

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

SECOND APPEAL NO.327 OF 2013

1. Munjaji s/o Manik Bokare,
Age 52 years, Occu.Agri.,
R/o Someshwar, Taluka
and District Nanded

2. Bhaskar s/o Mittu Bokare,
Age 37 years, Occu.Agri.,
R/o Someshwar, Taluka
and District Nanded

..Appellants
(Orig.Defendants)

Versus

- Uttam s/o Namdev Bokare,
Age 44 years, Occu. Agri.,
R/o Someshwar, Taluka
and District Nanded

..Respondent
(Orig.Plaintiff)

Mr Anil Kasliwal, Advocate for appellants
Mr Gajanan Kadam, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 6th July 2015

PER COURT

1. This appeal is by original defendants to Regular Civil Suit No.33 of 2010 which was filed for perpetual injunction. The suit property consists of Gut No.168 situated at village Someshwar, Taluka and District Nanded to the extent of 40-R.

2. The suit filed by the respondent herein came to be decreed by the 7th Joint Civil Judge, Junior Division, Nanded by judgment and order dated 24th November 2011, whereby the present appellants - original defendants were restrained from interfering into possession of the plaintiff over the suit land.

3. The appeal carried by the present appellants to the Principal District Judge, Nanded vide Regular Civil Appeal No.138 of 2011 also came to be dismissed on 3rd April 2012 affirming the judgment delivered by the trial Court, as such the present second appeal.

4. Learned Counsel for the appellants-defendants Mr Kasliwal raised two fold contentions **(a)** that this Court, in the background of evidence brought on record by T.I.L.R. vide Exh.102 panchnama and map of Gut No.168 Exh.103, in the light of provisions of Order X, Rule 3 of the Code of Civil Procedure should reject the evidence in totality and order further investigation in the matter and as such, sought remand of the case to the learned trial Court for fresh trial; and **(b)** Relying upon the observations of the learned trial Court and the lower appellate Court and appreciation of evidence thereto has sought to urge that there is high degree of perversity in appreciation of evidence by both the Courts below and sought to entertain the present appeal.

5. Few facts for filing of the present appeal are as under :

6. According to plaintiff, the suit land mentioned supra was owned by him and was in cultivating possession of the same. According to him, the defendants though are not having any title or relation to the land in question, were trying to obstruct his peaceful possession over the suit land.

7. The claim was resisted by the defendants-appellants by filing their written statement and they also filed counter claim at Exh.20.

During the trial, defendants have withdrawn the counter claim on 18th August 2011 by filing purshis to that effect Exh.94. According to defendants, the ownership and possession of the plaintiff over the suit land was disputed. The defendant No.1 claimed that he had purchased land to the extent of 65-R from the plaintiff's mother vide sale deed bearing No.3353 of 1971 dated 21st December 1971. The defendant No.2 claimed that the land to the extent of 65-R vide registered sale-deed bearing No.3354 of 1971 was purchased from uncle of the plaintiff viz. Deorao. Consequently, both the defendants No.1 and 2 got their names mutated in 7/12 extract of Gut No.168.

8. According to the defendants, Gut No.168 consists of 65 (+) 65 R land mentioned supra i.e. total 130-R. They further claimed that the name of the plaintiff was mistakenly shown by the revenue authority in 7/12 extract of Gut No.168 and as such, plaintiff is trying to take undue advantage of the same and as such, they sought dismissal of the suit.

9. Based on the claims raised, the trial Court framed following issues and answered the same accordingly at Exh.31.

No.	ISSUES	FINDINGS
1	Does plaintiff prove that he is in lawful possession of suit land ?	In the affirmative
2	Does the plaintiff further prove that the defendants have caused the obstruction to his possession over the suit land ?	In the affirmative

3	Is the plaintiff entitled to the relief of perpetual injunction as prayed ?	In the affirmative
4	What order and decree ?	Suit is decreed with costs

10. The above referred issues were tried and decided by learned trial Court based on the evidence of P.W.1 Uttam Bokare at Exh.32, P.W.2 Raosaheb Bokare at Exh.57, P.W.3 Namdeo Bokare at Exh.62 and evidence of defendant D.W.1 Bhaskar Bokare at Exh.71 and D.W.2 Vithal Bokare at Exh.92. Both the parties have filed various public documents so as to establish their claim before the Court below.

11. Learned trial Court noticed that the defendant No.1 had purchased 65-R land and father of defendant No.2 purchased 65-R land out of Survey No.44/B/2 which was later given Gut No.168. The total area of said Gut number was 1 hectare 70-R and as such, 40-R remained out of the said Gut number.

12. Learned lower appellate Court, while dealing with the aspect of measurement map Exh.103 has re-appreciated the entire evidence and has reached to a conclusion of dismissal of appeal. The lower appellate Court has noted that earlier, the land in question i.e. Gut No.168 was given Survey No.44/B/2. Exh.82 7/12 extract of the said survey number shows its holding as 1 hectare 70-R which entry was taken in 1965-1966. Learned lower appellate Court noted that the said document was prior to the sale of the land to defendant No.1, so

also the father of defendant No.2 and defendant No.2, who has entered into witness box has, in his evidence admitted correctness of this document. Learned lower appellate Court then appreciated the evidence Exh.33 - 7/12 extract and noted that out of 1 hectare 70-R land, plaintiff is shown to be owner and in possession of 40-R land. The defendant No.1 Munjaji shown to be owner of 17-R land as 48-R land from the share of defendant No.1, from the said Gut number, was acquired by the Government of Maharashtra. State Government through Vishnupuri Project was shown to be owner of 48-R, whereas defendant No.2 was shown to be owner of 65-R land. Exh.34 holding certificate of Gut No.168 shows plaintiff as owner of 40-R land from Gut No.169. Plaintiff is owner of 1 hectare 49-R land. Exh.96 shows regarding acquisition of 48-R land by the Government from Gut No.168.

13. Learned trial Court, so as to appreciate the exact holding and area of the disputed property and Gut number had appointed T.I.L.R. as a Court Commissioner in accordance with provisions of Order XXVI, Rule 9 of the Code of Civil Procedure who was directed to measure the land and fix the boundaries of land, internal boundaries, if any. The T.I.L.R., upon such measurement has drawn map at Exh.103 and which was proved by him by deposing at Exh.101.

14. Learned trial Court, while appreciating the evidence of T.I.L.R. has noticed that the sale deed is claimed by the defendants-appellants in their favour vide Exh.76 and Exh.30, the land that was

sold by plaintiff to the extent of 65-R through his mother to defendant No.1 on 21st December 1971 and by the uncle of plaintiff to the extent of 65-R to the father of defendant No.2. As such, the defendants have established their title to the extent of 65-R land out of Gut No.168. Accordingly, the names of defendants were mutated in 7/12 extract vide Entry No.222, 223 and 224 at Exh.80 and Exh.81.

15. It was also required to be noted that 48-R land was acquired for the Vishnupuri Project out of land of defendant No.1 and mutation entry No.503 of village Someshwar Exh.96 shows that Government had acquired 48-R land out of Gut No.168 from the share of defendant No.1.

16. Learned trial Court then has noticed that though out of 65-R land, 48-R land of defendant No.1 since has been acquired for Vishnupuri Project, still he has claimed possession over the 65-R land out of Gut No.168. It appears that so as to avoid the above issue, he has not examined himself by entering into witness box. Defendant No.2, who has entered into witness box has avoided the answer with regard to the acquisition of the land of defendant No.1 for irrigation project, as he has claimed that he is not aware of such acquisition.

17. Learned trial Court, upon evaluation of the report of T.I.L.R. and his oral evidence has noticed that T.I.L.R. has given the contradictory versions. Based on the same, learned trial Court has decreed the suit, as the plaintiff could establish his title over the suit property.

18. Apart from above, learned lower appellate Court after appreciating the evidence of defendant No.2 Bhaskar, noted that he has given clear admission that Gut No.168 is having total area of 1 hectare 70-R. He has also admitted that upon purchase of the land by defendant No.1 and father of defendant No.2, the balance land was shown in the name of plaintiff and further admitted that after excluding 1 hectare 30-R land purchased by both the defendants, they were unable to establish their title to the additional land of the said Gut number.

19. A judicial note was also taken about withdrawal of the counter claim by the appellants/defendants. The claim of the defendants-appellants that they have purchased complete Gut No.168 was also not established by them, as plaintiff from the documentary evidence i.e. revenue entry and his title, was able to demonstrate that balance 40-R land from Gut No.168 remained in his possession.

20. Learned lower appellate Court, as such proceeded to dismiss the appeal.

21. While appreciating the contentions of the present appellants, it is required to be noted that the provisions of Order XXVI, Rule 10 (3) of the Code of Civil Procedure if perused, the said provisions empowers the Court that if the Court dis-satisfied with the proceedings of the Commissioner, can order further inquiry in the matter, as it thinks fit.

22. It is required to be noted that the question of law that is sought to be raised in the above referred background, if analysed, the Court Commissioner who was examined, has throughout relied upon by both the parties. Even perusal of the appeal memo before the trial Court does not reflect that the appellants herein were dis-satisfied with the appreciation of evidence of the Court Commissioner. Rather, the appellants appear to have been relied upon the evidence of Court Commissioner. In the background of the above referred conduct of the appellants, it is required to be noted that the evidence of the Court Commissioner was not accepted by both the Courts below, as it is. The said evidence was subject to the strict scrutiny and as such, evidence, which is in tune with the documentary evidence and the pleadings, was accepted by the Courts below for reaching to a proper conclusion.

23. In view of above, in my opinion, the question of law as is sought to be canvassed based on the said legal provision, does not call for any interference.

24. So far as the second contention of Mr Kasliwal as regards the perverse appreciation of evidence is concerned, it is required to be noted here that both the Courts below have concurrently held against the present appellants, particularly in the light of the evidence that is brought on record which pertains to Gut No.168. It is, in clear terms, established from the documentary so also the oral evidence that both the defendants were having right to the extent of 65-R and the land to the extent of 48-R was acquired by the Government for the irrigation

project. What remained with the defendants was 65 (-) 48 R land and in any case, they were never in possession of 65-R of land on the date of filing of the suit, particularly in the background of the evidence discussed herein above as regards the revenue entries. Apart from above, it is required to be noted that both the defendants though filed the counter claim, have withdrawn the same and defendant No.1 has chosen not to enter into witness box. The defendant No.2 has shown his ignorance in the matter of acquisition of the land of defendant No.1 which fact was properly established by the plaintiff by adducing cogent evidence about the acquisition of said land of defendant No.1.

25. In view of above, in my opinion, no perversity is noticed.

26. As such, the present Second Appeal, which is against concurrent findings being sans merit, stands dismissed.

(N.W. SAMBRE, J.)

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