



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.312 OF 2022**

1. Nazir S/o. Pachumiya Sayyad,
Age 65 years, Occu. Nil
2. Shabbir S/o. Pachumiya Sayyad,
Age 60 years, Occu. Agri.
3. Akbar S/o. Pachumiya Sayyad,
Age 48 years, Occu. Agri.
Appellant no.2 is holding power of Attorney
of appellants no. 1 and 3
All R/o. Shivaji Nagar, Latur,
Dist. Latur Killari Pati, Tq. Ausa, Dist. Latur
At present Adgaon Tq. & Dist. Latur.

..Appellants
(Orig. Plaintiffs)

Versus

1. Sultana W/o. Ahmad Take,
Age Major, Occu. H. H.
R/o. Shivaji Chowk, Latur, Dist. Latur.
2. Manik S/o. Mahadeo Thorat (Dead)
Through his Legal Representatives
- 2/1. Shashikant S/o. Manikrao Thorat,
Age Major, Occu. Agri.,
- 2/2. Arun S/o. Manikrao Thorat,
Age 70 years, Occu. Agri.,
- 2/3. Sow. Vijay W/o. Shankarrao Konthibire,
Age Major, Occu. Agri.,
- 2/4. Sow. Chhaya W/o. Ramesh Konthibire,
Age Major, Occu. H.H.
All R/o. Shivral, Tq. Akkalkot, Dist. Solapur.
- 2/5. Sow. Chandrakala W/o. Venkatrao Bedre,
Age Major, Occu. H.H.,
R/o Mitra Nagar near Post Office
Tq and District. Latur.
3. Wahedabee Ajijmiya Take,
Age 68 years, Occu. H.H.,
4. Shaikh Shakil Ajij Ahmad Take,
Age 55 years, Occu. Business,

5. Shaikh Allading Ajij Ahmad Take,
Age 55 years, Occu. Business,
 6. Shaikh Sallaudin Ajij Ahmad Take,
Age 50 years, Occu. Business,
All R/o. Shivaji Nagar, Latur.
 7. Mariyambee Yasin Take (Dead-Abated)
 8. Salar Yasin Take,
Age 55 years, Occu. Business,
 9. Siddiq Yasin Take (Dead-Abated)
 10. Jahedabee Tahermiya Take,
Age 55 years, Occu. H.H.,
 11. Rais Salar Take,
Age 55 years, Occu. Business,
All R/o. Tele Galli, Latur, Dist. Latur.
 12. Chief Officer,
The Municipal Council, Latur.
- ..Respondents
(Original Defendants)

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Mr. M. L. Dharashive, Advocate for the Appellants.

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CORAM : S. G. CHAPALGAONKAR, J.
DATE : 14th NOVEMBER, 2024.

ORDER:-

1. The appellants / original plaintiffs are aggrieved by the judgment and decree dated 21.03.2020, passed by District Judge-4, Latur, in Regular Civil Appeal No.30/2016, thereby confirming judgment and decree dated 14.10.2015 passed by the Extra Joint Civil Judge, Senior Division, Latur in Regular Civil Suit No.259/2002. (Hereinafter, parties are referred as per their original status for the purpose of convenience and brevity).

2. Mr. Dharashive, learned Advocate appearing for the appellants restricted his submissions to challenge impugned judgment to the extent of finding recorded on point no.3 by the Appellate Court. He would submit that Trial Court had framed issues as regards to the bar under Section 11 of the Code of Civil Procedure (principle of res-judicata) to the present suit and recorded negative findings holding that decision in Regular Civil Suit No.613/1984 in respect of suit property does not operate as res-judicata in present suit. However, the Appellate Court while entertaining cross-objection filed by respondent no.2/5, reversed the findings recorded by the Trial Court.

3. Mr. Dharashive submits that Regular Civil Suit No.613/1984 was filed by the plaintiffs father, seeking specific performance of contract as regards to suit property, in pursuance to agreement of sale dated 25.03.1962, alternatively, for the relief of declaration of ownership by way of adverse possession over the property. The said suit was dismissed on 21.10.1991. The present plaintiffs had preferred appeal vide Regular Civil Appeal No.197/1991 before the District Court, which has been dismissed. Mr Dharashive submits that present suit is based on fresh cause of action dated 09.06.2002, when defendants attempted to dispossess plaintiffs from suit property and also gave threat to alienate the same. He would, therefore, urge that finding recorded by the Appellate Court

against point no.3 is perverse and liable to be quashed and set aside.

4. Although Mr. Dharashive restricted his submissions on aforesaid point, looking to numerous grounds formulated in appeal memo raising challenge to the concurrent judgments and decree, some factual aspect needs to be considered.

5. In nutshell the plaintiffs approached Civil Court at Latur vide Regular Civil Suit No.259/2002 claiming relief of perpetual injunction in respect of suit property and also claimed relief against defendant no.2 to remove construction raised on first and ground floor. The contention of the plaintiffs is that Municipal House No.8/2003 is part of survey no.193 situated at Shivaji Chowk, Latur. The plaintiffs' father Pachumiya purchased the said property. He was put into possession in pursuance to agreement to sale of the year 1962 executed by Yasin Take, who was Power of Attorney holder for Ahmad Take and others (original owners). Pachumiya continued in possession of the property till his death. The plaintiffs are in enjoyment of property after death of Pachumiya for last 40 years. The agreement to sale is not in existence. However, record indicates acquisition of some portion of land for I.T.I., wherein name of Pachumiya is shown as possessor. Similarly, in acquisition made by the Municipal Council, Latur for

construction of road, the name of Pachumiya is recorded as person in possession. The defendant no.1 is grand-daughter of Ahmad Take, who had executed Power of Attorney in favour of Yasin Take in respect of suit property.

6. Pachumiya had filed Regular Civil Suit No.613/1984 for specific performance of contract based on agreement to sale of the year 1962. However, said suit was dismissed. Similarly, husband of defendant no.1 had filed Regular Civil Suit No.709/1984 against Pachumiya for injunction. The same has been dismissed. The plaintiffs have constructed temporary shed over the suit property and some tenants were inducted by them. However, thereafter property is in possession of the plaintiffs.

7. The defendant no.2 got executed registered sale deed dated 24.06.2002 from defendant nos.1 and 3 to 6. Such sale deeds are not binding on rights of the plaintiffs. The defendant no.2 has now raised some construction on Northern side of the suit property, which needs to be demolished.

8. The contentions in plaint have been refuted by defendant no.2 by filing written statement. He denied adverse contentions and pleaded that suit is barred by principles of res-judicata, as suit filed by plaintiffs' father Pachumiya has been dismissed, which was

based on alleged agreement to sale of the year 1962. The plaintiffs have no independent right in the suit property.

9. The Trial Court framed the issues alongwith issue no.3 as regards to bar under Section 11 of the Code of Civil Procedure along with other issues and recorded finding that plaintiffs failed to prove ownership and possession. Consequently, dismissed the suit. However, findings against point no.3 as regards to the res-judicata was recorded in favour of plaintiffs holding that suit is not barred by principle of res-judicata.

10. The plaintiffs assailed dismissal of suit before First Appellate Court vide Regular Civil Appel No.30/2016. The Appellate Court concurred with the findings recorded by the Trial Court. Further, in cross-objection filed by respondent no.2/5, reversed findings as to res-judicata holding that present suit is barred in view of the judgment and decree in Regular Civil Suit No.613/1984 filed by the plaintiffs' father.

11. Both the Courts on appreciation of evidence concluded that plaintiffs could not produce agreement to sale of the year 1962 executed in favour of their father. The previous Suit No.613/1984 seeking specific performance of contract instituted by plaintiffs' father has been dismissed. In the same suit plaintiffs father had claimed relief of declaration of ownership over suit property and

title by adverse possession. The same was negated. The plaintiffs unsuccessfully carried assailed dismissal of suit before First Appellate Court vide Regular Civil Appeal No.197/1991, which has been dismissed. In present suit, plaintiffs have reiterated their claim based on agreement to sale of the year 1962, which has been already dealt and concluded in previous suit i.e. Regular Civil Suit No.613/1984. The subject matter of both the Suits as well as foundation of claim is one and the same. The present Suit simply attempts to make out fresh cause of action based on alleged disturbance and interference at the hands of defendants. Looking to the nature of pleadings in previous suit i.e. Regular Civil Suit No.613/1984 and present suit i.e. Regular Civil Suit No.259/2002, there can be no doubt that issues involved in previous suit are directly and substantially reiterated in present suit. Therefore, finding recorded by the Appellant Court against point no.3, thereby reversing findings of the Trial Court on issue of res-judicata cannot be faulted. Even otherwise in light of finding on other issues plaintiff has no case therefore finding on issue of res-judicata would not have bearing on substantive claim of plaintiffs as long as concurrent negative finding recorded on issue of plaintiffs possession remains undisturbed.

12. Since both the Courts have concurrently held that plaintiffs could not establish their possession over the suit property or

obstruction at the hands of defendants, so also no perversity in finding of facts so recorded is brought to notice of this court, no substantial question of law arises for consideration in present second appeal. Consequently, Second Appeal stands dismissed.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/November-2024