

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

Second Appeal No. 0590 of 2016

District : Nanded

1. Rabbani Khan s/o. Lalkhan Pathan,
Age : 69 years,
Occupation : Retired,
R/o. Sainagar,
behind Chand Nagar, Nanded,
Taluka & Dist. Nanded.

2. Noorjahan w/o. Rabbani Khan
Pathan,
Age : 59 years,
Occupation : Household,
R/o. Sainagar,
behind Chand Nagar,
Nanded,
Taluka & Dist. Nanded.

.. Appellants
(Original
defendants)

versus

Nusrat Jahan @ Shakilabegum
w/o. Babukhan,
Age : 51 years,
Occupation : Household,
R/o. Sainagar,
behind Chand Masjid,
Nanded,
Taluka & Dist. Nanded.

.. Respondent
(Original
plaintiff)

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Mr. Y.M. Khan, Advocate, for the appellants.

*Mr. Shaikh Mujtaba Gulam Mustafa, Advocate, for
the respondent.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 10TH APRIL 2019

ORDER :

01. Present appeal has been filed by original defendants. Present respondent had filed Regular Civil Suit No. 317 of 2004 before 5th Joint Civil Judge Junior Division, Nanded for recovery of possession, mesne profits and perpetual injunction. (Parties are referred to by their nomenclature before Trial Court.)

02. Plaintiff is the real sister of defendant No. 2. Defendant No. 1 is the husband of defendant No. 2. Plaintiff had shifted from Hyderabad to Nanded after the death of her mother. She had purchased a plot from her funds, bearing survey No. 111-B, CTS No. 12096 admeasuring 30' x 40'. She had made construction of ground floor in 1986 and then made further construction on the first floor, which came to be regularized by the Municipal Corporation later on. It was given number as 7/3/558 (old) and 7/5/565 (new) at Sai Nagar, behind Chand Masjid, Nanded. She is paying the property tax. Her husband runs his dispensary in two rooms facing North. She resides with her husband, mother-in-law and two daughters on the first floor. She is conducting her dress designing business from the suit property. Defendant No. 1 was employed with Zilla Parishad, Nanded. He was dismissed from his service on the count of misappropriation of funds. He and his family members were facing problem for residence. On his request, plaintiff allowed him in December 1998 to reside in one room on the ground floor. However, thereafter,

defendants illegally occupied other two rooms, open space and W. C. Unit. When she resisted defendants from making further encroachment on 02-04-2000, they quarrelled with her. Defendants have no right, title or interest over the suit property. Hence, she has filed suit for recovery of possession, mesne profits and injunction.

03. Defendants have resisted the claim of the plaintiff by filing written statement. It was contended that father of plaintiff, defendant No. 2 and one of brother had purchased the plot in the name of plaintiff with consent of others. Plaintiff has only 1/4th share in the property. They are occupying the premises since last more than 12 years and therefore, they have become owner by adverse possession. They have made construction by incurring expenditure to the tune of Rs. 74,987/-. They have claimed it along with interest from the plaintiff by way of counter-claim.

04. Plaintiff has filed written statement to the counter-claim. She has again contended that defendants are put in permissive possession and therefore, they can not take the defence of ownership by adverse possession. It is also stated that the counter-claim is not properly valued and court fee is not paid accordingly. She is not liable to pay anything to defendants.

05. Taking into consideration the rival

contentions, issues came to be framed. Parties have led oral as well as documentary evidence. After perusing the said evidence and hearing both sides, learned Trial Court has decreed the suit on 30-04-2012.

06. Original defendants approached District Court, Nanded by filing Regular Civil Appeal No. 128 of 2013. It was heard by learned District Judge-2, Nanded. After hearing both sides, the said appeal came to be dismissed on 18-02-2016. Hence, the defendants have filed this second appeal.

07. Heard learned Advocate Mr. Y. M. Khan for appellants and learned Advocate Mr. Shaikh Mujtaba Gulam Mastafa for respondernt.

08. It has been vehemently submitted on behalf of appellants that both the Courts below have failed to consider the evidence as well as law points involved in the case. In the sale-deed, which was admittedly in the name of plaintiff, her age is shown as 21 years and occupation as student. How she would have been able to raise amount of Rs.16,800/- towards consideration. This shows that she had no source of income and in fact the property was purchased by the father and defendant No. 2 in her name. In fact, plaintiff had completed her education in 1991 and prior to that she was not having any source of income. Both the Courts have failed to consider this fact. When father of plaintiff and defendant No. 2 had purchased the said property, both

the sisters are having share in the same. They are occupying the suit property as tenants-in-common. Plaintiff has filed suit in order to grab the property as it stands in her name. Defendants have made construction in the suit premises, which was never objected to by the plaintiff. Both the Courts below had failed to consider that defendant No. 2 had sufficient amount with her for raising construction in the suit premises. Merely because there was problem to defendant No. 1 in his service, it does not infer that plaintiff had granted permissive possession to defendants to occupy only one room. Substantial questions of law are arising in this case, as the point of ownership has been wrongly decided by both the Courts below.

09. Per contra, the learned Advocate appearing for respondent / plaintiff has supported the reasons given by both the Courts below and submitted that no substantial questions of law arise, when there is concurrent finding. Defendants have also taken plea of ownership by adverse possession, for which they must admit the ownership of plaintiff over the suit property.

10. The relationship between the parties is admitted. It is also admitted that the plot over which suit premises has been constructed was purchased in the name of plaintiff. Plaintiff has come with a case that she has purchased it out of her income; whereas defendants are contending that father of plaintiff and

defendant No. 2 had purchased it in the name of plaintiff. When the fact of sale-deed in the name of plaintiff is admitted, then a presumption can be raised that she has paid the consideration mentioned in the sale-deed. It would be for the defendants then to disprove the said fact by adducing cogent evidence. Defendants have not explained as to why father had decided to purchase the plot in the name of plaintiff. Mere statement is not enough. It has come on record that before shifting of plaintiff from Hyderabad to Nanded, the property left by father was partitioned. According to defendant No. 2, she had received Rs.85,000/- of her share. This fact is reflected even in appeal memo of the Second Appeal. Defendant No. 2 has not explained as to why she had not asked her share to be partitioned from the suit property also at that time, considering that the property was purchased by her father. Therefore, at the cost of repetition it can be said that, when defendants had admitted the contents of the sale-deed then, it was for them to prove that consideration was generated from their father. Defendants have failed to bring that evidence on record.

11. Plaintiff is the owner of the suit property and therefore, basic presumption is that she would have constructed the structure. She has paid taxes, electricity bill. Those documents produced by her support her contention that she had constructed the ground floor first and after some time, the first floor

was constructed. Defendants had come with a case that they had spent around Rs.3,07,447/- for construction. It was also contended that defendant No. 1 had taken loan from his Society; however, the documents showed that he had taken loan for religious purpose. In his cross-examination, defendant No. 1 has admitted that he had never applied for loan for construction of the house. He was bound to explain as to why he had applied for loan under different head. When no explanation to that effect is given, then the said circumstance goes against defendants. It is not in dispute that defendant No. 1 has been dismissed from service. Under such circumstance, the claim of the plaintiff that she had put defendants in permissive possession due to the need of defendants, holds good. When plaintiff noticed that defendants are encroaching on other part of the premises, she was justified in revoking the permission and asking them to hand over the possession.

12. Defendants have raised alternative defences also. They had contended that they have become owner of the suit property by adverse possession. It is to be noted that at one breath defendants were contending that defendant No. 2 is the co-sharer in the suit property with plaintiff. If it is so then they can not say that defendant No. 2 has become owner by adverse possession. No one is allowed to be possess a property against his / her own interest. Defendant No. 2 had filed Regular Civil Suit No. 132 of 2001 for partition and separate possession. The said suit came to be

dismissed and the appeal preferred by her was also dismissed. That means a competent Court has come to the conclusion that plaintiff is the exclusive owner of the property. In order to establish the claim of owner by adverse possession, defendants must admit that plaintiff is the exclusive owner. Thus, it can be seen that defendants have tried to take as many contrary defences as they can, but they have failed to establish any one of them.

13. Both the learned Courts below have dealt with the evidence and law points properly. There is no reason to disturb the concurrent findings. No substantial question of law is arising as contemplated under Section 100 of Code of Civil Procedure. Hence, the Second Appeal is disposed of as **"Not Admitted"**.

(Smt. Vibha Kankanwadi)
JUDGE

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