was given to Asrabai for her maintenance and revenue record was created accordingly and she had vested right to get maintenance, in view of the provisions of Womens' Right to Property Act, 1937, she had become limited owner of the suit property. Even under Shastrik Hindu Law, due to aforesaid record, Asrabai had become limited owner and that ownerships became absolute under the provisions of Section 14 (1) of Hindu Succession Act when 1956 Act came into force. If the defendants, successors of Bhaurao wanted to challenge the rights of Asrabai or wanted to get the property as reversioner, it was necessary for them to file Suit after her death for declaration and possession within prescribed period of limitation. The mutation was already made in favour of successor of Asrabai and so there was cause of action to the defendants for the Suit in

the year 1960 itself. Further, in the year 1973, sale deed was made by one daughter of Asrabai in favour of plaintiff Nos. 2 and 3 and so that had also given cause of action to the defendants, but they preferred not to challenge the transaction.

20. Plaintiff Nos. 1 to 3 are claiming the title as the successors of Asrabai or the transferee from the successor of Asrabai. In view of this circumstance, it can not be said that both of them could not have come together to the Court for the relief claimed.

21. One more point was argued for appellants/original defendants and that was about absence of specific points for consideration in regular civil Appeal decided by the first appellate Court. It is true that in the Judgment delivered by the first appellate Court, points were formulated as, " (i) whether trial Court committed error in dismissing Suit of the appellants ? and (ii) whether trial Court committed error in giving decree to the L.Rs. of deceased Vishwanath ? "

22. Though specific points were not formulated on the basis of the issues considered by the trial Court and aforesaid points, which District Court considered, the reasonings given by the first appellate Court shows that each and every point was specifically dealt with by the first appellate Court. Even the circumstance like the decision of the previous Suits like dismissal of the Suit of successors of Asrabai which was filed for relief of injunction are considered and findings are recorded, though not separately.

23. Learned counsel for the appellants placed reliance on the case reported as ***AIR 2011 Supreme Court – 1150 [Parimal Vs. Veena]*** in support of the contention that in view of the Order XLI Rule 31 of the Code of Civil Procedure, first appellate Court ought to have formulated specific points for consideration. There can not be dispute over this proposition. On this point, learned counsel for the respondents placed reliance on ***the case of Apex Court decided on 06/03/2006 [Civil Appeal Nos. 894-895 of 2002] [G.Amalorpavam & Ors. Vs. R.C.Diocese of Madurai & Ors.]***. In this case, Apex Court has laid down that if the appellate Court has

considered the entire evidence on record and has come to the conclusion and the findings are supported by the reasons, the Judgment does not vitiate due to absence of points for determination. There can not be dispute over this proposition and this Court has already observed that the first appellate Court in the present matter has considered the entire material and necessary points are dealt with by the first appellate Court.

24. Learned counsel for the appellants placed reliance on 3 more reported cases viz. ***AIR 2001 Supreme Court – 2171 (1) [Madhukar & Ors. Vs. Sangram & Ors.], AIR 2001 Supreme Curt – 965 (1) [Santosh Hazari Vs. Purushottam Tiwari (Dead) by L.Rs. and AIR 1967 Supreme Court – 1124 [Girijanandini Devi & Ors. Vs. Bijendra Narain Choudhary]***. In the first 2 cases, the duties of the Court dealing with first Appeal are discussed. The power of the High Court to consider other substantial question of law, not proposed by the appellant, is also mentioned. There is no dispute over the proposition and this Court has already mentioned the additional substantial question of law, which needs to be decided in the present matter.

Liberty was given to the learned counsel for the appellants to argue on this point also. In the third case [cited supra], again the provision of Order XLI Rule 31 of the Code of Civil Procedure is discussed. Necessary observations are made already in this regard. This Court holds that the first substantial question of law formulated by this Court was not involved in the matter and this Court holds that there is no possibility of interference of the decision of the first appellate Court due to absence of specific points for consideration in the Judgment of the first appellate Court. The third point is answered against the appellants/original defendants.

25. In the result, both the Appeals stand dismissed. In view of dismissal of the Appeals, C.A. No. 34 of 2011 stands disposed of. List the Contempt Petition on 30/09/2016.

[T.V.NALAWADE, J.]