

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

SECOND APPEAL NO. 878 OF 2016

1. Nanasaheb S/o. Gunwant Patil,
Age. 80 years, Occu. Agriculture,
 2. Mathurabai W/o. Nanasaheb Patil,
Age. 75 years, Occu. Household,
- Both R/o. Udgir, Tq. Udgir,
District Latur.

...Appellants.

Versus

1. Madhav S/o. Banaji Kendre,
Age. 41 years, Occ. Agriculture,
R/o. Haknakwadi, Tq. Udgir,
District Latur.
2. Jayabai W/o. Banaji Kendre,
Age. 70 years, Occ. Household,
R/o. Haknakwadi, Tq. Udgir,
District Latur.
3. Archana W/o. Madhav Kendre,
Age. 34 years, Occ. Household,
R/o. Haknakwadi, Tq. Udgir,
District Latur.
4. Lata W/o. Pandit Patil,
Age. 36 years, Occ. Household,
R/o. Udgir, Tq. Udgir,
District Latur.
5. Pritam W/o. Pandit Patil,
Age. 13 years, Minor,
U/g of her mother Lata Pandit Patil
i.e. R-4 as above.

...Respondents.

Advocate for Appellants : Ms. P V. Bodke Patil.
Advocate for Respondent Nos. 1 to 3 : Mr. S.S. Jadhavar.
Advocate for Respondent Nos. 4 & 5 : Mr. S.S. Auti Kulkarni
and Advocate Mr. S.D. More.

ORAM : MANGESH S. PATIL, J.
DATE : 03.12.2019

JUDGMENT:

This is a Second Appeal by the legal representatives of the original plaintiff challenging the concurrent findings of the two Courts below dismissing their suit for perpetual injunction.

2. The appellants' predecessor filed the suit *inter alia* avering that the land bearing Survey No. 62/4 (Old Survey No. 54) admeasuring 2 Hector 36 Are situated at Haknakwadi Tq. Udgir, is their ancestral and joint family property. His father Nanaji sold a portion admeasuring 1 Hector 48 Are to the father of the respondents prior to 28 years. The remaining land admeasuring 88 Are continued to be owned and possessed by his father and himself. However, the respondents obstructed their possession and therefore, he prayed for perpetual injunction restraining respondents from obstructing his possession over the suit land being 88 Are portion described in the plaint as a portion of land situated between Nanded - Bidar Road on the west and the portion sold to the respondents' predecessor to the east.

3. The respondents contested the suit by filing a written statement. They admitted about the father of the plaintiff having sold the land to their predecessor a portion admeasuring 1 Hector 48 Are but denied that any land remained with the father of the plaintiff. They contended that the

remaining portion from the land Survey No. 62/4 admeasuring 88 Are had in fact became a part and parcel of the Nanded - Bidar Road and no land remained for the plaintiff's father which he could have possessed.

4. Based on such pleadings the learned Civil Judge framed the issues and recorded evidence led by both the sides and by the impugned judgment and order dismissed the suit holding that the plaintiff had failed to prove his possession in specific portion / piece of land.

5. Being aggrieved, the predecessor of the appellants preferred appeal before the District Court but the District Court dismissed the appeal by the impugned judgment and order for similar reasons as assigned by the Civil Judge. Hence the Second Appeal.

6. The learned advocate for the appellants vehemently submitted that the dispute in question is as regards identity of the property and the Civil Court as well as the District Court ought to have played some active role and should have directed the land to be measured to settle the dispute once for all. She would submit that admittedly the predecessor of the appellants was the owner of the entire land Survey No. 62/4 which was totally admeasuring 2 Hectar 36 Are. Admittedly, the entire land was not sold by their predecessor to the predecessor of the respondents and only portion admeasuring 1 Hectar 48 Are was sold. Therefore, a portion admeasuring 88 Are would remain from the land belonging to the appellants. It is in view of such peculiar state of affairs, only the measurement of the land would have solved the dispute and the course which was followed in the case of ***Vasant Tukaram Prabhu Vs. Xalinibai Borcar alias Shalinibai Borkar*, 2014 (5) Maharashtra Law Journal 382**, of appointing the commissioner for measuring the land by invoking the power under Order XXVI Rule 9 should have been followed. The two Courts below having failed to appreciate and

consider such a course, substantial question of law arises in this Second Appeal in that regard.

7. The learned advocate for the respondents submits that there are concurrent findings of fact by the two Courts below which have taken a plausible view based on the objective assessment of the evidence led by the parties. There is nothing on the record which would enable this Court to interfere in such concurrent findings in the Second Appeal. He would submit that the two Courts have clearly pointed out and demonstrated as to how the appellants themselves are not aware as to the extent of their land. Therefore, the appeal may be dismissed.

8. Needless to state that by virtue of Section 100 of the Code of Civil Procedure, the scope for this Court to intervene in the concurrent findings of facts by the two Courts below is very limited. It is only when the findings and the conclusions are either perverse, arbitrary or capricious, that this Court is expected to invoke that power and cause interference. It is also equally trite that this being a Second Appeal, a substantial question of law has to be there to enable this Court to step in.

9. Bearing in mind the limitations on the powers of this Court by virtue of Section 100 of the Code of Civil Procedure, if one examines the matter in hand, it is quite clear that the observations made and the conclusions drawn by the two Courts below are clearly based on the pleadings and evidence obtaining before them.

10. Though there is some attempt made to dispute the sale deed executed by the father of the original plaintiff in favour of the predecessor of the respondents by saying that it is false and illegal, no such declaration has

been sought. Only a cursory attempt was made to impugn it on a vague ground that it is illegal. Conspicuously, the father of the original plaintiff Nanasaheb who had executed the sale deed in favour of the respondents' predecessor was also examined as a witness and above all, and interestingly even in his testimony, he stated the sale deed to be false when he is estopped from disputing the fact.

11. Be that as it may, admittedly a portion admeasuring 1 Hectar 48 Are was sold by Nanasaheb - PW. 2 to the predecessor of the respondents. Mathematically, after sale, a portion admeasuring 88 Are would remain from the land which totally admeasured 2 Hectar 36 Are. But then, it is apparent that the appellants themselves are not sure as to what stand they are supposed to take. In the sale deed it has been mentioned that Nanded - Bidar Road passes through land under sale in spite of that portion admeasuring 1 Hectar 48 Are has been sold to the predecessor of the defendants. Obviously, therefore, it was expected of the appellants to have come with a specific case as to how much portion from remainder of the land is affected by that road and how much still remains.

12. The learned advocate for the appellants relied upon the entries in the revenue record to point out that even after such sale in favour of the respondents' predecessor, name of the original plaintiff Pandit Kumar continued to be shown as the owner of the remaining portion of 88 Are. The learned advocate, therefore, submits that such revenue record which consistently shows title and possession of the plaintiffs over a portion of 88 Are, the two Courts below have committed an illegality in discarding it.

13. As has been correctly noted by the Courts below the revenue record is only meant to facilitate collection of land revenue and cannot be regarded as a document which confers title. On the contrary, this revenue record also

indicates that there is an entry regarding existence of Nanded - Bidar Road passing through that land. If such is the state of affairs, it was expected of the appellants to have come out with a concrete evidence to show specifically as to how much portion of the entire land Survey No. 62/4 is affected by that road. In the absence of such specific stand the observations and conclusions drawn by the two Courts below that stand of the appellants has not been consistent and the evidence is deficient to demonstrate that they are in possession of the suit land which they have described as 88 Are portion from the land Gut No. 62/4, is clearly plausible one.

14. Now coming to the last ditch effort made by the learned advocate for the appellant relying upon the decision in the case of ***Vasant Tukaram Prabhu*** (*supra*), there can be no debate as to the powers of the Court in appointing Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure and in an appropriate case the power can certainly be invoked even by the Appellate Court. However, pertinently, no such attempt in the line of this decision was made either before the Civil Judge or before the Appellate Court and for the first time such a stand is being taken. As is discussed herein above and as has been pointed by the two Courts below, the appellants' predecessor had come with a specific stand asserting his possession over the suit land and claiming perpetual injunction. In the circumstances, it was for him to have substantiated his averment regarding possession over the suit land which he has miserably failed. The lapse perpetuated even before the Appellate Court. If such is the state of affairs, in my considered view, the appellants are not entitled to derive any benefit from the decision in the case of ***Vasant Tukaram Prabhu*** (*supra*). Besides that was a case where the suit was still pending in the matter was before the High Court in an appeal against order.

15. Having considered the entire conspectus, no substantial question of

law arises in the Second Appeal. The decisions rendered by the two courts below are based on correct appreciation of evidence and there is no perversity. The Second Appeal is liable to be dismissed.

16. The Second Appeal is dismissed. No costs.

(MANGESH S. PATIL, J.)

S.P.C.