

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

17 SECOND APPEAL NO.778 OF 2017

NAMDEV TUKARAM SONUNE
VERSUS
DAGDUBA TUKARAM SONUNE AND OTHERS

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Mr. S.V. Nigam, Advocate for the appellant

Mr. G.B. Kingre, Advocate for the respondent Nos.1, 3 to 5

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 01st APRIL, 2019

PER COURT :

1 Present appeal has been filed by the original plaintiff challenging the Judgment and Decree passed in Regular Civil Appeal No.145/2013 by District Judge-2, Jalna dated 02.05.2017, whereby his appeal came to be dismissed. In the said appeal he had challenged the dismissal of his suit i.e. Regular Civil Suit No.422/2011 by 5th Joint Civil Judge Junior Division, Jalna on 28.03.2012. The said suit was filed by him for permanent injunction.

2 The plaintiff has come with the case that he is the owner and possessor of land admeasuring 1 Acre 20 Gunthas (61 Ares) in Gat No.91 situated at village Sawargaon Hadap, Tq. & Dist. Jalna. It has been

contended that defendant No.3 has a muscle power and therefore he used to threat plaintiff to dispossess. Defendant No.4 has given 10 Gunthas land in the name of defendant No.3. The defendant No.3 had tried to obstruct the possession of the plaintiff over the suit land on 15.09.2011. Defendant No.1 has sold portions from Gat No.91. Out of that 01 Acre land was given to Jalna Co-operative Sugar Factory on 29.04.1985. Thereafter, defendant No.3 purchased 40 Ares land from his mother on 29.08.2007. Mutation Entry in respect of the same has been taken. According to the plaintiff, defendant No.1 had no land left in the said Gat number to sell, yet in 2005 the transfer of property was made and thereafter, in 2007, 40 Ares land was given by defendant No.2 in favour of defendant No.3. Since the obstruction has been raised to the possession of the plaintiff, he has filed the suit.

3 The defendants have resisted the claim of plaintiff by filing written statement. They have disputed the description of the property. It is also stated that there was no cause of action to file suit. Defendants possess 50 Ares land and on the contrary, the plaintiff had tried to obstruct their possession over the said piece of land on 14.10.2011. A separate suit appears to have been filed by the defendants against the plaintiff and therefore, they prayed for dismissal of the suit.

4 Taking into consideration the rival contentions, issues came to be framed, parties have led oral as well as documentary evidence. After taking into consideration the evidence on record and hearing both sides the learned Trial Court has dismissed the suit. The said Judgment and Decree was challenged as aforesaid in appeal and the First Appellate Court has also dismissed the appeal. Therefore, the original plaintiff has filed the present Second Appeal.

5 It has been vehemently argued on behalf of the appellant that both the Courts below have not considered the evidence i.e. documentary as well as oral in proper perspective. Some stray admissions have been considered and without taking note about the documentary evidence which ultimately should prevail, both the Courts have come to conclusion that only 30 Gunthas of land remained in possession of the plaintiff. The documentary evidence in the form of 7/12 extract shows that the plaintiff is the owner and possessor of 61 Ares land. It was also submitted that since both the Courts below have given perverse findings, substantial question of law will definitely arise. Therefore, reliance has been placed on the decision in **Damodar Lal vs. Sohan Devi & others, (2016) 3 Supreme Court Cases 78** and **Kisan Ramji Khandare vs. Kausalyabai w/o Gangaram Korde & others, 2007(4) Mh.L.J., 43**, which is the decision by this Court. In both these cases it has

been held that when there is perverse findings by both the Courts below, those perverse findings of facts cannot be stamped as correct, only because they are the concurrent findings and the Second Appeal is maintainable.

6 The perusal of the paint would show that defendant No.1 is the brother of plaintiff, defendant No.4 is the real sister of defendant No.1 and step sister of plaintiff. It is stated that there was partition in the year 1984 between the two brothers as well as the defendant No.4. It is stated that the brothers got 8 acres and half acres land in strips and 3 acres of land was given to defendant No.4. Plaintiff contended that he has sold 7 acres of land to different persons and then said that 61 Ares land is still in his possession. As regards the partition, the defendant Nos.1 and 4 accepted that they have received 8 ½ acres and 3 acres land respectively and the plaintiff received 8 ½ acres land. They denied specifically that now plaintiff possess 61 Ares land. They have given account of the portions of land which defendant Nos.1, 2 and 4 had sold. We are not concerned with the property, which went to the share of defendant Nos.1 and 4. We are only concerned with the property, which came to the share of plaintiff and it is admitted that he had received 8 ½ acres of land. He categorically stated that he has sold out 7 acres and then he says that now he possess 61 Ares land. The boundaries of the same have been given by them. Therefore, it was for him to prove the

said fact.

7 The affidavit-in-chief of the plaintiff is nothing but the replica of
plaint. But then what he has stated in the cross-examination is required to be
considered. In unequivocal terms he admitted that his remaining portion of
land is towards East of the 7 acres of land, which he has sold. He says that
Mantha road passes from his 8 ½ acres of land. Around 30 Gunthas of land
was given for the road from his land and then it was again put in clear words.
That out of 8 ½ acres of land, now, he possess 30 Gunthas of land only. He
has given the description of that 30 Gunthas of land as - Towards East -
Sudam Gayke's land, Towards West - Murlidhar's land, Towards North -
Santram Dongre's land and Towards South - Mantha road. Thus, it is to be
noted that in clear words, this admission has taken that he has only 30
Gunthas of land, which has been left to him. Now, according to the learned
Advocate for the appellant these are the stray admissions, but it cannot be
taken as stray admissions because not only the fact from where the road has
passed and for road how much area was given and how much is remaining
with boundaries has been extracted from him in his cross and there was
absolutely no objection for the learned Advocate for the appellant at that
time. The second aspect, that is required to be noted is that plaintiff has
examined PW 2 Maroti. Though in his examination-in-chief he has stated

that plaintiff possessed 1 Acre 20 Gunthas land, in his cross-examination he has stated that he is unable to tell the area which is towards West, East and who possess the same, but in clear terms he admits that Jalna-Mantha highway passes through Gat No.91. Towards the North-South of Highway there is land belonging to defendant No.1 and the entire land of plaintiff was towards North of the Highway. But then he says that the said Highway has been constructed after the partition. Another witness who has been examined by the plaintiff was not able to tell in respect of which land the dispute is pending. Therefore, with this evidence both the learned Trial Courts have stated that since it has been admitted by the plaintiff that he possess only 30 Gunthas of land, he has suppressed material fact regarding acquisition of land and therefore, the relief of injunction has been refused.

8 The learned Advocate appearing for the appellant has placed much reliance on the documentary evidence, which is in the form of 7/12 extract, which shows that plaintiff's holdings is to the extent of 61 Ares. In the 7/12 extract there is no entry regarding acquisition of land for road/highway, but then the fact is not denied that there is highway or road going in between Gat No.91. Even in the sale deeds which plaintiff has executed he has shown the boundary of road. Therefore, even if the fact is not reflected in the 7/12 extract that the some portion of land was acquired

for road, the fact appears to be not in dispute for the parties. Under such circumstance, it was for the plaintiff to show boundary from where the said road has gone from whose portion the land was acquired and how his holdings comes to 61 Ares. The revenue record under these circumstances does not support the plaintiff.

9 The ratio laid down in above two cases cannot be disputed. But then to apply it to the present case, it ought to have been shown by the appellant that both the Courts have given perverse findings of fact. For the aforesaid reason it cannot be said that it is perverse. In unequivocal terms without confusing the plaintiff the admission has been brought on record, which has been thereafter not tried to be explained by the plaintiff by any other manner, because still it was an opportunity for the plaintiff to bring on record, that the said road is not part of his portion and that he still possess total area of 61 Ares from Gat No.91. But that too has not been utilized by the plaintiff. Under such circumstance, it cannot be said that the concurrent findings by both the Courts below are perverse and therefore, no substantial question of law has been shown. Hence, the Second Appeal is disposed of as “Not admitted”.

(Smt. Vibha Kankanwadi, J.)