

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

**SECOND APPEAL NO. 405 OF 2012
WITH
CIVIL APPLICATION NO. 7037 OF 2012**

1. Pandurang s/o Shivappa Sontakke,
Age: 47 years, Occ: Agri.,
R/o. Jalkot, Tq. Tuljapur,
Dist. Osmanabad.
2. Rajendra s/o Shivappa Sontakke,
Age: 42 years, Occ: Agri.,
R/o. Jalkot, Tq. Tuljapur,
Dist. Osmanabad. ...Appellant

versus

1. Rama s/o Bapu Lashkare,
Age: 72 years, Occ: Agri.,
R/o. Jalkot, Tq. Tuljapur,
Dist. Osmanabad.
2. Pralhad s/o Shaba Lashkare,
Age: 62 years, Occ: Agri.,
R/o. As above.
3. Umrao s/o Sopan Lashkare,
Age: 52 years, Occ: Agri.,
R/o. As above.
4. Sou. Chhabubai w/o Bhagwan Lashkare,
Age: 67 years, Occ: Labour,
R/o. Kachara Depot, Zingade Wasti,
Solapur.
5. Sou. Parwati w/o Thakru Pawar,
Age: 51 years, Occ: Household,
R/o. Jalkotwadi, Tq. Tuljapur,
Dist. Osmanabad. ...Respondents

.....

Mr. Amol Joshi, Advocate h/f Mr. R.S. Deshmukh, Advocate for
appellant
Mr. R.B. Deshmukh, Advocate for respondent Nos. 2 to 5.

.....

WITH

WRIT PETITION NO. 5462 OF 2004

1. Pralhad s/o Shaba Lashkare,
Age: 59 years, Occ: Agri.,
R/o. Jalkotwadi, Tq. Tuljapur,
Dist. Osmanabad.
 2. Sou. Chhabubai w/o Bhagwan Lashkare,
Age: 65 years, Occ: Household,
R/o. Kachara Depot, Zingade Wasti,
Solapur.
 3. Prakash Bhagwan Lashkare,
Age: 35 years, Occ: Service
R/o. As above.
 4. Omrao s/o Sopan Lashkare,
Age: 50 years, Occ: Labour,
R/o. Jalkotwadi, Tq. Tuljapur,
Dist. Osmanabad.
 5. Parwatibai w/o Thakru Pawar,
Age: 60 years, Occ: Agri.,
R/o. Jalkotwadi, Tq. Tuljapur,
Dist. Osmanabad.
- ...Petitioners

versus

1. Pandurang s/o Shivappa Sontakke,
Age: 45 years, Occ: Agri.,
R/o. Jalkot, Tq. Tuljapur,
Dist. Osmanabad.
2. Rajendra s/o Shivappa Sontakke,
Age: 40 years, Occ: Agri.,
R/o. Jalkot, Tq. Tuljapur,
Dist. Osmanabad.
3. Laxman s/o Vinayak Lashkare,
Age: years, Occ: Agri.,
R/o. Jalkot, Tq. Tuljapur,
Dist. Osmanabad.
4. Subabai w/o Vinayak Lashkare,
Age: 45 years, Occ: Household,

R/o. Jalkot, Tq. Tuljapur,
Dist. Osmanabad.

5. Rama s/o Bapu Lashkare,
Age: 70 years, Occ: Agri.,
R/o. Kale Chincholi, Tq. Lohara,
Dist. Osmanabad.

6. State of Maharashtra,
through Secretary,
Revenue and Forest Department,
Mantralaya, Mumbai.

...Respondents

.....
Mr. R.B. Deshmukh, Advocate for petitioners.
Mr. Amol Joshi, Advocate h/f Mr. R.S. Deshmukh, Advocate for
respondent Nos. 1 and 2.

.....
CORAM : N.W. SAMBRE, J.

Reserved on : 2nd July, 2015
Pronounced on : 6th July, 2015

JUDGMENT :

Present appeal is by original plaintiffs. Parties hereto shall be referred to as their status as is mentioned in the suit before the trial Court.

2. The plaintiffs filed Regular Civil Suit No. 245 of 2000 in the Court of Civil Judge, Junior Division, Tuljapur on 02/12/2000 for declaration and perpetual injunction based on the title acquired by them from defendant No.1 Rama. It is claimed that the land Block No. 151, which is the suit property, was purchased by the plaintiffs

from defendant No. 1 by registered sale deed dated 02/06/1999 as the suit property was exclusively owned property of defendant No.1, which could be identified as Survey No. 40/2. According to the plaintiffs, since the land was in exclusive possession of defendant No.1 and mutation entry was also in the name of defendant No.1, the plaintiffs have purchased the suit property for valuable consideration. It is further claimed by the plaintiffs that defendant Nos. 2 to 4 subsequent to sale deed got the mutation entry effected of their 1/4th share each in the record of rights of the suit property and were trying to alienate the suit property based on M.E. No. 1337.

3. As such, the plaintiffs claimed declaration that M.E. No. 1337 be declared as *void ab initio* and it be further declared that the plaintiffs are owners of the suit property.

4. Defendant No.1 filed his written statement at Exhibit-104 and admitted the claim of the plaintiffs. Defendant Nos. 2 to 5 by their common written statement at Exhibit-27 objected the claim in the suit alleging that predecessors Shaba, Sopan, Rama and Bhagwan were owners of Survey No. 40/B/2 along with defendant No.1. Shaba and Sopan owned 1.02 acre each and Ram and Bhagwan owned land 1.03 acre each and the property was never alienated in favour of defendant No. 1. The fact remains that the

property was in possession of defendant No.1, as such, mutation stood in the name of defendant No.1.

5. After framing issues as regards lawful possession of the plaintiffs, obstruction by the defendants, learned trial Court was pleased to dismiss the suit by its judgment and order dated 30/07/2007.

6. Present appellant, feeling aggrieved thereby, preferred an appeal bearing Regular Civil Appeal No.191 of 2007, which came to be dismissed on 08/02/2012 by the Principal District Judge, Osmanabad. As such, present second appeal.

7. In addition to above, Writ Petition No. 5462 of 2004 was taken out by the defendants questioning the order dated 27/04/2004 passed by the Secretary of Revenue and Forest Department. By the said order, the Secretary of the State Government has allowed the appeal preferred by the plaintiffs by order dated 27/04/2004 by ordering restoration of the possession at the time of consolidation in the year 1977 by setting aside decision of Superintendent of Land Records and Deputy Director of Land Records. It is required to be clarified herein that present appellants in fact preferred appeal No.2002/RR/A/3 on 07/01/2002 before Sub Divisional Officer,

Osmanabad questioning the Mutation Entry No. 1400. The said appeal came to be dismissed, however, the possession as on consolidation was ordered to be restored by the Secretary in relation to the same property.

8. While questioning the legality of both the judgments i.e. one by learned trial Court and other by learned lower appellate Court confirming the judgment and order passed by learned trial Court and dismissing the suit of the present appellants, learned Counsel for the appellants would urge that the Courts below have lost sight of the fact that defendant No.1 has admitted the entire claim of the plaintiffs. In addition to above, it is also urged that defendant No. 3 was witness to the sale deed executed by defendant No.1 and in view of the provisions of Section 115 of the Evidence Act, defendant Nos. 2 and 3 are specifically estopped from questioning title of the appellant. Learned Counsel for the appellants would urge that at the time of mutation entry after executing the sale deed in favour of plaintiffs, the defendants were put to appropriate notice and no objection was raised by them. As such, it is the case of acquiescence. In addition to above, learned Counsel for the appellants would urge that proceedings for mutation at the behest of defendant Nos. 2 to 5 were taken out behind back of the appellants herein. He would further urge that the contents of the sale deed are not denied by the

defendants and has placed reliance upon the written statement filed by the defendants to the suit.

9. While countering the above referred submissions, learned Counsel for the defendants-respondents would urge that the suit in question was rightly dismissed by the Courts below, as according to him, prior to implementation of consolidation scheme, the property was having colour of ancestral property, so also after implementation of scheme. Just because the defendant No.1 remained in possession of entire portion, that does not give him title to transfer the entire property to the plaintiffs. Learned Counsel for the defendants would further urge that while dismissing the suit, the Courts below have taken into account the defence as is raised and evidence on record. According to him, sale by defendant No.1 was neither for necessity nor such sale is proved by the appellants. In addition to above, he would urge that even if defendant No. 3 is witness to the sale deed in question, the sale deed binds only seller and not the witness. According to him, sale deed was only to the extent of share of defendant No.1 and defendant No. 1 was never authorized by rest of the defendants to execute sale deed. According to him, the suit is liable to be dismissed.

10. With an intention to consider the claim as sought to be

raised before this Court, it is required to be noted that in support of claim of the plaintiffs, plaintiff No.1 was examined at Exhibit-115, PW-2 Venkat at Exhibit-113, PW-3 Bajirao at Exhibit-118, PW-4 Jahiroddin at Exhibit-124, PW-5 Mahadeo at Exhibit-126, PW-6 Venkat at Exhibit-127, whereas the defendants have examined DW-1 Ramesh at Exhibit-132, defendant No.2 at Exhibit-135, DW-3 at Exhibit-133, defendant No. 3 at Exhibit-134.

11. Respective parties relied upon the documentary evidence vide Exhibits-4/1 to 10, 56/1, 71/1 & 2, 77/1 to 4, 83/1 to 4 and 114/1 and 2. The defendants relied upon the documentary evidence at Exhibits-137/1 to 5, 29/1 to 4, 87/1 and 2 and 152/1.

12. So far as the claim as is put forth by present appellants qua exclusive ownership of defendant No.1 and purchase of the suit property by the appellants for valuable consideration is concerned, it is required to be noted that original defendant Nos. 2 to 4 are co-owners of the ancestral property along with defendant No.1 prior to implementation of consolidation scheme. The nature of the property as ancestral is not in dispute. Prior to the implementation of consolidation scheme, name of defendant Nos. 2 to 4 were very much recorded against Survey No. 40/2/B, however, subsequent to implementation of consolidation scheme. The said property stood in

the name of defendant No.1. Even if it is presumed that the ancestors of the defendants have consented to mutate the entire property in the name of defendant No.1, in absence of any plea of giving up the land in question in favour of defendant No.1 or defendant Nos. 2 to 4 relinquishing their share in favour of defendant No.1, it is really hard to believe that the property after consolidation stood in the name of defendant No.1 only and he become exclusive owner of the same. It is required to be noted here that Mutation Entry No. 760 at Exhibit-138 support with the defence set up by defendant Nos. 2 to 4, and was established through their testimony.

Subsequent thereto, with the above referred back ground, it is required to be noted that the correction in mutation entry was ordered by the revenue authorities.

13. Though it is brought on record that the Talathi was examined by the plaintiff at Exhibit-124 so as to establish that there was an intimation to defendant Nos. 2 to 4 about the sale deed in question, cumulative effect of evidence of defendant No. 3 with that of evidence of Talathi who is examined by plaintiff, it is required to be noted that defendant No. 3 in his evidence has in specific terms brought on record that he was signatory to the sale deed in question as witness and it was upon understanding given by defendant No.1

that he is selling his own share, defendant No. 3 attended the said proceedings of execution of the sale deed. Apart from above, the intimation to other defendants was interpreted by both the Courts below to the detriment of the plaintiff as the said intimation is only about sale deed and cannot be read to be consent to the said sale deed. Apart from above, the plea of estoppel as is raised by learned Counsel for the appellant in view of the signature of defendant No. 3 to the sale deed as witness is concerned, as observed herein above the estoppel will not operate against witness who is not bound by the contents of the sale deed. Apart from above, the plea of estoppel while passing title, in my opinion, cannot be read contrary to the requirements of essential elements of valid contract, particularly in the matter of sale of immovable property i.e. to say estoppel will not operate against law.

14. In the light of evidence as is brought on record, it is required to be inferred that defendant No.1 was not having exclusive title over the suit property. In addition to above, it is required to be noted that it is not the case of present appellant, neither such case was established that they were made to believe by the defendants that defendant No.1 is alone owner of the suit property in question.

15. With the assistance of learned Counsel for the appellant,

I have gone through the entire observations of both the Courts below and noted that the plea of estoppel raised by present appellants in the present second appeal will be of hardly any consequences.

16. In my opinion, no case for interference is made out. The second appeal sans merit, stands dismissed. Consequently, civil application stands disposed of.

17. In view of above observations, once the Civil Court having found that the appellants herein have not established their ownership and title to the property in question, in my opinion, the order of State Government restoring mutation entry as was existence in 1977 is also not sustainable. As such, Writ Petition No. 5462 of 2004 is required to allowed in view of the reasons stated in present second appeal in terms of prayer clause (B), which reads thus :

“B) The order passed by learned Secretary Revenue and Forests Department Mantralaya Mumbai in file No. CON/43(A)02/17/CR.6/L1/CR.390(10)/2002 A & R dated 27.04.2004 may kindly be quashed and set aside.”

18. Writ Petition No. 5462 of 2004 is allowed to above extent. Rule made absolute in terms of prayer clause (B).

sd/-
[N.W. SAMBRE, J.]