

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

**APPEAL FROM ORDER NO. 77 OF 2016
WITH
CIVIL APPLICATION NO. 14460 OF 2016**

1. Shivaji Shahaji Jadhav
Age : 47 years, Occu. Agriculture,
R/o Khulgapur, Tq. & Dist. Latur.
2. Rajesaheb s/o Shahaji Jadhav,
Age : 41 years, Occu. Agriculture,
R/o Khulgapur, Tq. & Dist. Latur.
3. Narsingh s/o Shahaji Jadhav,
Age : 40 years, Occu. Agriculture,
R/o Khulgapur, Tq. & Dist. Latur.

....Appellants

VERSUS

1. Ujwalabai w/o Dnyanoba Padile
Age : 67 years, Occu. Agriculture,
R/o Khulgapur, Tq. & Dist. Latur.
2. Kondabai w/o Chandrabhan Karade,
Age : 57 years, Occu. Agriculture,
R/o Khulgapur, Tq. & Dist. Latur.
3. Suresh s/o Chandrabhan Karade,
Age : 42 years, Occu. Agriculture,
R/o Khulgapur, Tq. & Dist. Latur.
4. Mainabai w/o Suresh Karade,
Age : 39 years, Occu. Agriculture,
R/o Khulgapur, Tq. & Dist. Latur.
5. Kamalbai w/o Dagadu Khulage,
Age : 67 years, Occu. Agriculture,
R/o Khulgapur, Tq. & Dist. Latur.
6. Mahadev s/o Dagadu Khulage,
Age : 47 years, Occu. Agriculture,
R/o Khulgapur, Tq. & Dist. Latur.

7. Bhujang s/o Dagadu Khulage,
Age : 47 years, Occu. Agriculture,
R/o Khulgapur, Tq. & Dist. Latur. ..Respondents

...
Mr. S.S. Chaudhari, Advocate for appellants
Mr. Dhananjay Deshpande, Advocate for respondents

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CORAM : SUNIL P. DESHMUKH, J.

DATED : 6th MARCH, 2018.

ORAL JUDGMENT :-

1. Heard learned counsel for parties finally with consent.
2. Present appeal from order by original plaintiffs purports to take exception to the judgment and decree dated 15-06-2016 passed by District Judge- 4, Latur in regular civil appeal No. 74 of 2012 remanding the matter to trial court for framing issue with regard to adverse possession setting aside the decision of trial court dated 13-01-2012 partly decreeing suit filed by appellants.
3. The appellants are plaintiffs in special civil suit No. 148 of 2009. They filed said suit seeking recovery of possession of encroached portion to the extent of 47 Are from block No. 169 and mesne profit. The plaintiffs claim ownership over said portion of property and allege that said portion is illegally possessed by defendants encroaching over the land of plaintiffs.

4. In defence, there has been denial by defendants on almost all counts. They contended that defendants No. 1 to 7 are owners and possessors of separate portions from block No. 167. The land of defendants No. 2 and 3 from block No. 167 is not adjacent to block No. 169. The Government had constructed barrier/embankment over river Manjara. The surveyor had not issued any notice of measurement to the defendants at any time. The plaintiffs in collusion with surveyor have brought into existence record of measurement but same is not binding on defendants. There is "*Wahiwat Bandh*" between the owners of land block Nos. 167 and 169 and the same is in existence for over 60 years. The defendants were cultivating their land on the northern side and plaintiffs and their predecessors were cultivating block No. 169 situated on southern side. Land block No. 169 is at lower level and there is difference of about 5 to 6 feet in the levels of land blocks No. 167 and 169. The plaintiffs have failed to allege specific encroachment which had been caused by different defendants. The defendants claim to be in possession of land from the times of their predecessors in title for over 50 years. Defendants No. 1 to 4 are in possession of the property from the date of their purchase on the north side '*bandh*' for about 22 years. Similar is the case in respect of defendants No. 5 and 6, who are in possession of the property from the date of purchase. Defendants have further alternatively contended that

they are in possession of disputed land for about 40/60 years openly and continuously and have, thus, become owners of said portion by way of adverse possession.

5. Learned counsel Mr. Chaudhari, on behalf of appellants submits that in absence of mention of in the pleadings of actual date of possession running adverse to ownership of true owner issue of adverse possession would not arise.

6. In support of his submission, he purports to rely on the judgment in the case of *Miss Catarina Fernandes and others Vs. Jos Menino Rodrigues and another* reported in 2012(6) all M.R. 691. The placitum from the same has been referred to which appears to be altogether on different factual background and thus is hardly applicable to present case.

7. Mr. Chaudhari has refers the decision of the Supreme Court in the case of *Municipal Corporation Hyderabad Vs. Sunder Singh* reported in (2008)8 Supreme Court Cases 485 contending that remand order cannot be passed, merely for appellate court feels remand is necessary. While exercising such powers under rule 23 of Order 41 of the Civil Procedure Code, appellate court has to disagree with trial court's finding.

8. Another submission on behalf of appellants is, instead of remitting the matter, the appellate court itself could have framed

the issue and decided the same. For said purpose Mr. Chaudhari, learned counsel has relied on the judgment in the case of *Beniram Shriram Wani and other Ramchandra Nathalal Gurathi* reported in 2011(3) *Mh. L.J.* 545, whereunder the appellate court while acting under rule 25 of Order 41 considered it proper to frame proper issues and record findings thereon in order to let parties opportunity to address themselves on the same.

9. Learned counsel Mr. Deshpande for respondents, however, having regard to facts and circumstances submits that there is no error committed by the appellate court. He further submits that there is no substance in the contention of the learned counsel for appellants about absence of pleadings of actual commencement of adverse possession and as such, issue would not arise. For said purpose, he relied on judgment in the case of *Sathruppa Naicker and others Vs. Ramaswamy and others* reported in *AIR 1996 Madras 290*, refers to follow passage extracted from the same.

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“A reading of the above extracted portion of pleading would show that at one stretch he would say that the suit properties are ancestral properties and at the same time would say he has got title by prescription since he has been enjoying for long years by paying kist and patta standing in his name..... A reading of the plaint as well as his deposition in the Court would show that the plaintiff claims the property only as his ancestral property....”

Only in such a context the learned Judge has held that

there is no plea in the abovesaid case as to how and when adverse possession commences. Such a situation does not at all arise here in the present case. There is a clear plea of adverse possession and in such a situation simply because the actual date of commencement of adverse possession is not specifically suited in the written statement, it cannot be said that there is no plea of adverse possession.

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10. Although pleadings of parties have been referred to in the judgment by trial court, yet there appears to be absence of framing of issue in this respect. While passing the impugned order by learned Judge of appellate court, this absence has been noted and the issue arising from pleadings being germane for consideration, appellate court under impugned judgment considered it proper to have the issue framed in this respect and has set aside the decision by trial court letting the parties opportunity in this respect.

11. Overall situation on record does not lead me to consider that appellate court has committed any error in remitting the matter in order to let the parties opportunity to address themselves on the issue, which may be having bearing in the controversy.

12. In view of aforesaid, appeal from order is dismissed, however, it would be expedient that trial court proceeds with the

issue framed and records findings thereon as early as possible preferably within a period of three months from the date of receipt of writ of this order. Record and proceedings be sent back to the trial court forthwith.

13. Pending civil application does not survive and stands disposed of.

[SUNIL P. DESHMUKH]
JUDGE

MTK.