



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

**SECOND APPEAL NO.457 OF 2023
WITH
CIVIL APPLICATION NO.11128 OF 2023
IN
SECOND APPEAL NO.457 OF 2023**

Babulal Shankarlal Rana (Deceased)
Through legal heirs

1. Smt. Vijayabai Babulal Hirwane
(Rana) Died
2. Amol Babulal Hirawane (Rana)
Age: 48 years, Occu: Business,
3. Sachin babulal Hirwane (Rana)
Age: 53 years, Occu: Business,

Both R/o. 260, Shivajinagar, Jalgaon

4. Sandeep Babulal Hirawane (Rana)
Age: 62 years, Occu: Nil,
R/o. 1115, Pandurang Apartment,
Plot no. 19, Dhankawadi,
In front of MarotiMandir, Pune.
5. Sau. Madhuri Bipin Filoliya,
Age: 55 years, occu: Household,
R/o. Flat no. 19, Avadhut Apartment
Near Pawar Hospital, Plot no. 50,
Balaji Nagar. Pune 43.

Appellants
(Orig. Defendants)

Versus

Shri. Pratap Shankarlal Rana (Dalwale)
Age: 83 years, Occ: Business,
R/o. 70, Polanpeth, Jalgaon,
Tq. & Dist. Jalgaon

..(Respondent)

....
Mr. G. V. Wani, Advocate for Appellants.
Mr. Mukul Kulkarni, Advocate for Respondent.
...

CORAM : S. G. CHAPALGAONKAR, J.
DATED : 07th JANUARY, 2025.

ORDER:-

1. The appellants/legal representatives of original defendant impugns judgment and decree dated 15.04.2023 passed by District Judge, Jalgaon in Regular Civil Appeal No.146/2014, thereby upholding judgment and decree dated 05.05.2014 passed by 3rd Joint Civil Judge Junior Division, Jalgaon in Regular Civil Suit No.576/2002. (Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).

2. The respondent/plaintiff instituted suit for recovery of possession of suit shop admeasuring 5 x 4 sq. ft. situated at Polan Peth, Jalgaon. The plaintiff contends that he is owner of suit shop. The defendant is his brother. He put defendant/unemployed brother in possession of shop for the purpose of running pan shop on condition that he would vacate the same on the demand. Due to relationship between the parties, transaction was without consideration. The defendant instituted Regular Civil Suit No.363/1994 seeking perpetual injunction against plaintiff. The suit was decreed vide judgment and order dated 05.03.1997 and plaintiff was restrained from disturbing possession of defendant without following due process of law. Thereafter, plaintiff issued legal notice through registered post on 01.10.2002 asking defendant to hand over possession, but defendant falsely replied

and refused to hand over the same. Hence, cause of action arose to file suit.

3. The defendant refuted the plaintiff's claim by filing written statement Exhibit-13 and claimed himself to be the owner of suit shop. He contends that in the month of December 1980, he took possession of platform on rental basis @ Rs.100/- per month and raised construction of suit shop at his own cost. Till December 1993, he paid rent, but plaintiff and other brothers obstructed his possession. Hence, he filed suit for injunction, which has been decreed. Pertinently, defendant amended written statement and claimed ownership by way of adverse possession and also employed counter claim for declaration of ownership.

4. The Trial Court framed issues, recorded evidence of the parties and finally decreed the suit asking defendant to hand over possession of suit property to plaintiff with further direction for enquiry as to mesne profit. The counter claim of defendant has been rejected. Aggrieved defendant filed Regular Civil Appeal No.146/2014 assailing decree of possession passed in the suit. During the course of argument before the Appellate Court, plea of adverse possession was also waived and pressed into service only plea of possession based on license. However, could not find favour from the Appellate Court and suffered dismissal of Appeal. Hence, this Second Appeal.

5. Mr. Wani, learned Advocate appearing for the appellants submits that Courts below have erroneously discarded the case of defendant as regards to his possession based on license. No issue about tenancy/license was framed by Trial Court nor has Appellate court given consideration to the same. He would submit that Courts below have erroneously applied principle of *res-judicata* based on findings in previous suit, when such plea was never part of pleadings and evidence before the Court. He would, therefore, urge to frame substantial questions of law on aforesaid aspects and admit the Appeal.

6. Per contra, Mr. Kulkarni, learned Advocate appearing for the respondent/plaintiff submits that plaintiff had instituted previous suit for injunction with plea that he occupied suit property on the basis of license. The specific issue was framed in Regular Civil Suit No.363/1994 as to whether plaintiff proved that he is in possession of suit shop as licensee. The Court recorded affirmative finding only as to the possession of the plaintiff, but declined to accept the plea of license. Therefore, plaintiff is estopped from raising same plea in present suit. The Courts have rightly applied bar under Section 11 of the Code of Civil Procedure. Consequently, decreed the suit. He would further point out that plaintiff raised plea of ownership and also sought declaration based on adverse possession. The inconsistent pleas cannot be permitted in the facts

of the case. He would, therefore, justify concurrent decrees passed by the Courts below.

7. Having considered submissions advanced, undisputedly defendant, who is real brother of plaintiff was put into possession of suit premises/shop sometimes in the year 1980. The plaintiff claims that since defendant was unemployed, he permitted him to run pan shop in the suit premises out of love and affection. The defendant enjoyed property without any rent or license fees. However, later on refused to hand over possession and instituted suit seeking decree of injunction. It can be observed that defendant pleaded that he enjoyed possession on the basis of oral lease license and paid rent of Rs.100/- per month till 1993. In that suit there was specific issue as to the nature of possession of defendant. The Court accepted defendant's possession over the suit property, but refused his plea of licensee.

8. The decree passed in Regular Civil Suit No.363/1994 dated 05.03.1997 has attained finality.

9. It is apposite to refer issue no.1 framed in Regular Civil Suit No.363/1994 alongwith findings thereon, which reads thus:

ISSUES	FINDINGS
1) Does the plaintiff prove that he is in possession of Pan shop as a licensee of defendant No.1	Affirmative to the extent of possession.

10. Apparently, plaintiff's claim as regards to the possession based on license has been considered and decided against him. The findings has attained finality. In that view of the matter, plaintiff cannot be permitted to re-agitate the same claim while defending present suit. Pertinently, defendant has amended his original written statement and raised plea of ownership by way of adverse possession that has been dismissed. There is absolutely no material to indicate that defendant has ever paid license fees to plaintiff at any point of time. The Appellate Court has rightly observed that at the most this can be considered as case of gratuitous license. Assuming that this is case of gratuitous license, it can be terminated without notice and defendant cannot assert any more right to continue in possession. Eventually, findings recorded by the Courts below entitling plaintiff to recover possession based on admitted ownership of suit property cannot be faulted.

11. Although Mr. Wani, learned Advocate seeks to contend that plea of defendant as regards to license has not been dealt with by Courts below by framing appropriate issue or points for consideration, the gamut of factual aspects, coupled with the findings recorded in the previous suit concerning the defendant's claim regarding the license, renders the contention untenable. Apparently, the defendant has enjoyed possession of the suit

property owned by the plaintiff for more than 44 years, absolutely free of cost, while delaying the plaintiff's right to recover possession by taking multiple contradictory pleas, which cannot be justified. In the result, no substantial question of law arises for consideration in this Second Appeal.

12. Consequently, Second Appeal stands dismissed.

13. In view of dismissal of Second Appeal, Civil Application does not survive and accordingly stands disposed of.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/January-2025