

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

SECOND APPEAL NO. 689 OF 2007

Anusayabai W/o Shriram Hiwale,
Age : 52 years, Occu : Agri.
R/o Nivdunga, Taluka Jafrabad,
District : Jalna

...APPELLANT
[ori. plaintiff]

VERSUS

Jijarao S/o Gulabrao Jagtap,
Age : 37 years, Occu : Agri.
R/o Nivdunga, Taluka Jafrabad,
District : Jalna.

...RESPONDENT
[ori. defendant]

Mr. V.B.Mantri, Advocate holding for Ms. Ranjta R. Barhate,
Advocate for Appellant
Mr. V.R.Naik, Advocate for Respondent

CORAM : S. M. GAVHANE, J.

RESERVED ON : 09-01-2020

PRONOUNCED ON : 21-02-2020

ORDER :

. I have heard the learned Counsel appearing for the parties on admission of the appeal.

2. Appellant-original plaintiff has filed this second appeal aggrieved by the judgment and order dated 26-06-2007 of dismissal of her appeal bearing Regular Civil Appeal No. 201 of 2006 against the respondent/original defendant thereby confirming

the Judgment and Order dated 25-07-2006 passed by the Civil Judge, Junior Division, Jafrabad in Regular Civil Suit No. 38/2005 filed by the plaintiff dismissing the said suit for perpetual injunction against defendant.

3. Appellant / plaintiff filed suit for perpetual injunction to restrain the respondent / defendant from obstructing her possession over the land gut No. 320, admeasuring 2-Hectare 80-Are within four boundaries i.e. to the East-land of Kaduba Kharat, to the West-land of Venkat Jagtap and Shankar Zine, to the North-land of Vitthal Mali and to the South-remaining land of gut No. 320 situated at village Nivdunga, Tq. Jafrabad [hereinafter referred to as the 'suit land']. According to plaintiff, she purchased the suit land from original owner Sayed Hussain Abdul Majid by the registered sale deed dated 29.3.2003 [Exh. 30]. On the basis of said sale deed her name has been recorded to the suit land in the revenue record and thus, she is owner and in possession of the suit land. It is contended that the defendant has also purchased southern side land from said gut No.320 from original owner Sayed Hussain by the registered sale deed. The defendant was requested not to interfere and cause obstruction in the peaceful possession of

the plaintiff over the suit land and not to make encroachment on the suit land but, the defendant did not respond and therefore, the suit was filed for perpetual injunction.

4. Defendant by filing written statement at Exh. 15 denied the plaintiffs contentions that she is owner and in possession of the suit land. According to defendant the Govt. acquired 92-Are land from the suit gut No. 320 and therefore, the plaintiff is not in possession of the suit land i.e. 2-Hectare 80-Are land. It is alleged that the plaintiff got executed false registered sale deed from owner of 2-Hectare 80-Are though 92-Are land was already acquired by the Government for construction of percolation tank. Plaintiff is aware of the said fact. The plaintiff is thus only owner and possessor of 1-Hectare 88-Are and not 2-Hectare 80-Are land. It is further contended that the land from suit gut No. 320 purchased by the defendant is towards South of the suit land and there is a bandh of 5 to 6 feet in height and 1100 to 1200 feet in length and there are Nilgiri trees and lemon garden and therefore, there is no question of causing interference and obstruction over the suit land from the southern side of the suit land. With intention to encroach upon portion of the land of the defendant, as already 92-Are land

has been acquired by the Government from land gut No. 320, the plaintiff has filed the suit. The defendant had claimed to dismiss the same with costs.

5. The trial court framed the issues and after full fledged hearing dismissed the suit with costs on 25-07-2006. Aggrieved by the dismissal of the suit the plaintiff filed appeal bearing Regular Civil Appeal No. 201/2006 and the appellate Court dismissed the said appeal on 26.6.2007. Therefore, the appellant / plaintiff is before this Court in the second appeal.

6. Mr. Mantri the learned Counsel h/f Mrs. R. R. Marathe for appellant-plaintiff submitted that suit gut No. 320 was totally admeasuring 14-Acres 10-gunthas. Out of the said area, 2 acres 12 gunthas land was acquired by the Government for percolation tank. Thus, 11-Acres 38-gunthas land was remained. The plaintiff purchased 7-Acres i.e. 2-Hectare 80-Are land from the above land by the registered sale deed [Exh. 30] dated 29.3.2003 from original owner Sayed Hussain. It is submitted that the balance 4-Acres 38-gunthas land was purchased by the defendant by the registered sale deed Exh. 35 dated 05-08-2003 from the original owner

Saiyyad Hussain. But, the defendant claims that he purchased 7-Acres 10-gunthas land from gut No. 320. It is submitted that the defendant is admitting four boundaries referred earlier of the suit land purchased by the plaintiff in his evidence and therefore, according to the learned counsel for the plaintiff, the plaintiff has proved her ownership as well as possession over the suit land on the basis of sale deed and the evidence adduced on behalf of the plaintiff and therefore, findings of both the courts below that the plaintiff failed to prove her ownership and possession over entire suit land are incorrect. Therefore, according to the learned Counsel suit of the plaintiff was required to be decreed, but, both the courts below have erred in dismissing the suit. Thus, it is submitted that ground Nos. I to III in the appeal involved substantial questions of law to be considered by this court in this appeal and therefore, the appeal may be admitted.

7. Mr. Naik, the learned counsel appearing for the respondent / defendant on the other hand, submitted that the plaintiff purchased the suit land including 92-Are land which is acquired by the Government for percolation tank from suit gut No. 320 and the plaintiff and her witness have admitted the same. PW-

2, who is witness to the sale deed and son of Sayed Hussain-vendor of the plaintiff as well as defendant admitted in his evidence before the court that in the sale deed Exh. 30 executed in favour of the plaintiff the area of land is shown as *7-Acres*, but only *5-acres* land was sold to the plaintiff. He also admitted that the land which was acquired from his father was not deleted from the 7/12 extract and therefore, sale deed of *7-Acres* land was executed in favour of the plaintiff. The learned Counsel further submitted that in the sale deed of the plaintiff southern side of the suit land is land of the defendant. Thus, according to learned counsel for the defendant when the plaintiff failed to prove her lawful possession over the entire suit land as claimed by the plaintiff, which is only material issue in the suit for perpetual injunction, both the courts below have rightly declined to grant perpetual injunction and therefore, when both the courts have recorded concurrent findings of fact in this respect, no substantial questions of law at all are arising in this appeal, so as to admit the same and thus learned Counsel has claimed to dismiss the appeal having no merit.

8. I have carefully considered the submissions made by the learned counsel appearing for the parties. I have perused the

evidence adduced by the parties and the judgments of both the courts below.

9. On considering the rival contentions of the parties and the record, particularly 7/12 extract Exh. 28 of the suit gut No. 320, it appears that there is no dispute that originally total area of this gut number was 11-*Hectare* 22-*Are*. On perusal of sale deed Exh. 30 dated 29-03-2003 it is seen that Sayed Hussain son of Sayed Abdul owner of gut No. 320 had sold 2-*Hectare* 80-*Are* land from his 5-*Hectare* 61-*Are* share to the plaintiff and said 2-*Hectare* 80-*Are* land is the suit land within the four boundaries referred earlier. It is further seen that the suit land was sold for Rs. 1,40,000/- In the cross examination, the plaintiff admitted that the some portion of land gut No. 320 has been acquired for percolation tank. She admitted that the land purchased by her from gut No. 320 is the northern side land. She admitted that Maharashtra Government has acquired 2-*Acres* land from gut No. 320 for percolation tank in 1998 and that was acquired from original owner Sayead Hussain of the said land. She admitted that adjacent to her suit land towards south there is land of defendant and she denied that prior to purchase of suit land 2-*Acres* land was acquired from suit land for

percolation tank and there is an entry to that effect in the record. She denied that she purchased only 5-Acres land and she had given consideration of only 5-Acres land and that she is only in possession of 5-Acres land.

10. Sale deed Exh.30 does not show that plaintiff purchased 2-Hectare 80-Are land excluding land acquired for percolation tank in fact when PW-2 son of vendor of the plaintiff admitted that above 2-Acres land was already acquired from the land of vendor of the plaintiff and plaintiff purchased only 5-Acres land, the said fact was required to be mentioned in the sale deed Exh.30. It is seen that after the sale deed of the plaintiff, original owner Sayed Hussain has sold 2-Hectare 90-Are land to the defendant on 05-08-2003 as per the sale deed Exh.35. Four boundaries of the land sold to the defendant are that to the East-Government Pandi (Cart way), to the West-Land of Anna Shankar Zine, to the South- Land of Sumanbai Bhagwan Kharat and to the North-Land of Sumanbai Hiwale-plaintiff and on the date of sale deed the vendor has given the possession of the land to the defendant. Thus, it is clear from the sale deed Exh.35 of the defendant that to the North of the land of defendant there is a land of plaintiff from suit Gut No. 320. Thus, it appears

that though there is percolation tank in the Northern portion of land Gut No. 320 from which portion the plaintiff purchased land from her vendor Sayed Hussain, it was not mentioned in her sale deed that she purchased land excluding the land acquired for the percolation tank. It is seen that in fact, plaintiff purchased only *1-Hectare 88-Are* land but in the plaintiff's sale deed Exh.30 it was mentioned that she purchased *2-Hectare 80-Are* land.

11. Oral evidence of defendant and witness DW-2 shows that the defendant purchased *2-Hectare 90-Are* on 05-08-2003 from Gut No. 320 and on the same day he was given possession of the said land. Their evidence also shows that there is 5 to 6 feet wide Bandh between the land of the plaintiff and the defendant. Their evidence also shows that *92-R* land from Northern portion of Gut No. 320 has been acquired for percolation tank and that the plaintiff was never in possession of *7-Acres* i.e. suit land.

12. Thus, on considering oral as well as documentary evidence adduced by both the sides, the trial court held that plaintiff has failed to prove her possession over the suit land i.e. *7-Acres* land and said finding in the trial court is maintained by the

appellate court. Thus, there is a concurrent findings of both the courts that plaintiff has failed to prove her lawful possession of the suit land and thus both the courts have refused to grant perpetual injunction as claimed by the plaintiff. Thus, I am of the view that no substantial question of law is involved in the present appeal. Therefore, appeal is liable to be dismissed and the same is accordingly dismissed with no order as to costs.

13. As regards civil application No. 11417 of 2012 filed by the plaintiff for allowing her to produce additional evidence the same does not survive in view of dismissal of the appeal and said application is disposed of.

[S. M. GAVHANE, J.]