

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

SECOND APPEAL NO. 405 OF 1998

1. Fakirchand Sheku Gitre
Age : 58 Yrs., Occ. Agril.,
R/o : Raipur, Tq. Gangapur,
Dist. : Aurangabad.
2. Gangadhar S/o Fakira Gitre
Age : 38 Yrs., Occ. Agril.,
R/o : Raipur, Tq. Gangapur,
Dist. : Aurangabad.
3. Eknath S/o Fakira Gitre
Age : 33 Yrs., Occ. Agril.,
R/o : Raipur, Tq. Gangapur,
Dist. : Aurangabad.
4. Devidas S/o Fakira Gitre
Age : 30 Yrs., Occ. Agril.,
R/o : Raipur, Tq. Gangapur,
Dist. : Aurangabad.
5. Rangubai W/o Fakira Gitre
Age : 56 Yrs., Occ. Agril.,
R/o : Raipur, Tq. Gangapur,
Dist. : Aurangabad.

6. Asarabai Kachru
Age : 38 Yrs., Occ. Agril.,
R/o : Raipur, Tq. Gangapur, APPELLANTS/
Dist. : Aurangabad. [ORI. DEFENDANTS]

V E R S U S

Shamrao S/o Shivram Badoge
Age : 58 Yrs., Occ. Agril.,
R/o : Raipur, Tq. Gangapur, RESPONDENT/
Dist. : Aurangabad. [ORI. PLAINTIFF]

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Mr. N.K.Kakade, Advocate for Appellants.

Mr. Rajendra Deshmukh, Advocate for Respondent

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**WITH
CIVIL REVISION APPLICATION NO. 795 OF 2001**

Fakirchand Sheku Gitre
Age : 61 Yrs., Occ. Agril.,
R/o : Raipur (Dongaon),
Tq. Gangapur, Dist. : APPLICANT/
Aurangabad. [ORI. PLAINTIFF]

V E R S U S

1. Shamrao S/o Shivram Badoge
Age : 62 Yrs., Occ. Agril.,
R/o : Raipur (Dongaon),
Tq. Gangapur, Dist. : Aurangabad. RESPONDENT/
[ORI. PLAINTIFF]

2. Maharashtra State Electricity Board
Through its Assistant Engineer,
Sub Division, Gangapur, Taluka : **RESPONDENT/**
Gangapur, Dist. Aurangabad. **[ORI. DEFT.NO.2]**

3. Maharashtra State Electricity Board
Through its Sub Engineer,
Sub Division, Lasur Station,
Tq. Gangapur, District : **RESPONDENT/**
Aurangabad. **[ORI. DEFT.NO.3]**

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Mr. N.K.Kakade, Advocate for Applicant.

Mr. Rajendra Deshmukh, Advocate for R - 1.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 07/07/2016

JUDGMENT :

1. The Second Appeal is filed to challenge the Judgment and Decree of R.C.A. No. 350/1993 which was pending in the Court of the Additional District Judge, Aurangabad. The Appeal was filed by the original plaintiff to challenge the Judgment and Decree of R.C.S. No. 340/1987 which was pending in the Court of the Civil Judge [Jr. Division], Gangapur. The Suit was filed

for relief of injunction and the trial Court had dismissed the Suit. The first Appellate Court has set aside the said decision and the Suit is decreed as prayed for. Heard both sides.

2. The Suit was filed in respect of portion of 2 Acres 38 gunthas out of land G.No. 87 situated at village Pimpalgaon Divsi, Tahsil Gangapur, District Aurangabad. In the past, total area of this land was 22 Acres 24 gunthas. This land was divided amongst 3 issues of one Sheku viz. Fakirchand, Bandu and Khandu. Each was given around equal share and each was owner of 7 Acres and few gunthas. They were enjoying their shares separately. For percolation tank, the property of Khandu was acquired in entirety and some portions of the shares of Bandu and Fakira were acquired.

3. It is the case of the plaintiff, who is the purchaser from the successor of Bandu viz. Vitthal, that the land admeasuring 2 Acres 38 gunthas was with Vitthal and he purchased this land for the consideration of ₹ 10,000/- [Rupees Ten Thousand] under registered sale deed dated 10/08/1987. It is contended that on the

date of sale deed the plaintiff was put in possession of the property by Vitthal. He has given the boundaries of the portion purchased as per the sale deed. On northern side of this land, there was land of defendant No. 1 Fakira.

4. It is the case of the plaintiff that on the basis of the sale deed, his name is mutated in the revenue record and he has been taking crops in his portion. He has contended that immediately after the execution of sale deed, defendant No. 1 and his family members created dispute and they destroyed the standing crop of Jawar from his land. It is contended that the defendants had forcibly taken possession of his land and so the cause of action took place for the Suit.

5. Defendant Nos. 1 to 6 filed joint Written Statement. They admitted that the land was divided amongst 3 successors of Sheku. They also admitted that the plaintiff got executed the sale deed from Vitthal on 10/08/1987, but they denied that the consideration was paid and possession was taken from Vitthal by the plaintiff.

6. It is the case of the defendants that entire portion of Vitthal was acquired for percolation tank and there was no land left with Vitthal in G.No. 87. It is contended that as the record of acquisition was not completed, there was the name of Vitthal in the 7/12 extract and this circumstance is mis-used by Vitthal and the plaintiff. It is contended that in the past, R.C.S. No. 201/1985 was filed by defendant No. 1 against Vitthal and in that Suit relief of permanent injunction is given by the Civil Court and so no relief can be given in favour of the plaintiff.

7. On the basis of the aforesaid pleadings, issues were framed. Both sides gave evidence. The trial Court had dismissed the Suit by holding that the sale of the land in favour of the plaintiff is not proved. The circumstance that relief of injunction was given in favour of defendant No. 1 in R.C.S. No. 201/1985 was considered against the plaintiff. It is observed that Vitthal was not having 2 Acres 38 gunthas land after acquisition. The first appellate Court has considered the oral evidence and the documentary evidence viz. E-Statement prepared by the Special Land Acquisition

Officer. The first appellate Court has come to the conclusion that there was an area of 2 Acres 38 gunthas with Vitthal on the date of sale made in favour of the plaintiff. The vital admission in the oral evidence given by defendant No. 1 is considered which is in respect of allotment of shares to 3 issues of Sheku. It is also observed by the first appellate Court that the relief of injunction if given in favour of the plaintiff in the present matter, that will not overlap the decision given in favour of defendant No. 1.

8. Civil Revision Application is also filed by the appellant Fakira and it is against the decision of M.A.R.J.I. No. 33/1999 which was pending in the Court of the 3rd Additional District Judge, Aurangabad. This application was filed for condonation of delay caused in filing Appeal against the Judgment and Decree given by the trial Court in R.C.S. No. 9/1990. The Suit was filed by present plaintiff Shamrao and it was in respect of his right to take water from common well situated in G.No. 87 and to have his own motor pump on this well. The Suit was decided on 10/12/1992 and so the M.A.R.J.I. was filed. Here, only it needs to be observed that the

disposal of M.A.R.J.I. was as good as disposal of the First Appeal and so Second Appeal ought to have been filed. In any case, the decision of the other Appeal can decide the rights of Shamrao claimed in the other Suit.

9. The Second Appeal was admitted by this Court [other Hon'ble Judge] by Order dated 13/01/1999 by making following observation,

*" The Court below are at variance of factual aspect of possession of the suit property and so '**admitted**'. "*

10. It can be said that no substantial question of law as such was formulated by this Court. In view of the rival contentions, following points needs to be decided in the present matter as substantial questions of law.

[i] Whether the first appellate Court has committed error in re-appreciating the oral evidence and documentary evidence and to set aside the decision given by the trial Court that there was no property with Vitthal and possession was not given by Vitthal ?

[ii] Whether the first appellate Court has committed error in holding that the decision

of the present matter can not overlap the decision of previous Suit of injunction decided in favour of defendant No. 1 ?

11. This Court has carefully gone through the record like E-statement. This record of land acquisition shows that for the irrigation project, 3 H. 16 R. portion of Khandu was acquired, 1 H. 70 R. portion of Vitthal, son of Bandu, was acquired and 50 R. portion of Fakira, present defendant No. 1 was acquired. Thus, entire portion of Khandu was acquired, but out of 7 Acres 22 gunthas portion of Vitthal, 1 H. 70 R. around 4 Acres 10 gunthas land was acquired and so Vitthal was having remaining portion in land G.No. 87. Accordingly, after the acquisition made in the year 1984-85, the revenue record was prepared and the name of Vitthal was continued for remaining portion. The 7/12 extracts of this land at Exhs. 88 and 89 show that Vitthal was cultivating his portion separately. Thus, Vitthal was having the property shown to be sold to the plaintiff.

12. The plaintiff has examined Vitthal in support of his case and Vitthal has admitted that he has sold the

suit property in favour of the plaintiff. Mutation extract in that regard is produced at Exh. 87. In view of this circumstance and as defendant No. 1 had no *locus standi* to challenge the sale deed made by Vitthal in favour of the plaintiff, it was not proper on the part of the trial Court to hold that the sale transaction between Vitthal and the plaintiff was not proved. Due to mis-conception about the necessity of production of original sale deed in such a case, the trial Court committed error. The relevant portion of pleadings from the Written Statement is already quoted and it shows the execution of the sale deed by Vitthal in favour of the plaintiff was not disputed by the defendants.

13. Copy of sale deed is on record and in the sale deed, the boundaries of the portion sold are mentioned. The evidence of plaintiff is in accordance with the pleadings in the plaint. Defendant No. 1 has specifically admitted in his cross examination as follows.

- [i] Partition had taken place about 40 - 50 years prior to the date of deposition.
- [ii] Each member was enjoying his share

separately.

- [iii] Eastern portion of his share was acquired for irrigation project.

14. Fakira has tried to say that only 4 - 5 gunthas of his land was acquired, when as per record 50 R. portion of Fakira was acquired. The record shows that western portion was allotted to Fakira, middle portion was allotted to Khandu and extreme eastern portion was allotted to the share of Vitthal. On the eastern side of Fakira, there was land of Khandu and entire land of Khandu was acquired and there was water of irrigation project on this portion. Thus, there is no scope for Fakira to say that beyond water his land is there. In spite of these circumstances, he tried to contend that beyond water, he has some portion. The evidence of Fakira is also on existence of well which was there right from beginning and about which there was dispute in the other Suit. There is mention of this well in the mutation also.

15. On the basis of aforesaid circumstances, the first appellate Court has set aside the decision of the trial Court and has granted the decree of injunction in favour of the plaintiff. This Court holds that it is not possible to

interfere in the decision given by the first appellate Court and also in the order made in M.A.R.J.I.

16. So, both the above points are answered against the appellants and both the proceedings stand dismissed. In view of dismissal of Second Appeal, C.A. No. 1060 of 1999 stands disposed of.

[T.V.NALAWADE, J.]