

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

Second Appeal No. 0165 of 2018

District : Ahmednagar

1. Sheubai Nana Lanke,
Age : 70 years,
Occupation : Agriculture.
2. Pandurang Nana Lanke,
Age : 47 years,
Occupation : Agriculture.

Both R/o. Nighoj,
Taluka Parner,
Dist. Ahmednagar.

.. Appellants
(Original
plaintiff)

versus

1. Kondiba Hanumanta Lamkhade
(Deleted).

2. Balasaheb Anandrao Pawar,
Age : 57 years,
Occupation : Agriculture,
R/o. Nighoj, Taluka Parner,
Dist. Ahmednagar.

.. Respondents
(Original
defendants)

.....

Mr. N.B. Narwade, Advocate, for the appellants.

Respondent no.01 already deleted.

Mr. S.S. Bora, Advocate, holding for
Mr. V.S. Badakh, Advocate, for respondent
no.02 (caveator).

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With

Second Appeal No. 0205 of 2018

District : Ahmednagar

1. Sheubai Nana Lanke,
Age : 70 years,
Occupation : Agriculture.

2. Pandurang Nana Lanke,
Age : 44 years,
Occupation : Agriculture.

Both R/o. Nighoj,
Taluka Parner,
Dist. Ahmednagar.

.. Appellants
(Original
defendants)

versus

1. Kondiba Hanmant Lamkhade
(Deleted).

2. Balasaheb Anandrao Pawar,
Age : 57 years,
Occupation : Advocate,
R/o. Nighoj, Taluka Parner,
Dist. Ahmednagar.

.. Respondents
(Original
plaintiffs)

.....

Mr. N.D. Sonavane, Advocate, for the appellants.

Respondent no.01 already deleted.

Mr. S.S. Bora, Advocate, holding for
Mr. V.S. Badakh, Advocate, for respondent
no.02 (caveator).

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the order : 29th April 2019**

**Date of pronouncing
the order : 04th June 2019**

ORDER :

01. Second Appeal No. 165 of 2018 has been filed by the original plaintiffs, challenging the concurrent judgment and decree passed in Regular Civil Suit No. 89 of 1997 by the learned Civil Judge (Junior Division), Parner, District Ahmednagar, on 08-08-2014 and the judgment and decree passed in Regular Civil Appeal No.392 of 2014 passed by the learned District Judge-3, Ahmednagar, on 22-09-2017; whereas Second Appeal No. 205 of 2018 is filed by the original defendants challenging the judgment and decree passed in Regular Civil Suit No. 37 of 1997 passed by the same Presiding Officer on the same date before Civil Judge (J.D.), Parner and the judgment and decree passed in Regular Civil Appeal No. 412 of 2014 on the same date by the same Presiding Officer. Regular Civil Suit No.37 of 1997 was partly decreed by the learned trial Court; whereas Regular Civil Suit No. 89 of 1997 was dismissed. In appeal, the learned District Judge-3, Ahmednagar, has dismissed the Regular Civil Appeal No. 392 of 2014, thereby confirming the decree

passed in Regular Civil Suit No. 89 of 1997; whereas Regular Civil Appeal No.412 of 2014 came to be allowed and Regular Civil Suit No. 37 of 1997 came to be decreed in entirety. (Now, the parties are referred to by their name in order to avoid any confusion.)

02. Original plaintiff no.01 was the father of Sheubai. Pandurang is the son of Sheubai. Original plaintiff no.02 Balasaheb has purchased suit property from Kondiba during the pendency of the suit and thereafter he came to be added as plaintiff no.02 and then the name of Kondiba came to be deleted. Kondiba had purchased the suit property about 23 years prior to the suit and it is the case of Kondiba that he constructed a house therein. Sheubai tried to take disadvantage of old age of Kondiba and wanted to grab the suit property. She has encroached in the suit property and intending to construct house. During the pendency of the suit, by way of amendment, it was contended that Sheubai has taken forcible possession of northern side one room in 2002 and, therefore, amendment was made to the prayer clause for possession. Permanent injunction was claimed against her from making any type of construction in the suit property.

03. The said suit was resisted by Sheubai and

her son by filing written statement. She contended that as her husband has deserted her, she is residing in the suit property by constructing rooms along with her son Pandurang since about 25 years. She claimed that she has spent for construction of two rooms. There was a compromise between her and father. Since the suit property is ancestral, one room was given by her to one Tarabai Gajanan Lamkhade. There was dispute between Tarabai and Sheubai in the year 1994 and, therefore, Kondiba and Tarabai had filed R.C.S. No. 96/1994. Balasaheb, who is an Advocate by profession, was engaged by Kondiba in that matter. It was decided that Balasaheb would purchase the suit property from Kondiba and, therefore, Gajanan, who is the son of Kondiba, took amount of Rs. 8,000/- from Sheubai. Thereafter an agreement took place on 07-02-1997. However, by pretending that it is a compromise, Kondiba by taking help of Gajanan, executed sale deed in favour of Balasaheb on 15-02-1997 and immediately thereafter Kondiba filed R.C.S. No. 37 of 1997. When she came to know about the fact that she has been cheated, she filed R.C.S. No.89 of 1997.

04. In her suit i.e. R.C.S. No. 89 of 1997, Sheubai has raised some contentions and in addition to that, she has stated that she has constructed the

area adjacent to the property which is in possession of Tarabai about 20 - 22 years ago. The door to that premises is from the eastern side towards north to go to the main road. She is using that road as well as door to come and go from the house. She has made construction towards north side adjacent to the existing structure. It is also stated that almost entire work is complete. Only the roof is remaining. Balasaheb has no right, title or interest over the suit property. Only part from the southern side of house no.1827 has been purchased by Balasaheb. However, he is obstructing the possession of Sheubai and, therefore, she prayed for permanent injunction.

05. Balasaheb filed written statement and raised the same contention as raised in the plaint in R.C.S. No.37 of 1997. He contended that the plaintiff Sheubai has got her name mutated unauthorizedly to the Grampanchayat record and on the basis of the same, she has forcibly entered the suit premises.

06. Taking into consideration the rival contentions in both the suits, issues came to be framed. Both the suits were tried before the same Presiding Officer and the evidence has been led in one matter. Both the suits have been decided by

common judgment and as aforesaid, the suit filed by Balasaheb was partly decreed to the extent of encroached area only and the relief of taking possession from northern side premises was rejected; whereas suit filed by Sheubai was dismissed.

07. In appeal, the appeal filed by Balasaheb came to be allowed. Sheubai and Pandurang have been directed to demolish the construction shown in parrot colour in map and deliver possession of the property to Balasaheb. So also, they were directed to hand over vacant possession of the property shown in red colour in map Exhibit 95. The order of dismissal of the suit filed by Sheubai was confirmed. Hence, both these second appeals have been filed by Sheubai.

08. Heard learned Advocate Mr. N.B. Narwade for the appellants in Second Appeal No. 165 of 2018. Heard learned Advocate Mr. N.D. Sonavane for the appellants in Second Appeal No. 205 of 2018. So also, heard learned Advocate Mr. S.S. Bora for respondent no.02 in both the appeals.

09. It has been vehemently submitted on behalf of the appellant Sheubai, that both the Courts have not considered the evidence properly, so also, law points involved. The property was originally

belonging to Kondiba and he had entered into a compromise with Sheubai. In fact, a dispute had arose between them earlier and, therefore, Kondiba and Tarabai had filed suit against Sheubai, namely R.C.S. No. 96 of 1994, wherein Kondiba had come with a case that he has effected partition in respect of his agricultural lands about 07 years prior to 1994. He had sold the said property about 23 years ago to a third person. However, Gajanan, who was the younger son of Kondiba, purchased it from that third person and then by spending about Rs. 25,000/- had erected house therein. Since Sheubai was deserted by her husband, as a permissive possession she was put in possession of half of the house. However, there were good relations between Sheubai and Tarabai and, therefore, they had prayed for injunction against Sheubai. That suit came to be disposed of in view of Pursis filed. By way of compromise, Sheubai was allowed to reside in the property of half portion. But then by cheating her, Balasaheb has purchased the suit property. It was, therefore, necessary to consider as to who was the owner of the property and whether Sheubai had any right in the suit property, or not. When Balasaheb had purchased the suit property during the pendency of the suit, the contentions by original plaintiff i.e. Kondiba cannot be negatived. A document was produced at Exhibit 118 wherein Kondiba had promised

that he will not obstruct and interfere in the joint residence of defendant no.01 i.e. Sheubai over the suit property. Definitely, that right is binding on Balasaheb and, therefore, the possession of Sheubai ought to have been protected by both the Courts below.

10. In order to buttress his arguments, learned Advocate for the appellants has relied on the decision in *Uma Pandey & another Vs. Munna Pandey & others* [AIR 2018 SC 1930], wherein it has been held that *when one of the Court reverses the decree, by appreciating the evidence, then the High Court cannot dismiss the second appeal in limine. It deserves admission on framing appropriate substantial questions of law.* Further, it is tried to be relied on the fact that when a right of residence is created in favour of Sheubai, then she becomes owner of the said property and, therefore, reliance has been placed on the decision in *V. Tulasamma & others Vs. Sessa Reddy (Dead) by L.Rs.* [AIR 1977 SC 1944], wherein it was held that *if the widow has received property under compromise in lieu of maintenance, then she becomes full owner under Sub-section 1 of Section 14 of the Hindu Succession Act.*

11. Per contra, learned Advocate appearing for respondent no.02 Balasaheb submitted that the

learned trial Court, which was dealing in R.C.S. No.37 of 1997 not considered the facts properly. When Sheubai herself is relying upon document Exhibit 118, which was executed between her and Kondiba, then she accepts that Kondiba was the owner of the property. Even in the earlier suit, Kondiba had contended that he had permitted Sheubai to reside in the suit property. Since the suit property is the self acquired property of Kondiba, Sheubai cannot have any right by birth in the same. Kondiba was at liberty to dispose of the property. When he had put Sheubai in permissive possession of the property, he was entitled to revoke the same and, therefore, the decree that was passed by the learned trial Court by partly decreeing the suit, was erroneous and the said error has been set right by the first appellate Court. No fault can be found in the view taken by the learned first appellate Court. No substantial question of law is arising in this case.

12. Learned Advocate for respondent no.02 has relied on the decision in *Eramma Vs. Verrupanna & others* [AIR 1966 SC 1879] and *Smt. G. Rama Vs. T.G. Seshagiri Rao (Dead)* by L.Rs. [(2008) 12 SCC 392]. In both these citations, it is held that *when a permission is granted for residence, then the said female member cannot get ownership rights. It would be only permissive*

possession.

13. It is to be noted that Sheubai has taken many defences, in a sense, that at one place, she claims that she received half portion from Gut no.1330 wherein the house is situated in partition. But she has not led any evidence to support that contention and specific date or year of partition has not been told by her. Her another defence was that she herself has constructed the house i.e. the first room earlier and around the suit i.e. R.C.S. No. 37 of 1997, one more room from her earnings as agricultural labour. She has not led any positive evidence to prove this fact also. In her cross examination, she has categorically stated that she will not produce her bank account to prove that she had income of Rs.150/- per day and out of that, she has constructed the house. She has also contended that she has become owner of the property by virtue of Exhibit 118. However, if we consider that document, then it can be seen that it is on a stamp paper of Rs.05/- and it is not registered. It cannot be termed as sale deed or a document of transfer. There is no evidence on record to prove that the said property i.e. agricultural land is the ancestral property of Kondiba. Rather it is admitted by her, that it was self acquired property of Kondiba. Therefore, when he could have given

portion of the property, it would have been by a legal document either by way of sale deed or by will or gift deed. No such legal document is coming forward. She has come with a case, that she is residing in the room along with her son Pandurang for the last 25 years and it appears that the said fact is not much in dispute. But under which circumstances, she was put in possession of the said property i.e. room, is required to be considered.

14. Initially, Kondiba had come with a case, that he is the owner of the property, but Sheubai in order to grab the property by taking disadvantage of his old age, is trying to construct the house. In fact, at that time i.e. on the date of the suit filed by him, already the house was constructed and then in the year 2002, amendment was made in respect of new construction which is shown in parrot green colour in map Exhibit 95. It was rather pleaded that after the construction made in parrot green colour, she has forcibly taken possession of the room which is shown in red colour in the map Exhibit 95. The evidence has come that already she was in possession of the property and for that purpose, even there was earlier suit i.e. R.C.S. No.96 of 1994 and the said suit was withdrawn by Kondiba by filing a Pursis. Interestingly, Balasaheb was the Advocate who was representing Kondiba in that suit.

Definitely, he had ever knowledge about the fact about existence of the structure, so also, the fact that Sheubai is residing in that house. In spite of this fact, in the sale deed which has been executed by Kondiba in favour of Balasaheb, there is absolutely no mention about the house. Under this circumstance, it appears that the learned trial Court answered the issue no.04 in R.C.S. No.37 of 1997 in the negative. The said issue was, as to whether the plaintiff has forcibly taken possession of the northern side one room. This finding has been negatived by the first appellate Court by saying that Exhibit 118 agreement would show that Kondiba had allowed Sheubai to occupy the room, that means, the room shown in red colour and, therefore, it was held to be permissive possession and then it is stated that she is not entitled to continue the possession. Here, it appears that the learned first appellate Court has not considered a fact, that neither Kondiba nor Balasaheb had come with a case of permissive possession of Sheubai over the suit room shown in red colour in map Exhibit 95. Therefore, the question arises as to whether the first appellate Court was justified in inferring something which was not pleaded by a party. Therefore, to that extent, Second Appeal No.205 of 2018 deserves to be admitted. It will not be out of place to mention here, that in cross examination of

Sheubai, an admission has been extracted that her father had given permissive possession to her in respect of the room. In spite of this admission, it is required to be seen as to whether Balasaheb can use that admission because he himself had not come with a theory of permissive possession. A question asked beyond pleadings, though admitted, whether can be allowed to be utilized will have to be considered at the final hearing.

15. Now, as regards the other portion i.e. another room shown in parrot green colour, both the Courts have concurrently held that Sheubai had no authority to make any kind of construction. That appears to be a correct finding because Sheubai has not proved any title, interest or authority over that portion of land. She has also not come with a case that she had constructed that portion much prior to the suits. Under which authority she had undertaken that construction activity has not been explained by her categorically. As aforesaid, she has not proved the partition, as alleged. She has not proved that she has received title to the extent of half portion from said gut land by any legal means from Kondiba. Therefore, judgment and decree passed to that extent, especially her suit i.e. R.C.S. No. 89 of 1997 was restricted to that area which was later on got inspected and has been shown

by parrot green colour in the map, deserves to be confirmed. That decree is challenged in Second Appeal No. 165 of 2018. There is no application of Section 14 of Hindu Succession Act in this case as Sheubai has not come with a case that the suit property was given to her towards maintenance in any form or any limited right is given to her. Since the property was self acquired property of Kondiba, she could not have claimed it as of right. Therefore, the ratio laid down in *Eramma Vs. Verrupanna & others (supra)* and *Smt. G. Rama Vs. T.G. Seshagiri Rao (Dead) by L.Rs. (supra)*, relied by the respondent - Balasaheb are applicable here. The decision in *V. Tulasamma's case (supra)* was on a totally different line.

16. Taking into consideration the above said reasons, following order is passed :-

(A) Second Appeal No.165 of 2018 is disposed of as '**Not admitted**'.

(B) Second Appeal No.205 of 2018 is hereby **admitted** to the extent of delivery of vacant possession of the property shown in red colour in map Exhibit 95 i.e. northern side one room of the plaintiff, on the following substantial questions of law :-

(I) What was the nature of possession of

Sheubai over the northern side one room shown in red colour in map Exhibit 95 ?

(II) Whether the first appellate Court was justified in directing the defendant to deliver vacant possession of the said one room shown in red colour in map Exhibit 95 on the ground that Sheubai is in permissive possession; when it was not the case of Balasaheb in R.C.S. No.37 of 1997 ?

(III) Whether interference is required in the impugned judgment of the learned first appellate Court to the extent of the portion for which Second Appeal No.205 of 2018 is admitted ?

17. Learned Advocate on record Mr. V.S. Badakh waives service of notice on behalf of respondent no.02, upon admission of Second Appeal No.205 of 2018.

(Smt. Vibha Kankanwadi)
JUDGE

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