

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

SECOND APPEAL NO. 537 OF 1991

Mohd. Yusuf s/o Dada Patel
(Died) through his L.Rs.

1. Shaikh Shabbir s/o Yusuf Patel
Age : 30 Yrs., Occ. Agril,
R/o : Takari, Tq. Khultabad,
Dist. : Aurangabad.
2. Dastagir s/o Yusuf Patel
Age : 41 Yrs., Occ. Agril,
R/o : Takari, Tq. Khultabad,
Dist. : Aurangabad.
3. Shaikh Anis s/o Yusuf Patel
Age : 30 Yrs., Occ. Agril,
R/o : Takari, Tq. Khultabad,
Dist. : Aurangabad.
4. Iqbal s/o Yusuf Patel
Age : 35 Yrs., Occ. Agril,
R/o : Takari, Tq. Khultabad,
Dist. : Aurangabad.
5. Rashid s/o Yusuf Patel
Age : 37 Yrs., Occ. Agril,
R/o : Takari, Tq. Khultabad,

Dist. : Aurangabad.

6. Shaikh Shakir s/o Yusuf Patel

Age : 27 Yrs., Occ. Agril,

R/o : Takari, Tq. Khultabad,

Dist. : Aurangabad.

7. Bano Yusuf Patel

Age : 25 Yrs., Occ. Household,

R/o : Hussain Colony,

Aurangabad.

8. Sugrahee W/o Yusuf Patel

Age : 60 Yrs., Occ. Household,

R/o : Takari, Tq. Khultabad, APPELLANTS/

Dist. : Aurangabad. [ORI. PLAINTIFFS]

V E R S U S

The State of Maharashtra

Through the Dist. Inspector of

Land Records-cum-City Survey

Officer No. 2, Manjurpura,

Aurangabad.

..... RESPONDENT/

[ORI. DEFENDANT]

WITH
SECOND APPEAL NO. 240 OF 1992

Mohd. Yusuf Dada Patel

..... APPELLANT/
[ORI. PLAINTIFF]

V E R S U S

1. Gulam Hussain Bapu Patel
2. The State of Maharashtra
3. The Enquiry Officer No. 1
Gaothan Survey (Village
Aurangabad) through
District Inspector of Land
Records, Gaothan village
Survey Officer No. 2,
Aurangabad at present **RESPONDENTS/**
Manjurpura, Aurangabad. **[ORI. DEFENDANTS]**

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Mr. Amol Gandhi, Advocate for Appellants.

Mr. S.P.Sonpawle, A.G.P. for Respondent.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 01/08/2016

JUDGMENT :

1. The Appeals are filed to challenge the Judgments and Decree of R.C.A. No. 255/1986 and R.C.A. No. 263/1986 which were pending in the Court of the 5th Additional District Judge, Aurangabad. Both sides are heard. R.C.A. No. 263/1986 was filed by village

Sarpanch of village Takali after taking permission of the District Court as Village Panchayat was feeling that its rights were affected by the decree given in R.C.S. No. 980/1983. This Suit was filed by present appellant Mohd. Yunus against the Govt. and Enquiry Officer of Land Records for village Rajeri Takli, Tahsil Khultabad, District Aurangabad. The other Appeal was filed by the State Govt. against the decision of the trial Court. The first appellate Court has set aside the decree of permanent injunction given against the Govt. and Land Records office. Heard both sides.

2. The Suit was filed in respect of house property No. 358 (in village record) which was given Chalta No. 35/A in Sheet No. 1 and which was having size 53 feet East – West and 28 feet North – South. It is the case of plaintiff Mohd. Yunus that he has made construction of building over the area of 11 feet East – West and 28 feet North – South. It is contended that the remaining open space is adjacent to this property and he is owner not only of the construction made but the open space also.

3. It is the case of the plaintiff that in the year 1973 when survey was made by the Land Records office and City Survey office, they noticed that the plaintiff was in possession of area of 53 x 28 feet as mentioned above. It is contended that in the year 1974, when defendant – Enquiry Officer visited the village. During enquiry, they gave finding that the portion of 31 feet East – West and 28 feet North – South of house No. 358 was not belonging to the plaintiff and it was portion belonging to Village Panchayat. It is contended that such order was made on 19/10/1974 and this order was intimated to the plaintiff on 24/10/1974 by giving notice.

4. It is the case of the plaintiff that there was no need to exclude the open space from the house property of the plaintiff as nobody had taken such objection and nobody had made claim in respect of this space.

5. It appears that after receipt of notice, R.C.S. No. 699/1975 was filed by the plaintiff for relief of declaration, but the Suit was withdrawn on 12/01/1983. It is the case of the plaintiff that the present Suit was filed after giving notice u/s 80 of the Code of Civil Procedure

to the Govt. The relief of declaration was claimed that the plaintiff is the owner of 31 x 28 feet space excluded from record of house No. 358 and relief of injunction was also claimed.

6. State Govt. filed Written Statement and contested the matter. It contended that the plaintiff has no concern whatsoever with the open space situated towards East of Chalta No. 35/A and this space was given Chalta No. 35/B. It is contended that this portion belongs to the Govt. and plaintiff is not having title over this property. It is contended that plaintiff ought to have challenged the order made by the authority u/s 247 of the Maharashtra Land Revenue Code [for short, 'M.L.R. Code'] and the Suit is not tenable.

7. On the basis of aforesaid pleadings, issues were framed. Due to the circumstances like the plaintiff was using this open space after coming out of his house and according to him, he was approaching the public road by using the space, the trial Court had decreed the Suit. The circumstance that this portion was subsequently excluded from the property shown to be

owned by the plaintiff, was also considered by the trial Court. The circumstance that some portion of platform constructed by the plaintiff was in this open space was also considered in his favour.

8. In the Appeals filed by Village Panchayat and the Govt., the District Court has held that there is Govt. road on one side of the constructed portion of plaintiff and he has no record to show that he is owner of the open space. The first appellate Court considered the point of limitation in view of the provisions of M.L.R. Code and held that Suit was not filed within limitation.

9. Learned counsel for the appellant submitted that the point of limitation could not have been considered by the first appellate Court as such defence was not raised by the defendants in the trial Court. There is no force in this submission. The provision of Section 20 of the M.L.R. Code shows that even if the defence of limitation is not taken, in such a case, it is the duty of the Court to consider that defence. Learned counsel for the appellant then argued different point and he submitted

that in view of the provision of Section 14 of the Limitation Act regarding withdrawal of Suits, the Suit was filed within limitation. He submitted that notice u/s 20 of the M.L.R. Code was given and then Suit was filed in October, 1974. He submitted that the Suit was withdrawn on 12/01/1983 with the permission of the Court to file fresh Suit. Fresh Suit was filed on 14/11/1983. He submitted that under the provision of Section 14 of the Limitation Act the period during which the Suit was pending needs to be excluded and the fresh Suit was within limitation.

10. There is force in the aforesaid submission made by the learned counsel for the appellant. It is not disputed that the Suit was filed but then it was withdrawn, though after many years. In any case, this circumstance can not give more benefit to the plaintiff in the present matter. The plaintiff was expected to prove before the trial Court that he is the owner of the disputed portion. The discussion made by the trial Court and the first appellate Court shows that only due to the contention made by the plaintiff during the survey and enquiry, his name was entered in the record created by

the office of Land Records. He has no record with regard to the title to the suit property. This Court has carefully gone through the record of enquiry prepared by the office during survey and it shows that after making enquiry, decision was given on 31/10/1974 that portion which was given No. 35/B was belonging to Gaothan. The Map prepared by City Survey office shows that towards northern side of both 35/A and 35/B, there is Govt. road. The map shows that there was no need of using the open space for the plaintiff and it can be said that he tried to use the space as it was open and it was not claimed by any other villager. This circumstance can not transfer the title to the plaintiff over the open space. When the property is not claimed by anybody and there is no record of title in favour of such person, it needs to be presumed that it belongs to Govt. and necessary steps are required to be taken and accordingly steps were taken by the authority. On merits, the plaintiff has no case.

11. Both the Appeals were admitted by this Court [other Hon'ble Judge] on 09/12/2012, but no substantial question of law was formulated. This Court allowed both sides to argue on following substantial

questions of law.

[i] Whether the first appellate Court has committed error in considering the point of limitation at appellate stage ?

[ii] Whether the first appellate Court has committed error in holding that the plaintiff has failed to prove ownership over the disputed portion ?

12. In view of the discussion above, this Court holds that there is case on the point of limitation. The plaintiff filed Suit and immediately after issuance of notice, took permission of the Court for withdrawal of the Suit and then filed fresh Suit. However, there is no record with the plaintiff with regard to his title over the open space. It can be said that on the basis of the contentions made during survey, his name came to be entered in the record of rights. There is no old record of even Village Panchayat in respect of the suit property in favour of the plaintiff.

13. In the result, both the points are answered in the negative and both the Appeals stand dismissed.

Interim relief is vacated. Continuation of interim relief is refused.

14. In view of dismissal of Appeals, C.A. No. 1478 of 2010 stands disposed of.

[T.V.NALAWADE, J.]

KNP/S.A. 537...1991 - [J]