

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

Second Appeal No. 855 of 2004

- 1) Mohanlal s/o Chunilal Ajmera,
Age 58 years,
Occupation : Business,
R/o. Mahaveer Nagar, Purna,
District Parbhani.
 - 2) Kamal s/o Mohanlal Ajmera,
Age 40 years,
Occupation : Business,
R/o As above.
 - 3) Bhavaribai w/o Mohanlal Ajmera,
Age 50 years,
Occupation : Household.
R/o As above.
- .. Appellants.**

Versus

- 1) Syed Ahmed Hussain s/o Syed
Ali Hussain,
Age 59 years,
Occupation : Business,
R/o Mahaveer Nagar, Purna,
District Parbhani.
 - 2) Kailas Balaprasad Ajmera,
Age 40 years,
Occupation : Business,
R/o As above.
- .. Respondents.**

Shri. S.S. Rathi, Advocate, for appellants.

Shri. S.G. Chapalgaonkar, Advocate, for respondent No.1.

CORAM: T.V. NALAWADE, J.

DATE : 24th NOVEMBER 2015

JUDGMENT:

1) The appeal is filed to challenge the judgment and decree of Regular Civil Suit No.42 of 1997 which was pending in the Court of the Civil Judge Junior Division Purna, District Parbhani and also judgment and order of Regular Civil Appeal No.136 of 2001 which was pending in District Court Parbhani. The suit filed by the present respondent No.1 Syed Ahmed Hussain for relief of possession is decided in his favour. Heard both the sides.

2) The suit was filed in respect of open space situated between Plot No.40 and Plot No.41 which are part and parcel of Survey No.8 situated in Purna, Tahsil Purna, District Parbhani. The size of the plot is given as East West 27 ft and south north 40 ft. On Eastern side of this plot there is plot No.40 and on the Western side there is Plot No.41. It is the case of the plaintiff that one Vijaychand Shrimal was owner of entire survey number and from him he purchased the suit property for

consideration of Rs.6480/- under registered sale deed dated 30-7-1991. It is contended that the possession of this plot was given under the sale deed but during pendency of the suit the possession was taken by defendants. The map of the suit property is given along with the plaint. Thus suit was filed for possession on the basis of title.

3) Defendant Nos.1,2 and 4 filed joint written statement. They contended that suit property was part and parcel of Plot No.40 which was owned by defendant No.3 Kailas and this portion was sold to defendant No.4 by Kailas under registered sale deed dated 3-10-1985. It is contended that since then defendant No.1 is in possession of the suit property.

4) The issues were framed on the basis of aforesaid pleadings. Both the sides gave evidence. One Kishan Pawar, Power of Attorney Holder for Vijaychand gave evidence which is consistent with the aforesaid contentions of plaintiff. One Mariba is examined who has given evince that under the aforesaid sale deed, as per

instruction of his employer, Vijaychand, he had handed over the possession to the plaintiff. The plaintiff examined himself and he gave evidence as per the contentions made in the plaint. He has given evidence that on the basis of sale deed his name was entered in the assessment record of the property in local body. He has given evidence on cause of action. In the trial Court, Dattatraya Gavane, Advocate, was appointed as Court Commissioner and the report prepared by him is produced in evidence at Exhibit 108. He prepared map of the disputed property and it shows that the disputed property is situated between Plot Nos.40 and 41. Correction sale deed is proved in the evidence of Janimiyan PW 5.

5) In rebuttal, the defendants examined one Renukadas Bhalerao, Chief Officer of the local body, Purna. His evidence shows that on the basis of sale deed which was executed in favour of defendant No.4 Bhavaribai, the entry in the assessment record of the name of defendant No.4 was made. This record shows that the area of 10 ft x 40 ft. was shown to be purchased by Bhavaribai and to that area separate number was to be

given in the record of the local body and for that application was given. This portion was shown as part and parcel of Plot No.40. She is wife of defendant No.1.

6) Defendant No.1 has given evidence that the disputed property was purchased by him in the name of his wife in the year 1985. He has deposed that the area of this property is 10 ft x 40 ft and it was purchased for the consideration of Rs.2000/-. The execution of the sale deed is not disputed and so it can be said that in the year 1985 the open space having size of 10 ft east-west and 40 ft north south was sold.

7) The execution of the sale deed in favour of defendant No.3 Kailas Ajmera, vendor of defendant No.4, is not disputed and this document at Exhibit 123 shows that in the year 1984 he had purchased Plot No.40 from Vijaychand Shrimal. The length on east west side of the plot was 55 feet and the width on north south side was 40 ft. On the west side of this plot, Plot No.41 was shown. One witness Laxminarayan is examined and he has deposed that the disputed property is part & parcel of Plot No.40.

8) The sale deed and the correction of the sale deed executed in favour of plaintiff show that the property having size 27 ft east west and 40 ft north south is shown to be sold to the plaintiff by Vijaychand. In the present proceeding also learned counsel for the appellants was asked to produce the sale deed in respect of Plot No.41 as there is dispute over the area but the sale deed was not produced. The learned counsel for the appellants submitted that in the first appeal a copy of so called plan prepared by Vijaychand was produced and this document needs to be considered in evidence along with the admission given by Vijaychand that as per the lay out plan no open space was shown between Plot Nos.40 and 41. The First Appellate Court has not considered this plan but the trial Court has considered the evidence in respect of this circumstance. It is observed that the construction permissions were granted without reference to the plan. It appears that the land was already converted to Non Agriculture purpose and it was being used for factory and then the owner decided to sell the property by preparing plots. Nothing is on the record to show that the plan was submitted for approval and on that basis the development

of this property which was already converted to NA purpose, was to be made. Even if for some purpose this plan is considered, it was necessary for the present appellants to produce sale deed in respect of Plot No.41 as there was dispute over the area and he could have taken support of the sale deed to substantiate his contention. The family of defendant No.1 purchased some portion as it was adjacent to plot No.41 owned by this family.

9) This Court admitted the appeal on following substantial question of law :

"Whether both the courts below are justified in holding that the plaintiff has acquired ownership to the suit property by the registered sale-deed dated 22.7.1991 and the correction deed dated 1.12.1992 executed for and on behalf of Shri. Vijay Chand by Shri. Pawar, Power of Attorney and on the basis of the Commissioner's report at Exhibit 92 ?"

10) For proving the title, there is sale deed of the plaintiff and the circumstance that the same vendor had sold Plot Nos.40 and 41 is there. The only dispute is about entitlement of Kailas, defendant No.3 to have more area

than the area shown in the sale deed executed in his favour. The sale deed shows that the area of 55 ft x 40 ft was sold to him. The report of the Court Commissioner shows that length of East-West of construction on plot No.40 was 56 ft i.e. more than the property purchased by Kailas and so there was no open space left which could have been sold to defendant Nos.1 and 4. Similarly area of constructed portion of defendant No.1 on plot No.41 is shown to be more than 45 ft. It was necessary for him to produce the sale deed of Plot No.41 from which it could have been ascertained as to whether on East-West length of the plot No.40 some open space of plot No.41 is left. Due to non production of the sale deed in respect of Plot No.41 adverse inference needs to be drawn against the defendants. Further the circumstance that area of only 10 ft. x 40 ft. was shown to be purchased from the owner of Plot No.40 goes against him when there is area having length 23.7 ft east west. The decree could have been modified if the sale deed of plot No.41 was produced and if it was possible to infer that there is some portion of Plot No.41 on east side which was not constructed by defendant Nos.1 and 4.

11) The learned counsel for the appellants placed reliance on one case of this Court reported a **1990(1) Mah LR 802 (Khandu v Ramrao)**. The learned counsel submitted that when in a sale deed property is described by boundaries, the boundaries should prevail as per the observations made by this Court in the reported case. This Court has carefully gone through the facts of the reported case. There was dispute about one lane. On one side of the property of the plaintiff, in the sale deed executed in favour of the plaintiff on that side lane was shown in existence. This lane was in the use of adjacent owner. After measurement of the property of the plaintiff and the lane it was noticed that the area of lane could have been included as the property of the plaintiff if the boundaries were ignored. In view of the facts of that case this Court held that the boundaries would prevail. Thus the facts of the reported case were altogether different. In the present case, no lay out plan as such was sanctioned for development and the specific areas were sold by giving them the numbers. Roads were there and the Plot Nos.40 and 41 have road on their east and west sides respectively. Though in the sale deed executed in

favour of defendant No.4 it is shown that on west side there is plot No.41, the area sold is specifically mentioned in the sale deed and so he cannot go beyond that area. Thus if some space was left after selling Plot Nos.40 and 41 between the two plots that area belonged to the original owner Vijaychand. Thus, title is passed to the plaintiff. As there was no open space left in plot No.40, there was no question of purchasing some open space by defendant Nos.1 and 4 from defendant No.3. The description of the property shown to be purchased goes against defendant No.1,3 and 4. It is a finding of fact and this Court is not expected to interfere in the concurrent findings of the Courts below. In the result, the aforesaid substantial question of law is answered against the appellants and the appeal stands dismissed.

Sd/-
(T.V. NALAWADE, J.)

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