

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

**Second Appeal No.276 of 2015
With
Civil Application No. 7259 of 2015**

Ramkisan S/o Pandurang Bhandari,
Age 71 years,
Occu: Business and Agriculture,
R/o New Adarsh Colony, Latur. **.. Appellant.**

Versus

Ramanujandas S/o Laxminarayan Zanwar,
Age 60 years,
Occupation : Business,
R/o Ganant Building,
Sangammeshwar Colony,
Old Ausa Road, Latur. **.. Respondent.**

Shri. Aniruddha A. Nimbalkar, Advocate, for appellant.

Shri. Amit S. Deshpande, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 21 AUGUST 2015

JUDGMENT:

1) The appeal is filed against the judgment and order of Regular Civil Appeal No.216/2012 which was pending in the Court of District Judge-2 Latur and also against the judgment and decree of Special Civil Suit No.78/2008 which is decided by the Civil Judge, Senior

Division, Latur. Both the sides were heard for final disposal.

2) Following substantial question is involved in the appeal in view of the facts and circumstances.

"Whether there was the evidence to prove that the suit property is in existence and it is in possession of the defendant ?"

3) Present respondent Ramanujandas Zanwar had filed the suit for recovery of possession of area of 30 ft x 60 ft from property bearing CTS No.10154/3 situated on the western side of Latur - Ausa Road, Latur. Relief of mandatory injunction was claimed for removal of structure if any found in this portion of the defendant, appellant.

4) It is the case of the plaintiff, present respondent that he had purchased land Survey No.27/B/1 admeasuring 3 acres 11 gunthas from village Kanheri, Tahsil Latur under registered sale deed dated 5-4-1974. It is his case that he got prepared lay out and then he sold plots from this land to various persons. Two plots which

were given number as 20 and 21 were sold to one Sohanlal Joshi by the plaintiff and the size of these plots was 40×60 ft (North South length 60 ft and East-West length 40 ft. of each plot). It is the case of the plaintiff that the defendant purchased these two plots from Sohanlal Joshi under sale deed dated 18-7-1985 and in the sale deed he gave wrong description of the plot and mentioned that adjacent to these 2 plots there was Latur-Ausa highway, on eastern side. It is the case of plaintiff that when the plots were sold to Joshi by him, he had shown some open space belonging to him on eastern side of these plots and so Joshi could not have sold the open space situated on the eastern side of plots Nos.20 and 21 to the present defendant.

5) It is the case of the plaintiff that defendant has made construction on eastern side of these plots and he has made encroachment on the property of the plaintiff.

6) The defendant filed written statement and he denied the aforesaid case of the plaintiff. He contended that no open space belonging to the plaintiff is available

on eastern side of the aforesaid two plots purchased by defendant and there is no cause of action for the suit.

7) Both the Courts below decided against present appellant by holding that in the sale deed executed in favour of aforesaid Joshi some open space was shown on the eastern side of the plot and that space was shown to be owned by the plaintiff and so the plaintiff is entitled to decree of possession and other reliefs.

8) This Court has carefully gone through relevant record and pleadings (in plaint, written statement). Record contains the sale deeds and the record of property card and map prepared by city survey office. In the plaint, plaintiff has contended that the suit property is bearing CTS No.10154/3 and the property of the defendant bears CTS No.10154/2 and it is situated to the western side of the suit property. Plaintiff did not produce the property card or map if any prepared by city survey office in respect of CTS No.10154/3. The plaintiff has come with specific case that he had purchased portion of 3 acres 19 gunthas and it was developed by him by laying plots but he did not produce any such lay out plan. There is nothing

on record to show as to how many plots were prepared and how many plots are actually disposed of. There is clear possibility that such record is withheld by plaintiff. If it was agriculture land in the past, the plaintiff must have prepared some record for getting permission to use the land for non agriculture use and he must have obtained permission in respect of lay out plan.

9) Even if the sale deed executed in favour of Joshi is considered as it is, from this sale deed it is not possible to infer that the area of 30×60 ft was left on the eastern side of the plots sold to Joshi by plaintiff. There is vague mention in the sale deed that some space was left by plaintiff on that side for preparing garden. At present there is city survey map of property CTS No.10154. On eastern side of these plots Latur AUSA road is shown. It appears that it is a State highway. In that case measurement needs to be taken from road side and it needs to be ascertained as to whether any property is left on the eastern side of CTS No.10154 which belongs to plaintiff. Plaintiff did not opt for such measurement.

10) Considering the area of plot Nos.20 and 21 which is purchased by defendant No.1 it can be said that the area mentioned in the property card of CTS No.10154 is somewhat less than the area purchased by plaintiff. In view of this circumstance also it was necessary for the plaintiff to see that measurement of CTS No.10154 was done or at least plot Nos.20 and 21 prepared by him in the lay out plan were measured and it was ascertained that more area is included in CTS No.10154. That is not done by the plaintiff.

11) Aforesaid circumstance shows that the plaint was very vague and there was no material for proving the case of the plaintiff. This Court has no hesitation to observe that both the Courts have committed error in giving decree of possession to the plaintiff. Only due to possibility that some area is left beyond Plot Nos.20 and 21 from the lay out plan towards eastern side and that area belongs to plaintiff, this Court holds opportunity can be given to the plaintiff to take measurement and decision with regard to dispute on merits. Only for this purpose this Court holds that matter can be remanded back to the

Appellate Court.

12) In the result, the appeal is allowed. The judgments and orders of the trial Court and the Appellate Court are hereby set aside. The matter is remanded back to the lower appellate Court for fresh trial. During trial opportunity is to be given to the plaintiff to take measurement of plots which were prepared by him from Survey No.27/B/1 through Cadestral Surveyor to ascertain as to whether any space is left on the eastern side of the property of the defendant, Plot Nos.20 and 21. The parties are to appear before the District Court on 14th September 2015. The District Court is to allow appointment of Cadestral Surveyor and also allow both the sides to lead evidence. Cost of measurement to be born by the plaintiff. Civil Application No.7259 of 2015 stands disposed of. No order as to cost.

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

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