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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 145 OF 1994
WITH
SECOND APPEAL NO. 146 OF 1994**

1) Rohinton Homi Tarapurwala } Occupation: Horticulture, } Residing at Bavada, Post } Bavada, Taluka Dahanu, } Dist: Thane }	Appellant
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V/s.

1) Prabhakar Pandurang Jadhav } Adult. } 2) Vasant Pandurang Jadhav } Adult. } 3) Shrikant Pandurang Jadhav } Adult. } 4) Smt. Savitribai Pandurang Jadhav } Adult. } 5) Smt. Sandhya Pandurang Jadhav } Adult. } 6) Bhanudas Raghunath Bhawe } Adult. } All agriculturists, residing at } Kolivali, Tal. Dahanu, Dist. Thane. }	Respondents
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CORAM : NITIN W. SAMBRE, J.

RESERVED ON : JANUARY 2, 2020.

PRONOUNCED ON: AUGUST 19, 2020.

JUDGMENT:

- 1] Both these appeals are by original plaintiff.
- 2] R.C.S. No. 100/1986 came to be initiated by present appellant-plaintiff for possession based on title. According to plaintiff, following land was owned by deceased Pandurang Jadhav who died on 13/12/1981:

Land situated at village Kolivali in Dahanu Taluka of Thane District:

Survey No.	Area	Assessment
	A G	R P
74	18-16	14-00
75	11-00	12-25

Of the aforesaid land Pandurang sold following land to various persons.

Out of Survey No. 74:

Acres 8 and 20 Gunthas to Smt. Dina Eruch Talati, Acres 6 to Eruch Jehangir Mistry. Acres 3 and 36 Ghunthas to the plaintiff on

26/03/1974 Total 18-16.

Out of Survey No. 75:

Acres 7 and 11 $\frac{1}{4}$ Ghunthas to the plaintiff on 26/03/1974 and balance of 3 acres and 28 and $\frac{3}{4}$ Ghunthas remained with the deceased Pandurang Tukaram Jadhav.

3] According to him, the land which was transferred to the appellant-plaintiff was since not measured at the time of handing over possession, and there was oral agreement that the appropriate adjustments of the land will be made after carrying out measurement. Appellant-plaintiff based on sale deed executed in his favour on 26/3/1974 exhibit 19, applied for measurement. According to him land was measured on 30/03/1977 in the presence of deceased Pandurang and other purchasers to whom deceased Pandurang sold part of the land as referred above. According to him, as per the measurement, map was delivered to the plaintiff on 11/02/1980 by the City Survey Department. He would further urge that based on aforesaid measurement and the map received on

11/02/1980, he approached deceased Pandurang who assured him handing over of possession of the disputed land (which fell short as was reflected in the sale deed) however, in view of his death on 13/12/1981, possession could not be handed over to appellant resulting into filing of the aforesaid suit for possession and mesne profit.

4] The suit claim was resisted by defendant Nos. 1 to 5 who are legal heirs of deceased Pandurang. Defendant Nos. 1 to 3 are sons, defendant No. 4 is widow whereas defendant No. 5 is married daughter. Defendant No. 6 claim to have purchased the adjacent land vide exhibit 22 from Eruch Jehangir Mistry. Since in the measurement it is reflected that defendants were found in possession of excess land to which the plaintiff was entitled to by virtue of sale deed exhibit 19, the aforesaid suit was brought into action.

5] All the respondent-defendants were duly served. Defendant Nos. 1 to 5 i.e. present respondent Nos. 1 to 5 filed their written

statement at exhibit 9 and resisted the claim. According to defendant-respondent Nos. 1 to 5, suit was not brought within the limitation. Defendants have denied the entire claim of the the appellant-plaintiff and sought dismissal of the suit.

6] Defendant No. 6 was duly served, however, has chosen not to file his appearance. As such the court of Civil Judge Junior Division Dahanu vide order dated 21/09/1987 proceeded *ex-parte*.

7] The trial court, based on pleadings framed the issues at exhibit 13. Appellant entered into witness box at exhibit 9 and has proved his claim.

8] As far as defendant Nos. 1 to 5 are concerned, neither of them have entered into the witness box nor have cross examined the plaintiff. Similar appears to be the case with defendant No. 6.

9] The trial court accordingly decreed the suit vide it's Judgment and Decree dated 30/11/1988.

10] Defendant Nos. 1 to 5 chose to prefer Appeal No. 2 of 1989 questioning the aforesaid Judgment whereas defendant No. 6 preferred Civil Appeal No. 10 of 1989.

11] The Appellate court vide its impugned Judgment allowed the appeal and set aside the Judgment delivered by the trial court and dismissed the suit. As such, this second appeal.

12] Second appeal was admitted on 21/02/1994 on the ground of ground nos. (e) (g) (f) (n).

13] As such this appeal has come for final hearing.

14] Heard respective counsel at length. Perused record and proceedings.

15] Both these appeals are preferred by the appellant questioning the Judgments delivered in two separate appeals preferred by original defendant Nos 1 to 5 and defendant No. 6.

16] Learned counsel for the appellant would urge that the Appellate court committed an error apparent on the face of record in dismissing the suit by taking recourse to the provisions of Section 92 of the Indian Evidence Act and further committed an error in holding that the suit is barred by limitation particularly in the wake of limitation prescribed under Article 65 of the Limitation Act. He would urge that the evidence of the appellant-original plaintiff was not controverted and as such appellant has proved his claim and that being so, the appeals ought to have been dismissed by the court below. He would further claim that suit for possession is based on title and since the appellant has paid entire consideration for the land as has been described in the sale deed exhibit 19, even otherwise he is entitled for lawful possession of the property purchased. He would further invite attention of this court to the evidence of plaintiff to claim that suit was based on the map issued by office of District Inspector of Land Records ('DILR' for the sake of brevity) a public authority, after carrying out the measurement and since the same was not disputed by either of the defendants, the

trial court rightly decreed the suit and as such the appellate court ought not to have interfered with the the findings of fact recorded by the trial court. As such, according to him, the questions of law which need consideration are:

Whether the lower Appellate court committed an error apparent on the face of record by rejecting the claim of the appellant based on incorrect application of provisions of section 92 of the Indian Evidence Act?

Whether the lower Appellate court committed an error in discarding the evidence of the appellant though same was not controverted by the respondent-defendants?

Whether lower Appellate court has committed an error in recording finding that exhibit 24, map issued by DILR was not properly proved?

Whether the Lower Appellate Court has committed an error apparent on record in holding that the suit claim is barred by limitation as the suit claim was brought beyond the period of 12 years?

17] None for respondent nos. 1 to 5.

18] So far as the aforesaid contentions are concerned, learned counsel for the respondent-original defendant No. 6 would urge that the suite of the appellant-plaintiff was rightly held to be time barred as it is pleaded by the appellant that for the first time, cause of action arose on 26/03/1974, whereas the suit was filed on 21/10/1986, i.e. after expiry of 12 years of limitation. According to him, limitation was started operating from the date of sale deed i.e. 26/03/1974 and as such, the Lower Appellate court has rightly held that the suit is time barred. He would further claim that section 92 of the Indian Evidence Act is appropriately invoked by the learned District Judge so as to discard the case of the appellant-plaintiff as that of oral agreement which was in addition to the sale deed exhibit 19. He would further urge that section 92 creates an embargo on the claim of the appellant-plaintiff of oral agreement, when there exist a written agreement exhibit 19. A further contention is, the map issued by DILR was never proved by the appellant and that being so, both the second appeals are liable to be dismissed.

19] Considered rival submissions.

20] From the record it depicts that defendant no. 6 proceeded ex parte on 21/09/1987 and as such he has neither filed a written statement nor lead any evidence. He has also chosen not to cross examine the plaintiff.

21] In view of the pleadings in the plaint and the written statement exhibit 9, the Trial court framed following issues and answered accordingly.

	ISSUES	FINDINGS
1.	Does plaintiff prove that lands were not accurately measured at the time of sale- deed?	Yes.
2.	Does he further prove that vendor and purchaser agreed that after the measurement by D.I.L.R. the deficit if any was to be made good?	Yes.
3.	Does he prove that the lands Surveyor measured lands on 30.3.1977 in the presence of the parties?	Yes.
4.	Whether the suit is bad for misjoinder of parties and the cause of actions?	No.

5.	Is suit barred by limitation?	No.
6.	Does plaintiff prove that Eruck Jahangir Mistry sold his lands to defendant No. 6?	Yes.
7.	Does plaintiff prove that he is entitled to possession of the lands admeasuring 8 gunthas land from survey No. 74 and 1 acre 4.25 gunthas from survey No. 75 from the defendants No. 1 to 5?	Yes.
8.	Does plaintiff prove that he is entitled to possession of 24 from the defendant No. 6?	Yes.
9.	What order regarding future mense profits?	Inquiry U/o. 20 R.12(1) (c) C.P.C. is directed.
10.	What order and decree?	As per order.

22] As far as the case of the defendant Nos. 1 to 5 is concerned, defendant Nos. 1 to 5 have preferred to file their written statement vide exhibit 9 and it was claimed that suit was bad for misjoinder of parties. The said defendants though have appeared, neither cross-examined the plaintiff nor themselves entered into the witness box.

23] The trial court while decreeing the suit has noticed that the land as is claimed in the plaint was purchased by plaintiff from its owner deceased Pandurang vide exhibit 19 i.e. sale deed dated

26/03/1974. The certified copy of the sale deed dated 16/02/1976 executed in favour of defendant no. 6 was also produced on record by plaintiff which is marked as exhibit 22 in his evidence. That being so, the area that was purchased by the plaintiff and its measurements and boundaries as mentioned in exhibit 19 were duly proved so also the boundaries and the measurements of defendant No. 6 as are mentioned in sale deed exhibit 22 executed by Eruck Jahangir in favour of defendant No. 6 were brought to the notice of the court through the said evidence.

24] It is also approved by the appellant-plaintiff through his evidence that appellant-plaintiff has purchased 3 acres and 36 gunthas of land vide exhibit 19 sale deed dated 26th March 1974 from the southern side. So also it is proved by him that he has purchased 7 acres and 11.25 gunthas from the southern side of survey number 75. The revenue entries in the name of appellant based on the sale deed exhibit 19 were duly proved vide exhibit 20 and 21, the 7/12 extract revenue record which are public documents. It was proved that in exhibit 22, the land was

transferred by Eruck Jahangir Mistry to defendant No. 6 and same map made out from revenue record i.e. Exhibit 23 issued in favour of defendant No. 6. Appellant also proved the certified copy of the measurement map which is a public document issued by the office of DILR-exhibit 24 issued on 11/02/1980. Based on the measurement map, the appellant has deposed that he is entitled for possession of the land to the extent of 4 Gunthas from survey number 74 and 1 acre 4 Gunthas from survey number 75 i.e. less land that was handed over to him. He has also established that he is entitled for the possession to the extent of 24 gunthas of the survey number 74 from defendant No. 6 and one acre 4.25 Gunthas from survey number 75 as was shown in red colour and blue colour respectively in the measurement map exhibit 24, a public document.

25] The aforesaid evidence of the appellant was not at all controverted by any of the defendants/heirs i.e. defendant Nos. 1 to 5 & 6 and as such it was rightly held by the Trial court that document exhibit 19, document exhibit 24 and other public

documents were duly proved. For reference the document exhibit 22, sale deed executed in favour of defendant No. 6 by Eruck Jahangir Mistry was also taken note of in evidence. The evidence of appellant/ original plaintiff has proved that he has purchased the suit property from deceased Pandurang and what was delivered to him was short than the one mentioned in the sale deed. Respondent nos. 1 to 5 though have come out with denial, however, appellant has discharged his burden of establishing his claim that he was not given possession of the land as has been mentioned in the sale deed exhibit 19 and there was short delivery.

26] In the aforesaid background, it was for the respondent-defendant to demolish the claim put forth by the appellant-plaintiff by adducing appropriate evidence by objecting the measurement map exhibit 24 wherein it is reflected that defendant nos. 1 to 6 were found in possession of more land than the one which they are lawfully entitled to.

27] Once the defendants failed to establish their lawful title to the

excess holding and appellant by virtue of exhibit 19 established his title to the said land, the Trial Court rightly decreed the Suit whereas the Appellate Court inappropriately discarded the evidence of the appellant-plaintiff while dismissing the claim. Rather the evidence speaks of the appellant establishing his suit claim in accordance with law.

28] In the aforesaid background, this court is required to consider whether the article 65 of the Limitation Act is attracted in the case in hand and whether the claim of the appellant was time barred?

29] The appellant once having proved exhibit 19, the sale deed, he has established that he has purchased the property mentioned in the sale deed and is reflected in the plaint on 26/03/1974 and had applied for measurement having noticed that he was delivered less land as compared to what has been mentioned in sale deed exhibit 19. It is also proved by him that from the public document exhibit 24 - a measurement map, which was received over by him on 11/02/1980 and present respondents-original defendants were party

to the measurement. As such the cause of action in the present case in favour of the appellant, even if claim to have been pleaded to be with effect from 26/03/1974 i.e. date of execution of sale deed exhibit 19, still the limitation has to be considered to have started from the date of issuance of measurement map i.e. 12/02/1980. Here is a case where suit for possession is based on title, as such, the limitation prescribed under Article 65 of the Limitation Act is that of 12 years from the date of cause of action. Once the deceased Pandurang vide exhibit 19 has assured the possession of the suit property as mentioned in the sale deed and plaint and it is established through evidence that exhibit 19 to exhibit 24, less land in measurement, was handed over to the appellant and respondent-defendants were found to be in possession of the excess land than they are lawfully entitled to, it has to be held that limitation for the cause of action has to be considered from 11/02/1980 i.e. the measurement map issued by DILR after carrying out measurement with the defendants.

30] The lower Appellate court as such committed an error apparent

on the face of record in considering that the plaintiff himself having pleaded that the cause of action arose on 26/03/1974 i.e. date of execution of sale deed exhibit 19, has chosen to calculate the limitation of 12 years from the said period. The lower Appellate court appears to be oblivious to the fact that area mentioned in the sale deed exhibit 19 was found to be not in possession of the appellant in the measurement map and rather same was found to be in possession of defendant Nos. 1 to 6 that too without any lawful authority. The lower Appellate court has made an incorrect observation of fact that in the evidence, appellant has not been able to demonstrate that measurement reflected in the exhibit 24-measurement map was carried out in absence of the parties and as such discarded the said piece of evidence. The lower Appellate court as such committed an error of law in discarding the evidence which is a public document particularly when neither defendant Nos. 1 to 5 nor defendant No. 6 have raised any objection to the same, either in the form of affidavit or otherwise. As such, the Trial court has rightly made an observation that measurement map i.e. public document exhibit 24 was duly proved and defendants are in

possession of the excess land whereas appellant-plaintiff was delivered less land to that of what has been stated in the sale deed exhibit 19.

Appellant-plaintiff has come out with a case of oral agreement in addition to exhibit 19 for claiming possession of the land based on sale deed exhibit 19. Appellant as such has proved his title to land in question as has been claimed by him through exhibit 19 and that being so, he was justified in claiming the possession of the land that was short delivered to him. The plea of oral agreement as sought to be canvassed by the plaintiff so as to establish his claim for possession cannot be termed to be not permissible in law, particularly in the light of 2nd proviso to Section of the Indian Evidence Act. Section 92 of the Indian Evidence Act reads thus:

“92. Exclusion of evidence of oral agreement. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be

admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1)

Proviso (2) -The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document”.

31] The second proviso to section 92 of the Indian Evidence Act in express terms provides for that it can always prove that there exists a separate oral agreement as to any matter on which document is silent and which is not inconsistent with its terms, may be proved.

32] As far as the plea put forth by the appellant-plaintiff that there exists an oral agreement and the terms of such oral agreement cannot be read in contravention to the terms of main agreement i.e. exhibit 19 sale deed is concerned, the claim put forth by the

appellant-plaintiff is substantiated by contents and recitals of exhibit 19 sale deed in favour of the appellant by deceased Pandurang Jadhav. Apart from above, even if it is presumed that there does not exist any oral agreement as has been claimed by the appellant- plaintiff, however, still the fact remains that deceased Pandurang or his successors i.e. legal heirs defendant Nos. 1 to 5 are bound by the terms of the sale deed exhibit 19 and that being so are bound to to honour the terms of the sale deed exhibit 19 in its totality including the delivery of the land for which entire consideration was accepted.

33] As such, it has to be inferred that the lower appellate court committed an error of law by recording of finding contrary to provisions of Limitation Act particularly article 65 of the Limitation Act and thereby holding that the suit claim was barred by the limitation and also same is hit by embargo created under section 92 of the Indian Evidence Act. The findings of the lower Appellate court rather wholly misplaced and based on incorrect appreciation of factual and evidential matrix. Rather maybe in somewhat cryptic

words, the trial court has decreed the suit, however it has to be observed that the decree drawn by the trial court is legally justifiable.

34] As a consequence of above, both these appeals are liable to be allowed. Hence, following order.

ORDER

(I) The Judgment delivered by the lower Appellate court in Civil Appeal No. 2 of 1989 and 10 of 1989 on 07/04/1993 is hereby quashed and set aside.

[II] The Appeals preferred by respondent-plaintiff before the learned District Judge are ordered to be dismissed and the Judgment delivered by learned Trial court in R.C.S. No. 100 of 1986 thereby decreeing the suit on 30/11/1988 stands confirmed.

35] Both these appeals are allowed in the above terms.

[NITIN W. SAMBRE, J.]