

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

SECOND APPEAL NO. 784 OF 2016
WITH
CIVIL APPLICATION NO. 14644 of 2016

1. Shaikh Rafikuddin s/o Shaikh Jainuddin,
Age 56 years, occup. labourer
r/o Zaker Hussain Colony,
Sillod, Dist. Aurangabad
2. Shaikh Salimuddin s/o Shaikh Jainuddin,
Age 52 years, occup. and r/o as above .. Appellants/
orig.Defendants

versus

1. Shaikh Khalil s/o Shaikh Jainuddin,
age 60 years, occup. Pensioner,
r/o Dr. Zaker Hussain Colony,
Sillod, Dist. Aurangabad
2. Sugrabee w/o Shaikh Jainuddin,
age 80 years, occup. Nil,
r/o Bilal Nagar, Sillod,
Aurangabad
3. Rashidbee w/o Shaikh Bilal,
age 30 years, occup. Household,
r/o Borgaon Bazar, Tq. Sillod,
Dist. Aurangabad
4. Saberabee w/o Shaikh Khalil,
age 32 years, occup. Household,
r/o Deulghat, Tq. Deulghat,
Dist. Aurangabad
5. Sabiyabee w/o Shaikh Khalil,
age 25 years, occup. Household,
r/o Borgaon Bazar, Tq. Sillod, .. Respondents/
Dist. Aurangabad orig. Plaintiffs

Mr. A. A. Khan, Advocate for appellants
Mr. R. V. Gore, Advocate for respondent no. 1

CORAM : SUNIL P. DESHMUKH, J.
DATE : 27th March, 2017

ORAL JUDGMENT :

1. Heard learned counsel for the parties.
2. The second appeal purports to take exception to the decree passed by trial court [civil judge, junior division, Sillod] in regular civil suit no. 104 of 1988 on 01-12-2010 declaring the respondents – original plaintiffs to be lawful owners of suit property and directing appellants-original defendants to vacate possession of three rooms and clamping injunction against them from causing obstruction to plaintiffs' possession over open space. Matter was carried by defendants in appeal bearing regular civil appeal no. 18 of 2011 which the appellate court [District Judge-4 Aurangabad] dismissed on 20-08-2015. [Parties hereinafter are referred to by their status in the suit].
3. The disputed property is a land plot having dimensions 55 ft. x 40 ft. situated at Sillod. Said plot has been purchased by plaintiffs from its original owner Haji Gulam Gilani under a registered sale deed in 1978. While sale deed is executed in favour of plaintiffs, it referred to plot no. 46. Subsequently, under a deed of correction dated 12-10-1988, number of the

property was corrected and the vendor admitted the same to be plot no.47 and not plot no. 46 as had been shown to have been sold under the registered sale deed referred to above.

4. The defendants who are the brothers of plaintiff no. 1 were given three rooms for temporary residence. While subsequently construction was intended by plaintiff, the defendants purported to object to the same. In the circumstances aforesaid suit ensued.

5. Defendants no. 1 and 2 had filed their written statement. Defendant no. 1 has averred that it is in fact defendant no. 1 who has purchased suit property and had constructed rooms thereon. It is their case that actual consideration of ₹ 200/- was paid by defendant no.1.

6. During the trial, defendant no. 1 expired and his legal heirs were brought on record.

7. The trial court had framed necessary issues about ownership of plaintiffs and about as to whether the defendants proved that defendant no. 1 had purchased suit plot and about obstruction by defendants to plaintiffs' possession over the property. The trial court had considered the factual position on appreciation of evidence as had been

adduced and found the plaintiffs to be owners of suit property and that defendant no. 1 had failed to show that it is defendant no. 1 who had in fact purchased the property. The obstruction was held to be proved and in the circumstances decree of declaration of ownership with injunction restraining defendants from disturbing plaintiffs' possession was passed.

8. As stated earlier, the matter was carried in appeal by the defendants. The appellate court as well framed the points for determination as were the issues before the trial court and found the plaintiffs to be the owners and that the defendants had failed to show that defendant no. 1 had purchased suit property nor could they prove that defendant no. 1 had constructed rooms over suit property. The appellate court has in paragraphs no. 14 to 18 of its judgment observed as under;

" 14. The defendants stated that defendant no. 1 purchased that property from out of his earnings. D.W. 1 Shaikh Rafiquddin in his cross-examination stated that the plaintiff is elder than him. His father retired from the post of Police Jamadar on 01-10-1975. Before working at Sillod, his father was working at Ambad, Aurangabad etc. When, suit plot was purchased, he was 18 years old and plaintiff was 23 years old. On the date of execution of sale deed, he was not present there. He does not know who were other

witnesses present at the time of that transaction. Thus, he had no personal knowledge that who had paid amount of consideration to the vendor. He admitted that in the sale – deed name of the plaintiff is mentioned as purchaser-owner of that property. Since beginning, name of plaintiff was recorded in Grampanchayat and Municipal record. The electric connection of suit property was also obtained in the name of plaintiff. The plaintiff is paying it's bill. Plaintiff is paying house property tax. He volunteered that his father used to pay amount for said payment, but, he does not know on which date and how much amount was paid by his father. Thus, he has no personal knowledge about that also. He personally never went to deposit amount of tax. He admitted that the receipts of tax are in possession of plaintiff. He has stated that Plot No. 46 and 47 are different. After retaining Plot No.46, correction was made in sale-deed. This version of this witness is totally contrary to the plaintiffs case. There is absolutely no evidence about it. Plaintiff has come out with a case that while executing sale-deed only mistake was happened in mentioning the plot number. The plot sold to him and put in his possession was one and the same. Only on paper that mistake was got corrected.

15. This witness further stated that he does not know in which year his father had made construction on the suit plot. From where construction material was brought also does not known to him. He has no receipts of building material purchase. He does not know whether building construction permission was obtained from local authority or not. He does not know how many period was spent in completing the construction. He claimed that one Babubhai meson had made construction of that house.

16. In this case, defendant no. 3 did not file his written statement. But, he has filed affidavit in lieu of evidence and claimed that his father purchased that plot from previous owner Gulam Jilani. Thereafter, his father had constructed that house consisting of five rooms from his earning. In cross-examination, it has come on record that he has no knowledge about following things :-

- A. Who was previous owner of that plot.*
- B. At the time of purchase, he was not present there. He claims that his father had purchased that plot in lieu of Rs.5000/-. But, in his presence that amount was not paid by his father.*
- C. When his father made construction of that house.*
- D. Whether building permission was obtained or not.*

17. D. W. 3 Syed Babu Syed Lal claims that he is meson by profession. He claims that construction of that house was done by him before about 21 years ago prior to his deposition. In cross-examination, he has stated that he has no knowledge as to from whom that plot was purchased, what is area of that plot, whether building permission was obtained or not, in which year construction was done, from where building material was purchased. No written agreement took place between him and owner of that house. Thus, except his bare words, there is absolutely no evidence to show that he has made construction of that house. He admitted that defendant no. 2 Shaikh Rafiquiddin had brought him to give that deposition in Court and defendant no. 2 has borne expenses of bringing him in the Court. It shows that he is tutored witness of defendants. From this evidence, it is duly established that there is absolutely no evidence with defendants to prove that income of deceased

defendant Shaikh Jainoddin. They have also no evidence to prove that Shaikh Jainoddin had purchased that from his income and then made construction of said house on that plot from his income. Only to falsely claim ownership over the suit property, they have raised this false defence.

18. On the other hand, plaintiff had proved that suit plot was purchased by him. It's sale-deed is standing in his name His name is appearing in record of rights as owner and possessor of that plot. He is paying municipal taxes. The electric connection is also standing in his name. Therefore, there is no merit in the defense of the defendants that there was joint family of deceased defendant no 1 Shaikh Jainoddin and his sons and for that family, Shaikh Jainoddin purchased the suit plot and made construction of house from his own earning and therefore, ownership right of that house was conferred on defendants. "

9. Learned counsel for the defendants submits that as a matter of fact there is a written document executed between father of the plaintiff no.1, i.e. defendant no. 1 and the original vendor, however, the same has not been taken into account although that has been placed on record.

10. Countering aforesaid, learned counsel for plaintiffs points out that neither there is pleading to that effect nor the document has been exhibited nor it is a case that document could have been read in evidence as it is an unregistered document. He submits that the document is not even

notarized, further pointing out that consideration amount paid had been Rs.200/- and the plaintiffs had been running business and this fact has not been disputed by the defendants.

11. Taking into account that the document on which reliance is being placed by defendants, obviously it being a subsequent document before which under a registered sale deed original vendor had parted with property in favour of plaintiff, such unregistered and unexhibited document hardly has any evidentiary value and credibility. Furthermore, there is even subsequent document of October 1987 whereas it appears to be contention of defendants that the document which has not been exhibited nor proved nor has been pleaded about is of September, 1987. It is not a case that correction deed had not been executed by original vendor.

12. Taking overall view of the matter, it does not appear to be a case wherein the evidence as has been adduced on behalf of the defendants inspires any confidence. In the circumstances, decisions rendered to by two courts do not appear to discrepant and away from the evidence from evidence on record.

13. The second appeal does not give rise to question which can be said to be of substantial nature and as such the same stands dismissed.

14. Civil application does not survive in view of dismissal of second appeal and stands accordingly disposed of.

SUNIL P. DESHMUKH,
JUDGE

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