

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.130 OF 1990

Imamsaheb s/o Daudsaheb,
Age 60 years, Occupation Agriculture,
R/o Paranda Dist. Osmanabad. **...Appellant.**

VERSUS

1. Badshaha s/o Maktumsaheb Basale
Through His L.Rs.
(Amendment carried out as per Court's
Order dated 24-02-2006 in C.A. No.
2773 of 1997)
- 1-A. Najmunbi w/o Badshah Basale,
Age 60 years, Occupation Household,
R/o Paranda Dist. Osmanabad.
- 1-B. Munnabi w/o Badshah Basale,
Age 58 years, Occupation Household,
R/o Paranda Dist. Osmanabad.
(Abated Vide Court's Order dated
08-07-2010).
- 1-C. Abdul Karim s/o Badshah Basale,
Age 40 years, Occupation Agriculture,
R/o Paranda Dist. Osmanabad.
- 1-D. Vilayat s/o Badshah Basale,
Age 35 years, Occupation Agriculture,
R/o Paranda Dist. Osmanabad.
- 1-E. Mannan s/o Badshah Basale,
Age 32 years, Occupation Agriculture,
R/o Paranda Dist. Osmanabad.
- 1-F. Irshad s/o Badshah Basale,
Age 30 years, Occupation Agriculture,
R/o Paranda Dist. Osmanabad.
- 1-G. Naushad s/o Badshah Basale,
Age 28 years, Occupation Agriculture,
R/o Paranda Dist. Osmanabad.

2. Keru s/o Gana Mali,
Since died His L.Rs.
- 2-A. Ambadas s/o Keru Mali,
Age 34 years, Occupation Agriculture,
R/o Paranda Dist. Osmanabad.
- 2-B. Mahadeo s/o Keru Mali,
Age 34 years, Occupation Agriculture,
R/o Paranda Dist. Osmanabad.
- 2-C. Rukhminibai w/o Bhagwan Waghmare,
Age 34 years, Occupation Household,
R/o Paranda Dist. Osmanabad.
- 2-D. Satyabhamabai w/o Shivaji,
Age 27 years, Occupation Household,
R/o Sutarnet Barshi.
3. Abdul Karim s/o Badshaha Basale,
Age 30 years, Occupation Service,
D.C.C.Bank, Bhoom, Now At D.C.C.
Bank Paranda, Dist. Osmanabad.

..Respondents.

Mr. Dalal, Advocate holding for Mr. V. D. Salunke,
Advocate for Appellant.

Respondent No.1A, 1C to 1G, 2A to 2D Served (Admit)

Respondent No.1B Abated Vide Court's Order dated 8-7-2010.

Mr. Amol Joshi, Advocate holding for Mr. R. S. Deshmukh,
Advocate for Respondent No.3.

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
13-03-2019.**

**Date of Pronouncing the Order :
03-05-2019.**

JUDGMENT :

1. Present appeal has been filed by original defendant No.1 in
Regular Civil Suit No.95 of 1972 before Civil Judge, Junior Division,

Paranda Dist. Osmanabad. The said suit came to be decreed and the plaintiff i.e. present respondent No. 1 in the said suit was held to be entitled for getting possession of the suit plot by removing encroachment made by the present appellant and original defendant No.2. The said decree was confirmed in appeal No.39 of 1982 by learned 2nd Additional District Judge, Osmanabad on 15-10-1988 by dismissing the appeal filed by the present appellant.

2. Original plaintiff i.e. present original respondent No.1 (who died during the pendency of the appeal) had filed Regular Civil Suit No.70 of 1972 against one Keru Gana Mali i.e. respondent No.2 herein for specific performance of the contract. In the said suit he had prayed for specific performance of the agreement to sell dated 07-11-1969 in respect of 6 Guntha land out of Paradi No.3 of Paranda admeasuring 11 Acres 4 Gunthas for a consideration of Rs.900/-. It was stated that, plaintiff was put in possession of the suit plot on the day of the agreement to sell when he had paid the earnest amount of Rs.200/- to said Keru. Keru had agreed to bring permission for converting the land into non-agriculture, and thereafter the sale deed was to be executed. The balance amount of Rs.700/- was to be paid by the plaintiff to Keru on the date of registration of the sale deed. It is stated by the plaintiff that, Keru did not fulfill his part of the contract, and therefore, he had issued notice to Keru on 29-07-1972 through advocate. It is stated that,

he was ready and willing to perform his part of the contract and therefore the suit for specific performance was filed.

3. The original plaintiff had also filed Regular Civil Suit No.95 of 1972 contending that, though he was put in possession of the suit land, which is the suit land in Regular Civil Suit No.70 of 1972 also, on the basis of an agreement to sell (Isarpavti) dated 07-11-1969 and he was cultivating the same, defendant No.1 Imamsaheb obstructed his possession over the suit plot and made encroachment thereby dispossessing plaintiff. It is also stated that, a structure to the extent of 30 x 30 feet was also constructed in zinc sheets by defendant No.1 and therefore he filed the said suit for possession of the said property from defendant Keru and one Abdul Karim who is the son of plaintiff.

4. Both the suits have been contested by the defendants therein. Defendant Keru had filed written statement and admitted the contents of Isarpavti, thereby admitting that such contract had taken place between him and plaintiff, however according to him he has performed his part of the contract and on the instructions of the plaintiff he has executed sale deed in favour of defendant No.3 Abdul on 07-07-1972. It appears that, during the pendency of the suit Keru expired and his legal representatives were brought on record. They did not file any separate written statement.

5. As regards Regular Civil Suit No.95 of 1972 is concerned, defendant No.1 Imamsaheb filed written statement and contended that he is bona fide purchaser for value without notice. He purchased the suit plot vide registered sale deed dated 07-07-1972 for a consideration of Rs.600/-. It was contended that, the suit of the plaintiff is barred by limitation. Keru or his legal representatives did not file written statement in Regular Civil Suit No.95 of 1972. Defendant No.3 filed written statement and stated that, he has purchased 6 Gunthas of land out of 2 Acres from Paradi No.3 from deceased for a consideration of Rs.600/- on 07-07-1972. However, he has denied that, he purchased the suit plot as per the instructions of his father i.e. plaintiff. According to him that property is different from the suit property.

6. Taking into consideration the rival contentions, issues came to be framed in both the suits. Plaintiff in both the suits led oral as well as documentary evidence. So also the defendant No.3 appears to have produced certain documents. Defendant No.1 Imamsaheb did not enter the witness box but appears that certain documents were filed by him.

7. Taking into consideration the evidence on record and hearing both sides, both the suits were decreed by the learned Trial Court. The legal heirs of deceased Keru were directed to execute sale deed

in respect of suit plot in favour of plaintiff as per the terms of Isarpavti. It was held that, on the date of Regular Civil Suit No.70 of 1972 plaintiff was in possession of the suit land and since he has been dispossessed by defendant No.1 Imamsaheb, he is entitled to get possession of the suit plot from defendant No.1 Imamsaheb by removing the structure.

8. Defendant No.1 Imamsaheb filed the said Regular Civil Appeal No.39 of 1982 challenging the Judgment and decree passed in Regular Civil Suit No.96 of 1972 by the learned Trial Court and as aforesaid after hearing both sides, the said appeal has been dismissed on 15-10-1988. Hence, this second appeal.

9. Heard learned Advocate Mr. Dalal, holding for Mr. V. D. Salunke, Advocate for appellant, learned Advocate Mr. Amol Joshi, holding for Mr. R. S. Deshmukh for respondent No.3. The appeal was admitted by this Court vide order dated 04-10-1991 on following substantial questions of law ;

A) Whether the respondent No.1 (Original plaintiff in Suit No.70 of 1972 who had filed the said suit against the original owner of the land in question for specific performance of an agreement for sale, had a right in law to file Regular Civil Suit No.95 of 1972 against the present appellant for possession of the land in question by removing the alleged encroachment ?

E) If the written statement of the original owner filed

in R.C.S. No.70 of 1972 (which was a suit for specific performance of the alleged agreement for sale dated 07-11-1969) can be made use of under Section 32 (7) read with Section 13 (a) of the Indian Evidence Act, then whether both the lower Courts were right in the law is not considering the contents of the said written statement along with other evidence on record ?

R) Whether both the lower Courts have properly identified the boundaries of the plots in question by referring to the sale deed dated 07-07-1972 executed by Keru Mali in favour of the appellant with reference to the boundaries in the alleged agreement for sale dated 07-11-1969 ?

10. The learned advocate appearing for the appellant submitted that, Regular Civil Suit No.70 of 1972 was filed for specific performance of the contract. Present appellant – original defendant No.1 Imamsaheb was not a party to that suit. Keru who was defendant No.1 in Regular Civil Suit No.70 of 1972 was the owner of the suit property. According to the plaintiff, Keru had entered into agreement dated 07-11-1969 to sell the said property for a consideration of Rs.900/- and he had paid earnest amount of Rs.200/-. Thereafter he was put in possession of the property by Keru. It was contended in Regular Civil Suit No.95 of 1972 that, present appellant had dispossessed plaintiff forcibly, and therefore the said suit is stated to be filed for recovery of possession. In fact the legal status of defendant No.1 Imamsaheb has not been

discussed at all by both the Courts below. No relief was claimed in respect of suit land sold to defendant No.1 in Regular Civil Suit No.95 of 1972. Under such circumstance he is not liable to hand over the possession of the said plot. No doubt there was no written statement filed by Keru or his heirs in Regular Civil Suit No.95 of 1972, however Keru had filed written statement in 70 of 1972 which was not later on accepted by his legal heirs. Under such circumstance both the Courts ought not to have considered the written statement filed by Keru wherein he had admitted the execution of the agreement to sell and it was stated that, plaintiff was put in possession of the suit plot. The said statement in the written statement made by Keru cannot be said to be binding on present appellant. Both the Courts have not considered as to what was the defence raised by present appellant and has not adjudicated it. It cannot be stated that, Keru's written statement can be used under Section 32 (7) of Indian Evidence Act read with Section 13 (a) of Indian Evidence Act. He therefore submitted that, both the Courts below have wrongly held that, plaintiff is entitled to get possession from present appellant/ defendant No.1.

11. In order to buttress his submissions he relied on the decision in *Nadiminti Suryanarayan Murthy (Dead) Through L.Rs. Versus Kothurthi Krishna Bhaskara Rao and Others*, reported in 2018 (2) *Mh.L.J.* 543, and submitted that, when no relief is granted and

present appellant was not party to Regular Civil Suit No.70 of 1972 then that decree cannot be executed against the appellant. In this case of *Nadiminti* the property was agreed to be sold to one "P", in fact sold to defendant No.6 by defendants No.1 to 5 and in that case it was held that defendant No.6 would join in execution of sale deed in his favour along with defendants No.1 to 5, that means he would be a necessary party to that suit.

12. Per contra, the learned advocate appearing for the respondents submitted that, the defendants who are defendants in Regular Civil Suit No.70 of 1972 have not challenged the said decree by which they were directed to execute sale deed in favour of plaintiff. Now the appellant cannot challenge any part of that decree or the decree in entirety in this appeal. Regular Civil Suit No.90 of 1972 was filed under Section 6 of Specific Relief Act. Plaintiff had come with a case that, he was put in possession of the property by virtue of the agreement to sell and then he has been dispossessed within six months prior to the suit. Both the Courts have concurrently held that, plaintiff was put in possession of the suit property. Under such circumstance as per Section 6 of the Specific Relief Act, he should be put back in possession of the suit plot. The property which was sold to defendant No.1 was different than the property involved in Regular Civil Suit No.90 of 1972. There is absolutely no denial about the dispossession of the plaintiff by

present appellant. When it was proved that, defendant No.1 Imamsaheb has made encroachment and dispossessed the plaintiff and he has also erected a structure in zinc sheets in area admeasuring 30 x 30 feet, then definitely the plaintiff was entitled to get the possession of the property by removal of the structure. Therefore, no substantial question of law is arising in this matter though it was framed at the time of admitting the appeal.

13. It is to be noted that, original plaintiff had filed two suits Regular Civil Suit No.70 of 1972 and Regular Civil Suit No.95 of 1972. Regular Civil Suit No.70 of 1972 was for specific performance of the contract against Keru and after his death his legal representatives have been brought on record. In that suit Keru had filed written statement wherein he admitted the execution of the agreement to sell but then had put a defence that he has performed his part of the contract and executed sale deed in favour of Abdul Karim Badshaha Basale as directed by the plaintiff. Said Abdul Karim is the son of plaintiff. The said suit i.e. Regular civil Suit No.70 of 1972 has been decreed and Keru's heirs have not filed any appeal challenging the decree passed therein. Therefore, the said decree has achieved finality.

14. Regular Civil Suit No.95 of 1972 was filed against the present appellant as defendant No.1, Keru (After his death against his Legal

Representatives) and Abdul Karim Badshaha Basale for possession of the suit property. It was contended by the plaintiff specifically that, he was put in possession of the suit land on 07-11-1969 in pursuant to the agreement to sell and it appears from the suit that it was filed on 30-11-1972. That means, it was filed under Section 6 of the Specific Relief Act to get back the possession of the same. Since the suit was not contested by Keru and was only contested by defendant No.1, though defendant No.3 was party to the said proceeding, he had come with a case that he has no concern with the property and he purchased 6 Gunthas of land out of 2 Acres from Paradi No.3 for consideration of Rs.600/- from Keru on 07-07-1972 vide sale deed Exhibit 49, which is situated away from the suit plot. Thus it was for the defendant No.1 Imamsaheb to prove his title, right or interest in the suit plot. He had come with a case that, he has purchased the suit plot and he is a bona fide purchaser for value without notice. The sale deed which was executed in his favour was dated 07-07-1972, is produced at Exhibit 48. However, both the Courts below have considered the boundaries and came to a conclusion that the plot which was purchased by the defendant No.1 Imamsaheb from Keru was different than the suit plot wherein he had erected structure admeasuring 30 feet x 30 feet. Now as regards the agreement to sell executed by Keru in favour of plaintiff, as aforesaid was the subject matter in Regular Civil Suit No.70 of 1972. Section

13 (a) of Indian Evidence Act provides that ;

“13. Where the question is as to the existence of any right or custom, the following facts are relevant –

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;”

Therefore, the said document is a relevant fact to be proved regarding the existence of right. The right which was created in favour of plaintiff was to get specific performance of the contract.

Further Section 32 (7) provides that ;

“32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense, which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases ;

.....

(7) or in document relating to transaction mentioned in Section 13, clause (a),-- When the statement is contained in any deed, Will or other document which relates to any such transaction as is mentioned in Section 13, Clause (a).”

Thus, under this provision statement contained in a deed, Will or other document, (here we are concerned with deed or other document) which relate to any transaction contemplated under

Section 13 (a) is admissible under this Clause. Therefore, when the said agreement Ex. 45 was produced and proved by plaintiff, in Regular Civil Suit No.70 of 1972 then it was also a relevant document and could have been considered in Regular Civil Suit No.95 of 1972, when both the matters were tried together. Even the written statement itself to the extent of admissions made by Keru can be said to be a relevant fact under these provision, and therefore both the Courts have rightly considered the said written statement along with other evidence on record. One more important fact that is also required to be considered is that, the defendant No.1 Imamsaheb himself had not entered the witness box to rebut the evidence that was led by the plaintiff. Under such circumstance definitely from the available evidence on record, the inferences have been properly drawn by both the Courts below.

15. Defendant No.1 Imamsaheb had encroached on the plot under Isarpavti given to plaintiff. There is absolutely no denial to the allegations about dispossession by the defendant No.1, and therefore this fact was also properly considered by both the Courts below. Since Exhibit 45 agreement to sell proved the possession of the plaintiff over the suit plot prior to the institution of the suit and that too Regular Civil Suit No.95 of 1972 was filed within six months of dispossession, then definitely that suit was maintainable under Section 6 of the Specific Relief Act. Hence, the substantial questions

of law are answered as follows ;

- (A) In the affirmative.
- (E) In the affirmative.
- (R) In the affirmative.

16. The ratio laid down in *Nadiminti case (Supra)* is not applicable to the facts of the case as it was a case under Section 52 of Transfer of Property Act and it was held that, when during the pendency of the litigation more transactions taking place in relation to the suit house, then such transactions are directly hit by principle of *lis pendens*, and in that case the purchaser along with other defendants i.e. vendors were held to join with other defendants to execute the sale deed. Here in Regular Civil Suit No.70 of 1972 since the property was different than which was purchased by defendant No. 1, plaintiff was not claiming any relief against him in respect of specific performance of the contract. At the cost of repetition it can be said that, in Regular Civil Suit No. 95 of 1972 his prayer was restricted to putting him back in possession of the suit land under Section 6 of the Specific Relief Act. Therefore, there is no illegality or error committed by both the Courts below. The second appeal stands dismissed with costs. Decree be drawn accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.