

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 432 OF 1991

Janabai Irrappa Jogdand
(Died – Through Lrs)

1-A) Nilabai w/o Eknath Dahiwade,
Age : 45 yrs, r/o Bhimwadi Parli
Vaijinath, District Beed.

1-B) Kalabai w/o Kondiba Dahiwade
(Deleted since expired)

1-C) Tarabai Irrappa Jogadand,
Age : 43 yrs, r/o as above.

1-D) Devidas Irappa Jogdand
(Deleted since expired)

1-E) Padminbai w/o Bhanudas Roade
Age : 41 yrs, r/o Parli Vaijinath,
District Beed.

1-F) Suryabhan s/o Irappa Jogdand
(Deleted since expired)

1-G) Suman d/o Irappa Jogdand,
Age : 39 years
R/o as above.

1-H) Avinash Irappa Jogdand,
Age : 35 yrs
R/o as above.

.. Appellants.
(Orig. Plaintiffs)

Vs.

1. Bajirao Yadavrao Jagatkar
(Died- through Lrs)

1 (a) Krishnabai Bajirao Jagatkar
Age : 62 yrs, occ : retired

- 1 (b) Shakuntala Bajirao Jagatkar
Age : 45 yrs, occ : occu. service

Both r/o Jagatkar Galli, Parli Vaijinath,
District Beed.

2. Krishnabai w/o Bajirao Jagatkar,
Age : 40 yrs, occu. household
R/o as above.

3. Yashwant s/o Kishan Jagatkar
(Abated vide order dt. 8.4.1992)

.. Respondents
(Orig. deft. 1 to 3)

Mr. M.M. Patil Beedkar, Advocate for the appellants.

Appellant no. 1-B, 1-D and 1-F deleted as per Court's order dt. 01-09-2009

Mr. Mujtaba Gulam Mustafa, Advocate for respondent nos.1(a), 1(b) & 2.

Respondent no.3 abated as per Registrar's order dt. 8-4-1992

CORAM : SUNIL P. DESHMUKH, J.

DATE : 09-03-2017

JUDGMENT :

1. Present Second Appeal arises from conflicting decisions rendered by the trial and appellate courts. The Second Appeal is by the plaintiff who had instituted Regular Civil Suit No. 325 of 1978 seeking declaration of ownership over area of 20' X 30' bounded by sides as referred to in sketch map of plaint.

2. According to the plaintiff, house bearing then property no. 225 (new no. 231) had been inherited from her father Kerba Paraji

Mahar and after his death, she had been residing there from 1964 to 1972 and upon construction of a house by her husband, she had shifted to other place in Parali Vaijnath. Plaintiff has contended that on the western side of property no. 225, there is property bearing no. 226 (new no. 232), which presently is occupied by one Motiram Kishan Bansode, having been purchased by him under the registered sale deed dated 22-02-1968. Defendant no.1 purports to have purchased the property on the eastern side of the same under registered sale deed dated 24-04-1968 from Shivram Mukunda, on whom the property is contended to have descended from one Ganga Sambha Mahar. Plaintiff has averred that defendants no. 1 and 2 were employees in the Municipal Council, Parali Vaijanath and taking disadvantage of the same, they have caused the property to be shown as property bearing no. 232/1 and had obtained permission for construction over the same, which is affecting property bearing no. 231, which had been erstwhile bearing property no. 225. The plaintiff had thus applied to the Municipal Council seeking stay to the permission granted to defendant no. 1 and accordingly the permission had been stayed. Further, the Municipal Council had allowed the construction to defendant no.1 excluding the portion of property claimed by the plaintiff. Despite aforesaid, the defendant no.1 purported to go on with construction affecting plaintiff's rights over suit property. The suit ensued seeking declaration and injunction.

3. In defence, defendant no. 1 has disputed boundaries and dimensions of properties. According to defendant no.1, the original municipal no. 226 had been of 20' X 40' dimensions, which at the institution of the suit had been bearing municipal no. 232. Municipal no. 232 had been divided in two separate portions, under two sale deeds of the year 1968 executed by the vendor Shivram. Municipal no. 232/1 is the eastern portion of 20' X 20' and municipal no. 232/2 is western portion purchased by Motiram Kishan Bansode. It is contended by the defendants that plaintiff had mischievously, using clout of her husband, who was then an active political leader, entered her name in the record in respect of disputed property claiming it to be bearing no. 225, now no. 231. It is denied that the plaintiff had ever been in possession of disputed land from 1964 to 1972 as claimed by her. Defendant no.1 has contended that the plaintiff had been residing elsewhere from even before 1962. Although defendant has legitimately obtained permission for construction, under political clout of her husband, the same was got stayed. The suit property was got attached under section 145 of the Code of Criminal Procedure. It is further contention of defendant no. 1 that a court commissioner had been appointed and he has submitted report on 19-06-1979 wherein it has been reported that houses no. 225 and 226 could not distinguished and ascertained and further reported that the construction work of

defendant no.1 is subsisting on suit site. According to defendant no. 1, suit site is in the name of defendant no.1 in city survey record at sheet no. 16 and further claims that the property had descended on Shivram from his original owner Ganga Sambha Mahar and accordingly he had dealt with the same in favour of defendant no.1. Defendant no.1 has been in possession of suit property since 24-04-1968 i.e. the date of registered sale deed in his favour with correction in the same on 02-02-1974. Suit site belongs to defendant no.1 and plaintiff's claim is not tenable. It is further averred that in the facts and circumstances of the case, suit merely for declaration and injunction would hardly be maintainable without there being claim for possession since it emerges that the suit property is not at all in possession of the plaintiff.

4. Trial court with reference to aforesaid pleadings had framed issues as to whether the plaintiff proves that she is owner of suit property no. 225 (new no. 231) and it admeasures 20' X 30'; whether defendant no.1 proves that municipal house no. 226 (new no. 232/1) admeasures 20' X 20'; whether plaintiff proves her title to suit property; whether defendant no.1 proves that the property is purchased from Shivram Mukunda under registered sale deed dated 24-04-1968 and he is in possession; whether the plaintiff proves unlawful obstruction by the defendants; whether plaintiff proves her possession over suit site and whether she is entitled to ownership as

sought.

5. Trial court has referred that plaintiff claims suit site to be her ancestral property bearing house no. 225 (new no. 231) admeasuring 20' X 30' bounded on the East, North and South sides by municipal cement roads whereas on the West, property bearing no. 226 in possession of and owned by Motiram Kishan Bansode, purchased by him from Shivram under registered sale deed dated 22-02-1968. The plaintiff in order to prove her case has produced extracts of property tax register at Exhibits 8 and 9, certificate issued by the Municipal Council, Parli at Exhibit 6, copy of letter issued by the Municipal Council to plaintiff at Exhibit 7, copy of letter issued by the Chief Officer under list exhibit - 42 at 42/1 and tax receipt at 42/2.

6. Trial court has referred to the extract of property register produced at Exhibit 10, permission for construction under the list exhibit 22 at 22/1, certified copy of correction deed at 22/2 and has considered that the properties bearing municipal house no. 226 (new no. 232/1) and municipal house no. 226 (new no. 232) are quite distinct and commissioner's report at Exhibit 57 may not be representing proper position. So far as size of suit site is concerned, trial court has relied on the oral testimonies on behalf of the plaintiff and inferred that albeit Exhibit 7 refers to dimensions of property to be

10' X 15' but having regard to the evidence led by the plaintiff, it appears to be probable that there is substance in the claim made by the plaintiff with regard to the dimensions of the property.

7. On the other hand, defendant no.1 apart from himself has examined DW 2 – Shivram - the vendor, DW3 - Bhagoji, DW4 - Hariba and DW5 – Ranba, however, except said Shivram, none of the witnesses has referred to the dimensions of the suit site. Trial court found their evidence not to be cogent and convincing and considered that Shivram being interested witness, his evidence may not be reliable. The trial court has also appreciated that while Shivram speaks in his testimony about the dimensions of the property to be 20' X 20', yet the document of title claimed by defendant no.1 does not refer to the direction of the property under transaction and there is no plausible explanation given in respect of the absence of dimensions in the sale deed.

8. Trial court inferred from documents and the testimonies of the witnesses that there is lot of force in the contention of the plaintiff about her title and possession and as such considered her title and possession to have been proved. Trial court considered that portion of house bearing no.226 in the sale deed executed by Shivram in favour of defendant no.1 refers to dimensions but it is not consistent with the

version of the defendant no.1. Even the correction deed of 1974, according to the court, refers to the half portion from East as claimed by defendant no.1 would not emerge, and considered that evidence given by witnesses of defendant no. 1 to be not consistent with the documentary evidence. So far as possession is concerned, trial court considered although there appears to be construction activity over disputed property of erection of some pillars, it would not be in law a settled possession and it may tantamount stray case of possession. As plaintiff has timely sought remedy, it cannot be said that the plaintiff has lost possession. Trial court as such decreed the suit declaring the plaintiff to be the owner of suit property and perpetually restraining the defendants from interfering with the plaintiff's possession over suit property.

9. In Appeal therefrom by defendant no.1, bearing Regular Civil Appeal No. 191 of 1981, appellate court has set aside the decree and has dismissed the suit under its judgment and decree dated 25-04-1989.

10. It is against the aforesaid judgment of the appellate court, the second appeal is preferred by the plaintiff and this Court has admitted the second appeal on grounds no. IV, V, VI and VIII reading thus :

“ IV. That it ought to have been seen by court below that old house no.225 corresponding to new 231 was inherited by plaintiff from her father and hence there cannot arise any question of production of document of title, and as such on that count plaintiff's case cannot be thrown away.

V. That the lower appellate court lost sight of the fact that sale deed dated 24.4.1968 at Exhibit 49/1 executed by Shivram in favour of defendant no.1 does not mention directions of property sold, hence it cannot be held that suit property is of ownership of defendant no.1.

VI. That court below erred in disturbing finding of trial court that suit house bears old municipal no.225 and new no.231 and its dimensions are 20' X 30'

VIII. That it ought to have been seen by lower appellate court that documents produced by plaintiff in share of certificate issued by Parli Municipal Council Exh.6, letter sent by Municipal Council Exh.7, Extract of property Tax Ex.8 & 9, tax receipt at Exh.62/2 clearly go to establish ownership and possession of plaintiff over suit property since 1964 to 1972. ”

11. While deciding the Regular Civil Appeal, district court appears to have considered that in the absence of any document of title

of plaintiff and document of title to suit property having been purchased by defendant no.1, it appears that the plaintiff's case has been considerably weakened. Apart from aforesaid, appellate court has also considered that commissioner's report shows that properties bearing erstwhile houses no. 225 and 226, now corresponding to houses no.231 and 232 respectively, are not distinguishable. Appellate court appears to have considered that documents at Exhibits 6, 8, 9, 10 and 14/1 are not documents of title either to house no. 225 or for that matter to no. 226. Appellate court has appreciated that sale deeds Exhibit 50 and Exhibit 49/1 respectively dated 22-02-1968 and 24-04-1968 are about old house no. 226 corresponding to new no. 232 in favour of Motiram Kishan Bansode and defendant no.1 respectively. Appellate court also appears to have considered that since there is no attempt to correct the mistake of the area of old house no. 225 and plaintiff had not produced a single document of title to show that suit property originally belonged to her father deceased Kerba Paraji Jagatkar and her having not produced extract of city survey number of Municipal old house no. 225 to show that her father was in possession as owner. Appellate court has considered thus *"So considering and appreciating the documentary evidence namely the aforesaid sale deeds the suit property is bearing old house no. 226 corresponding to new house no. 232 and it does not bear the old house no. 225 corresponding to new no. 231."* It has been considered that the plaintiff as such failed to establish title to suit property as well as

her possession on the date of filing of suit. Evidently, it was in possession of defendant no.1 at the time of filing of suit. It has been considered by appellate court that trial judge has overlooked documents under the lists exhibit 50 at 50/1 and exhibit 49 at 49/1 which are title documents and as such adjudged that the decision by trial court has been erroneous.

12. Learned advocate Mr. M. M. Patil (Beedkar), vehemently submits that while trial court with reference to evidence on record has appreciated and considered that plaintiff, to a large extent, succeeds in proving her claim to suit property, appellate court has committed a grave error in reversing findings recorded by trial court. He submits that the record and evidence amply bears veracity of claim of the plaintiff and her entitlement to suit property. The property is ancestral and as such, it could not have been expected that any document of title must be available. According to learned advocate, appellate court has been swayed away by documents placed on record on behalf of defendants, while it is difficult to say their vendor had any origin or source of title to disputed property. He, therefore, submits that it ought to have been considered that old House No. 225 (New No. 231) had been inherited by plaintiff from her father. He submits that the so called document of title exhibit-49/1 executed by Shivram in favour of the defendant is not reliable, for it does not reveal necessary particulars,

inter-alia directions of property sold. He submits that documents Exhibits – 6, 7, 8 and 9 clearly establish the claim of plaintiff. Appellate court has erred in not giving its due to these documents placed on record. He, therefore, urges to set aside judgment of the appellate court and restore that of trial court.

13. Mr. Mustafa, learned advocate, on the other hand, submits that basically claim made by the plaintiff had no basis. Plaintiff is neither in possession of any document of title nor there is any other document supporting veracity of the claim of plaintiff. He submits that while plaintiff claims entitlement to property admeasuring 20' X 30', yet it emerges on record that plaintiff has not established fact of owning an area of 20' X 30'. The plaintiff stakes claim to erstwhile property House No. 225, now bearing House No. 231, but record depicts that so called acceptance of plaintiff's claim under correspondence by municipal council is only of an area of 10' X 15' and not anything more. Whereas it has emerged on record that the disputed property totally admeasures around 20' X 20' area which is a division by two sale transactions of 1968 of erstwhile property admeasuring 20' X 40'. Lot of documents have been placed on record including registered ones. No challenge has ever been posed to these registered documents and area of property sold thereunder. It is due to clout enjoyed by husband of appellant in the municipal council, existence of some documents had been brought

about and the suit has been filed. He submits that it has emerged on record that the appellant had never been in possession of the property. There is no existence of the property even in the municipal council's record as claimed by the plaintiff, in her name. He submits that documents which are being relied on are post registered sale deeds executed in favour of defendant No. 1. Exhibit-6 is a certificate which in fact purports to show that property House No. 225 is converted into House No. 232, which is not even the case of the appellant. Exhibit-7 is a letter issued by municipal council, perhaps at the instance of appellant, depicting payment of taxes from 1964 to 1975. This document does not accept case of the appellant about her being owner of 20' X 30' area at any point of time. Plaintiff, if at all, has any claim, it is claim at some other place and not over the disputed property.

14. Exhibit-6 is a certificate of 1968 about taking entry of plaintiff in respect of house bearing No. 2/225. It does not give any indication about dimensions of the property.

15. Exhibit-7 is a communication of 1976 from Municipal Council, Parali Vajinath, which appears to refer to tax register referring to that from 1964-65 to 1974-75 her name has been appearing in respect of House No. 225 of Division No. 2 and has been described as open land of 10' X 15' and that while revision of taxes taken place in 1975-76,

same has been recorded as house No. 231 of Division No. 2. This appears to be in response to explanation sought from the Municipal Council.

16. Exhibit-8 is a document in respect of house No. 225 (Old) and new number 231, which only refers to an open land of plaintiff.

17. Exhibit-9 shows that it is in respect of old house No. 225 (new 231) for the year 1954 showing 12 x 10 construction.

18. Exhibit-10 is of the year 1975-76 in respect of new house No. 232/1 admeasuring about 20' X 20' open land.

19. Plaintiff – appellant has approached the court seeking declaration of ownership over an area of 20' X 30' giving description of the property while the corresponding record, particularly, Exhibits-6, 7, 8 and 9, it appears, do not lend support to the claim so made. Nor does it appear that any previous record in respect of property claimed has been placed before court by plaintiff – appellant.

20. In the face of aforesaid position, while it appears that there is no credible material placed, claim being staked to property admeasuring 20' X 30', by plaintiff, does not ostensibly appear to be legitimate. There is no corresponding record indicating dimensions of house No. 225 to be 20' X 30' as claimed by the plaintiff. Whereas

there has been some material on record indicating that while commission had taken place there has been some construction coming up on behalf of defendants over suit land, which they relate and claim to originate from sale deeds executed in their favour by legal heir of original owner. Municipal record, it appears, register does show existence of properties in the name of defendants, corroborating case of defendant.

21. In such a case, decision reached by appellate court cannot be said to be not adhering to the record. Appreciation of appellate court does not appear to be impeachable on that count. A possible view has been taken by appellate court. Substantial questions, as such, stand answered as aforesaid. It would, however, be open to plaintiff to take recourse to such measures as may be available to her to property claimed by her to have been inherited. As such, decision of appellate court does not deserve to be interfered with at the second appellate stage.

22. Second appeal, therefore, fails and is dismissed.

[SUNIL P. DESHMUKH],
JUDGE

arp/