

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.400 OF 2013

Madhav Ramaji @ Rabhaji Lasure,
(Dead) by his Legal Heirs.

1. Smt. Indubai w/o Madhav Lasure,
Age Major Occupation Household,
R/o Kopargaon Tq. Kopargaon
Dist. Ahmednagar.
2. Balu @ Balasaheb Madhav Lasure,
Age Major, Occupation Service & Agri.,
R/o As above.
3. Bajrang Madhav Lasure,
Age Major, Occupation Agri.,
R/o As above.

...Appellants.

VERSUS

1. Smt. Anusayabai Rabhaji Lasure,
Age Major, Occupation Household,
R/o Sanwastar, Tq. Kopargaon
Dist. Ahmednagar.
(Died. Deleted as per order
dated 27-09-2013).
2. Sau. Vijayabai Raman Katare,
Age Major, Occupation Agriculture,
R/o Ramwadi Tq. Kopargaon
Dist. Ahmednagar.
3. Maharashtra State Farming Corporation,
Sakarwadi Tq. Kopargaon Dist.
Ahmednagar.
4. State of Maharashtra,
Through Collector, Ahmednagar.

5. Sau. Laxmibai Karbhari Wakchaure,
Age Major, Occupation Agriculture,
R/o Sanwastar, Tq. Kopargaon
Dist. Ahmednagar.

Madhav Ramaji @ Rabhaji Lasure
(Died) By His L.Rs.

6. Sau. Hirabai Balasaheb Gangurde,
Age Major, Occupation Household,
R/o Karwadi (Manjur) Tq. Kopargaon
Dist. Ahmednagar.
7. Sau. Tarabai Bhaskarrao Kate,
Age Major Occupation Agriculture,
R/o Sawargaon Tq. Yeola
Dist. Nashik.
8. Sau. Shobha Prakashrao Madhawi,
Age Major, Occupation Agriculture,
R/o Chinchondi Tq. Yeola Dist.
Nashik.

...Respondents.

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Advocate for appellants : Mr. L. K. Pradhan.

Advocate for respondent No.2 : Mr. S. S. Chapalgaonkar.

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WITH

SECOND APPEAL NO.401 of 2013

Madhav Gangaram Naikwade (Dead),

1. Smt. Indubai w/o Madhav Naikwade,
Age Major, Occupation Household,
R/o Laxminagar Tq. Kopargaon
Dist. Ahmednagar.
2. Balu Madhav Naikwade,
Age Major, Occupation Agriculture,
R/o Borawake Vasti Tq. Kopargaon

3. Dist. Ahmednagar.
Bajrang Madhav Naikwade,
Age Major, Occupation Agriculture,
R/o Laxminagar Tq. Kopargaon
Dist. Ahmednagar.

...Appellants.

VERSU

1. Smt. Anusayabai Rambhaji Lasure,
Age Major, Occupation Household,
R/o Sanvastar Tq. Kopargaon
Dist. Ahmednagar.
(Died. Deleted as per order
dated 27-09-2013).
2. Sau. Vijayabai @ Vithabai Katare,
Age Major, Occupation Agriculture,
R/o Sanvatar Tq. Kopargaon
Dist. Ahmednagar.
3. Sau. Hirabai Balasaheb Gangurde,
Age Major, Occupation Household,
R/o Karwadi (Manjur), Tal. Kopargaon
Dist. Ahmednagar.
4. Sau. Tarabai Bhaskarrao Kate,
Age Major, Occupation Agriculture,
R/o Sawargaon Tq. Yeola Dist.
Nashik.
5. Sau. Shobha Prakashrao Madhawi,
Age Major, Occupation Agriculture,
R/o Chichondi Tq. Yeola Dist. Nashik.
6. Thakan Madhav Naikwade,
Age Major, Occupation Service,
R/o Laxminagar Tq. Kopargaon
Dist. Ahmednagar.
7. Dnyaneshwar Madhav,
Age Major, Occupation Service,

R/o Laxminagar Tq. Kopargaon
Dist. Ahmednagar.

8. Balu Madhav Naikwade,
Age Major, Occupation Agriculture,
R/o Laxminagar Tq. Kopargaon
Dist. Ahmednagar.

...Respondents.

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Advocate for appellants : Mr. L. K. Pradhan.
Advocate for respondent No.2 : Mr. S. S. Chapalgaonkar.
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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
12-02-2019.**

**Date of Pronouncing the Order :
08-04-2019.**
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ORDER :

1. Both these appeals are arising out of common Judgments given by both the Courts below, and therefore, here also they are dealt with commonly.

2. Second Appeal No.400 of 2013 is arising out of Judgment and decree passed in Regular Civil Suit No.03 of 1989 (Old Regular Civil Suit No.749 of 1982) which was filed by the predecessor of the appellant i.e. Madhav Ramaji @ Rabhaji Lasure for declaration, partition and perpetual injunction in respect of suit lands bearing Survey No.115/1 and 115/2. The said suit came to be dismissed by Civil

Judge, Senior Division, Kopargaon on 10-11-1993. Second Appeal No. 401 of 2013 has been filed challenging the judgment and decree passed in Regular Civil Suit No. 49 of 1989, which was filed by the respondents, for injunction in respect of the same property. Present appellants were the defendants in that suit. The said suit came to be decreed by the same Judgment and decree passed by learned Civil Judge, Senior Division, Kopargaon.

3. The present appellants challenged the Judgment and decree passed in both the civil suits in Regular Civil Appeal No.136 of 1994 and Regular Civil Appeal No.138 of 1994 before District Judge-1, Kopargaon and both the appeals came to be dismissed on 21-03-2013. Now the appellants intend to challenge the said Judgment and decree passed by the first appellate Court, in this second appeal.

4. The common facts which give rise to both the suits was that, Madhav i.e. predecessor of present appellants had come with a case that, he is the son of deceased Ramaji @ Rabhaji Lasure. The suit lands i.e. Survey No.115/1, 115/2 admeasuring 6 Acres 20 Gunthas and 6 Acres 36 Gunthas respectively situated at village Sanvatsar Tq. Kopargaon were the ancestral properties of Ramaji. Defendant No.1 Anusayabai is the widow of Ramaji and step mother of deceased Madhav. It is also stated that, the suit fields were given for cultivation

on rent to defendant No.3 by deceased Ramaji. But after Ceiling Act, those fields were vested with defendant No.4. According to Madhav, he was harassed by defendant No.1 i.e. Anusayabai and the family members, and therefore, he left the house and went to reside at Kopargaon. He had a real sister by name Laxmibai and defendant No.2 Vijayabai is the daughter of Laxmibai. After Madhav left the house, Anusayabai and Vijayabai took disadvantage of the sickness and old age of Ramaji and got document styled as 'Will' on 15-08-1973 contending that he is bequeathing the suit properties to Vijayabai. The said 'Will' was registered on 27-12-1973. According to Madhav at the time of executing the 'Will', Ramaji was not feeling well and was not able to understand the things. Under such circumstance, the said 'Will' was not binding on Madhav. During the pendency of the suit Madhav expired and his legal representatives have been brought on record. They also contend that, said 'Will' of Ramaji is not binding on them. Said Ramaji @ Rabhaji had no right to execute 'Will' in respect of entire property. Madhav had birth right in the same being co-parcener. After Ramaji @ Rabhaji died, mutation has been effected on the basis of his 'Will' and those entries are false. Those entries are not binding on Madhav and his legal representatives. Without any proper enquiry, the State authorities i.e. Revenue Authorities have mutated name of Vijayabai. It is further stated that, Madhav had filed suit for account of

rent against defendants No.3 and 4 and his share. It was contended that, defendants No.3 and 4 have given rent to defendant No.2 Vijayabai. It was also stated that, defendants No.3 and 4 (in the suit filed by Madhav) have got the suit fields under Ceiling on Holding Agriculture Lands Act and it is stated that it was put in possession of defendant No.4 by order dated 03-05-1977. Then the State Government has taken a decision to return the land to original owners for cultivation, and therefore, 1 Hectare 77 R land has been given to Vijayabai. Madhav has therefore prayed for partition and separate possession.

5. Defendants No.1 and 2 contested the matter. They denied that, Madhav is the son of Ramaji @ Rabhaji. It is denied by them that, they have got a false 'Will' executed from Ramaji by taking undue advantage of sickness and old age. It is also denied that, the suit fields were ancestral properties of Ramaji. It is also denied that, Anusayabai is the step mother of Madhav. They are the legal heirs of Ramaji who was the owner of the suit properties. Vijayabai is the adopted daughter of Ramaji and Anusayabai. The 'Will' that was executed by Ramaji is legal and valid. As Madhav is not the son of Ramaji @ Rabhaji, he is not entitled to get share in the suit properties. It is contended that, Madhav and Laxmibai are the children of one Gangadhr Naikwadi.

6. Defendant No.4 – the State Government filed written statement and contended that, mutation entries have been taken properly. The mutation entries cannot be challenged in Civil Court. The suit property was originally belonging to Ramaji @ Rabhaji. He was taking adhoc rate during his lifetime. In the enquiry of mutation entry No.5571, it was transpired that, deceased Ramaji @ Rabhaji had heir by name Anusayabai. Then defendant No.2 filed affidavit on 08-10-1976 stating that, the lands have been bequeathed to her by Ramaji @ Rabhaji by virtue of said 'Will' and produced registered 'Will'. After considering the registered 'Will', the entries have been taken.

7. Defendant No.5 filed separate written statement and admitted that, she is the sister of deceased Madhav but then she denied that Madhav was son of Ramaji @ Rabhaji. It is stated that, she as well as Madhav were the children of one Gangahdar Naikwadi and name of their mother was Geetabai. Their father died during their childhood. They had no relation with Ramaji @ Rabhaji. It is also stated that, defendant No.2 i.e. Laxmibai is her daughter and she has been given in adoption to Ramaji @ Rabhaji and Anusayabai. Laxmibai was maintaining Ramaji @ Rabhaji and Anusayabai, and therefore, out of love and affection and without pressure or undue influence Ramaji @ Rabhaji had bequeathed the suit properties to Laxmibai. Madhav was

never in possession of the suit lands as heir or Ramaji @ Rabhaji.

8. In Regular Civil Suit No.49 of 1989 filed by present respondents No.1 and 2, they raised the same contention and then contended that Madhav and thereafter his legal heirs are obstructing their possession over the suit lands, and therefore, they prayed for injunction. The present appellants who were the defendants in that case, filed written statement and raised same contentions.

9. In both the suits, issues came to be framed taking into consideration the rival contentions. Parties have led common evidence and after hearing both sides, the learned trial Court has held that Mahdavi has failed to prove that he was the son of Rabhaji @ Ramaji. He failed to prove that, Anusayabai and Laxmibai obtained 'Will' dated 15-08-1973 by fraud. The said 'Will' has been held to be valid. Anusayabai and Laxmibai are held to be possessors of the suit properties, and therefore, the suit filed by Madhav and continued by his legal representatives was dismissed and the suit filed by Anusayabai and Laxmibai came to be decreed.

10. As aforesaid the appeals preferred by present appellants have been dismissed by learned District Judge -1, Kopergaon, hence second appeal.

11. Heard Mr. L. K. Pradhan, learned advocate representing for appellants and Mr. S. S. Chapalgaonkar, learned advocate representing respondent No.2. Both have argued in support of their contentions.

12. The learned advocate appearing for the appellants submitted that, both the lower Courts have not considered the evidence and law points properly. The documentary evidence which was produced by the predecessor of appellants – plaintiffs was not considered only on the ground that, it has not come from the proper custody. But what has been overlooked is that the other documents definitely show that Madhav was representing himself as the son of Ramaji @ Rabhaji to the entire world. Nobody had taken objection to the same. To demonstrate this fact, he had produced his own marriage invitation card at Exhibit 97 and also the election voters list. Unfortunately after filing of the suit Madhav expired, and therefore on whatever available documents, his legal representatives have continued the suit. What has been held by both the Courts that, the 'Will' left in favour of defendant No.2 is a valid 'Will', however the perusal of the said 'Will' would show that, it has been executed by deceased Rabhaji as well as defendant No.1 Anusayabai. The

defendant No.1 was alive when the suit was filed. 'Will' has to take effect after the death of the testator and in order to substantiate, he relied on the decision in *Madhuri Ghosh and Another Versus Debobroto Dutta and Another*, reported in 2017 (2) *Mh.L.J.* 503, and *Shantabai wd/o Govindrao Ghorpade and Others Versus Indubai wd/o Raghunath Chormore*, reported in 2005 (2) *Mh.L.J.* 553. The document on which defendant No.2 relied dated 15-08-1973, appears to be a joint 'Will' and as regards the position of a joint 'Will' he relied on the decision of this Court in *Vasant Narayan Karkhanis Versus Mrs. Prabhavati Bhalchandra Hajarnis*, reported in 1999 (2) *Mh.L.J.* 889. Though the attesting witnesses were examined, it can be seen that they are the relatives of either defendant No.1 or the husband of defendant No.2. Exclusion of the only son and also mentioning that he has no issue at all is a suspicious circumstance, and therefore, that has not been properly addressed by both the Courts below. Hence, substantial question of law are arising in this case.

13. Per contra, the learned advocate for the respondent No.2 Mr. S. S. Chapalgaonkar relied on the reasons given by both the Courts below and submitted that, there is proper appreciation of evidence

as well as law. Original plaintiffs failed to prove that Madhav was the son of Ramaji @ Rabhaji and defendant No.1 Anusayabai, and therefore, question of his inheritance or challenge to the 'Will' left by Ramaji @ Rabhaji does not arise.

14. The first and the foremost fact that is required to be considered is that, since there are concurrent findings of both the Courts below, this Court in second appeal would be slow in a way that unless substantial question of law has been shown, it cannot be entertained. The substantial question of law should be as contemplated under Section 100 of Code of Civil Procedure. As regards the facts of the case are concerned, when both the Courts below have appreciated the evidence and come to a concurrent finding then unless it is shown that the said appreciation of evidence as well as finding based upon that appreciation is perverse, no second appeal can be entertained. Here in this case, even the defendant No.5 in Regular Civil Suit No.03 of 1989 who accepted that she is the real sister of Mahdavi specifically stated that, she as well as Madhav are not the children of Ramaji @ Rabhaji and defendant No.1 Anusayabai. It is specifically stated by her that, they both are children of one Gangadhar Naikwadi. Her written

statement carries more importance and puts heavy burden on plaintiffs to prove that Madhav as well as defendant No.5 were the children of Ramaji @ Rabhaji and defendant No.1 Anusayabai. Defendant No.5 not only kept quiet by filing written statement but she has entered the witness box and led the evidence, contended the same things, and therefore, it carries weight. Nothing has been brought on record from her cross to shake her version. No doubt she is the mother of defendant No.2 in whose favour the 'Will' has been left but both the capacities are required to be considered from different angles. Both the Courts have discarded invitation card of marriage of Madhav on the ground that, it has not been produced from proper custody and the proper custodian of the same has not been examined. Name in voters list will not conclude that, Madhav is the son of Ramaji @ Rabhaji and defendant No.1 Anusayabai. Son of Madhav i.e. P.W.1 Balu was not able to answer questions which were in respect of showing the relationship between his father and Ramaji @ Rabhaji. Though Madhav had expired during the pendency of the suit, that fact cannot be taken as an adverse circumstance for the plaintiffs. There was other source available for the plaintiffs to bring on record that Madhav was son of Rabhaji and defendant No.1 Anusayabai. The near relatives of the parties could have been

examined by plaintiffs. When there is concurrent finding of fact that plaintiffs have failed to prove that, Madhav was son of Ramaji @ Rabhaji, question of his inheritance to the property left by Ramaji @ Rabhaji will not arise. He cannot have any share in the property left by Ramaji @ Rabhaji. Further he has no right to challenge the 'Will' dated 15-08-1973 left by Ramaji @ Rabhaji on any count.

15. Since defendants No.1 and 2 had filed another suit for injunction, we may also deal with the point cursorily, as to whether defendant No.2 has received any right in the properties left by Ramaji @ Rabhaji and how the 'Will' dated 15-18-1973 is required to be construed. Perusal of the said document would give up picture that, it has been executed by Ramaji @ Rabhaji as well as defendant No.1 Anusayabai. Defendant No.1 was alive on the date when the suit No.49 of 1989 was filed. The observations in *Vasant Narayan Karkhanis Versus Mrs. Prabhavati Bhalchandra Hajarnis (Supra)* would help. It has been observed in this case that,

“ The expression used in the Will “during our lifetime we will continue to be the owners of the said property” is suggestive that the ownership which the joint executants contemplated was the user during the lifetime and it was this ownership which was to devolve on the death of

either of them to the survivor. This becomes further clear from the use of the expression "the said arrangement shall come into effect only after our death." The intention of the executants, therefore, was to keep the said property intact for the benefit and enjoyment of the ultimate legatees and during the lifetime of either of them the property was not in any manner to be parted with or diminished."

Here in this case also the wordings used in Will dated 15-08-1973 are also on similar lines. That means, it was intended by Rabhaji as well as Anusayabai that, the property would be enjoyed by Anusayabai or Rabhaji till their lifetime i.e. either or survivor and only after the death of both of them, it would go to Vijayabai. Now during the pendency of the second appeal Anusayabai expired, and therefore, this subsequent event is also required to be taken into consideration. Therefore, definitely when both the Courts have concluded that, Anusayabai and Vijayabai were entitled to protect their possession, it is a correct view. Even if for the sake of arguments it is accepted that, when the suit was filed by Anusayabai and Vijayabai, Vijayabai might not have received the property by way of Will but then she had the interest because she was to get that property. But after death of Rabaji, Anusayabai became the

exclusive owner, and therefore, she was entitled to protect her possession from the defendants in her suit. The ratio in other two rulings cannot be denied but they are not applicable to the facts of the case.

16. Taking into consideration above said reasons and the parameters of the "second appeal" as laid down in catena of Judgments, no substantial question of law has been shown. Hence, both the second appeals are disposed of as **not admitted**.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.