

Sonam/Santosh.

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 110 of 2008

WITH

MISC. CIVIL APPLICATION NO. 237 of 2017

1] Smt. Neeta Bhalchandra Kalghatgi [Deceased]
Wife of Bhalchandra Kalghatgi,
Major in age, housewife,
Residing at 25, Bhalchandra Nagar,
Tilakwadi, Belgaum, Karnataka State
Through Legal Representatives:

- 1A. Shri. Bhalchandra Shankarrao Kalghatgi,
Widower of late Neeta Bhalchandra Kalghati,
Major in age, married,
Residing at 25, Bhalchandra Nagar
Tilakwadi, Belgaum, Karnataka State.
- 1B. Smt. Arati Chandrashekar Shetye,
Daughter of late Neeta Bhalchandra Kalghatgi,
53 years of age, married and her husband:
- 1C. Shri. Chandrashekar Rajaram Shetye,
61 years of age, married.
Both residing at C/o Chandrashekar R. Shetye,
40-A Munjal Nagar, G. M. Road,
Eastern Express Highway,
Chembur, Mumbai, 400089.
- 1D. Smt. Madhavi Mahadeo Khadye,
Daughter of late Neeta Bhalchandra Kalghatgi,
51 years of age, married, and her husband:
- 1E. Shri. Mahadeo Vishram Khadye,
58 years of age, married
Both residing at 301 A,
"GOD'S Gift"1112/120,
N. M. Joshi Marg,
Lower Parel (West), Mumbai 400013.
- 1F. Shri. Mahesh Bhalchandra Kalghatgi,
Son of late Neeta Bhalchandra Kalghatgi,
48 years of age, married, and his wife;
- 1G. Smt. Rama Mahesh Kalghatgi,
46 years of age, married
Both residing at Plot No. 39, 45, 46, 47. Sector 3,
"Neel Residency", Flat No. A-201,
New Panvel, 410206, District Raigad.

- 1H. Shri. Dnyanesh Bhalchandra Kalghatgi,
Son of late Neeta Bhalchandra Kalghatgi,
43 years of age, married and his wife;
- 1I. Smt. Hema Dnyanesh Kalghatgi,
40 years of age, married,
Both residing at "SMRITI" 25, "C"
Scheme, Angol Extension,
Hindunagar, Tilakwadi, Belgaum,
Karnataka, 590006.
2. SMT. ASHWINI C. MADALI,
Wife of Mr. Chandrasekar Madali,
Major in age, housewife,
Residing at Kali Amraj, Behind Rex Talkies,
Belgaum, Karnataka State.
3. SMT. SHUBHALAXMI B. PHAYDE:(deceased)
4. B. PHYDE alias MAHESH N. PHAYDE
Major of age.
R/o M/s Narvekar & Co.
C/o Bombi Niwas, Margao, Goa.
5. SMT. MAYA S. POKLE,
Wife of Shrikant Pogle,
Major in age, housewife,
Residing at Alto Duler, Mapusa, Goa.
6. SHRI SHRIKANT alias SHRIKRISHNA T.POKLE,
Major in age,
Residing at Alto Duler, Mapusa, Goa.
7. SMT. DAYA N. SHETYE,
Wife of Nitin Shetye,
Major of age, married,
Resident of 'Neelchandra', Plot No.8,
Chowgulewadi, Mandoli Road,
Tilakwadi, Belgaum-590006.
- ... Appellants/
Original Def Nos. 1, 3, 5, 7 & 9

The Appellant Nos. 1, 2, 3, 4, 5 & 7 herein are represented
in this Appeal by their Power of Attorney Shri Shrikrishna
Pogle vide Power of Attorney dated 29/04/2003.

Versus

1. SHRI NILCONTA G. S. AMONKAR,
Major of age, married, Landlord and his wife,
2. SMT. PRABHAVATI NILCONTA AMONKAR,
Major of age, housewife,
Both residents of Curchorem, Goa.
- ...Respondents/
Original Plaintiffs

- 2a) Shri. Vallabh Nilkanth Amonkar,
Son of late Prabhavati Nilconta Amonkar,
Major of age, married, and his wife;
- 2b) Smt. Durga Vallabh Amonkar,
Major of age, married
Both residents of H. No. 413,
Landscape Pinto Park,
D.B. Road, Campal, Panaji, Goa. 403001.
- 2c) Shri. Gajanan Nilkanth Amonkar,
Son of late Prabhavati Nilconta Amonkar,
Major of age, married, and his wife
- 2d) Smt. Amita Gajanan Amonkar,
Major of age, married,
Both residents of Bungalow No. 59,
Sai Raj Park, Shantinagar,
Ponda, 403401.
- 2e) Shri Vivek Nikanth Amonkar,
Son of late Prabhavati Nilconta Amonkar,
Major of age, married, and his wife
- 2f) Smt. Pritam Vivek Amonkar,
Major of age, married,
Both residents of H. No. 366, "Betal Prasad",
Near Maruti Ghad, Curchorem, Goa.
- 2g) Smt. Vandana Shashikant Shanbhag,
Daughter of late Prabhavati Nilconta Amonkar,
Major of age, married, and her husband.
- 2h) Shri. Shashikant Rayappa Shanbhag,
Major of age, married;
Both residents of H. No. 501,
Tirupathi, Plot No. 32, Sector 19,
Nerul, Navi Mumbai 400706.
- 2i) Smt. Vanita Hiren Kerkar,
Daughter of late Prabhavati Nilconta Amonkar,
Major of age, married, and her husband.
- 2j) Shri. Hiren Subhash Kerkar,
Major of age, married,
Both residents of H. No. 201-202,
Royal Orchard Correia Complex,
Fatorda, Margao, Goa.
3. SHRI DURGANAND SAWARDEKAR,
Major of age, married, businessman,
R/o Curchorem, Goa.
4. SMT. SUSHILABAI D. SAWARDEKAR,
Major of age, married, housewife,

*Corrections carried
out as per order dated
28.03.2024 in MCA
732 of 2024(F)*

R/o Curchorem, Goa.

... Respondents/
Original Def. Nos. 11 & 12

- 4a. Shri Shailesh D. Sawardekar,
Major in age, and his wife,
- 4b. Smt. Rena Shailesh Sawardekar,
Major in age,
Both residents of Bepquegal,
Curchorem, Goa.
- 4c. Smt. Maya Shirwaikar,
Daughter of Durganand Sawardekar,
Major in age, and her husband.
- 4d. Dr. Shekhar D. Shirwaikar,
Major in age,
Both residents of Sevida Building,
7th lane, Miramar, Panaji, Goa.
5. SHRI BHALCHANDRA KALGHATGI,
Major in age, married,
Residing at 25, Bhalchandra
Nagar, Tilakwadi Belgaum,
Karnataka State.
[Deleted as per order dated 27/08/2015 passed in MCA 392/2015]
6. SHRI CHANDRASEKAR MADALI,
Major in age, married,
Residing at Kali Amraj, Behind Rex
Talkies, Belgaum, Karnataka State.
7. SHRI SHETYE alias NITIN SHETYE,
Major of age, married,
Resident of 'Neelchandra", Plot No.8,
Chowgulewadi, Mandoli Road.
Tilakwadi, Belgaum-59006.
8. SHRI. GAURISH PHAYDE,
Son of deceased Shubhalaxmi Phayde,
R/o. Brahmin Galli, Karwar – 585301, Karnataka.
9. SMT. GAYATRI YATIN GAWADE,
Daughter of deceased Shubhalaxmi Phayde,
Residing at Belgaum.
- Corrections carried out as
per order dated 28.03.2024 in
MCA 732 of 2024(F).
- ... Respondents/
Original Def. Nos. 2, 4, 6
- ... Respondents

Second Appeal No. 110 of 2008

Mr. Sudesh Usgaonkar with Ms. Marie Rosette Pereira, Advocates for the Appellants.

Mr. Sahish Mahambrey, Advocate for Respondent Nos. 2(e) and 2(f).

Miscellaneous Civil Application No. 237 of 2017.

Mr. Sahish Mahambrey, Advocate for Applicants.

Mr. Sudesh Usgaonkar with **Ms. Marie Rosette Pereira**, Advocates for the original Appellants.

Mr. Vallabh D. Pangam, Advocate for Respondent Nos. 2(c) and 2(d).

CORAM: VALMIKI SA MENEZES, J.

DATE : 10TH NOVEMBER, 2023.

ORAL JUDGMENT :

1. This Second Appeal impugns Judgment and Decree dated 24/07/2008 passed by the District Judge-I at Margao, Goa in Regular Civil Appeal 44/2007 and to Cross Objections No. 8/2005, whereby the Appeal of the Respondent Nos. 1 and 2 (original Plaintiffs No. 1 and 2) was allowed, partly decreeing Regular Civil Suit No. 35/1993 for partition and dismissing the Cross Objections of the original Defendant Nos. 1 to 10 whose counter claim for Decree of Permanent Injunction against the Plaintiffs from interfering with their possession of the suit property, was dismissed.

The Appellants No. 1 to 7 are respectively Defendant Nos. 1, 3, 5, 7, 8 and 9 in Regular Civil Suit No. 35/1993 before the Civil Judge, Junior Division at Sanguem, Defendant Nos. 1 to 10 having filed a common written statement and counter claim. Defendant Nos. 11 and 12 filed a separate written statement supporting Defendant Nos. 1 to 10 and have not seriously contested the proceedings. For the sake of convenience, the Appellants shall be

referred to as Defendants while the contesting Respondent Nos. 1 and 2 shall be referred to as Plaintiffs, in these proceedings.

2. The Appeal has been admitted on the following Substantial Question of Law:

“Whether the lease hold rights of the Appellants No. 1 to 10 (Defendant Nos. 1 to 10) in respect of the entire property surveyed under No. 86/15 was affected by the Deed of Sale dated 26/09/1969 conveying half the rights in the said part surveyed under No. 86/15 by Respondent Nos. 3 and 4 (Defendant Nos. 11 and 12) to the Appellants?”

3. THE FACTS:

The facts which are relevant to this Second Appeal, as are derived from the record and proceedings of the Courts below, are as under:

(a) Regular Civil Suit No. 35/1993 was instituted by the Plaintiffs for the following reliefs:

- A) That suit property surveyed under No. 85/7 and 86/15 be partitioned by metes and bounds by appointing an expert person/commissioner for division of individual shares of Plaintiffs and Defendant Nos. 1 to 12 in equal shares.
- AA) It be declared that Defendant Nos. 1 to 10 have ceased to be in sole possession of the suit property surveyed under no. 86/15 and that Plaintiffs are

sole and absolute owners in possession of half of the plot surveyed under No. 86/15 which is an independent unit allotted to the Plaintiffs in the partition and Defendant Nos. 1 to 10 have no right of whatsoever nature in the plot allotted to the plaintiffs.

- B) That by order in the nature of permanent injunction, Defendant Nos. 1 to 10, their agents, servants, etc. be restrained permanently from alienating or transferring any interest or right in the suit property till the disposal of present suit.
- C) That Defendant Nos. 13 and 14 be permanently restrained from interfering or continuing with the construction work in the suit property particularly surveyed under No. 86/15 in any manner whatsoever.
- D) That by mandatory injunction, Defendants be directed to remove all the construction or ore and restore the suit property in its original position.
- E) That the Defendant Nos. 1 to 10 be ordered and decreed to pay the sum of Rs. 1000/- (Rupees One Thousand Only) per day with effect from 01/07/1993 till they remove the ore from the suit property and demolish the illegal construction by restoring the land in its original position.

(b) This suit was instituted for partition by metes and bounds of the suit property under survey No. 85/7 and survey no. 86/15 in equal shares, to the Plaintiffs and to the Defendant Nos. 1 to 12 in equal shares. According to the pleadings in the plaint, the suit property comprises land situated in Sanguem taluka, originally described in the Land Registration Office at Quepem under No. 2260 and 4546 at Folio 48 of Book B-9 and Folio 183 of Book B-14, and described in Sanguem Revenue Office (Matriz Predial) under No. 317 and 318 respectively. The plaint claims the two survey holdings to be one piece of land forming the suit property.

(c) It was further pleaded in paragraph 7 of the plaint that the Plaintiffs were in absolute possession and enjoyment of the suit property along with its other co-owners. Though, it also stated that a part of the property under survey no. 85/7 towards the river side was leased to one Agencia Ultra Maritima by the co-owners. At paragraph 9 of the plaint, the Plaintiffs claim that the other part of the property surveyed under No. 86/15 was leased under benami transaction to one Karpe, which lease came to an end when one Narahari Narvekar negotiated with the Plaintiffs and the other co-owner Ramnath Sinai Savordekar, who purchased the Western half of the property by Agreement for Sale dated 26/04/1962; that this agreement did not materialise due to disputes which ultimately came to an end after this Court, in Appeal, directed the Plaintiffs to

refund the amount of Rs. 1,05,000/- to the Defendants. That in the mean time Ramnath Savordekar, owner of undivided half of the entire property, sold his half share of the Western half of the property to the said Narvekar by Deed of Sale dated 25/9/1969.

Thus, the plaintiffs claim that Ramnath Savordekar and Narvekar became co-owners of the suit property.

(d) In the written statement filed by Defendant Nos.1 to 10 they state that they have always been in enjoyment of the western half of the suit property under survey no.85/7 first as lessees, and after the purchase of the share of late Ramnath Savordekar, as its owners. However, in para 10 of the written statement, the defendants plead that they continue to be in possession of the western half of the suit property to the extent of 7500 sq. Metres leased to them by Narahari Sriram Narvekar through one Purushottam Karpe and they continue to be lessees of that part. The Defendants therefore set out a case that in so far as the portion of the western half of the suit property bearing Survey No.86/15, their leasehold rights subsist and have not been extinguished on the execution of the Deed of Sale by Ramnath Sanvordekar.

In para 13 of the written statement, the Defendants have averred that they continued in possession with the portion of the suit property leased to them under the lease deed dated 29/12/1952, and sub-lease dated 14/12/1961,

consequent to which they raised a counter-claim seeking a decree of permanent injunction to restrain the Plaintiffs from interfering with their possession of the western half of the suit property under Survey No.86/15.

(e) The plaintiffs filed a written statement to the counter-claim denying the fact that the Defendants continued in possession of the leased portion and claimed to be in possession of the entire suit property.

In the meanwhile, the said Narahari Narvekar filed Special Civil Suit No.34/1970 against the plaintiffs seeking specific performance of Agreement of Sale dated 26/4/1962 in so far as the refusal of the plaintiffs to execute a Deed of Sale in their favour. Under the same agreement, Ramnath Sinai Savordekar was co-owner to the extent of half share, had executed a Deed of Sale in favour of Narahari Narvekar.

In this suit, Narvekar pleaded that he was willing to pay the balance consideration on the agreed consideration of Rs.1,05,000/- an advance of Rs.42,000/- having already been paid to the Plaintiffs Nilkant Amonkar and his wife Prabhavati. In para 9 of that plaint, Narvekar pleaded that he continued in possession of the suit property under the Agreement dated 26/4/1962. This suit came to be decreed on 30/9/1985.

(f) In a First Appeal No.29/1986 filed by the plaintiffs before this Court, the suit of the Defendants, children of

Narvenkar was dismissed directing refund of the earnest money paid by Narvekar to the Plaintiffs herein. Whilst directing refund, this court held that Narvekar was not entitled to any interest since it was not in dispute that the property in question was in possession of the Defendants herein. There is a clear finding of this Court in First Appeal No.29/1986 that the Defendants continued in possession of the suit property despite refusal to grant specific performance of the Agreement for Sale in favour of the Defendants.

(g) In the present suit, issues were framed by the Trial Court, which are quoted below:

- 1) Whether the Plaintiffs prove that the Plaintiff is a co-owner in possession of the suit property surveyed under No. 86/15 and 85/7 along with the Defendants?
- 2) Whether the Plaintiffs prove that they are entitled to partition their suit property so as to separate their half share from the suit property and until then Defendant Nos. 1 to 10 are not entitled to create any third party interest in the suit property?
- 3) Whether the Defendant Nos. 1 to 10 proves that they are in possession of the entire property surveyed under No. 86/15?
- 4) What Relief? What Order?

The Plaintiff No. 1 initially deposed by partly recording his evidence in chief, after which he abandoned his evidence. Thereafter, his son Gajanan Amonkar, filed his Affidavit in Evidence and examined himself as PW1, as an Attorney of the Plaintiffs. He is the sole witness examined on behalf of the Plaintiffs. The Defendants have examined Durganand Savardekar and DW1 and Vishnu Salgaonkar as DW2.

(h) The Trial Court examined Lease Deed dated 29/12/1952 at Exhibit 86 colly concluding that the same was in respect of the Western half of both properties i.e. survey holdings. It also concluded that the rights under the Lease were assigned by Purushottam Corpo (Original lessee-Karpe) in favour of Narahari Narvekar by Deed of Sub-Lease dated 14/01/1991 (at Exhibit C-94 colly) and was subsisting and in operation, since there was no evidence on record to suggest that the Plaintiffs had terminated the Lease Deed by notice, in respect of the other half of the property under survey No. 86/15. The Trial Court rejected the Plaintiffs' contention that the lease hold right in favour of the Defendants got extinguished and terminated on the sale of half right of ownership, as the father of the Defendant No. 11 in survey no. 86/15, to Narahari Narvekar, since what was purchased was only an undivided share. Consequently, it held that though the Plaintiffs are co-owners of the suit property, they have failed to prove their entitlement to partition of the suit

property as Defendant Nos. 1 to 10 had established by evidence that they continue to be in possession of the suit property as lessees thereof.

The Trial Court also considered the Judgment dated 28/08/1987 of this Court in the Defendants suit for specific performance and concluded therefrom that the Defendants continued to enjoy possession of the leased area until the date of that Judgment. Accordingly, it is specifically held that since the Defendants are lessees in possession of the suit property, the Plaintiffs cannot interfere with their possession of the suit properties under survey no. 86/15; however, despite these findings, the Trial Court apart from dismissing the suit, also dismissed the Defendants counter claim for a Decree of Injunction.

(i) In the meanwhile, the Defendant Nos. 1 to 10 filed Regular Civil Suit 12/2002 before the Civil Judge, Junior Division at Sanguem against the Plaintiffs, seeking a Decree to declare the Plaintiffs as owners by adverse possession and/or by prescription of the suit property under survey No. 86/15 and for a permanent injunction against the Plaintiffs. In this suit the Defendants pleaded that they were lessees of the suit property; they also pleaded the fact that their suit for specific performance of the Agreement for Sale dated 26/04/1962 had been dismissed and this Decree was upheld by this Court in its Judgment dated 26/08/1987. The Defendants claim that despite the Plaintiffs' letter dated 28/12/1988 seeking

delivery of possession of the leased portion to them, the Defendants continued in possession of the property. The Civil Court dismissed this suit on 28/02/2011. In an Appeal (RCA 25/2012), by Judgment and Decree dated 28/11/2013, the District Court held that the Defendant Nos. 1 to 10 were lessees of the suit property and continued to be lessees until 26/08/1987 when their suit for specific performance was dismissed; as such, the Defendant Nos. 1 to 10 have also become co-owners of the suit property with the Plaintiffs to the extent of quarter share after execution of the Sale Deed dated 26/9/1969.

(j) The Decree of the Trial Court in the present suit was challenged before the District Court in Regular Civil Appeal No. 44/2007 which was disposed of by the impugned Judgment and Decree dated 24/07/2008, partly allowing the Appeal, and decreeing the suit by holding that the Plaintiffs were entitled for partition of the land under survey no. 86/15, by metes and bounds to separate possession of their half share. It also held that the Defendant Nos. 1 to 10 were entitled to separate possession of half share while the area falling in the Western half portion of the land surveyed under survey. no. 86/15 sold to Narahari Narvekar should be adjusted to the share of the Defendants. Cross objection of the Defendants to the extent that their counter claim was rejected and was dismissed.

The District Court held that the original Lease dated 29/12/1952 was not renewed and stood determined by

efflux of time, in terms of Section 111 of the Transfer of Property Act; it held that since Narahari Narvekar came into possession of the land under a Sub-Lease, illegally, the possession of the Defendant Nos. 1 to 10 as heirs of Narvekar cannot be said to be lawful. The District Court also holds that the Defendant Nos. 1 to 10 are in possession of the property as its lessees.

4. During the pendency of this Appeal, the Plaintiffs filed Miscellaneous Civil Application No. 237/2017 for production of additional documents. The additional documents sought to be produced are the Plaint in the Regular Civil Suit N. 12/2002 and the Judgment and Decree dated 28/11/2023 passed by the District Court in RCA No. 25/2012, which is referred to in the preceding paragraphs.

Both these documents are records of a Civil Court and there could be no objection to their production in this Appeal. Reading the contents of the documents, it is also revealed that they are in some way connected with the present proceedings. They would be relevant for the decision of the present Appeal, though, the question of whether the pleadings contained in Civil Suit 12/2002 and the findings rendered in Judgment in RCA 25/2012, would be a matter which I would consider while deciding the questions raised in the present Appeal. For the above reasons I allow Miscellaneous Civil Application No. 237/2017 and take on record the documents produced therein.

5. **SUBMISSIONS:**

(a) Learned Advocate Shri. Sudesh Usgaonkar for the Appellants / Defendant Nos. 1 to 10 submitted that the entire case of the Plaintiffs hinges upon them proving the contents of para 9 of the Plaint, that is the claim that the Lease Deed came to an end when Narahari Narvekar executed the Agreement for Sale dated 20/04/1962, he further submits that there is no pleading in the Plaint that this Deed of Lease / Sub Lease was terminated either by efflux of time or by any specific notice, and further, that the Plaintiffs would have to prove exclusive possession of the suit property, failing which the inference pleaded in para 23 and 24 of the Plaint cannot be sustained.

(b) It is further submitted that the original Plaintiffs did not step into the witness box and PW1, who was their son, not being a privy to any of the transactions, was not competent to depose as a witness. This Court having held in its Judgment dated 26/08/1987 in the proceedings filed by the Defendants for specific performance of the Agreement dated 28/04/1962 that the defendants continued in possession of the suit property as its lessees to the extent of the undivided rights / part of the plaintiffs and were therefore not entitled to interest on the earnest money to be refunded, the Appellate Court has committed an error in holding that the possession of the Defendants was not lawful. It was further submitted that the District Court has not given any findings on the question as to whether the Lease stood extinguished on execution of the Agreement of Sale and has in fact committed

a serious legal infirmity in holding that the possession of the Defendants cannot be said to be lawful. It was further submitted that this was not the case pleaded in para 9 of the plaint, wherein the Plaintiffs claim that the Defendants were in fact lessees of the property until the lease stood automatically terminated on the execution of the Agreement for Sale.

(c) The learned Advocate for the Appellants then submitted that in the facts pleaded in the present case, the doctrine of merger of interest of a lessee in a property on purchasing the lessor's interest therein, in terms of clause (d) of Section 111 of the Transfer of Property Act, 1882 does not apply. He submitted that in the facts of the present case, the Defendants have not acquired the Plaintiffs ownership right in the property and continued to be lessees qua the Plaintiffs share. Reliance was placed on the following Judgments:

- 1. *Pramod Kumar Jaiswal V/s Bibi Husn Banu* reported in (2005) 5 SCC 492.**
- 2. *T. Lakshmipathi V/s P. Nithyananda Reddy* reported in (2003) 5 SCC 150.**
- 3. *Kalawati Parmar V/s Sharad Dattatraya Tapray* reported in 2020 (1) Maharashtra Law Journal, page 518.**
- 4. *Madan Pal V/s Bashanti Kumar*, reported in AIR 1989 Calcutta 223.**

(d) Countering these submissions, learned Advocate Shri. Sahish Mahambrey first submits that the scope of a second appeal is limited to the substantial question of law framed by the Court, and as such, in the present case, the finding of fact given by the Appellate Court that the original Lease dated 29/12/1952 stood determined by the efflux of time in terms of Section 111 of the Transfer of Property Act, ought not be interfered with.

He submits that in terms of Section 111 (g) of the Transfer of Property Act, the Lease stood determined on signing of the Agreement for Sale dated 26/04/1962; he further submits that if it is held that the Lease Deed did not stand determined as on the date of signing of the Agreement, as pleaded in the para 9 of the plaint, it certainly stood determined as on 26/08/1987, when this Court, in its Judgment of that date held that the Defendants were only entitled to the refund of the earnest money paid on the agreement without interest. In the alternate, it was argued that the lease stood determined, the day the Defendants set up a case of adverse possession, as pleaded in Regular Civil Suit No. 12/2002, i.e. on 22/04/2002 when the plaint was instituted, since the plea of adverse possession implies that the Defendants were no more claiming possession as lessees.

(e) It was further submitted by the learned Advocate for the Plaintiffs that the Defendants, at para 8 of the Affidavit in Evidence of DW1 has admitted that they continued in possession of the leased area till the Judgment of the High

Court was passed on 28/08/1987, after which in reply to the Plaintiff's letter dated 28/12/1988 at Exhibit C-85 seeking possession of the property from the Defendants, the Defendants, by their reply dated 11/05/1990 claim adverse possession over the suit property. The learned Advocate submits that there is further admission in paras 10 and 11 of the affidavit that the Defendants were in possession and enjoyment of the property under survey no. 86/15, half by ownership through Sale Deed dated 26/09/1969 from Ramnath Savordekar and by adverse possession, to the other half. Thus, the Lease Deed clearly stood determined on the plea taken of adverse possession in plaint filed by the Defendants in Regular Civil Suit No. 12/2003.

(f) The learned Advocate for the Plaintiffs has placed reliance on the unreported Judgment dated 24/07/2023 of the Supreme Court in ***Gurbachan Singh V/s Gurcharan Singh*** passed in Civil Appeal No. 10556-10558 of 2010 to contend that the scope of a second appeal in determining a substantial question of law is very limited. He further placed reliance upon an unreported Judgment dated 19/07/2012 of the Supreme Court in ***Ahmedsaheb V/s Sayed Ismail*** passed in Civil Appeal No. 5316 to 5318 of 2012 to contend that the admission of a party in the proceedings either in the pleadings or in oral evidence is the best evidence and the same does not require further corroboration.

He then placed reliance on the Judgment of the Supreme Court in ***R. Kanthimathi V/s Beatrice Xavier***

reported in **AIR 2003 SC 4149** to submit that when a lessee enters into an Agreement of Sale of the leased property, a new relationship is created and the relationship of a landlord and a tenant comes to an end; he submits that the intention of the parties to give up the old relationship of landlord and a tenant and to create a new relationship as an owner can be understood from the terms of the Agreement of Sale. He further relied upon an unreported Judgment dated 30/10/2014 of the Nagpur Bench of this Court rendered in **Radheshyam Choube V/s A. S. Mogare** in second appeal No. 4/2002 to contend that in terms of Section 111(g) of the Transfer of Property Act, where an Agreement holder renounces his character as a Lessee and claims title to the property, the lease stands determined.

(g) Learned Advocate Shri. Vallabh D. Pangam for Respondent Nos. 4 and 5 (original Defendant No. 11 and 12, Savordekars), supporting the Plaintiffs submitted that in terms of Order 42 Rule 1 CPC, the Decree of the Courts below would continue to operate in relation to the portion of the suit property surveyed under survey no. 85/7 and to that extent could not be interfered with. He relied upon the Judgment dated 12/05/1961 of the Punjab and Haryana High Court in **Sant Ram V/s Daya Ram**, passed in Regular Second Appeal No. 1217 of 1959 to contend that every co-owner of a property is entitled to seek partition of the same, and in the present case the Decree for partition would operate in so far as the area under survey no. 85/7.

(h) In rejoinder learned Advocate Shri. Sudesh Usgaonkar for Defendant Nos. 1 to 10 submitted that in the Regular Civil Suit No. 12/2002, the Trial Court and the Appellate Court have by Judgment negated the Defendants contentions of claiming adverse possession over the property when they had earlier taken the plea as lessees of the same, and as such the Defendants were held in those proceedings to be lessees, based upon the plea taken in Regular Civil Suit No. 35/1993, the present suit. He has taken me through these specific findings in para 9 of the Judgment of the District Court in RCA No. 25/2012. He submits that the only question before the Trial Court was whether the Plaintiffs prove the contents of paras 9 and 10 of the Plaint, i.e. whether the plaintiffs prove that the lease stood determined on signing the Agreement for Sale. This question, according to the learned Advocate for the Defendants has not been answered by the Appellate Court in its Judgment, though the Trial Court has specifically held, on weighing the evidence and considering these documents that the Lease Deed subsists. He further contends that the provisions of Section 111 (g) of the Transfer of Property Act are required to be strictly construed and if read with the provision of Section 54 of that Act, the only exception to inferring that there was a transfer of property would be, when a stand is taken that the lease stood determined by the terms of a fresh contract of sale. He submits that in the present case possession of the Defendants continued in terms of the lease in their favor and it was not the Plaintiffs case that possession was given to the Defendants under the Agreement of Sale, so

as to create a new relationship of transferor and transferee under a sale.

CONSIDERATION OF SUBMISSIONS :

6. For the purpose of deciding the sole substantial question of law raised in this Appeal, the question could be addressed by splitting the same into two issues:

(a) Whether the execution of Agreement dated 26/04/1962 between the Plaintiffs and Ramnath Savordekar on the one hand and the Defendants (Narvekar) of the other part resulted in termination of the Lease dated 29/12/1952 and Sub -Lease dated 14/12/1961 (as pleaded in para 9 of the plaint)?

(b) Whether the suit for partition was maintainable if the lease was not terminated and was subsisting?

7. It is the case of the Plaintiffs in para 7 of the Plaint that the suit property is in absolute possession and enjoyment of the Plaintiffs along with other co-owners. Thus, to maintain a suit for partition by metes and bounds, it was incumbent upon the Plaintiffs to prove that they were in actual and physical possession of the suit property at the time the suit was instituted, and failing proof of this fact, the suit must fail.

8. In para 9 of the plaint, it was the Plaintiffs' case that the lease with Karpe dated 29/12/1952 and subsequent Sub-Lease dated 14/12/1961 by Karpe, with consent of the Plaintiffs in favour of Defendant Nos. 1 to 10 came to an end when Narahari Narvekar

entered into the Agreement for Sale dated 20/4/1962 with the Plaintiffs, in relation to the western half of the suit property. It is further the Plaintiffs' case in the Plaint that since this Agreement did not materialize, on the suit for specific performance of that agreement having failed before the High Court, by its Judgment dated 26/8/1987 having directed refund of the earnest money. According to the Plaintiffs, the lease having come to an end in this manner, the Defendant Nos. 1 to 10 are no more in possession of the suit property as Lessees, but have become co-owners of the suit property by virtue of having purchased the half undivided share of the ownership from Savordekar.

9. On considering the evidence, the Trial Court has returned a specific finding of fact that the Lease Deed dated 14/12/1961 had never been terminated by the Plaintiffs by giving a notice of termination to the Defendant Nos. 1 to 10. The finding, which is based upon the record of evidence led by the attorney of the original Plaintiffs, is recorded in paras 17 to 20 of the Judgment of the Trial Court wherein it holds that there is no evidence led by the Plaintiffs of the factum of termination of the Lease by giving a notice to the Defendants. On examining the Lease Deed and the Deed of Sub-Lease, the Trial Court has also returned a finding that the Lease was for the entire holding under Survey No.86/15 and what was purchased by Narahari Narvekar from Savordekar under Deed of Sale dated 25/09/1969 was the undivided share of ownership to the extent of Savordekar's half share in this property. The finding of the Trial Court that the Deed of Lease was not terminated by notice, by the Plaintiffs, cannot be faulted.

10. There is no statement made anywhere in the pleadings or evidence that the Lease Deed was terminated by a notice. Thus, it is not the Plaintiffs' case that the Lease was determined by a notice, but it is their case that the lease stood automatically terminated by execution of the Agreement for Sale dated 26/4/1962. The Plaintiffs would thus have to establish that the lease was terminated by the above act and would have to further establish by evidence, as to when they entered back into possession of the suit property on such termination. The pleadings of the Plaintiffs are silent on this aspect.

11. A perusal of the terms of the Agreement for Sale which is at Exhibit PW.2/A (Exhibit 86-Colly) nowhere state that the possession of the Defendants under the lease had come to an end. The document also does not put the Defendant Nos. 1 to 10 in possession of the suit property in part performance of the agreement for the consideration received. The agreement is therefore not accompanying with grant of possession or reflective of the intention of the parties to put the Defendant Nos. 1 to 10 in possession of the suit property in capacity of a purchaser and to end the relationship of lessor/lessee between the Plaintiffs and the Defendants under the Lease Deed of 14/12/1961. Clearly, therefore, the Defendant Nos. 1 to 10 continued in possession of the suit property after entering into the Agreement for Sale, but not as a vendor.

12. A perusal of the Judgment of this Court dated 26/8/1987 which arose from the suit for specific performance of the Agreement for Sale, clearly sets out at para 6 thereof that it was

not in dispute that the suit property was in possession of the Defendants. It was for that reason, that the High Court refused to grant payment of interest on directing return of the earnest money of Rs.1,05,000/- to the Plaintiffs. From this finding, it is clear that throughout the pendency of the suit for specific performance which was instituted in 1971 until Judgment dated 26/8/1987, the Defendant Narahari continued in possession of the suit property. It is pertinent to note that after the passing of the Judgment of the High Court on 26/8/1987, the Plaintiffs issued a notice dated 28/11/1988 which is at Exhibit 85 in evidence stating therein that the Plaintiff No.1 was interested to take possession of the suit property as soon as possible. In that notice, Plaintiff No.1 further calls upon the Defendants to let him know what steps would have to be taken for them to deliver possession of the suit property to him. He admits in the letter that the suit property was in possession and occupation of the Defendants.

13. From the above evidence, it is clear that the Plaintiffs were not in possession of the suit property as on 28/12/1988 when they gave notice requesting the return of possession. This fact has also been taken note of by the District Court in its Judgment dated 28/11/2013 in Regular Civil Appeal No.25/2012 at paras 25, 28 and 30 thereof, where it holds that the Defendants were lessees of the suit property i.e. southern half of the western half of survey No.86/15. There is, therefore, no doubt that the Defendants never ceased to be in possession of the suit property from the time they were put in possession of the same under Sub-Lease of 14/12/1961.

14. The question then, to be answered by the Courts below, was whether the possession of the Defendant (Narahari Narvekar) was attributable to the Deed of Sub-lease dated 14/12/1961 as a lessee, or whether his possession continued as a purchaser under Agreement for Sale dated 26/4/1962. The other question to be answered was whether the Agreement of Sale operated as a document reflecting the intention of the parties to terminate the lease and end their relationship as lessor/lessee and create a new relationship with Narahari as a purchaser of the suit property. In other words, it would be necessary to determine whether there was a merger of interests of the lessor and lessee under the lease causing its determination, and consequently whether the tenant had acquired a right to joint possession of the property as an owner. It would be advantageous to refer to the provisions of Section 111 of the Transfer of Property Act, 1882, which reads as under :

“111. Determination of lease.— A lease of immoveable property determines—

(a) by efflux of the time limited thereby;

(b) where such time is limited conditionally on the happening of some event—by the happening of such event;

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event;

(d) *in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;*

(e) *by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;*

(f) *by implied surrender;*

(g) *by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;*

(h) *on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.”*

15. It is the case and submission of the Plaintiffs that by virtue of the above quoted provisions, and more specifically clause (d) thereof, that by execution of the Agreement of Sale dated 26/9/1969 that the Defendants have lost the character of being a

lessee in relation to the Plaintiffs' half share of the suit property and assumed the character of a purchaser co-owner, consequently, the Lease stood terminated. Alternately, it was argued that letter dated 28/12/1988 at Exhibit C-85 by which the Plaintiffs called upon the Defendants, pursuant to judgment dated 26/8/1987 of this Court, to return possession of the suit property, operates as a notice of termination of the lease dated 14/12/1961.

As held in the preceding paragraphs, an examination of the terms of the Agreement for Sale dated 26/4/1962 reveals that the two sets of co-owners, Plaintiffs and Savordekar each agreed to sell their undivided right of ownership to the suit property for a consideration and undertake to effect a deed of sale within 15 days of the execution of the agreement. There is not a single reference made in the Agreement for Sale to the Lease Deed or the intention of the parties to terminate it or any covenant therein by which possession was continued with the Defendants as Purchasers or a part performance of the terms of the agreement of sale.

16. In *S. Kanthimathi* (supra), the Hon'ble Supreme Court was dealing with a case where the tenant/lessee requested the landlady owner to sell the disputed premises and executed an agreement for sale wherein they stipulated a change in their relationship as purchaser and seller. In the covenants of the agreement, it was agreed that non-payment of any of the installments of consideration of the Agreement of Sale, would automatically operate as cancellation of the agreement. In these facts, the Supreme Court, whilst considering the application under

the provisions of Section 111 of the Transfer of Property Act, states thus :

“ 5. Submission for the tenant is after entering into the agreement, the landlady accepted Rs. 20,000/-confirming delivery of possession in this context which clearly constitute clear intend of the landlady of entering into new relationship with the ten ant under it. On the other hand, learned Counsel for the respondent submits that the words "already been surrendered" therein, only refer to the existing possession of the tenant and nothing more. So far this sub mission for the respondent we have no hesitation to reject the same. The reference of the words "already been surrendered" has been incorporated with consciousness. This is to be construed in the background of landlady having received major amount of sale consideration and as normally, if substantial sum is received by the seller, the purchaser is put in possession of the property hence to fall in the same lines the said words were used to confirm of this possession in this context. There could be no other reason to record therein as such. Even if it be said to refer to the possession's as a tenant the reassertion in the agreement of sale is only for the purpose of denoting possession given in pursuance to this agreement of sale.

6. Any jural relationship between two persons could be created through agreement and similarly could be changed through agreement subject to the limitations under the law. Earlier when appellants were inducted into tenancy it only means both agreed that their relations is to be that of a landlord and tenant. Later when landlord decides to sell this property to the tenant and tenant agreed by entering into agreement they by their positive act changed their relationship as purchaser and seller. When seller-landlord accepts sum he actually acts under this agreement. This acceptance preceded by agreement of sale changes their relationship. This is how they intended. Once accepting such a change then their relationship of landlord tenant ceases.

7. This Court in Arjunlal Bhatt Mall Gothani v. Girish Chandra Dutta (1973) 2 SCC 197 held as under:

“The appellants were tenants in the premises of the respondent-landlord and three suits, including an eviction suit, were pending against them. By an agreement between the appellants and the respondent, the respondent agreed to sell the whole property to the appellants for a certain sum to be paid to him by equal instalments. Clause 5 of the agreement provided that in case of default of any instalment, the agreement for sale

would stand cancelled and if the purchasers failed to pay the defaulted instalments within one month's notice the payments made would stand forfeited and purchasers would make over possession of the property to the vendor."

"Under Clause (5) of the agreement the question of giving notice arises only if the vendor wanted to forfeit the instalments paid by the purchaser. Not even one instalment having been paid the question of forfeiture does arise and no notice was necessary for cancelling agreement. It stood automatically cancelled. It was sought to be argued before us that once the agreement stood cancelled the appellants stood restored to their original position as tenants and the suit could not be filed without giving notice under the Transfer of Property Act. We are of opinion that when the agreement, D/ June 7, 1959 was entered into the old relationship of landlord and tenant came to an end. The rights and liabilities of the parties have to be worked out on the basis of that agreement." (SCC p.119, para 5)

8. This decision clearly spells out that once there is agreement of sale between a land lord and a tenant, the old relationship as such comes to an end. It goes on to record that even after the cancellation of such agreement of sale the status of tenant is not restored as such. In other words, on the date of execution of the aforesaid agreement of sale their status as that of landlord and tenant changed into a new status as that of a purchaser and a seller."

17. In my considered opinion, the ratio laid down in **S. Kanthimathi** (supra), was on the basis of the specific agreement set out in that matter, where there were specific clauses in the Agreement for Sale by which a new relationship was created and the relationship of landlord and tenant stood specifically terminated. Such is not the case in the present Agreement for Sale, since there were no clauses in this agreement whereby one can infer any intention on the part of the parties to terminate the Lease

Agreement. Further, though in paragraphs 9 and 12 of the Complaint the Plaintiffs claim that the Lease Deed came to an end on executing the Agreement of Sale dated 26/4/1962, reading of Affidavit-in-Evidence of Gajanan Amonkar (Exhibit 70) on behalf of the Plaintiffs does not contain a single statement of the claim made in paras 9 and 12 of the complaint. In fact, the affidavit only states that since the father of Defendant No.11 sold his rights of half share in the suit property to Narvenkar, the suit property is now in possession of the heirs of Narvenkar and the Plaintiffs.

18. Further reading of the evidence of Gajanan Amonkar reveals that there is no statement made anywhere in the evidence that the Lease of 14/12/1961 terminated on signing of the Agreement for Sale dated 26/4/1962, and in fact, in para 16 of the Affidavit-in-Evidence, it is stated that the Plaintiffs took possession of their rights over the suit property somewhere in 1990 when the suit property was abandoned by Narvekar. This fact is not contained in the pleadings and is not supported by any evidence, documentary or otherwise suggestive of any acts of possession exercised by the Plaintiffs over the suit property.

The alternate argument now advanced by the Plaintiffs that termination of the Lease was done by notice dated 28/12/1988 is also not borne from the evidence on record. In fact, the notice dated 28/12/1988 at Exhibit 85 was produced in the cross-examination of the Plaintiff and not relied upon or any evidence in chief led on this document by the witness Gajanan Amonkar to claim that the lease was terminated by this document.

19. *Radhesham Chobey* (supra) relied upon by the Plaintiffs was a case wherein the suit premises was initially occupied by the Respondent in the case in the capacity of a tenant and subsequently, purchased by Agreement with the landlord by a registered Sale Deed. In the suit filed by the tenant wherein the ownership of the Plaintiff/subsequent purchaser-landlord was denied, on a claim that there was an earlier Agreement for Sale in their favour with the original landlord. It was in that context, relying upon the ratio laid down in ***R. Kanthimathi*** (supra), the Nagpur Bench of this Court applied the provisions of Section 111(g) of the Transfer of Property Act, and held that the Defendants having denied the title of a Plaintiff as landlord even prior to filing of the suit, the act amounted to a forfeiture of their tenancy rights in the premises. The Judgment in ***Radhysham*** (supra) was rendered in the specific facts of that case which are quite different from the facts of the present case and is clearly distinguishable.

20. *Pramod Kumar Jaiswal* (supra), was a case decided by the Supreme Court wherein the question raised was, the tenants having taken an assignment of rights of some of the co-owners, would the lease continue to operate and subsist with a relationship of landlord-tenant, between the remaining co-owners who had not assigned their ownership rights in the property. Answering this question, the Hon'ble Supreme Court holds thus:

“5. On the admitted facts and based on the arguments, the only question that requires to be considered is the effect of the purchase of the rights of certain co-owner landlords by the tenants of the building, on the lease originally taken by them and on the basis of

which they held the building. A lease in terms of Section 105 of the Transfer of Property Act gets determined on the happening of one of the events referred to in Section 111 of the Transfer of Property Act. The clause relevant for our purpose is admittedly clause (d). Insofar as it is relevant, the Section reads:

"111 Determination of lease a lease of immovable property determines-

(a)-(c)

(d) In case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right.

(e)-(g)"

On a plain reading of the provision, it is clear that in a case where a tenant takes an assignment of the rights of the landlord or the reversion, the lease is determined, only in a case where by such assignment, the interests of the lessee and the lessor in the whole of the property, become vested in the tenant. The emphasis in the Section is clearly on the coalescing of the entire rights of the lessor and the lessee in the whole of the property in the hands of the lessee. (emphasis supplied) The above provision incorporates the doctrine of merger at common law. According to Blackstone (as quoted in Broom's Legal Maxims):

"when a less estate and a greater estate, limited subsequent to it, coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated; or in the law phraseology, is said to be merged, that is sunk or drowned in the greater; or to express the same thing in other words, the greater estate is accelerated so as to become at once an estate in possession".

In Cheshire and Burn's Modern Law of Real Property, 16th Edition, it is stated,

"The term 'merger' means that, where a lesser and a greater estate in the same land come together and vest, without any intermediate estate, in the same person and in the same right,

the lesser is immediately annihilated by operation of law. It is said to be "merged", that is, sunk or drowned, in the greater estate."

It is further stated :-

"The essentials are that the estates shall unite in the same person without any intervening estate, and that the person in whom they unite shall hold them both in the same right."

To illustrate the first essential, if A, who is tenant for life, with remainder to B for life, remainder to C in fee, purchases and takes a conveyance of C's fee, the intervening life interest of B, since it is vested, excludes the possibility of merger." (see page 993)

In Megarry's Manual of the Law of Real Property, 8th Edition, it is explained as follows:-

"Merger is the counterpart of surrender. Under a surrender, the landlord acquires the lease, whereas merger is the consequence of the tenant retaining the lease and acquiring the reversion, or of a third party acquiring both lease and reversion. The principle is the same in both surrender and merger: the lease is absorbed by the reversion and destroyed.

For merger to be effective, the lease and the reversion must be vested in the same person in the same right with no vested estate intervening."

This is based on the principle that a man cannot be a lessee of himself. The House of Lords in Rye v. Rye [1962] A.C. 496 said that a person cannot grant himself a lease of the land of which he is the owner. According to the Woodfall on Landlord and Tenant.

"It may be laid down as a general rule that whenever the particular estate and that immediately in reversion are both legal or both equitable, and by any act or event subsequent to the creation of the particular estate become for the first time vested in one person in the same right, their separate existence will cease and a merger will take place."

An extinguishment of a tenancy by merger is thus a counterpart of surrender by the tenant to the landlord. In Puran Chand Vs. Kirpal Singh, (2001) 2 SCC 433, this Court stated that a landlord could not become his own tenant and "when a landlord transfers his rights in the leased property to his tenant there would be a merger of the rights of the tenant in his property to his higher rights as owner and the tenancy would come to an end under Section 111(d) of the Transfer of Property Act." (SSC P. 440, para 19)

22. Here in this case, the lessee has acquired only the rights of certain co- owner landlords and may have the right to work out his rights against the others. The right to work out his rights would not enable him to plead that the two rights in the whole of the property has come to vest in him. What is involved in the present case is the question whether on the acquisition of the rights of some of the co-owner landlords by the tenant, there is an extinguishment of the tenancy by merger as postulated by Section 111 (d) of the Transfer of Property Act. T. Lakshmi pathi answers that question and with respect, answers that question correctly.

23. A plain and grammatical interpretation of Section 111(d) of the Transfer of Property Act leaves no room for doubt that unless the interests of the lessee and that of the lessor in the whole of the property leased, become vested at the same time in one person in the same right, a determination of the lease cannot take place. On taking an assignment from some of the co-owner landlords, the interests of the lessee and the lessor in the whole of the property do not become vested at the same time in one person in the same right. Therefore, a lessee who has taken assignment of the rights of a co-owner lessor, cannot successfully raise the plea of determination of tenancy on the ground of merger of his lessee's estate in that of the estate of the landlord. It is, thus, clear that there is no substance in the contention of the learned counsel for the appellants that in the case on hand, it should have been held that the tenancy stood determined and the application of the landlord for a direction to the tenant to deposit the rent in arrears should have been dismissed. The position of the appellants as tenants continue and they are bound to comply with the

requirements of the Rent Control Act under which the order for deposit has been passed against them. The High Court has rightly dismissed the revision.

26. The decision of the two-Judge Bench of this Court in Indra Perfumery v. Moti Lal was not brought to the notice of the two-Judge Bench deciding Nalakath Sainuddin case; else the former decision would have certainly received consideration of the Court in the latter case. I propose to deal with these two cases.

28. If one were to agree with the principle so propounded, certain anomalous consequences will follow, as can be demonstrated. The facts of Indra Perfumery case show that M was the owner of the house which was let out in its entirety to T. T sub-let a part of the house to IP, the sub-tenant. IP purchased the interest of M, the owner, in the whole of the property and, therefore, IP stepped into the shoes of M. If M would have filed a suit for recovery of possession against T on determination of the latter's lease, then, in that suit T would have been impleaded as a defendant and IP could also have been joined as additional defendant being a sub-tenant in possession of a part of the tenanted premises. Whether IP was joined as a party to the suit or not, the estate vesting in IP being subordinate to the estate of T, in the execution of decree of eviction passed against T, M would have been entitled to evict T and IP both. Ever since the date of purchase by IP, M can neither determine the tenancy of T nor file a suit for eviction against him as he has lost the title in the property which title has come to vest in IP. The only person who can determine the tenancy and claim recovery of possession is IP inasmuch as the whole of the interest in whole of the property has come to vest in IP by purchase. Now, if IP were to file a suit for eviction against T, would IP, the plaintiff also join IP itself as an additional defendant? Or, would it be the requirement of law that IP, in its capacity as sub-tenant, must first deliver possession to T, the tenant and then, the tenant must deliver possession to IP itself in its capacity as owner? This is what will follow if we were to agree with the observation made by the learned Judges in Indra Perfumery case that, "the appellant is the owner of the house, it is also a tenant of a part of the house of which the respondent are tenants from Mohd. Shafi".

29. *The conclusion drawn in Indra Perfumery case would have been different if only the attention of the learned Judges would have been invited to Section 109 of the Transfer of Property Act and the doctrines of "statutory attornment" and of merger with all the ramifications. This was done in Nalakath Sainuddin case?. It has been clearly held on a detailed examination of all the relevant statutory provisions and the doctrine of merger:*

(i) that merger is founded on the principle that two estates – one larger and one smaller cannot - and need not - coexist, if the smaller estate can in equity, and must in law, sink or merge into the larger estate. One cannot be an owner and sub-lessee both at the same time. The smaller estate of sub-tenancy shall sink or drown into the larger estate of ownership as the two cannot coexist; (Nalakath Sainuddin case, SCC Pp. 14 & 15, paras 20 & 25)

(ii) that Section 109 of the TP Act does away with the need for consensual attornment. The attornment is brought about by operation of law. The limitation on the right of the landlord against splitting up of the integrity of the tenancy, inhering in the inhibitions of his own contract, does not visit the assignee of the part of the reversion. The severance of the reversion and the assignment of the part so severed do not need the consent of the tenant. (See - Mohar Singh v. Devi Charan15, SCC p. 66, para-7.)

30. *Ownership of the property which is the subject-matter of tenancy is certainly a larger estate than the tenancy itself and naturally larger than the sub-tenancy. If the sub-tenant acquires the entire interest of the owner in the whole of the estate forming the subject-matter of sub-tenancy, the sub-tenancy merges into ownership and the estate of the sub-tenant stands enlarged into that of a full owner. The sub-tenant cannot be the owner and the sub-tenant both at the same time. Of course, the situation would have been different if the sub-tenant would not have acquired the entire estate of the owner or the ownership interest in the entire estate forming subject-matter of sub-lease, as was the case in Badri*

Narain Jha v. Rameshwar Dayal Singh in Sk. Faqir Bakhsh v. Murli Dhar?

31. In the case of Nalakath Sainuddin the sub-tenant had acquired not a share only of the landlord owner's estate nor an ownership in only a part confined to sub-tenaney premises; what he had acquired under the deed dated 12-9-1988 was the full ownership in the entire premises The right of version, vesting in the erstwhile owners, had come to vest fully and entirely in the sub-tenant."

21. Thus, the ratio of ***Pramodkumar Jaiswal*** (supra) would clearly apply to the facts of the present case. Having held that the terms of the Agreement for Sale dated 26/4/1962, nor the evidence led by the parties on record, bears out a case that the terms of the Agreement intended to terminate the Lease, on execution of the same. In the present case, the Narhari Narvekar only purchased the half undivided right of Savordekar by Sale Deed dated 26/9/1969. Having failed to obtain specific performance of the Agreement dated 26/4/1962, as held by this Court in its Judgment dated 26/8/1987, the Defendants continued in possession of the suit property and were held not entitled to interests and the refund of the earnest money paid, due to the fact that they were in possession and enjoyment of the property. Clearly therefore, the leasehold rights of Narvekar under Lease Deed dated 14/12/1961 were never determined by the signing of the Agreement for Sale date 26/4/1962, nor was the Lease Deed determined by any notice given by the Plaintiffs under the Transfer of Property Act. The possession having continued with the Defendant Nos. 1 to 10, in relation to the suit property, to the exclusion of the Plaintiffs, under the Lease Deed dated

14/12/1961, a suit for partition would therefore be not maintainable.

22. This Court, in **Kalavati vs Sharad** reported in **2020(1) Mah. L.J. 519**, relying upon the principle contained in Section 111 of the Transfer of Property Act and the ratio laid down by the Supreme Court in **T. Lakshmipathi** (supra) and **Pramod Kumar Jaiswal** (supra), has held :

“45. Insofar as the judgments relied upon by Mr. Pethe, learned counsel appearing for the plaintiff in case of T. Lakshmipathi and others (supra) and in case of Pramod Kumar Jaiswal and others (supra) are concerned, it is held by the Supreme Court that where the party had acquired only partial ownership interest, the interests of the lessee and lessor in the whole of the property is not vested in such party at the same time and in the same right and there was no merger of such right in view of section 111(d) of the Transfer of Property Act, 1882. It is held that the merger takes place and the lease gets determined only if entire reversion or entire rights of landlord are assigned to or purchased by the tenant. On tenant taking assignment from only some of co-owner landlords, interests of lessee and lessor in whole of property do not become vested in one person.

46. A perusal of the averments made in the appeal memo filed by the defendant nos. 1(b) to 1(e) before the learned District Judge impugning the decree passed by the trial court and more particularly ground (N) clearly indicates that it was the specific ground raised by those defendants that those defendants had become 1/3rd owner in the suit property and as the owner, the relationship between the plaintiff and those defendants had changed and that in view of the same, no decree of eviction can be passed against those defendants. Similar grounds are raised by the defendant nos. 1(b) to 1(e) in ground (n) in this civil revision application. I am thus not inclined to accept the submission of the learned counsel for the defendant nos. 1(b) to 1(e) that his clients have not pleaded merger of tenancy right in the suit property with ownership rights in respect of the 1/3rd share of defendant no.2(a). The principles of law laid down by the Supreme Court in case of T. Lakshmipathi and others (supra), Pramod Kumar Jaiswal and others (supra) relied upon by Mr. Pethe, learned counsel for the

plaintiff would apply to the facts of this case. I am respectfully bound by the said judgment."

23. In ***T. Lakshmipathi*** (supra), the Hon'ble Supreme Court, considering the provisions of Section 111 of the Transfer of Property Act, and the common law doctrine of merger of rights held, thus:

"12. The first question which arises for decision is whether the appellants are absolved of their obligation of delivering possession over the suit premises to the landlord-respondent No.1 because the tenancy rights in the suit premises held by respondents No.2 and 3 and transferred by them to the appellants have merged in the ownership entailing determination of tenancy. The learned senior counsel for the appellants has placed strong reliance on the doctrine of merger.

13. Law Lexicon (P. Ramanatha Aiyar, Second Edition, 1997) defines "merger" as the

"destruction or 'drowning' by operation of law of the less in the greater of two estates coming together and vesting without any intervening estate in one and the same person in the same right. 'Whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or in the law phrase is said to be merged that is, sunk or drowned in the greater (2 Black. Com.177; Tomlins Law Dictionary)."

According to Foa (General Law of Landlord and Tenant, Eighth Edition, p.642),

"a lease may be determined by merger. A merger takes place where a tenant acquires the immediate reversion: for when a greater estate and a less coincide in the same person without any intermediate estate, the less is said to be merged in the greater. . . . For merger, however, to take place, the two interests must come to one and the same person in one and the same right."

14. The common law doctrine of merger is statutorily embodied in Transfer of Property Act, 1882. Section 111 (d) provides:-

"111. Determination of lease. __ A lease of immovable property determines-----

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;

A bare reading of the doctrine of merger, as statutorily recognized in India, contemplates (i) coalescence of the interest of the lessee and the interest of the lessor (ii) in the whole of the property (iii) at the same time (iv) in one person (v) in the same right. There must be a complete union of the whole interests of the lessor and the lessee so as to enable the lesser interest of the lessee sinking into the larger interest of the lessor in the reversion.

18. In the case at hand, it cannot be denied, nor has it been denied, that the appellants herein are not purchasers of the entire ownership interest in the property. What they have purchased is interest of some out of all the co-owners of the property. The interest of the respondent No.1, whatever be its extent, has not come to vest in the appellants. The appellants have also acquired the tenancy rights in the property. Thus they have acquired partial ownership and full tenancy rights. It cannot be said that the interests of the lessee and the lessor in the whole of the property have become vested in the appellants at the same time and in the same right. The lease cannot be said to have been determined by merger. So long as the interests of the lessee, the lesser estate and of the owner, the larger estate do not come to coalesce in full either the water of larger estate is not deep enough to enable annihilation or the body of lesser interest does not sink or drown fully. (Emphasis supplied)

24. Applying the common law doctrine of merger of interest stated above, which is further reinforced in the judgments of **Radhesham Chobey** (supra), **Pramodkumar Jaiswal** (supra), **Kalavati** (supra) and **T. Lakshmi pathi** (supra) to the facts of the present case, the Defendants 1 to 10, whose predecessor Narvekar had purchased only 50% of the undivided share in the property, continued to have an interest in the suit property as a lessee in relation to the

Plaintiffs, and thus, there was no merger of interest as a lessee with that as a purchaser. As discussed above, from the evidence on record and from the reading of various clauses of the Agreement for Sale dated 26/4/1962, there was no intention set out in any document or even demonstrated in conduct of the parties for the agreement to operate as a termination or determination of the Lease dated 14/12/1961. This, coupled with the specific findings of this Court in its Judgment dated 26/8/1987 that the Defendants continued in possession of the suit property throughout the suit for specific performance, which fact is acknowledged in the Notice dated 28/12/1998 at Exhibit 85, and further finding recorded by the District Court at para 30 of its Judgment dated 28/11/2013 in Regular Civil Appeal No.25/2012 holding that with respect to the southern half of survey No.86/15 (suit property) the Defendants continued to be Lessees till 26/8/1987.

In that view of the matter, I hold that the execution of Agreement dated 20/4/1962 between the Plaintiffs and Ramnath Savordekar on one hand, and the Defendant (Narvekar) on the other hand did not result in termination of the Lease dated 29/12/1952 and Sub-Lease dated 14/12/1961 as pleaded by the Plaintiffs in para 9 of the plaint. Consequently, as the Defendants No.1 to 10 continued to have a subsisting lease with respect to the Plaintiffs' share in the suit property, and they being in possession of the suit property since 29/12/1952, to the

exclusion of the Plaintiffs, the Plaintiffs are not entitled to maintain their suit for partition. Thus, the relief sought in prayer clauses (A) and (AA) of the Plaint requires to be rejected. Prayer clauses (B) to (E) being consequential reliefs, will have to be also rejected.

25. Perusal of the judgment of the Appellate Court would reveal that the findings rendered in paragraphs 27 and 28 that the original Lease of 29/12/1952 itself was not renewed and stood determined by efflux of time in terms of Section 111 of the Transfer of Property Act, was totally uncalled for, as this was not a case pleaded by the parties nor was it an issue before the Courts below. The Plaint itself proceeded on the premise that the Lease Deed and the Sub-Lease of 14/12/1961 stood determined on the execution of Agreement for Sale dated 26/4/1962. Thus, this finding was uncalled for in the light of the pleadings and case set up by the Plaintiffs. Further, having held at para 28 of its Judgment that Narhari Narvekar was in possession of the suit property as a lessee, the District Court has clearly erred in then holding that the co-owner Ramnath Savordekar had no right to sell a specific portion of the suit property without getting the same partitioned. This again, was not a case pleaded by the Plaintiffs.

26. A further perusal of the Judgment of the District Court reveals that there is no assessment of evidence on the question of whether the execution of the Agreement dated 26/4/1962 would result in the determination/termination of

the Lease and Sub-Lease dated 14/12/1961. In fact, no finding is rendered on this question, which was the main issue raised by the Plaintiffs whilst pleading in para 9 of the plaint. For all the above reasons, the impugned Judgment and Decree dated 24/7/2008 partly decreeing Regular Civil Suit No.35/1993 and dismissing Cross Objections No.8/2008, is required to be quashed and set aside. Consequently, the Judgment and Decree dated 26/4/2007 of the Civil Court, in Regular Civil Suit No.35/1993 to the extent that it has dismissed the suit for partition and other reliefs, is required to be upheld.

27. However, the question that remains to be answered is whether the decree of the Trial Court, to the extent that it has dismissed the Counter-Claim of the Defendants No.1 to 10 for a decree of permanent injunction against the Plaintiffs from interfering with their possession of the western half of the suit property under Survey No.86/15, can be sustained.

At para 25 of the Judgment of the Civil Court, it has rightly held that the Plaintiffs have failed to prove that the Lease Deed had been terminated and that Defendants No.1 to 10 have ceased to be in possession of the suit property under Survey No.86/15. It has further held, after considering the evidence of witness DW.1 and the terms of the Lease Deed and the Agreement for Sale that Narahari Narvekar continued to be in possession of the leased area till the judgment of this Court was passed on 28/8/1987 and thereafter. On facts, it has examined the Lease Deed and the

Agreement for Sale and has rightly concluded that Defendants No.1 to 10 are Lessees from the time they were put in possession of the suit property, further holding that the Plaintiffs cannot interfere with the possession of the Defendants 1 to 10 as Lessees or co-owners of the suit property. Consequently, it held issue no.3, which was whether Defendants No.1 to 10 were in possession of the entire suit property, in the affirmative and in favour of the Defendants. Having rendered the above findings, the Civil Court had no option, but to grant the relief of permanent injunction in favour of Defendants No.1 to 10, but instead committed an error by dismissing the counter-claim. For reasons recorded therein, to the extent that the trial Court has dismissed the counter-claim of the Defendants No.1 to 10, its decree dated 26/4/2007 is required to be set aside and the relief in prayer clause (A) of the counter-claim will have to be granted.

CONCLUSIONS :

28. For the reasons contained in the preceding paragraphs, I answer the sole substantial question of law formulated by order dated 21/9/2011 in favour of the Appellants; I hold that the leasehold rights of the Appellants (Defendant Nos. 1 to 10) in respect of the entire property surveyed under No. 86/15 are not affected by the execution of the Deed of Sale dated 26/09/1969 conveying half the rights in the said part surveyed under No. 86/15 by Respondent Nos. 3 and 4 (Defendant Nos. 11 and 12) to the

Appellants or determined by the execution of the Agreement of Sale dated 26/4/1962.

Further, for the reasons stated above, I hold that the leasehold rights in favour of the Appellants under Lease Deed dated 29/12/1952 and Sub-Lease dated 14/12/1961 do not stand terminated/extinguished or come to an end on the execution of the Agreement for Sale dated 20/4/1962 and such Leasehold rights continue to subsist in favour of the Appellant against the Plaintiffs in the suit (Respondent No.1, 2(a) to 2(j) herein).

29. Consequently, the Appeal is allowed. The Judgment and Decree dated 24/7/2008 passed by the District Court, South Goa, Margao in Regular Civil Appeal No.44/2007 and Cross-objection No.8/2008, and Decree in Regular Civil Suit No.35/1993 to the extent that it dismisses the Counter-Claim of the Appellants is quashed and set aside.

Regular Civil Suit No.35/1993 before the Civil Judge, Junior Division, Sanguem stands dismissed.

The Counter-Claim of Defendants No.1 to 10 in Regular Civil Suit No.35/1993 stands decreed.

The Plaintiffs are hereby restrained from interfering with the possession of the Defendants No.1 to 10 or from disturbing/stacking/screening or washing of the mineral ore and from transportation of the same to and from the western half of the suit property under Survey No.86/15 or from obstructing their access leading to the western half in any manner whatsoever.

The interim order dated 21/9/2011 in Civil Application No. 302 / 2008, shall stand discharged.

Decree shall be drawn up in these terms. No costs.

VALMIKI SA MENEZES, J.

SANTOSH SHRIDHAR
MHAMAL

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