

## **Pandurang Doulu Patil Vs Ramrao Dadu Patil since deceased by his LRs, Shri Lalaso Ramrao Patil, Shri Balak Ramrao Patil and Shri Dilip Ramrao Patil**

**Court:** Bombay High Court

**Date of Decision:** April 24, 2009

**Acts Referred:** Limitation Act, 1963 &" Article 65

**Citation:** (2009) 4 BomCR 227

**Hon'ble Judges:** R.Y. Ganoo, J

**Bench:** Single Bench

**Advocate:** T.S. Ingale, for the Appellant; G.M. Khambete, for respondent Nos. 1A to 1C, for the Respondent

### **Judgement**

R.Y. Ganoo, J.

Regular Civil Suit No. 530 of 1983 came to be filed in the Court of Civil Judge, Junior Division, Vadgaon, District

Kolhapur by three persons namely Ramrao D. Patil, Manjulabai and Rajaram against Pandurang for recovery of possession in respect of the

property i.e. land bearing Gat No. 1125, Survey No. 188/1, 188/2 situate at village Latwade, Tahsil Hatkanagale, Dist. Kolhapur (hereinafter

referred to as the "suit property"). These three persons shall hereinafter be referred to as Ramrao and Ors. for the sake of convenience. The said

suit was contested by Pandurang and the learned Civil Judge, Junior Division, Vadgaon by the judgment and decree dated 6th February, 1985

decreed the suit in favour of the three plaintiffs as mentioned aforesaid. Provisions of mesne profit were also made. Pandurang against whom the

decree for possession was passed, filed Regular Civil Appeal No. 62 of 1985 in the District Court at Kolhapur against original plaintiffs as well as

one person by name Golula w/o Baburao Patil. Said appeal came to be heard and decided by learned 3rd additional District Judge and Assistant

sessions Judge, Kolhapur (hereinafter referred to as the "learned additional Distict Judge"). By his judgment and decree dated 4th August, 1989 he

dismissed the appeal and confirmed the judgment and decree passed by the learned trial Judge on 6th February, 1985. Being aggrieved by this

judgment and decree dated 4th August, 1989 present second appeal was filed by Pandurang, original defendant No. 1.

2. Pandurang against whom the suit came to be filed is the present appellant. Ramrao D. Patil, Manjulabai and Rajaram who had filed the suit are

the respondents in this second appeal. Said Ramrao died during the pendency of the second appeal and his heirs are brought on record who are

respondents Nos. 1(a) to 1(c) and who are represented by learned advocate Mr. Khambete. Rest of the respondents remained absent. They are

not represented by any advocate. Respondent No. 1(a) to 1(c) shall hereinafter be referred to as said respondents.

3. Few facts necessary for the disposal of this appeal are as under:

4. One Vithabai held the suit property and the suit property was a patil Vatan land. Said Vithabai died in the year 1945. Thereafter, the property

was enjoyed by Mr. Subhana husband of Vithabai. He died in the year 1951. According to the present appellant, it was reported to the

Government authority that there are no heirs of said Vithabai/Subhana and the present appellant was put in possession of the suit property for

cultivation on year to year basis. According to the appellant, the Patil Vatan applicable to the suit property came to be abolished by the provisions

of the Maharashtra Revenue Patels (Abolition of Office) Act of 1962 (hereinafter referred to as the "said Act") and that the said Act came into

effect from 1st January, 1963. According to the appellant, the appellant approached Government authority contending that he is the heir of

Vithabai and that the regrant order in accordance with the provisions of the said Act should be made in his favour. It is seen that the Collector

granted the said application and by order dated 23rd August, 1965, the Collector passed an order of regrant and that the appellant paid Nazarana

in accordance with the provisions of the said Act and on 26th April, 1966, the appellant was put in possession of the suit property as a full owner

thereof and in his capacity as a person to whom regrant was made. The appellant continued to enjoy the property as a full owner. The Regular

Civil Suit No. 530 of 1983 as mentioned aforesaid came to be filed on 30th June, 1978. The said suit came to be disposed of as mentioned

aforesaid. Appeal also came to be disposed of as mentioned aforesaid and that is how the second appeal.

5. Before this Court learned advocate Mr. Ingale appearing on behalf of the appellant submitted that the order of regrant dated 23rd August, 1965

made in favour of the appellant and subsequent enjoyment of the property by the appellant created ownership rights in favour of appellant and

therefore if at all the Ramrao and others wanted to take possession of the suit property by following the due process of law, they ought to have

sought a declaration that the said order of regrant dated 23rd August, 1965 was incorrectly passed and respondents were entitled to have an order

of regrant and it is only after obtaining such a declaration, they would have been entitled to ask for possession and then the competent Court could

have been in a position to investigate the matter. The learned advocate Mr. Ingale submitted that in the present case, Ramrao and Ors. had filed

the suit and proceeded on the footing that they are the heirs of Vithabai and that the learned additional District Judge accepted the contention of

Ramrao and others and dismissed the suit, which was decreed in favour of the appellant. According to learned advocate Mr. Ingale, as the order

of regrant dated 23rd October, 1965 remained undisturbed during the proceedings before the learned trial Judge as well as the learned additional

District Judge, the learned additional District Judge could not have arrived at conclusion that the Ramrao and others were the owners of the suit

property. He further submitted that the view taken by the learned additional District Judge that the appellant had practiced fraud and made

misrepresentation and thereafter secured order dated 23rd August, 1965 should not be accepted because the learned additional District Judge

could not have recorded the finding in that behalf without investigating the rights of the Ramrao and others. He submitted that the learned additional

District Judge accepted the claim of Ramrao and others that they have succeeded to the rights of Vithabai. According to learned advocate Mr.

Ingale, learned additional District Judge could not record a finding to that effect. Learned advocate Mr. Ingale submitted that the view taken by the

learned additional District Judge in declaring Ramrao and others as owners of the property is not correct as no formal inquiry in that behalf was

made by a forum which could have decided that issue.

6. The learned advocate Mr. Khambete appearing on behalf of the said respondents submitted that once the learned additional District Judge

recorded the finding that the appellant had practiced fraud, this Court should not interfere in the judgment delivered by the learned additional

District Judge in view of the observations of the Supreme Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by

L.Rs. and others, . The learned advocate Mr. Khabete had submitted that when the learned additional District Judge came to the conclusion that

the fraud was practiced upon the Collector, the said observation has been rightly held against the appellant and that the learned additional District

Judge rightly reversed the decree passed by the learned trial Judge.

7. I have considered the respective submissions advanced before this Court. The land was granted to the appellant in accordance with the order

dated 23rd August, 1965. Ramrao and others claimed to be the owners of the suit property. They submitted before the learned additional District

Judge that the fraud was practiced. The learned additional District Judge accepted that contention. In my view, it was necessary for the learned

additional District Judge to investigate the title of Ramrao and others and their case that they were the heirs of Vithabai ought to have been

decided. It is required to be mentioned that the suit came to be filed on the basis of the claim of the Ramrao and others that they have succeeded

to the rights of Vithabai. There is no specific finding recorded so far as this aspect of the matter is concerned. Ramrao and others claimed to be the

heirs of Vithabai. It cannot be that they were ignorant about their rights in regard to the suit property. Nothing is placed before this Court to show

that after the death of Subhana, they took active steps to protect their interest in the property. It is only in the year 1978, they come up with a

stand that they are the heirs of Vithabai and entitled to have the possession in respect of the suit property. It is seen that an application was made

by the appellant to the appropriate authority for securing the benefit of the provisions of the said Act and to have suit property reganted in his

favour. According to learned advocate Mr. Khambete the Ramrao and others were not served with the notice. If Ramrao and others claimed that

they were the owners of the property, it was absolutely necessary for them to have the order of regrant set aside and then come to the Court for

getting possession of the property on the ground that they were entitled to the suit property. Once the order of regrant was passed in favour of the

appellant that had the effect of granting title in his favour. In my view, the authority who could decide whether the order of regrant was illegally

obtained or obtained by fraud was the very authority who granted an order of regrant in favour of the appellant. In my view, the Civil Court will not

have jurisdiction to observe that the order of regrant was obtained by the appellant by practicing fraud. With these observations, I am inclined to

observe that the observations of the learned additional District Judge that the order of regrant was obtained by fraud cannot sustain. In my view, it

was absolutely necessary for Ramrao and others to have order dated 23rd August, 1965 set aside by establishing they were the rightful persons in

whose favour an order of regrant could have been passed and then take a stand that the appellant was illegally holding the land and apply for

possession. The mere observation in the suit that Ramrao and others succeeded to the rights of Vithabai without having order dated 23rd August,

1965 set aside, Ramrao and others could not have staked their claims for possession. To that extent, the learned additional District Judge has

erred.

8. It was next contended by learned advocate Mr. Ingale that the institution of the suit on 30th June, 1978 was beyond the period of limitation

keeping in view the fact that Article 65 of the Indian Limitation Act would apply to the facts of this case. According to Mr. Ingale learned advocate

for appellant, the important date is 26th April, 1966 when the appellant was put in possession as a person in whose favour the order of regnant

was passed and the period of limitation for recovery of possession would start from 26th April, 1966 and the suit ought to have been filed within

12 years from 26th April, 1966. According to Mr. Ingale since the suit came to be filed on 30th June, 1978, it was patently beyond the period of

limitation. The learned advocate Mr. Ingale submitted that Ramrao and others gave notice calling upon the appellant to handover the possession

within a period of 4 months and that the said notice period came to an end on 26th August, 1966. Mr. Ingale submitted that the learned additional

District Judge took this date namely 26th August, 1966 as the date when the period of limitation commenced and treated institution of a suit on

30th June, 1978 as the one within a period of limitation. According to learned advocate Mr. Ingale it was not open for the learned additional

District Judge to give concession to Ramrao and others to the extent of 4 months as the period of limitation could not be extended by

correspondence by and between the parties. The learned advocate Mr. Ingale submitted that if the learned additional District Judge accepted that

the period of limitation commenced from 26th April, 1966 and thereafter excluded the period of 4 months being the notice period, the learned

additional District Judge has erred by granting concession to the respondents and if the commencement of the period of limitation is treated as

w.e.f. 26th April, 1966, the institution of the suit on 30th June, 1978 is patently beyond the period of limitation. He submitted that the aspect of

period of limitation was not rightly appreciated by the learned additional District Judge and that he committed an error and if his argument is

accepted it will go to show that the institution of the suit on 30th June, 1978 was beyond the period of limitation. He therefore submitted that the

second appeal be allowed by setting aside the judgment delivered by learned additional District Judge.

9. Learned advocate Mr. Khambete appearing on behalf of said respondents contended that the view taken by the learned additional District

Judge is right because the said respondents thought it fit to call upon the appellant to give possession within a span of 4 months and it is only when

the said respondents were satisfied that the appellant is yielding to the demand the said respondents had to institute the suit for recovery of

possession. Learned advocate Mr. Khambete further submitted that the possession of the present appellant did not become adverse to that of the

said respondents and others on 30th June, 1978 because the notice period of 4 months ought to be excluded as has been done by the learned

additional District Judge.

10. I have considered the rival submissions on the question of limitation. The appellant was put in possession on 26th April, 1966 as a result of the

order dated 23rd October, 1965. The said respondents and others gave notice and asked the appellant to handover the possession within a period

of 4 months come to an end. It is clear that said respondents knew as to what development were taking place at site and that is how they had

issued notice to the appellant to handover the possession. The learned additional District Judge accepted the stand of the appellant that the period

of limitation did commence from 26th April, 1966 however accepted the argument of the said respondents that the period of 4 months upto 26th

August, 1966 is to be excluded and the period of limitation ended after 30th June, 1978 and that is how he treated the institution of the suit within

the period of limitation. In my view, the observations of the learned additional District Judge in granting concession of 4 months to the said

respondents and others was not proper once the period of limitation is said to have commenced on 26th April, 1966. The suit ought to have been

filed prior to 26th April, 1978. Since the suit was instituted on 30th June, 1978, the learned additional District Judge erred in holding that the

institution of the suit on 30th June, 1978 was well within a period of limitation. As the period of limitation ended on 26th April, 1978, the institution

of the suit thereafter ought to have been treated as one beyond the period of limitation and the learned additional District Judge should have

dismissed the suit by allowing the appeal instead the learned additional District Judge dismissed the appeal and fell in error.

11. In my view, both the points which were agitated before this Court by learned advocate Mr. Ingale can be easily termed as substantial questions

of law, which go to the root of the matter and that is how the Court was required to deal with them. The learned advocate Mr. Khambete had of

course in the course of his submission submitted that it was not open for the appellant to raise the question of not challenging of the order of regrant

dated 23rd August, 1965 before the appropriate authority because while admitting this appeal, the ground (f) was not considered as a ground

raising substantial question of law. He had, therefore, submitted that the argument advanced by learned advocate Mr. Ingale ought not to be

considered by the Court. I do not agree with the submission advanced by the learned advocate Mr. Khambete. It is true that at the stage of

admission of the second appeal, the Court has to fix the points which could be termed as substantial question of law and that practice was followed

in this appeal also. However, if at the stage of final hearing of the appeal, if a point which is raised in the appeal memo but it is not treated as

substantial question of law is placed before the Court for its consideration and if the Court hearing the second appeal would consider the said point

and substantial question of law, it would not be proper to reject the hearing on the said point merely because at the stage of admission that point

was not treated as substantial question of law. Since ground (f) was stated in appeal memo, respondents in this appeal had notice thereof. It is in

this context, I have heard learned advocate Mr. Ingale and Mr. Khambete and that is how the matter was attended to.

12. For the reasons mentioned aforesaid, I am inclined to observe that view taken by the learned additional District Judge is required to be

interfered with and that this second appeal is required to be allowed. The suit filed by original plaintiff is required to be dismissed.

13. Before I part with the judgment, it is clarified that in future if the present respondents feel that they should challenge the order of regrant dated

23rd August, 1965 made in favour of the appellant, they are free to do so. This Court has not expressed views on that aspect of the matter namely

whether the respondents herein were entitled to an order of regrant on the basis of their claim that the persons who instituted the suit at the relevant

time were the heirs of Vithabai. For the reasons mentioned aforesaid, the second appeal is disposed of by passing following order:

#### ORDER

Second Appeal is allowed. The judgment and decree dated 6th February, 1985 passed by Civil Judge, Junior Division, Vadgaon, Dist. Kolhapur

judgment and decree dated 4th August, 1989 passed in Regular Civil Appeal No. 62 of 1985 passed by 3rd Additional District Judge and

Assistant Sessions Judge, Kolhapur Dist. Kolhapur is set aside. In the facts and circumstances, there shall be no order as to costs.

14. After the aforesaid order is passed, learned advocate Mr. Ingale appearing on behalf of the appellant submitted that though an order of

injunction was granted in favour of the appellant that is to say the possession of the appellant which was then held by him at the time of admission

of this appeal was sought to be protected by the order of this Court by the time the Writ could reach the Court below, the appellant was

dispossessed from the suit property. Learned advocate Mr. Ingale submitted that now that the Regular Civil Suit No. 530 of 1983 is dismissed, the

possession of the suit property be restored to the appellant. Learned advocate Mr. Khambete opposed the submission saying that the possession

was obtained when the injunction was not running against the said respondents. In my view, now that this Court has accepted the case of the

appellant and dismissed the Regular Civil Suit No. 530 of 1983, the possession of the suit property should be restored to the appellant.

Accordingly, the learned Civil Judge, Junior Division, Vadgaon upon receipt of Writ of this Court of this order is concerned will issue a possession

warrant and see that the possession of the suit property is restored in favour of the appellant.

15. After the aforesaid order is passed, the learned advocate Mr. Khambete appearing on behalf of the said respondents submitted that the

operation of the order in this second appeal be stayed for a period of 3 months as his clients are interested in going through the judgment and do

the needful. The learned advocate Mr. Ingale for the appellant opposed the submission. In my view, the said respondents will have to be given an

opportunity to go through the judgment and attend to the matter. Hence, the operation and execution of this judgment delivered in the second

appeal is stayed till 31st July, 2009.