

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

Second Appeal No.440/2017

Keshav Ganpat Malekar and another
Vs.
Shivaji Ganpat Shinde and others

*Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.*

Court's or Judge's Orders

Shri K.V.Deshmukh Advocate for appellants.
Shri R.M.Mardikar, Advocate for respondents 1 & 2.
Shri S.M.Chande, Advocate for Respondent nos. 3(A) to 3(F)

CORAM : A.S.CHANDURKAR, J.
DATED : 26.09.2018

1. This appeal has been filed by the original defendant nos. 1 and 2 who are aggrieved by the judgment of the trial Court dismissing the suit as filed by the respondent nos. 1 and 2 herein and granting a declaration that the plaintiffs were the owners of land bearing Gat No.327 admeasuring 80 R. Further injunction was granted restraining the present appellants-defendant nos. 1 and 2 from obstructing the possession of the plaintiffs. The appellate Court has confirmed that decree.

2. Relevant facts are that, it is the case of the plaintiffs that the land bearing Gat No.327 admeasures about 1 Hectare 4 R with a well situated therein. Land admeasuring 80 R from that Gat was owned by one Jayram-defendant no.3. The plaintiffs on 14.09.2005 purchased the aforesaid agricultural land for a consideration of Rs.1,30,000/-. According to them, the defendant no.3 had on 18.03.1978 purchased the suit property from Shriram Malekar. The plaintiffs however claimed that they were in possession of the suit field. The defendant nos. 1 and 2 tried to disturb their possession and hence, the aforesaid suit for declaration and perpetual injunction came to be filed.

3. In the written statement as filed by the defendant nos. 1 and 2 they denied the title of the plaintiffs. It was their case that the plaintiffs had shown wrong boundaries of the land which they had claimed to have purchased. According to them, Survey No.49/3A was admeasuring 1 Hectare 20 R and it was owned by the father of the defendant nos. 1 and 2 - Ganpat and he was in occupation thereof. The said land was thereafter converted into Gat No.328 and the vendor of defendant no.3 had no title to that property. It was further pleaded that Survey No.49/3 was admeasuring only 40 R in which the vendor of defendant no.3 and his brother had title. The said Survey No.49/3 was given Gat No.327. It was thus pleaded that as the vendor of defendant no.3 was not concerned with Survey No.49/3A, the defendant no.3 and thereafter the plaintiffs could not claim any right in the suit land.

4. After the parties led evidence, the trial Court recorded a finding that the plaintiffs were the owners of field bearing Gat No.327 admeasuring 80 R which they had purchased on 14.09.2005. It was held that the defendants failed to prove that the sale deed executed by the defendant no.3 in favour of the plaintiffs was illegal. The suit was accordingly decreed. The appellate Court confirmed the said decree.

5. Shri K.V.Deshmukh, learned counsel for the appellants submitted that both the Courts committed an error in holding in favour of the plaintiffs. According to him, the plaintiffs had not proved that Survey No.49/3 was subsequently converted into Gat No.327 which land was claimed to be purchased by the plaintiffs. As per the Map at Exhibit 98, which was prepared by the Talathi, it was clear that the description of the suit property as given by the plaintiffs was incorrect. According to learned counsel, when there was a conflict between Gat numbers and boundaries, the boundaries would prevail and when the said boundaries of the suit land are considered, it was clear that the suit as filed was liable to be dismissed. In that regard,

the learned counsel placed reliance on the decision in *the Palestine Kupat Am Bank Co-operative Society Ltd. Vs. Government of Palestine and others*, reported in AIR 1948 Privy Council 207 and *Sheodhyan Singh and others Vs. Mst. Sanichara Kuer and others*, reported in AIR 1963 SC 1879. Both the Courts committed an error in shifting the burden of proving the sale deed dated 14.09.2005 as illegal on the defendant nos. 1 and 2. It was for the plaintiffs and defendant no.3 to prove that the said sale deed in favour of the plaintiffs was legal and valid. For said purpose, learned counsel referred to the decision in *Union of India and others Vs. Vasavi Co-op. Housing Society Limited and others*, reported in 2014(2) SCC 269. It was then submitted that the plaintiffs failed to examine their vendor and therefore a case for drawing adverse inference under Section 114(g) of the Evidence Act would arise. Learned counsel also submitted that the issues that were initially framed by the trial Court on 15.12.2005 were subsequently re-framed while deciding the suit and this aspect also vitiated the impugned judgment. He placed reliance on the decision in *Provash Chandra Dalui Vs. Bhswanath Banerjee*, reported in AIR 1989 SC 1834. It was thus submitted that the suit as filed was liable to be dismissed.

6. Shri R.M.Mardikar, learned counsel for the respondent nos. 1 and 2 supported the impugned judgment. It was submitted that both the Courts rightly found that the plaintiffs had valid title to the suit property and that the plaintiffs were entitled to the declaration with regard to Gat No.327. It was submitted that as per the Taluka Inspector of Land Records Map at Exhibit 65, location of Gat No.327 was identical to the location as shown by the plaintiffs in sale deed. One of the boundaries was the river which was shown in the sale deed as well as in Exhibit 65. On the contrary, both the Courts rightly found that the Map prepared at Exhibit 98 was not in accordance with the existing records and it was rightly discarded by both the Courts. He referred to the notice at Exhibit 49 that was issued by the defendant nos. 1 and 2, which, in fact, gave correct description of the

suit property and not as contended by the defendant nos. 1 and 2. It was thus submitted that considering concurrent findings of fact recorded by both the Courts, there was no reason to interfere under Section 100 of the Code of Civil Procedure, 1908. Learned counsel referred to the decision in *Syeda Rahimunnisa Vs. Malan Bi (dead) by Lrs. and another*, reported in 2017 (1) Mh.L.J. 934 in that regard.

Shri S.D.Chande, learned counsel for the legal heirs of deceased respondent no.3 adopted aforesaid contentions and submitted that the appeal was liable to be dismissed.

7. The following question of law was framed while issuing notice :

“When it is a matter of record that old survey number of Gat No.327 was 49/3 and old survey number of Gat No.328 was 49/3A, whether both the Courts were right in holding that plaintiffs are the owners of the new Gat No.327, specifically when old original defendant nos.1 and 2 by virtue of sale-deeds dated 24th November, 1980 and 19th April, 1982 ?”

8. I have heard the learned counsel for the parties at length and I have also perused the evidence that was led by the parties before the trial Court. Insofar as location of the suit field is concerned, the trial Court has taken into consideration the Map of Gat Nos. 327 and 328 as prepared by the office of the Taluka Inspector of Land Records. It has been found that Gat No.327 is shown adjacent to a river. It has also taken into consideration the Map prepared by the Talathi who was examined by the defendant nos. 1 and 2. In the cross-examination of that witness, he admitted that without verifying the original record the said Map was prepared and that no notice was given to the adjoining land owners before preparing that Map. It is on that basis that the trial Court has proceeded to accept the Map drawn at Exhibit-65 by the Taluka Inspector of Land Records. It is also to be

noted that according to the plaintiffs there was a Well standing in their land as per the reference made in their sale deed. The existence of the said well is proved by the revenue records at Exhibits-142 and 143.

The appellate Court on reappreciating this evidence has agreed with the findings recorded by the trial Court with regard to the Map at Exhibit 65. It has also found that the Map at Exhibit 98 was not a certified copy of a public document. In the light of deposition of the Talathi at Exhibit 97, the Map at Exhibit 98 was rightly discarded by the trial Court. The appellate Court has also referred to the aforesaid mutation entries and has accepted the case of the plaintiffs. I find that this appreciation of evidence by both the Courts is reasonable not requiring any interference.

9. It is also to be noted that the defendants issued a public notice at Exhibit 149 in which description of the suit property was given. Though the said public notice was given by the defendant nos. 1 and 2, the land described by them in their written statement is contrary to the description of the land given in the said notice. It is also seen that though it was the case of the defendant nos. 1 and 2 that land admeasuring 1 Hectare 20 R was allotted to their father Ganpat in the partition, there is no sufficient evidence in that regard. It has been thus found that after the defendant no.3 purchased the suit property on 19.03.1978, no land was remaining with Rajaram and Shriram. The manner in which the plaintiffs acquired title by purchasing land from Survey No.49/3 has also been explained. It is thus found that both the Courts have rightly appreciated the evidence available on record while decreeing the suit. These findings do not suffer from any perversity.

10. There can be no dispute with regard to the legal proposition as urged by the learned counsel for the appellants that in case of a dispute between boundaries and plot numbers, the boundaries should prevail. When that principle is applied to the case in hand in the light of evidence on record, it is clear that the plaintiffs

had rightly proved that they were entitled to the land from Survey No.49/3 especially when the Map prepared by the Taluka Inspector of Land Records at Exhibit 65 clearly indicated its location. It is found that the plaintiffs have duly proved their case and it cannot be said that the suit has been decreed in view of weakness in the case of the defendants. The ratio of the decision in Vasavi Co-op.Housing Society Limited and others (supra) does not support the contentions of the appellants. There is also no reason to draw any adverse inference on account of non-examination of the defendant no.3. The title of the plaintiffs stands duly proved and hence the other decisions relied upon by the learned counsel for the appellants do not support his contentions. In the light of the concurrent findings recorded by both the Courts on a proper appreciation of evidence on record, there is no reason to interfere with the impugned judgments. The substantial question of law as framed while issuing the notice is answered by holding that the plaintiffs had duly proved that they are the owners of Gat No.327 as pleaded by them.

11. Second Appeal is, therefore, dismissed with no order as to costs.

JUDGE

Andurkar