

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.857 OF 2012

Rama Janu Kohil

...Appellant.

Versus

Sushila Gajanan Patil

...Respondent.

*Adv. C. G. Gavnekar a/w Ashutosh Gavnekar & Rohit Parab, for the Appellant.
Adv. Rajesh Datar, for Respondent Nos. 1 to 4.*

Coram : Sharmila U. Deshmukh, J.

Date : April 26, 2024.

P. C. :

1. Being dissatisfied by the judgment dated 12th March, 2012 passed by the Appellate Court in Regular Civil Appeal No. 119 of 2007 reversing the judgment of dismissal of the suit by Trial Court at the instance of the Plaintiff, the Original Defendant Nos. 1 to 3 are before this Court.

2. The facts of the case are that Regular Civil Suit No. 45 of 2002 was instituted seeking declaration of ownership of the suit property and for injunction restraining the Defendants from interfering with their possession. It was contended that the grandfather of the Plaintiff Nos. 1 and 3 was the tenant of land owned by one Mr. Todankar and had received the tenanted land from the landlord. Pot

Kharab land adjoining the tenanted land was in possession of the Dalvi family i.e. the Plaintiff's predecessors and in such situation by virtue of sale deed executed in on 17th June, 1936 under registration number 731, the Plaintiff's grandfather purchased gaathan land situated at Mandve Village Zirad. The suit property was described as the land forming subject of the sale deed executed in the year 1936 and Pot Kharab land of Survey No. 12 Hissa No. 7 bounded on the northern side by Pot Kharab land admeasuring 2 Are of Survey No. 12 Hissa No. 7 owned by Dalvi family, on the eastern side by fencing of Kashibai Amichand, Mathurabai Dadu Mhatre and Gopal Mahadev Koli, on the western side by Dalvi family's land out of Survey No. 55 and on the southern side by Mandva Village Road and the Plaintiff No. 4's residence.

3. In the year 2000, the Defendant Nos. 1 to 3 attempted to encroach upon the suit property for purpose of celebrating Holi festival. Prior to that, the Holi festival was being celebrated in land bearing Survey No. 12 Hissa No. 2 owned by one Shri. Madvi, who thereafter refused permission to celebrate Holi on his land. Thereafter in the year 2001, the Defendants approached the Tahsildhar with demand for place to celebrate Holi, which was permitted to be celebrated by Tahsildhar in the suit property for that year. The Plaintiffs after obtaining permission from the

Grampanchayat dated 20th June, 2001 sought to construct a compound wall around their property which was objected by the Defendant Nos. 1 to 3. Hence, the suit came to be filed seeking declaration of ownership and injunction.

4. The suit came to be resisted by the Defendants. It was contended by Defendant Nos. 1 to 3 that the Plaintiffs are not residing at Mandve. The gaathan land of Village Zirad is used for pasturing of cattle by the Koli community. The Defendant No. 4 after carrying out measurements has determined the area of government gaathan land and has given the same to the Koli community for celebrating Holi festival. The Defendants denied that the vendor of the Plaintiff's grand-father had any right to sell the suit land. The Plaintiffs are trying to erect the compound on the land allotted by Defendant No. 4 for the purpose of Holi celebration.

5. The case of the Defendant Nos. 4 and 5 was that in a meeting called by the Government officers which included the members of the Plaintiff's family and villagers it was decided that the Holi festival will be celebrated in the land decided by Defendant No. 4 and the ownership right of the Plaintiffs over the said land will be resolved later on.

6. The parties went to trial and the Trial Court by judgment dated 25th April, 2007 dismissed the suit. The Trial Court held that the

boundaries given in the plaint and the boundaries given in the sale deeds are not matching. Further as regards the Pot Kharab land, only 7/12 extract of Survey No. 12/7 is produced on record which shows the name of Plaintiff No. 5. However, the cultivation column is blank. The Trial Court noted that the Pot Kharab land is tenanted land and there is no Section 32M certificate on record to show that the land is purchased by the grand-father of the Plaintiff. The Trial Court noted that there is no document of title of Todankar to the properties sold to the Plaintiff's grand-father and as such in the absence of proof by the Plaintiffs in respect of the boundaries of the land sold to their grand-father and Section 32M certificate under the Maharashtra Tenancy and Agricultural Lands Act, 1948 not being produced on record, the Trial Court negated the issue of Plaintiff's ownership.

7. As against this, the Plaintiffs filed Regular Civil Appeal No. 119 of 2007. The Appellate Court noted that the boundaries mentioned in the sale-deed and boundaries mentioned in the plaint are matching and are correctly described. The Appellate Court noted that sale deed alongwith the 7/12 extract establishes the sale of the land to the Plaintiff's grandfather. The Appellate Court held that the sale deed dated 17th June 1936 is produced from proper custody and it is free from suspicion. Taking support of Section 90 of the Indian Evidence Act, 1872 the Appellate Court held that the sale-deed is admissible in

evidence and the purchase of the suit property from Mr. Todankar stands supported. The Appellate Court further noted that the Defendants have not brought on record any evidence from the Grampanchayat to prove that the suit lands are part of gaathan land and the allotment of the suit land by Defendant No. 4 for celebration of Holi festival is against the property rights of plaintiffs. The Appellate Court thereby reversed the findings and allowed the Appeal.

8. Heard Mr. C. G. Gavnekar for the Appellant and Mr. Rajesh Datar for Respondent Nos. 1 to 4.

9. Learned counsel for the Appellate would submit that the Trial Court has rendered a well reasoned finding as regards the two gunthas land forming part of the gaathan by taking into consideration the recitals in the sale-deed. According to him, the boundaries stated in the sale-deed and the boundaries mentioned in the plaint do not tally and the Trial Court therefore rightly considered that the sale-deed in respect of the suit property cannot be accepted as title document. He would further submit that as regards Pot Kharab land, it is an admitted position that the same is a tenanted land and without Section 32M certificate being produced on record, the ownership in respect of Pot Kharab land was also not proved. He submits that considering these two aspects, the finding of the Appellate Court as

regards the ownership of the Plaintiff was unsustainable and suffering from perversity.

10. *Per contra*, learned counsel for the Respondents submits that the sale-deed of the year 1936 shows that the purchase of the suit land and since then the Plaintiffs are in possession of the suit property. He submits that as regards the Pot Kharab land, once it is held that the property was tenanted property which was being cultivated by the Plaintiff's ancestors, even if 32M certificate is not produced, the Plaintiffs are deemed purchasers as on tillers day. He would further submit that the Defendant Nos. 4 and 5 who are the Government officials have not examined themselves and no witness have been produced by the Defendants to support their allotment of the suit property for the purpose of celebration of Holi festival.

11. To counter the submission, learned counsel for the Appellant would submit that the burden was upon the Plaintiff to prove the ownership of the property and it is only if the initial burden was discharged the onus would shift upon the Defendants to show that the property has been allotted to the Defendants for the purpose of celebrating of Holi festival.

12. Considered the submissions and perused the record.

13. The substantial question of law canvassed by learned counsel

for the Appellant is the perversity of findings of the Appellate on the sale-deed dated 17th June, 1936. As the findings of Trial Court and Appellate Court qua the boundaries mentioned in the sale deed and plaint are at variance, with the assistance of learned counsel for the parties this Court has examined the contents of sale deed and plaint to ascertain whether the boundaries tally. In the sale-deed the boundaries which are mentioned are as under.

पूर्वेस काशिबाई अमिचंद मथुराबाई दादू म्हात्रे व गोपाल महादेव कोळी यांचे बाडकुली दरम्यान कुंपण. पश्चिमेस सं नं. ५५ पैकी खुद्दपैक आमची जमीन. दक्षिणेस मांडवा व्हिलेज रोड. उत्तरेस माझी जमीन.

14. In the plaint, the boundaries which are mentioned as under :

उत्तरेकडे : स. नं. १२, हि.नं. ७ पैकी पो. ख. २१ अडीच गुंठे अशी दळवी कुटूंबाची जागा.

पूर्वेस : काशिबाई अमिचंद मथुराबाई दादू म्हात्रे व गोपाल महादेव कोळी यांचे बाडकुली दरम्यान कुंपण

पश्चिमेस : सं नं. ५५ पैकी खुद्दपैक दळवी कुटूंबाची जमिन.

दक्षिणेस : मांडवा व्हिलेज रोड, वादी नं. ४ हिचे राहते घर.

15. On examining the boundaries mentioned in sale deed and plaint, it is evident that the boundaries tally and the finding of the Trial Court that the boundaries are not matching was erroneous which was rightly corrected by the Appellate Court. To establish their ownership, the sale deed of the year 1936 has been produced from

property custody and the Appellate Court has rightly relied upon Section 90 of the Evidence Act, and held the sale-deed to be admissible in evidence. The Plaintiffs have produced the title document executed in their favour in respect of the suit property. The Trial Court has noted that the government survey of Mandwa taluka Zirad is not done yet and the 2 Are land is unsurveyed land. The Plaintiffs claim to be in possession of the said land since the purchase by their grandfather. In the cross-examination, nothing has been elicited to prove that the Plaintiffs are not in possession. In addition the Plaintiffs had been granted permission by the Grampanchayat to construct the compound wall. The Appellate Court has rightly held that it was possible for Defendants to bring evidence from the Grampanchayat to establish that the suit lands are part of gaothan, which has not been done. The Tahsildhar though being party Defendant has not adduced any evidence to show that the 2 Are land is gaothan land. In the absence of any material to demonstrate that the suit properties are gaothan land, the registered sale-deed of the year 1936 being title document establishes the ownership of the Plaintiff over the suit property.

16. As regards the submission that Section 32M certificate under the Maharashtra Tenancy and Agricultural Lands Act, 1948 was not produced, as per the provisions of The Maharashtra Tenancy and

Agricultural Lands Act, on tillers day i.e. on 1st April, 1957 if the tenant is found to be cultivating the land, he is deemed to have purchased the land and the non issuance of the 32M certificate will not upset the deemed purchase by the tenant, unless the purchase is shown to have been refused by the tenant. In the present case, 7/12 extract is produced on record which shows the name of the Plaintiff No. 5 at least till the year 2000-2001. The Trial Court was therefore not right in holding that in the absence of Section 32M certificate, the property being the tenanted land cannot be said to be owned by the Plaintiff's ancestors. The Defendant Nos. 1 to 3 do not claim any ownership rights in the suit property and what is claimed is only right to celebrate Holi on the suit property which according to them has been allotted by the Defendant No. 4. As the ownership rights have been established by the Plaintiff and there is no material to prove that the suit property was gaothan land, the allotment if any by the Tahsildhar cannot override the ownership rights of the Plaintiff.

17. It is settled that it is impermissible for this Court in exercise of powers under Section 100 of CPC to re-appreciate the evidence unless it is demonstrated that the findings of the Appellate Court are based rendered in the absence of any evidence or that wrong inference has been drawn on proven facts by erroneous application of law. The Appellate Court being the final fact finding Court, has on re-

appreciation of the evidence rightly reversed the findings of the Trial Court and there is no perversity demonstrated in the present case. As such, no substantial question of law arises. Appeal stands dismissed.

18. In view of dismissal of Second Appeal, Civil/Interim Application if any, taken out therein does not survives for consideration and the same is disposed of.

19. At this stage, request is made by learned counsel for the Appellant for stay of the operation of the judgment and decree dated 12th March, 2012 passed by the Appellate Court which was granted by order dated 7th December, 2012 by way of ad-interim relief. This request is opposed by learned counsel for the Respondents by submitting that the claim of the Defendant *qua* the suit land was only for the purpose of celebrating the Holi and as such, no stay be extended. Considering that there was a stay which was operating from the year 2012, I am inclined to extended the same for a period of four weeks from the date of uploading of this order.

[Sharmila U. Deshmukh, J.]