



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

SECOND APPEAL NO. 89 OF 2005

Bhalchandra S/o Shrikisan Joshi,
Since deceased through legal heirs,

- A) Smt. Kamal Bhalchandra Joshi,
Age 79 yrs, Occ. Household,
R/o Lane No.5, House No.2710/A,
Near Tulja Bhavani Mandir,
Dhule Tal & Dist. Dhule. 424001.
- B) Mrs. Saroj Shrinivas Vyas,
Age 53 yrs, Occ. Household,
Shri Niketa, Shri Balaji Nagar,
Near Venkari Layout, Yadgir,
Tal. Yadgir, Dist. Gulbarga.
Pin code 585201
R/o Mahindale, Tal & Dist. Dhule.
- C) Mrs. Sharda Manoj Sharma,
Age 51 yrs, Occ. Household,
R/o near Gurudwara, Naya Mohalla,
Malkapur, Tal. Malkapur,
Dist. Buldhana.
- D) Prashant Bhalchandra Joshi,
Age 49, Occ. Business,
R/o 703/A, Cosmos Heritage,
Manpada, Thane,
Dist. Thane.
- E) Vijay Bhalchandra Joshi (predeceased son)
Through his legal Heirs,
- E-1) Padma Vijay Joshi,
Age 50 yrs., Occ. Household,
R/o Lane No 5, House No 2710/A,
Near Tulja Bhavani Mandir,
Dhule, Tal. & Dist. Dhule.
- E-2) Amit Vijay Joshi,
Age 26 yrs., Occ. Student,

E-3) Sumit Vijay Joshi,
Age 23 yrs., Occ. Student,

(E-2 & E-3) R/o 703/A,
Cosmos Heritage, Manpada,
Thane, 1, Dist. Thane.

... **Appellants.**

Versus

Omprakash Shrikisan Joshi,
Age : 50 Years, Occu. : Nil,
R/o Shakuntala Niwas,
Badkes Plot Behind Rajwade Nagar,
Chalisgaon road, Dhule.

... **Respondent.**

...
Advocate for Appellant/s : Mr. V. C. Solshe h/f Mr. M. H. Patil.
Advocate for Respondent : Mr. S. M. Kulkarni.
...

WITH

SECOND APPEAL NO. 1734 OF 2004

Omprakash Shrikisan Joshi,
Age : 45 Years, Occu. : Nil,
R/o Rajwade Nagar,
Chalisgaon road, Dhule.

... **Appellant.**

Versus

Bhalchandra S/o Shrikisan Joshi,
Since deceased through legal heirs,

A) Smt. Kamal Bhalchandra Joshi,
Age 79 yrs, Occ. Household,
R/o Lane No.5, House No.2710/A,
Near Tulja Bhavani Mandir,
Dhule Tal & Dist. Dhule. 424001.

B) Mrs. Saroj Shrinivas Vyas,
Age 53 yrs, Occ. Household,
“Shri Niketa”, Balaji Nagar,
Near Venkari Layout, Yadgir,
Tal. Yadgir, Dist. Gulbarga.
Pin code 585201.

- C) Mrs. Sharda Manoj Sharma,
Age 51 yrs, Occ. Household,
R/o near Gurudwara, Naya Mohalla,
Malkapur, Tal. Malkapur,
Dist. Buldhana.
- D) Prashant Bhalchandra Joshi,
Age 49, Occ. Business,
R/o 703/A, Cosmos Heritage,
Manpada, Thane,
Dist. Thane.
- E) Vijay Bhalchandra Joshi (predeceased son)
Through his legal Heirs,
- E-1) Padma Vijay Joshi,
Age 50 yrs., Occ. Household,
R/o Lane No 5, House No 2710/A,
Near Tulja Bhavani Mandir,
Dhule, Tal. & Dist. Dhule.
- E-2) Amit Vijay Joshi,
Age 26 yrs., Occ. Student,
- E-3) Sumit Vijay Joshi,
Age 23 yrs., Occ. Student,
- E-2 & E-3 R/o 703/A,
Cosmos Heritage, Manpada,
Thane (West), Dist. Thane. ... Respondent/s.

...

Advocate for Appellant : Mr. S. M. Kulkarni.
Advocate for Respondent/s : Mr. V. C. Solshe h/f Mr. M. H.
Patil.

...

CORAM : SHAILESH P. BRAHME, J.
DATE : 17.11.2025

ORAL JUDGMENT :-

1. Heard both sides finally.

2. Both appeals are emanating from judgment and decree passed in Regular Civil Suit No.295 of 1996 preferred by appellant in Second Appeal No.89 of 2005 for perpetual injunction. The suit was decreed by the Trial Court and the defendant preferred Regular Civil Appeal No.78 of 1999. By impugned judgment and decree, appeal was allowed reversing the decree. Second Appeal No.1734 of 2004 has been preferred by the defendant being aggrieved by findings recorded by Lower Appellate Court against him, albeit the decisions was in his favour.

3. Both appeals were admitted vide order dated 17.03.2009 on following substantial questions of law :

“In Second Appeal No.1734 of 2004

(i) Whether the suit, in the form as it was filed, was tenable ?

(ii) Whether the Courts below were right in holding that the property is joint and not the self-acquired in the light of evidence of the appellant where the appellant states that it is his self acquired property ?

In Second Appeal No.89 of 2005

(i) Whether the first appellate court has exercised powers under Order 41, Rule 33 of the Civil Procedure Code in its proper perspective ?

(ii) *Whether the first appellate court could refuse the relief of perpetual injunction, holding the joint possession of the parties ?”*

4. For the sake of convenience, the parties shall be referred to by their original status in the suit and the paper book of Second Appeal No.89 of 2005 is preferred.

5. Second Appeal No.1734 of 2004 has not been preferred challenging any decree or part of the decree. No appeal would lie against findings and the observations. Appeal lies against the decree which is a trite law. The findings which are against the defendant can be challenged and can be dealt with under Order 41 Rule 22 of CPC, for that purpose neither any cross appeal or cross objection is required to be filed.

6. In view of the settled legal position as per law laid down in *S. Nazeer Ahmed Vs. State Bank of Mysore and others ; AIR 2007 SC 989*, *Banarasi and others Vs. Ram Phal ; AIR 2003 SC 1989*, *Musaji Mohamadali Master and sons and others Vs. Gulamali Dadabhai Amreliwala and others ; 2005 (2) ALL MR 320*, *Saurav Jain and others Vs. A.B.P Design and others ; AIR 2021 SC 3673*, I am of the considered view that second appeal cannot be considered on merits. Second Appeal No.1734 of 2004 is liable to be dismissed.

7. The relationship between the parties is undisputed. They are real brothers litigating over a shop. The plaintiff claims that suit shop is undivided joint family property. It is further contended that a joint family business was being run in the suit shop. The cause of action for filing suit is the overt act of the defendant in putting lock to the suit shop, thereby preventing the plaintiff from enjoying the joint possession. Suit is filed simplicitor for injunction.

8. The suit is contested by the defendant on the ground that it was purchased vide sale deed dated 06.02.1981 at Exh.56 in the name of the defendant and he was the exclusive owner. The business is being run exclusively by the defendant because the plaintiff had shown no interest to carry on the business. It is contended that such a suit is not maintainable and liable to be dismissed.

9. Trial Court decreed the suit thereby restraining the defendant from causing obstruction to the joint possession of the parties over the suit shop. The decree is reversed by Lower Appellate Court.

10. Learned counsel for the appellant Mr. Solshe submits that the plaintiff is recorded to be joint owner of the undivided property and therefore imposing lock on the suit shop has prevented the plaintiff from enjoying the joint possession. It is submitted that defendant cannot exclude plaintiff altogether. It is further submitted that Lower Appellate Court committed apparent error of jurisdiction in non-suiting the plaintiff outrightly. He would further submit that the law laid down in the judgment of supreme Court in the matter of ***Anathula Sudhakar Vs. P. Buchi Reddy (D) by L.Rs. and others ; AIR 2008 Supreme Court 2033*** cannot be made applicable to the present case. In the wake of findings, it is submitted that the Lower Appellate Court should not have reversed the decree by dismissing the suit. Reliance is also placed on the judgment of Supreme Court in the matter of ***T. Lakshmipathi and others Vs. P. Nithyananda Reddy and others [2003 DGLS (SC) 341]***.

11. Per contra, learned counsel Mr. Kulkarni appearing for the defendant submits that the title of the defendant acquired by sale deed dated 06.02.1981 vide Exh.56 is proved. Neither any suit is filed challenging the title nor is there any claim regarding partition. Under these circumstances, it would not be open for the Lower Appellate Court to hold that it was a

joint family property. The findings recorded by the Lower Appellate Court in paragraph Nos.8 to 10 against defendant are perverse and illegal. It is further submitted that the suit filed by the plaintiff is defective and not tenable because neither relief of any partition nor declaration is solicited. It is further submitted that the defendant carried out the business and he is in exclusive possession of the property after having registered sale deed at Exh.56.

12. I have considered rival submissions of the parties. Both the Courts below have recorded findings on vital aspects of the matter, concurrently, that the suit shop is a undivided joint family property and neither of the parties have claimed partition. Plaintiff has filed suit simplicitor for injunction against co-owners. Normally, no injunction can be granted against the co-owner. The closed scrutiny of the plaint discloses that the cause of action shown by the plaintiff is that of putting of a lock over the suit shop. Both parties are entitled to enjoy undivided joint family property.

13. Learned counsel for the appellant has relied on the judgment of Supreme Court in case of ***T. Lakshmipathi and others Vs. P. Nithyananda Reddy and others [2003 DGLS (SC)***

341]. My attention is adverted to the observations of the Apex Court which are to the effect that :

“24. In the facts and circumstances of the case, no defence or shelter is available to the appellants behind the plea that they have acquired interest of some of the co-owners. The law as to co-owners is well settled. Where any property is held by several co-owners, each co-owner has interest in every inch of the common property, but his interest is qualified and limited by similar interest of the other owners. One co-owner cannot take exclusive possession of the property nor commit an act of waste, ouster or illegitimate use, and he does so he may be restrained by an injunction. A co-owners may, by an arrangement, expressed or implied, with his other co-owners, possess and enjoy any property exclusively. Such a co-owner can also protect his possession against the other co-owners and if he is disposed by the latter, he can recover exclusive possession. (See Jahuri Sah & Ors. Vs. Dwarika Prasad Jhunjhunwala (1966) Supp SCR 280). It is beyond any controversy that on the death of late P. Narayana Reddy, his rights devolved upon the several heirs including respondent no.1. The respondent No.1 is the only male person in the body of the co-owners, all others being women. It may be for this reason, or otherwise, that the respondent No.1 was in possession of the property, through tenants, realizing the rent peacefully and with the consent, expressed or implied, of other co-heirs of late P. Nithyananda Reddy. So far as the respondents Nos.2 and 3 are concerned, by operation of Section 116 of the Evidence Act, they were estopped from challenging or denying the ownership of the respondent

No.1 and his rights in the tenancy premises. As held in Vasudeo Vs. Balkishan, (2002) 2 SCC 50, the rule of estoppel between landlord and tenant continues to operate so long as the tenancy continues and unless the tenant has surrendered possession to the landlord. The estoppel would cease to operate only on the tenant openly restoring possession by surrender to the landlord. Neither the respondents Nos. 2 and 3 nor their successors in interest or the persons claiming under could have denied the title of the respondent No.1 during the continuance of the tenancy and even thereafter unless they had restored possession over the tenancy premises to the respondent No.1. Looking at the status of the appellants whether as co-owners or as persons inducted in possession by the tenants they have no legs to stand on. If other co-owners could not have dispossessed the respondent No.1 or demolished the property without the consent of respondent no.1 it is difficult to conceive how their transferees could have demolished the tenancy premises and raised their own construction over the land on which the tenancy premises stood earlier. ”

14. Those observations are aptly applicable in the case at hand. Putting of the lock by the defendant would cause prejudice to the applicant and leads to exclusion of the applicant. In the peculiar facts and circumstances, I find that injunction is necessary to be granted so as to make the suit property enjoyable jointly. This aspect of the matter is lost sight by Lower Appellate Court which is a mistake apparent on

the face of record. Accordingly, I find that the substantial questions of law required to be answered in favour of plaintiff to that extent only.

15. The sale deed was executed at Exh.56 exclusively in the name of defendant. The defendant is unable to produce material on record to show that he had independent source of income so as to purchase the suit shop. The admissions are rightly dealt with by Lower Appellate Court. Interestingly, it is case of both the parties that business was been carried till May 1996. It is incomprehensible as to when suit shop was purchased in 1981 by the defendant as to why the business was carried jointly till 1996. The inference which could be drawn is that in the absence of independent income, the suit shop in all probabilities might have been purchased out of the nucleus of the joint family and joint family business was carried on for further 15 years. I do not find the perversity or illegality in the findings recorded by the Lower Appellate Court holding that it was not self-acquired property. The findings are plausible and reasonable and no interference is called for.

16. In view of law laid down by Supreme Court in *Anathula's* case, the plaintiff should have prayed for either declaration or injunction. Learned counsel Mr. Kulkarni is right

in contending that suit is defective. However, the present case depicts a quite peculiar picture. Here the cause of action shown to be putting up of lock and exclusion of the defendant. Parties do not prefer to claim partition. Plaintiff admits the joint ownership of defendant. Hence, ratio of Supreme Court cannot be made applicable.

17. For the reasons stated above, I am inclined to allow Second Appeal No.89 of 2005 partly by passing following order:

ORDER

- (i) Second Appeal No.89 of 2005 is partly allowed.
- (ii) Second Appeal No.1734 of 2004 is dismissed.
- (iii) The judgment and decree passed by Lower Appellate Court in Regular Civil Appeal No.78 of 1999 is partly allowed.
- (iv) The judgment and decree dated 29.07.1999 passed by the Trial Court in Regular Civil Suit No.295 of 1996 stands substituted by following decree :
 - (a) The suit is partly decreed.
 - (b) The defendant is restrained from putting lock on the suit shop and the lock is directed to be

removed so that both parties shall enjoy joint possession and ownership.

(v) Decree be drawn accordingly.

(vi) There shall be no order as to costs.

(SHAILESH P. BRAHME, J.)

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vmk/-