

(2024) 02 BOM CK 0062
In the Bombay High Court
Case No : Second Appeal No. 25 Of 2024

Dagadu Dnyanu Diwase And Ors

APPELLANT

Vs

Prakash Dattatraya Diwase

RESPONDENT

Date of Decision : 22-02-2024

Acts Referred:

Code Of Civil Procedure, 1908 — Order 20 Rule 12(1C), Order 21 Rule 12(1C)

Citation : (2024) 02 BOM CK 0062

Hon'ble Judges : Sandeep V. Marne, J

Bench : Single Bench

Advocate : ?Chetan Patil, Mandar Bagkar, Drupad S. Patil

Final Decision : Dismissed

Judgement

Sandeep V. Marne, J

1. This Appeal is filed by the Appellants challenging the Judgment and Decree dated 19 May 2023 passed by the District Judge-2, Kolhapur allowing Regular Civil Appeal No. 230 of 2016 and reversing the Judgment and Decree dated 8 July 2016 passed by the 8th Joint Civil Judge Junior Division, Kolhapur in Regular Civil Suit No. 912 of 2014. On account of the impugned decree passed by the first Appellate Court, Plaintiff's suit for recovery of possession of the suit property has been decreed with further directions to conduct an enquiry into mesne profits under Order 21 Rule 12(1C) of the Code of Civil Procedure, 1908 (the Code).

Appellants, who are Original Defendants, are aggrieved by the decision of the first Appellate Court and have filed the present Appeal.

2. House property bearing City Survey No. 1046-C/13/3 admeasuring 33.6 sq.mtrs and two rooms in the house constructed thereon on the first floor admeasuring 386 sq. ft at Kolhapur is the subject matter of the suit (suit property). Plaintiff's case, as pleaded in the plaint, is that the land bearing C.T.S. No.1046/13/9/13 admeasuring 127.3 sq.mtrs was owned by Mr. Annaso Gangadhar Athane. Out of that property, an area admeasuring 33.3 sq.mtrs was

purchased by Plaintiff's father-Dattatraya by registered Sale-deed dated 3 June 1968 by paying consideration of Rs.2,000/-. With a view to correct the error of non-description of division number, registered Correction Deed dated 6 May 1970 was executed by the vendor in favour of Plaintiff's father. On the basis of the said two documents, the Plaintiff claims ownership through his father in the suit property. It is Plaintiff's case that his father was in service at Shahu Mill, Kolhapur and he purchased the suit property out of his personal income and therefore the suit property is his self-acquired property. That the entire family consisting of Plaintiff, his parents and sisters were residing in the suit property before purchase thereof and all the charges like Municipal Taxes, Electricity Bill, etc. were always paid by the Plaintiff's father.

3. Plaintiff's father-Dattatray Laxman Diwase expired on 14 December 1998. Plaintiff's sisters executed registered Relinquishment Deed dated 26 December 2008 releasing their rights in respect of the suit property in Plaintiff's favour. That therefore Plaintiff's name was mutated to the revenue records of the suit property. Plaintiff pleaded that his uncle-Dnyanu Laxman Diwase owned Plot No.12 admeasuring 500 sq.ft at Mahadik Vasahat, Kolhapur, in which his entire family consisting of his children were residing. That the said plot was given for development by the family of Dnyanu in 1991-92 and consideration for such development was received by Dnyanu's family.

4. Defendant No.1 is the son of Dnyanu Laxman Diwase and Plaintiff's cousin and Defendant Nos.2 and 3 are wife and son of Defendant No.1. It is Plaintiff's case that Defendant Nos.1 and 2 approached him in January 2013 and requested for temporary accommodation in the suit property till acquisition of alternate premises by them. Plaintiff accordingly permitted Defendants to reside in the suit property on temporary basis. That without Plaintiff's permission, Defendant No.2 filed an application for electricity connection in her name which was objected to by the Plaintiff. That despite Plaintiff's objection, the Electricity Company provided electricity connection in the name of Defendant No.2. That Plaintiff requested the Defendants to vacate the suit premises. As Defendants refused to vacate the suit premises, Plaintiff instituted Regular Civil Suit No. 912 of 2014 in the Court of Civil Judge Junior Division, Kolhapur seeking recovery of possession of the suit property from the Defendants as well as for mense profits. The suit was defended by the Defendants by filing Written Statement inter-alia contending that the father of the Defendant had independent income through vegetable business and that the suit property was purchased jointly by the two brothers in the name of Plaintiff's father, who was the elder brother. Defendants thus claimed that they also have title in the suit property. Defendants also pleaded in the Written Statement that they always resided in the suit property, much prior to the year 2013.

5. On the basis of the pleadings, the Trial Court framed issues about suit property being self-acquired property of Plaintiff's father, permission to use and occupy the suit property by Plaintiff to Defendants, unauthorized occupation of

suit property by Defendants etc. By Judgment and Decree dated 8 July 2016, the Trial Court proceeded to dismiss the suit holding that Plaintiff failed to prove that the suit property is self-acquired property of his father.

6. Aggrieved by the Decree of the Trial Court, Plaintiff filed Regular Civil Appeal No. 230 of 2016 before the District Court, Kolhapur. The first Appellate Court has allowed the Plaintiff's Appeal by Judgment and Decree dated 19 May 2023 and has reversed the Decree of the Trial Court. The first Appellate Court has decreed Plaintiff's suit by directing the Defendants to vacate the suit property and deliver its possession to Plaintiff within three months. Plaintiff is also entitled to mesne profits from the date of issuance of notice (21 July 2014) till the date of delivery of possession at the rate to be determined separately by conduct of enquiry under Order 20 Rule 12(1C) of the Code. The Defendants are aggrieved by the decision of the first Appellate Court and have filed the present Appeal.

7. When the Appeal came up for admission on 5 February 2024, this Court admitted the appeal by formulating following substantial questions of law :

(i) Whether the finding of the first Appellate Court about suit property being exclusively purchased by Plaintiffs' father, Dattatray can be sustained in the light of several admissions given by the Plaintiff in the cross-examination?

(ii) Even if it is assumed that Dnaynu and Dattatray had independent sources of income, was it necessary for the Defendants to prove that the purchase of the suit property was through nucleus of the joint family income ?

(iii) Whether the evidence on record proves that the Defendants resided in the suit property much prior to the year 2013 when according to the Plaintiffs, the Defendants started occupying the same ?

(iv) Whether the Defendants are in permissive possession of suit property ?

(v) Whether Defendants are entitled to protect their possession even if they loose title to the suit property?

8. The learned counsel appearing for parties made a joint request for taking up the Appeal for hearing immediately after formulation of substantial questions of law. This Court accordingly proceeded to hear the learned counsel appearing for the Appellants and the learned counsel appearing for the Respondents extensively on substantial questions of law so formulated. The Appellants have placed on record private paper-book containing pleadings and evidence produced on record. This Court has perused the same. This Court has also considered the submissions canvassed by Mr. Chetan Patil, the learned counsel appearing for the Appellants and Mr. Drupad Patil, the learned counsel appearing for the Respondent. It would be necessary to summarise the submissions canvassed by the learned counsel appearing for the rival parties.

9. Mr. Chetan Patil, the learned counsel appearing for the Appellants would submit that the first Appellate Court has committed a fundamental error in not

assessing the evidence for the purpose of examining correctness of the findings recorded by the Trial Court. That it is elementary principle that the judgment of the first Appellate Court must reflect conscious application of mind to the findings recorded by the Trial Court in the light of evidence available on record. That if the Appellate Court is to reverse the judgment of the Trial Court, the Appellate Court must go into close quarters with the reasoning assigned by the Trial Court and thereafter assign its own reasons for arriving at a different finding. That in the present case, the judgment of the first Appellate Court does not indicate that it has made any attempt to even consider the findings recorded by the Trial Court. That the Appellate Court has gone ahead to record its own finding as if it was a Trial Court. That without examining the reasoning of the Trial Court, it was neither possible nor open for the first Appellate Court to reverse the Decree of the Trial Court. In support of his contention, Mr. Patil would rely upon the judgment of the Apex Court in *Santosh Hazari Vs. Purushottam Tiwari (Deceased)* by LR. (2001) 3 SCC 179

10. Mr. Chetan Patil would then take me through the evidence on record, particularly the admissions given by the Plaintiff in his cross-examination. According to him, Plaintiff admitted in the cross-examination that at the time of purchase of the suit property, there was joint family between Plaintiff and Defendants. That the suit property was previously in tenancy with Diwase Family, which was merely regularized by execution of Sale-deed. That Plaintiff further admitted that on account of cordial relations between the family members, the suit property was not partitioned between the two brothers. According to Mr. Patil, the above admissions leave no matter of doubt that the suit property was jointly purchased by Dattatraya and Dnyanu. So far as the possession is concerned, he would contend that the Plaintiff admitted in the cross-examination that Defendant No.1 was born in the suit property and that since the birth occurred in the year 1964, it was conclusively proved that Defendant No.1 always resided in the suit property since the year 1964. According to him, this admission completely demolishes the false story set up by the Plaintiff in the plaint that Defendants were granted permissive or temporary use of the suit property by the Plaintiff in the year 2013. He would further submit that Plaintiff specifically admitted that the father of Defendant No.1 was also working in Shahu Mill and that the finding of the first Appellate Court about absence of income of the father of Defendant No.1 is clearly perverse. He would further submit that the finding of the first Appellate Court about Dattatraya and Dnyanu not residing in the joint family at the time of execution of the Sale-deed is again contrary to the specific admissions given by the Plaintiff in his cross-examination.

11. Mr. Chetan Patil would accordingly contend that the Trial Court had rightly arrived at the conclusion that no evidence was produced by the Plaintiff about purchase of the suit property by Dattatraya out of his sole income. That the Trial Court had correctly expressed doubt about Plaintiff's claim of self-acquisition of property by Dattatraya on account of admissions given by him that the suit property was in joint tenancy of the family. That such a well-reasoned order

passed by the Trial Court could not have been reversed by the first Appellate Court without examining the correctness of those findings. That since residence of Defendant No.1 in the suit property is proved since his birth (1964), the decree of the first Appellate Court directing delivery of possession deserves to be set aside.

12. Per-contra, Mr. Drupad Patil the learned counsel appearing for the Respondent/Original Plaintiff would oppose the Appeal and support the Order passed by the first Appellate Court. That the first Appellate Court has rightly arrived at the conclusion that the suit property is self-acquired property of Dattatraya. That to prove joint purchase of suit property by Dattatraya and Dnyanu, it was incumbent upon the Defendants to prove payment of consideration by Dnyanu for purchase of the suit property. Alternatively, if the defence of joint family was raised, Defendants ought to have led evidence to prove that purchase of suit property was through the nucleus of the joint family income. That there is absolutely no evidence on record to indicate that Dnyanu either paid any part of consideration or that the purchase of the suit property was through the nucleus of any joint family property. That therefore mere availability of income of Dnyanu was not sufficient to raise a surmise of joint purchase of the suit property by Dattatraya and Dnyanu. That the alleged admission given by Plaintiff about Dnyanu being in service in Shahu Mill is contrary to Defendant's own case in Written Statement that Dnyanu was doing vegetable business. That therefore no presumption of availability of income of Dnyanu can be raised on the basis of stray admission given out of context, which is contrary to the case pleaded by the Defendants. That therefore the Appellate Court has rightly held that the suit property is purchased by Plaintiff's father for himself and not for the alleged joint family. In support of his contention, he would rely upon the judgment of the Apex Court in the case of D.S. Lakshmaiah and Anr. V/s. L. Balasubramanyam and Anr. 2003) 10 SCC 310

13. Mr. Drupad Patil would further submit that in absence of title, the Defendants do not have any right to occupy the suit property. That Defendants have not set up a claim for adverse possession. That therefore mere permission granted to the Defendants to occupy the suit property does not create any right in their favour to occupy the same indefinitely. That Plaintiff is therefore entitled to have them ejected by following due process of law. He would pray for dismissal of the Appeal.

14. Rival contentions of the parties now fall for my consideration.

15. The moot issues that arise for consideration in the present Appeal are about (i) nature of purchase of the suit property i.e. whether it is self-acquired property of Dattatraya or is it a joint family property of Dattatraya and Dnyanu and (ii) entitlement of Defendants to occupy the suit property. If the first issue is decided in favour of the Defendants, i.e. if this Court arrives at a conclusion that the suit property was jointly purchased by Dattatraya and Dnyanu, Defendants would automatically be entitled to occupy the same. However, if the first issue is

decided against the Defendants, the second issue of possession will have to be determined independently. I accordingly proceed to decide the issue of title first.

16. The Trial Court has refused to believe the case of the Plaintiff that the suit property was purchased by Dattatraya through his individual income. For recording that conclusion, the Trial Court had considered Plaintiff's evidence wherein he has given admission about the lack of knowledge about payment of consideration. The Trial Court held that none of the parties, who were present at the time of execution of the Sale-deed dated 3 June 1968, were living and that therefore Plaintiff was unable to adduce evidence about payment of consideration exclusively by his father-Dattatraya. The Trial Court refused to give weightage to the mutation entry recording name of the Plaintiff for the purpose of holding that the suit property is self-acquired property of Dattatraya. The Trial Court has taken into consideration admissions given by the Plaintiff about suit property being in tenancy of joint family and purchase thereof in the name of his father. In short, various admissions given by the Plaintiffs in his cross-examination about existence of joint family at the time of purchase, suit property being in tenancy of joint family, lack of knowledge about payment of consideration, absence of witnesses to prove payment of consideration etc. are considered as relevant factors by the Trial Court for holding that the Plaintiff failed to prove that the suit property is self-acquired property of his father.

17. On the other hand, perusal of the judgment of the first Appellate Court would indicate that it has given emphasis on purchase of the suit property in the name of Plaintiff's father. It has held that there is no evidence on record to show that Dattatraya and Dnyanu were residing in joint family at the time of execution of Sale-deed. It also held that Dattatraya had independent source of income through service in Shahu Mills whereas there is absence of evidence to indicate Dnyanu having any independent source of income. The first Appellate Court has also taken note of the fact that after Dattatraya's death, individual names of legal heirs of Dattatraya were mutated in the revenue records. That the sisters executed Relinquishment Deed in favour of the Plaintiff, whereafter name of Plaintiff alone came to be mutated to the revenue records in respect of the suit property. That the Defendants never objected to Plaintiff's name being recorded to the revenue records. On these broad reasonings, the first Appellate Court has proceeded to reverse the Decree of the Trial Court.

18. It must be observed at the very outset that the judgment of the first Appellate Court is not very happily worded. It has recorded atleast two perverse findings. Firstly, it has held that "there is no evidence to show that Dattatray and Dnyanu were residing in joint family at the time of the said sale-deed". This finding appears to be contrary to the evidence adduced by Plaintiff. In his cross-examination, Plaintiff has given following admissions:

हेम्हणखरेकी रर.स. कं.१०४६क ही ममिळकत खरेदीके लीत्यावेळेसवादी प्रततवादींच्या पूवरहकादारांचुटंबएकत होते.

It is true that there was joint family of Plaintiff and Defendant's predecessors at

the time of purchase of property bearing RS No. 1046-C.

हेम्हणखेरेकी दत्तातय व ज्ञानु यांचे त्यांच्या हयातीत संबंधचांगलेवखेळीमिळीचेहोते.हेम्हणणे खेरेकी या संबंधामुळेत्यांच्यातया ममिळकतीचचेवाटप झालेनाही.

It is true that the relationship between Dattaraya and Dnyanu were good and cordial. It is true that the properties were not partitioned because of such relations.

19. The above admissions undoubtedly indicate that Dattatraya and Dnyanu were residing in joint family at the time of purchase of the suit property. Therefore, the above quoted finding of the first Appellate Court about non-existence of joint family at the time of execution of sale-deed, recorded without taking into consideration evidence on record, is clearly perverse.

20. Another perverse finding recorded by the first Appellate Court is about absence of independent income of Dnyanu. The first Appellate Court has held in para-17 of its judgment that "In contrast, there is no evidence to show that Dnyanu was having any such independent source of income to contribute the consideration to purchase the suit property." This finding is clearly contrary to the admission given by the Plaintiff in his cross-examination as under :

मिझेचुलतेज्ञानुहेदेखीलशाहुमिलमिध्येचनोकरीस होते.तेकधी मनवृत्तझालेव कोणत्या पदावरुन मनवृत्तझालेहेमिला आठवत नाही.

My uncle was also employed in Shahu Mill. I do not remember as to when and on what post did he retire.

21. It is thus clear that the first Appellate Court has not taken into consideration, the above admission given by the Plaintiff in his cross-examination while recording a perverse finding that there is no evidence to show that Dnyanu was having any independent source of income. Of course, the admission of Plaintiff about Dnyanu's employment with Shahu Mill is held to be inconsequential in latter part of the judgment on account of defence in the written statement about Dnyanu's vegetable business. However the first Appellate Court has clearly erred in holding that Dnyanu had no income at all.

22. Even though the findings recorded by the first Appellate Court about absence of joint family of Dattatraya and Dnyanu at the time of execution of Sale-deed and absence of independent income of Dnyanu are held to be perverse, the issue is whether the ultimate finding recorded by the first Appellate Court about suit property being self-acquired property of Dattatraya can be sustained. Before I go into the issue of existence of joint family between Dattatraya and Dnyanu, I would like to first deal with the issue of availability of independent income of Dnyanu at the time of purchase of the suit property. Though Plaintiff has given an admission in his cross-examination that Dnyanu was also working in Shahu Mills, the said admission is clearly contrary to the pleadings in the Written Statement. In their Written Statement, Defendants pleaded that Dnyanu was

doing vegetable business and was earning income therefrom. The relevant pleadings in the Written Statement is as under :-

प्र.वादी नं. १ यांचेवडील हेभाजीपाल्याचा व्यवसाय करीत होते. त्यामिधून त्यांना चांगले उत्पन्न ममिळत असे.

Father of Defendant No. 1 was doing vegetable business and he was earning good income from the same.

23. In the light of the above pleading, the Defendants ought not to have given a suggestion to Plaintiff in his cross-examination about Dnyanu working in Shahu Mills. In the light of specific pleadings by the Defendant in the Written Statement that Dnyanu was doing vegetable business, the admission given by the Plaintiff about Dnyanu serving in Shahu Mills becomes redundant. As a matter of fact, the Trial Court ought not to have permitted the question suggesting Dnyanu's service with Shahu Mills during cross-examination of Plaintiff in the light of different stand taken in the Written Statement. Be that as it may. Plaintiff's admission contrary to Defendants' stand does not prove that Dnyanu was serving with Shahu Mills.

24 . Coming back to the issue of existence of joint family between Dattatraya and Dnyanu, though no evidence is led by the Defendants, Plaintiff's admissions in his cross-examination would lead one to believe that Dattatraya and Dnyanu lived in joint family at the time of purchase of the suit property. I therefore proceed on an assumption that there was indeed a joint family between Dattatraya and Dnyanu. The sale-deed has been executed in the name of Dattatraya alone. Therefore, the natural presumption is that Dattatraya is the sole owner of the property. Since Defendants contended that despite execution of Sale-deed in the Dattatraya's name, the purchased property is of joint family, the burden of proving this assertion shifted on Defendants. And to prove this defence, it became incumbent for them to lead evidence about purchase of the property through joint family income. Therefore, the Defendants ought to have led evidence to show that Dnyanu contributed in payment of consideration for purchase of the suit property. Defendants however chose not to lead evidence. Thus there is no evidence on record that Dnyanu paid any part of consideration for purchase of the suit property. As a matter of fact, perusal of the entire Written Statement filed by the Defendants would indicate that there is no averment that Dnyanu individually contributed for purchase of the property. On the contrary, the defence taken by the Defendants is that the suit property was purchased by Dattatraya and Dnyanu through joint family income. If this is the case, it became incumbent for the Defendants to prove that there existed any joint family income. Perusal of the entire evidence on record would indicate that the evidence to support existence of joint family income is clearly lacking. Nothing has come on record to indicate that the joint family owned any property which was generating any income. On the contrary, it has come on record that Dattatraya and Dnyanu were earning their own incomes through service in Shahu Mill and vegetable business respectively.

25. It is well settled law that mere proof of existence of separate income for joint family members is not sufficient and it must be proved that the property was purchased from nucleus of the joint family income. Here the judgment of the Apex Court in D.S. Lakshmaiah (supra) relied upon by Mr. Drupad Patil is apposite. In paras-7, 8, 17 and 18 of the judgment, the Apex Court held as under:

7. The question to be determined in the present case is as to who is required to prove the nature of property whether it is joint Hindu family property or self-acquired property of the first appellant.

8. There was evidence and it has been established that Item 2 measuring 15 guntas of land was joint Hindu family property but, admittedly, no evidence has been led that the said joint Hindu family property was yielding any income or that any nucleus was available with the aid whereof Item 1 property could be purchased by the first appellant. Admittedly, no evidence has been led on behalf of the respondent-plaintiffs to show income from Item 2 property or value of the property. At the same time no evidence has also been led by the first appellant to prove that he had any separate income so as to acquire them 1 property. In absence of evidence either way which party would succeed and which fail, is the question. The legal position is well settled as we will presently notice.

17. In view of the aforesaid discussion, the respondents having failed to discharge the initial burden of establishing that there was any nucleus in the form of any income whatsoever from Item 2 property and no other nucleus was claimed, the burden remained on the respondents to establish that Item 1 property was joint family property. In this view, the fact that the first appellant has not led any evidence to establish his separate income is of no consequence insofar as the claim of the respondents is concerned. Under these circumstances, for failure to lead evidence, the respondents' claim of Item 1 to be joint family property would fail as rightly held by the first appellate court.

18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.

(emphasis supplied)

26. Thus, in order to prove purchase of the property through joint family income, it was incumbent for the Defendants to prove that there existed a nucleus in the form of income of joint family and that the purchase was done through that nucleus. Defendants however failed to lead evidence. In absence of any evidence to suggest presence of any nucleus through which the suit property could be

purchased, Plaintiff was not even required to prove the converse since the sale deed was executed in his father's individual name and not as karta or manager of the joint family. Thus when purchase of property is in name of one of the joint family members having independent source of income, if another family member desires to prove that the property was purchased for the joint family, it becomes incumbent for him/her to prove :

- (i) existence of joint family,
- (ii) existence of joint family income,
- (iii) purchase of property through nucleus of joint family income.

27. It is only when the above three elements are established by a family member raising claim of purchase of property for joint family that his/her claim can be upheld. Failure to prove even a single factor would lead to presumption of property being self-acquired by person in whose name sale deed is executed and who has independent income. In the present case, though admissions given by Plaintiff may suggest existence of joint family, Defendants have not led evidence to prove the second and the third factors. Thus failure to lead evidence has proved disastrous for Defendants.

28. I therefore find that the purchase of the suit property by Dattatraya is not through the nucleus of joint family income. It is therefore difficult to hold that purchase of the suit property by Dattatraya was for joint family as sought to be alleged by the Defendants.

29. Defendants came up with a case in their written statement that suit property and one more property at Ruikar colony were joint family properties of Dattatraya and Dnyanu. That suit property was in Dattatraya's name and Ruikar colony property was in Dnyanu's name. That Plaintiff and his brother relinquished their shares in Ruikar colony property in favour of Bhikaji (Defendant No. 1's brother), who in turn relinquished his share in suit property in name of Plaintiff and his brother. That Defendant No. 1 retained his shares in suit property as well as in property at Ruikar Colony. That he received Rs. 80,000/- from redevelopment of property at Ruikar colony. However, Defendants did not lead evidence to prove these pleadings. Purchase of two separate properties by Dattatraya and Dnyanu in their individual names having independent incomes in fact seem to suggest that both properties were self-acquired properties of Dattatraya and Dnyanu. Non-grant of any share to Plaintiff in property purchased in Dnyanu's name and receipt of consideration by Defendant No. 1 in redevelopment of that property clearly suggests that suit property is not a joint family property. Defendants made a lame attempt to justify unbelievable story of possessing share in both properties of Dnyanu and Dattatraya by pleading that there was relinquishment by Plaintiff and his brother in favour of Bhikaji in Ruikar Colony property and by Bhikaji in favour of Plaintiff and his brother in the Suit Property. But this story woven by him is not proved by leading evidence.

30. I have therefore no hesitation in holding that suit property is self-acquired property of Plaintiff's father-Dattatraya, in which Defendant No. 1 does not have any share. The first Appellate Court therefore cannot be faulted for holding that the suit property is self-acquired property of Dattatraya. Plaintiff's admissions in cross examination are inconsequential to the issue of title. It was necessary for Defendants to prove that suit property was purchased through nucleus of joint family income. First two questions of law are answered accordingly.

31. The next issue is about possession of the Appellants/Defendants in respect of the suit property. I have already held that Defendants have failed to prove title in respect of the suit property. The Trial Court framed an issue as to whether the Defendants are in permissive possession of the suit property. Another issue raised by the Trial Court was about legality of possession of suit property by Defendants. The Trial Court held that the Plaintiff was not able to prove his assertion that he permitted Defendants to occupy the suit property in January 2013. The Trial Court appreciated the evidence, particularly various admissions given by Plaintiff and held that permissive occupation of the suit property by Defendants was not proved. The Trial Court held that Defendants came in possession of the suit property much prior to January 2013. The Trial Court therefore has refused to accept that possession by Defendants is unauthorised.

32. On the contrary, the Appellate Court, though has framed a separate issue with regard to permissive possession of Defendants over the suit property, did not answer it separately but has dealt the issues of title and possession together. There is not much discussion by the first Appellate Court on the issue of possession. Without discussing the evidence on record, the first Appellate Court has held that the Defendants are in unauthorised possession of the suit property since the date of revocation of permission.

33. On the aspect of possession, the Plaintiff came with a specific case in the plaint that Defendant Nos.1 and 2 approached him in January 2013 stating that they had sold the property received by them in redevelopment and that they were residing at some other place on rent. That the landlord called him upon to vacate the rented premises and therefore they requested Plaintiff to temporarily permit them to reside in the suit property. Plaintiff pleaded that Defendant Nos.1 and 2 agreed to vacate the suit properties immediately after arrangement of new place of residence. Plaintiff therefore claimed that he permitted Defendants to temporarily occupy the suit property considering their domestic difficulties and relationship of Defendant No. 1 as cousin. In this connection, pleadings in para-6 of the plaint are as under :

६) वरीलप्रमाणेवस्तुसंस्थितीअसताना यातील प्रततवादी नं.१ व २ यांनीवादीकडेजानेवारी २०१३ मध्येयेऊनत्यांचीजमि मवकससत करून आलेलीममिळकत मवक्री के लीअसून आम्ही भाडेनेइतर मठकाणी वास्तव्यास होतो. मिात जागामिलक यांनीजागा खाली करणेस तातडीनेसांमगतलेअसलेनेदावा ममिळकतीमध्येतात्पुरतीसोय करा. नवीन जागा ममिळकतच आम्ही दावा ममिळकत खाली करतो असेसांमगतले.सदर ममिळकतीमध्येवादी हेत्यांचेपत्नी व मुलांसोबतरहाणेसअसूनप्रततवादीची अडचण मवचारात घेऊनव चुलतभाऊअसलेने वादीनेप्रततवादींचना तात्पुरताआसरा

दावा ममिळकतीमध्येघेणेबाबतपरवानगी मदली. यावेळी प्रततवादी हेवादीची जाणूनबुजूनमदशाभूलकरीत असलेबाबतव वादीची प्रततवादी फसवणूक करत असलेबाबतवादी व त्यांचेकुटुंबासपुसटशीकल्पना आली नाही. वादी यांनी प्रततवादीवर मवश्वास ठेवूनस्वतः तळमिजलेवरीलदोन खोल्यांमध्येअडचणीनेराहून पमहले मिजलेवरीलममिळकत प्रततवादींचना तात्पुरतीस्वरूपात व प्रततवादीची अडचण मवचारात घेवून प्रततवादींचना वापरणेसमदली.

34. Having considered the pleadings of Plaintiff about possession of suit property by Defendants, it would be necessary to consider the evidence in this regard. Following are the admissions given by Plaintiff in the cross-examination:

हे म्हणणे खरे आहे की भभकाजीवदगडमिझा जनमि सस.स.क्रं १०४६ मध्ये झाला.

It is true that Bhikaji, Dagdu and me were born in CS No. 1046.

हे म्हणणे खरे की प्रततवादी.१क्रं२ यांचे लग झाले त्या वेळेस मी भभकाजी वं प्रततवादी क्रं.१ असे आम्ही सस.स.नं १०४६ मध्ये राहणेस .होतो

It is true that at the time of marriage of Defendant Nos. 1 and 2, me, Bhikaji and Defendant No. 1 were residing in CS No. 1046.

हे म्हणणे खरे आहे की या ममिळकतीमध्ये दोन मवज ममिटर आहेत . हे म्हणणे खरे आहे की एक मवज ममिटर मिझा नावाने आहे वं त्याचे मबल मी भरतो वं द सरे मवज ममिटर प्रततवादी कु . १ ने नावाने आहे, त्याचे मबल तो भरतो .

It is true that there are two electricity meters in the property. It is true that one of the meters is in my name and I pay Bills of the same and the second meter is in the name of Defendant No. 2, who pays its Bills.

35. Mr. Chetan Patil has emphasized on the above admissions to suggest that those admissions given by the Plaintiff in his cross-examination completely demolishes his theory of permissive use of suit property by Defendants since January 2013. However, at the same time, Plaintiff deposed in his Affidavit of examination in chief that Defendant No. 1 and his father owned house at Plot No. 12 admeasuring 5000 sq. ft. at R.S.No. 284/2A in Mahadik Vasahat, Kolhapur in which Defendant No. 1, his brother and father were residing. Plaintiff also examined Smt. Indubai Maruti Katkar who is relative of Plaintiff and Defendants, as his Witness No. 2. She stated in her chief examination that Defendants used to reside earlier in Mahadik Vasahat and that she used to visit Defendants there. She stated in her cross examination that at the time of marriage of Defendant No. 1, he was not residing in the suit property. She reiterated that she visited Defendants in their house at Mahadik Vasahat. That the said Plot in Mahadik Vasahat was purchased by Dnyanu. That she last visited Defendants in house at Mahadik Vasahat 10-12 years ago. That prior to 2013, Defendants were residing in rented place at Market Yard and came in suit property in 2013. The third witness was Mohan Baliram Pargande, whose evidence was essentially about electricity connection procured by Defendant No. 2 in 2013.

36. Plaintiff's admissions in the cross examination must be viewed in the light of other evidence as discussed above which clearly seem to suggest that Defendant No. 1 was residing in house at his father's plot in Mahadik Vasahat. As observed

above, Defendants failed to lead evidence. However in their written statement, Defendants admitted existence of another property at Ruikar Colony in ownership and possession of Defendants' branch. They pleaded that in Kolhapur the family owned two properties viz. the suit property and a property in Ruikar colony. That the property in Ruikar colony was in name of Defendant No. 1's father Dnyanu, whereas the suit property was in name of Plaintiff's father. That the children of Dattatraya and Dnyanu has shares in both properties. They claimed that Plaintiff and his brother relinquished their shares in Ruikar colony property in favour of Defendant No. 1's brother Bhikaji, who in turn relinquished his share in suit property. That however Defendant No. 1 retained his share in the suit property. That Defendant No. 1 and his brother gave the property at Ruikar colony for redevelopment for which Defendant No. 1 received Rs. 80,000/-. That Defendant No. 1 has 1/4th share in suit property. That Defendants are in possession of 1 room on ground floor and 2 rooms on first floor. However, to prove these assertions, Defendants did not lead evidence. Therefore, the pleadings about Plaintiff relinquishing his share in Ruikar colony property, etc were not proved. On account of failure on the part of Defendant No. 1 to prove above pleadings, his story of possession of suit property for long time is not believable. Though there is some variance in name of the concerned property which is named by Plaintiff and his witness as 'Mahadik Vasahat' and by Defendants as 'Ruikar Colony'. Though property is referred in different names, it is one and the same property. Thus, Defendants' written statement also proves connection of Defendants with another property at Mahadik Vasahat/Ruikar Colony. Therefore Plaintiff's story of Dnyanu and Defendants residing at property in Mahadik Vasahat/Ruikar Colony cannot be entirely disbelieved.

37. Defendants' claim for possession is based on title. They never claimed adverse possession over suit property. It is settled law that a party cannot be permitted to take contradictory pleas of title and adverse possession simultaneously. He must elect one out of the two. Here, there is no claim of adverse possession. Defendants' claim in suit property was premised purely on title, which they have failed to establish. On account of failure to prove title, claim for protection of possession must fail.

38. It is a well settled position of law that injunction cannot be sought against true owner of property. A true owner is entitled to recover possession from trespasser by following due process of law and not by force. In the present case, though Defendants' possession over the suit property is proved, the possession is merely permissive. Defendants did not plead that they acquired possessory title to the suit property by adverse possession. Therefore, even if Plaintiff's admissions about birth of Defendant No.1, residence of Defendant Nos. 1 and 2 after marriage and birth of Defendant No. 3 in suit property are taken as correct, still in absence of claim of adverse possession, Defendants cannot prevent Plaintiff from seeking recovery of possession in his suit. In absence of proprietary title, mere permissive occupation of property would not create any right in favour of Defendants. Therefore, I hold that Plaintiff is entitled to recover possession of

the suit property from Defendants. Third, fourth and fifth questions of law are answered accordingly.

39. I therefore do not find any reason to interfere with the decree passed by the first Appellate Court. The Second Appeal accordingly fails and is dismissed with costs.

40. After the judgment is pronounced, Mr. Chetan Patil, the learned Counsel appearing for the Appellants, prays for stay on execution of the Decree for a period of 8 weeks. Considering the facts and circumstances of the case, the execution of the Decree of the first Appellate Court is suspended for a period of 8 weeks.