

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

SECOND APPEAL NO. 17 OF 2008
WITH
CIVIL APPLICATION NO. 490 OF 2008

Pandurang Bhagwan Narwade
(died) through his legal
representatives -

1. Moharbai Pandurang Narwade,
Age 48 years, Occu. Household
 2. Dattatraya Pandurang Narwade,
Age 26 years, Occu. Agri.,
 3. Mahesh Pandurang Narwade,
Age 24 years, Occu. Driver
- All r/o Ganesh Nagar, Osmanabad
Taluka and District Osmanabad

..Appellants

Versus

- .
- Smt. Kesharbai w/o Parsaram Narwade,
Age 47 years, Occu. Household,
R/o Chikhali, Taluka and District
Osmanabad

..Respondent

Mr M.U. Shelke, Advocate for appellants
Mr K.J. Suryawanshi, Advocate for respondent - sole

CORAM : SUNIL P. DESHMUKH, J.

DATE : 20th December, 2016

ORAL JUDGMENT

1. This second appeal is at the instance of legal representatives of original defendant, purporting to challenge the concurrent judgments and decrees in favour of respondent - original plaintiff, passed by the 2nd Joint Civil Judge, Junior Division, Osmanabad, in regular civil suit

no. 94 of 1989 dated 21st February, 2003 and dated 5th September, 2007, passed by District Judge-1, Osmanabad in regular civil appeal no. 67 of 2003.

2. The subject-matter of dispute is landed property bearing gut no. 97 ad-measuring 1 hectare, 58-R situated at village Chikhali in taluka and district Osmanabad. Respondent-original plaintiff in aforesaid regular civil suit is wife of Parasram Narwade. She married to him in 1972 and was co-habiting with him at Chikhali for a couple of years. Since the couple was being harassed by the original defendant - appellant, forcing them to move out of village, they had started residing at Ter. They were managing and controlling aforesaid landed property through *bataidar*. Parasram had been absconding since 1976 and his whereabouts were unknown for over seven years. However, respondent went on getting cultivated the suit land through others. Around 1981-82, the appellant had forced his entry over the suit land alluring the respondent over that she would be maintained from the income of the suit land. It is the case of the respondent that for about couple of years, she had received a part of share, however, since 1984 the appellant declined to give her legitimate share in the produce of the suit land.

3. Surreptitiously, the appellant got his name entered in 7/12 extracts showing that he is in possession on behalf of Parasram-the husband of respondent. The same was realised around 1986 by the respondent and thereupon she had applied for correction of the record. The application was rejected. Around 1989, possession was

demanded by respondent from appellant but, same was responded to by refusal and as such, suit ensued.

4. The appellant-defendant resisted the suit, denying that the couple of Parasram and the respondent-plaintiff had ever co-habited for two years and then shifted to Ter and resided there till 1975. It was denied that the couple had been managing the suit land through *bataidar*. The contention with regard to Parasram being absconding since 1976 was also denied and further it was denied that the plaintiff had been cultivating suit land through others. It was denied that appellant had forcibly entered suit land in 1981-82 and got his name entered in the 7/12 extract behind the back of the respondent. It was, however, admitted by appellant that respondent had been married to Parasram who was owner of the suit land.

5. It had been the contention of the appellant while resisting the suit, that Parasram was a simple person and respondent was of doubtful character. As such, quarrel broke out between them a few months after marriage and respondent had deserted Parasram and started residing at Sangvi with her parents. Parasram was cultivating suit land till 1980. In 1980, Parasram executed a lease-deed in favour of Rama Tukaram Jadhav for a period of two years.

6. Thereafter, Parasram was in need of money and had agreed to sell the suit land to the appellant in the year 1982 for a consideration of Rs.8,000/- under an executed agreement of sale. An earnest money of Rs.7,000/- had been accepted by Parasram and he had handed over possession of the suit land to the appellant. The balance

of consideration was agreed to be paid at the time of execution of sale-deed. The appellant claimed that he is in possession of the land pursuant to agreement of sale. In 1983, Parasram left the village and had started living at Bhivandi to earn his bread and butter. While he had been back to village in 1985 on the eve of Gudi-Padwa, the appellant was ready and willing to pay the balance of consideration of Rs.1,000/- and to get sale-deed executed from Parasram. But Parasram had promised to execute sale-deed at the time of Gudi-Padwa of next year. Appellant had spent a lot of amount over improvement of said land. In 1986, Parasram did not execute the sale deed as he was in hurry and had assured to execute the sale-deed in 1990. Parasram, since then had not returned. The plaintiff does not have any right to suit land.

7. On the basis of aforesaid pleadings, the trial court framed issues as to whether respondent-plaintiff proves her being owner of suit property and had been in its possession, whether she proves Parasram had been absconding since 1976, whether she proves that appellant-defendant caused forcible entry in 1981-82 over suit land, whether appellant-defendant proves his possession pursuant to agreement of sale and renewal of agreement of sale, as contended in written statement, whether appellant-defendant proves that sale deed dated 4th May 2001 having been executed by Parasram and whether respondent-plaintiff is entitled to possession and mesne profits at the rate claimed in the plaint.

8. The trial court, upon consideration and appreciation of evidence, found that suit property is owned by Parasram, he had been absconding since 1976 and the appellant forcibly entered suit land in 1981-82. The court further found that there had been no agreement as contended by the appellant and further that the appellant has failed to prove that there had been sale-deed dated 4th May 2001 by Parasram. As such, it was held that respondent was entitled to possession and inquiry with respect of mesne profits had been directed.

9. In appeal at the instance of appellant-defendant, points for consideration as were framed were about ownership of the plaintiff-respondent over suit land and about Parasram being a legally dead person and further whether there had been any execution of agreement of sale in favour of appellant-defendant putting him in possession and about execution of sale-deed dated 4th May 2001 in his favour by Parasram and about entitlement of respondent-plaintiff to possession of suit land, finding that respondent who is legally wedded wife of Parasram and Parasram being legally dead person, had become owner of suit land and appellate court had concurred with the finding of trial court about failure of appellant to prove agreement of sale in his favour in 1982 and also his failure to prove sale deed dated 4th May 2001 by Parasram in his favour.

10. Learned counsel Mr Shelke appearing for appellants vehemently submits, looking at the pleadings of the parties it emerges, since 1975 the respondent and her husband Parasram had never been in actual

possession of the suit property. The suit property, on their own saying, was being cultivated by other persons. Documents had been placed on record in the first place in the form of agreement of sale and further a registered one dated 4th May 2001, a sale-deed, gives rise to presumption that Parasram being alive and was not legally dead person as had been assumed by the courts. He submits that sale-deed is a registered document and in the circumstances, it has to be presumed that Parasram had been alive. He refers to provisions of Sections 107 and 108 of Indian Evidence Act, 1872 and contends that having regard to section 107, while the two documents have been placed on record, burden to prove that Parasram is dead, is on the plaintiff-respondent. Taking into account these two documents on record, it cannot be said in fact and in law that such a burden has ever been discharged by the plaintiff-respondent. He, therefore, submits that the two courts have been in patent error in considering that Parasram to be legally dead person and as such, urges this court to formulate a substantial question of law in this regard and admit second appeal which has been pending since 2008.

11. Countering aforesaid submissions, Mr Suryawanshi appearing for the respondent refers to that the matter has been pending since 2008. Initially, it was being adjourned on one or other pretext. However, during pendency, it was dismissed in default twice and has been restored and thereafter, matter is coming up after long period before the court. The old lady - respondent who is suffering pitiable living condition since she is not able to enjoy the fruits of the litigation. She is the rightful owner of suit property after death of her

husband – Parasram. He submits that when it is not denied that Parasram was her husband and had left behind no other legal heir and succeeds rightfully to his property. He, however, contends that the courts have considered the evidence. He submits that the courts have considered that there is no credibility and/or veracity in execution of agreement of sale in the year 1982 and have considered that the appellant had in fact admitted that Parasram had been absconding in a previous suit. He further submits that the purported signatures of Parasram as were appearing on the agreement of sale and the sale deed being bogus and fraudulent and could have been easily brought before the courts by production of bank documents depicting thumb impressions of Parasram as the same could have been available in the routine course which the bank has claimed to have destroyed.

12. Aforesaid apart, he refers to that there have been several events which pointedly make it clear that the agreement of sale as well as the sale-deed are bogus and fraudulent documents. He refers to paragraphs no. 11, 12 and 13 of the appellate court's judgment which are reproduced hereinbelow for ready reference.

“ 11. The appellant is relying on the agreement of sale Ex. 79 dated 11.3.1982 which is said to be bearing thumb impressions of Parasram. As stated earlier to prove this fact witness Vilas Patil was examined at Exh.78. The agreement reads that the appellant paid earnest amount of Rs.7000/- to Parsram whereupon Parsram executed the agreement and handed over possession of the suit land to the appellant. The 7/12 extract Exh. 5 shows that in the year

1982-83 the appellant was recorded as cultivator of the suit land. Exh. 61 shows that the respondent challenged the entry by filing application on 24.7.1986. The learned Tahsildar held that Parsram was alive and therefore the challenge could not sustain. Even in her application as per Exh.62, the respondent alleged that Parsram was not heard of since 1980. Shri Thombare has tried to make much capital of her statement recorded on 10.8.1990 that her husband has not been heard of since last 10 years, which means since 1980. It must be remembered that the respondent is a lady from village background doing only labour work. A suggestion was given to her during cross-examination that her husband had been to village Chikhli in the year 1985 and then in 1989. What it means is that before 1982 Parsram had left village Chikhli. Then it is extracted in her cross-examination that she was residing at village Sangvi for 10 to 12 years which means before 1980.

12. The story of the appellant begins since execution of alleged agreement Exh. 79 on 11.3.1982. There is no dispute that the appellant is the cousin of Parsram. It was suggested to the respondent that she resided with Parsram only for three months after her marriage. It is denied by her. Even according to her witness Trimbak Ghute Parsram is absconding from the village since last 10 to 12 years, which means since the year 1980. According to witness Pandurang Jadhav the police patil, Parsram is absconding since 20 to 25 years, which means Parsram absconded between 1977 to 1982. He denied that Parsram was coming to village Chikhli on Chaitra Purnima.

13. Then there is sale-deed Exh. 126 dated 4.5.2001. Interestingly enough even here the money was said to be paid well before execution of sale-deed. When the appellant was well aware of the suit that was pending against him, the best course open for him was

that he could have brought Parsram in the court and ask him to join the suit as a party. Why he clandestinely got executed sale-deed when the suit was pending in the court, is not made clear by him. It only throws light on his oblique motive. Of all the witnesses examined by the appellant to prove that Parsram has been heard of, it were witnesses Vilas Patil, Goroba Jadhav and Mahadeo Yedke, who claimed to be from village Chikhli. Out of them admittedly Mahadeo Yedke was residing at Savargaon. Witness Goroba Jadhav denied that he was the brother-in-law of appellant Pandurang but admitted that house of Pandurang is far away from his house. Then Vilas Patil has pleaded ignorance why sale-deed was not executed on the same day by paying full amount. The evidence of the witnesses for the appellant does not inspire confidence. On the other hand, there is no reason to discard the evidence of the respondent and the police patil to the effect that Parsram has not been heard of since 1980. Consequently I do not find any reason to interfere with the findings of the trial court that the respondent became owner of the suit land as Parsram is presumed to be dead being not heard of for more than seven years. On the other hand, the appellant failed to prove that Parsram was alive and executed agreement of sale and sale-deed in his favour. I therefore answer point no. 1 in the affirmative and point no.2 in the negative”.

13. Mr Suryawanshi contends that in view of re-appreciation by the appellate court concurring with the finding that of the trial court, the appreciation being based on record and evidence would seldom be liable to be considered as mis-appreciation or it can be said that it tends to be perverse. In such a scenario, he contends that a fraud on the old lady was being played and matter has been kept pending for about 26 years. In second appeal, the court should observe restraint

on disturbing finding of fact rendered by two courts. As a matter of fact, he submits, there is no substantial question of law in second appeal and much less referable to section 107 of the Evidence Act. He refers to section 107 of the Evidence Act and submits that when it has come on record that Parasram had not been heard of for seven years, question as to whether he is alive or dead is a matter of proof, burden of which naturally had shifted on the appellant and having regard to the discussion of evidence as referred to above, it has come up on record that appellant has miserably failed to discharge such burden. He, therefore, submits that when a person is a legally dead person, a fraud has been played showing him to be alive and by not producing him nor corroborating the evidence with the signatures on the documents to demonstrate that those were of Parasram. He submits that no further indulgence be given to the appellants since already eight years have been exhausted, more than sufficient indulgence had been enjoyed by the appellants, and thus, submits that the appeal should be dismissed.

14. Having heard the learned counsel as aforesaid, the submission of the appellants that the ground that has been raised on their behalf about the documents show Parasram to be alive and the burden of proof will be required to be considered pursuant to Section 107 of the Evidence Act having not been discharged does not appear to carry any weight, having regard to aforesaid evidence as has come up as discussed by the appellate court in the judgment reproduced hereinabove. Pursuant to contention of Mr Suryawanshi, both the courts have considered the evidence on record

and have appreciated the same, particularly the trial court had first hand experience of the witnesses and their evidence had opportunity to observe their demeanor and the trial court has referred to the same and has considered and found that the evidence adduced on behalf of appellant-defendant not only does not inspire confidence but the same also appears to be manufactured without there being any support to the same. The appellate as well as trial court have appreciated and observed that the plaintiff-respondent has sufficiently discharged burden and by preponderance, it emerges that Parasram was a legally dead person before the alleged agreement of sale that has been claimed to have been executed.

15. In the circumstances, I do not see that the litigation is to be allowed to be stretched any further by giving indulgence to appellants. The appreciation of facts and evidence by the courts not being perverse and which appears to be in tune with the evidence on record, as such, would seldom be liable to be considered as mis-appreciation or perverse.

16. Second appeal as such stands dismissed. Interim relief, if any, stands vacated.

17. Civil application stands disposed of.

18. At this stage, Mr Shelke urges this court to consider the offer on behalf of appellant-defendant to purchase suit land from plaintiff-respondent. It is for the parties to consider the same. Learned counsel Mr Suryawanshi states that he would communicate the offer

to his client and it would be proper that reasonable market price be offered and paid in one go.

SUNIL P. DESHMUKH,
JUDGE

vvr