

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.412 OF 2019
WITH
CIVIL APPLICATION NO.8592 OF 2019
SA/412/2019**

NAMDEO S/O KISANRAO MARKAD
VERSUS
VASANT S/O KACHARU KALE AND ANOTHER

.....
Advocate for Appellant/Applicant : Mr. B. K. Patil
Advocate for Respondent No.1 : Mr. P. K. Nikam
.....

**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 22-09-2021.**

ORDER :

1. Present appeal has been filed by the original defendant No.1 to challenge the concurrent Judgment and decree passed by the Courts below. The present respondent No.1 is the original plaintiff who had filed Regular Civil Suit No.37 of 2009 before Civil Judge, Junior Division, Khultabad District Aurangabad, for declaration that the sale deed dated 10-06-1997 executed by defendant No.2 in favour of defendant No.1 in respect of 11 R from land Gut No.51 situated at village Salukheda, Taluka Khultabad, District Aurangabad, as null and void, consequential prayer of injunction was also prayed. The said suit came to be decreed on 28-02-2011. He challenged the said Judgment

and decree by filing Regular Civil Appeal No.131 of 2011 before learned District Judge-1, Aurangabad. After hearing both sides, the said appeal came to be dismissed on 30-11-2017. Hence, this second appeal.

2. Heard learned Advocate Mr. B. K. Patil for appellant and learned Advocate Mr. P. K. Naikam for respondent No.1.

3. It has been vehemently submitted on behalf of the appellant/original defendant No.1 that original plaintiff is admittedly not the owner of the suit property i.e. 11 R from land Gut No.51 situated at village Salukheda. He is the adjoining owner. He is not the party to the sale deed which he sought to be declared as void and illegal. Therefore, the basic fact is that he has not *locus standi* to challenge the said document and get any kind of relief in respect of the same. The evidence on record would show that the existence of such property has been shown by the defendants. Under such circumstances, merely the adjoining owner is asking for any relief, it cannot be granted. In fact, measurement ought to have been got done by the plaintiff in order to prove that no such land as stated in the sale deed exist. He had come with that statement and, therefore, burden was on him to prove the non-existence of such

land which has been conveyed by defendant No.2 in favour of defendant No.1. Both the Courts below have failed to consider this aspect and they did not concentrate on the point that the plaintiff has no *locus standi* to challenge the said document. Substantial questions of law are therefore arising in this case requiring admission of the second appeal.

4. Learned Advocate for the appellant has relied on the decision in *Haryana Waqf Board vs. Shanti Sarup and Others*, reported in (2008) 8 Supreme Court Cases 671, wherein it has been held that :-

“The appellant Wakf Board had filed an application for appointment of Local Commissioner for demarcation of the suit land. In our view this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of the dispute and in the facts of the present case whether the Local Commissioner should be appointed for purpose of demarcation in respect of the suit land.”

He further relied on the decision in *Jamir Khan s/o Amir Khan vs. Dharamchand s/o Roopchand Sawala*, reported in 2018 (1) Mh.L.J. 174. This Court after considering the fact that the measurement carried out by the Taluka Inspector of Land Records was not

according to the procedure, remanded the matter for retrial after remeasurement of the land. On this point itself he has given few more Judgments of which now only citation would be given :-

- 1) Kishor s/o Shamrao Dongre vs. Rohini w/o Kishor Dongre, reported in 2018 (1) Mh.L.J. 180,
- 2) Fatima Gomes Fartado and others vs. Indirabai Vinayak Lotlikar and others, reported in 2016(2) Mh.L.J.905,
- 3) Meenadevi w/o Vasdev Vatnani vs. Narmadabai @ Leelabai w/o Gopaldas Zanwar, reported in 2015(6) Mh.L.J. 578,
- 4) Atmaram Ananda Jagrut vs. Rajaram and others, reported in 2014(3) Mh.L.J. 463,
- 5) Bento Antonio Gomes alias Antonio Bento Gomes vs. Rosario Salvador Carneiro and others, reported in 2014(4) Mh.L.J. 366,
- 6) Ram Lal & Ors. vs. Salig Ram & Ors., reported in 2019 STPL 728 SC,
- 7) Sudhakar s/o Baburao Kulkarni vs. Gorabai w/o Thansing Marag and others, decided by this Court in Second Appeal No.482 of 2018, on 22-04-2019,
- 8) Arunrao Jagannatrao Deshmukh vs. Rajabhau s/o Manikrao Deshmukh, decided by this Court in Second Appeal No.294 of 2017, on 02-04-2019,
- 9) Rambhau s/o Daulatrao Mule and others vs. Balabhau s/o Pandharinath Kachre, decided by this

Court Second Appeal No.875 of 2016, on 08-11-2019,
10) Ramzan Sheikh Chand Sheikh (since deceased)
through his LRs. And ors. vs. Panjab s/o Nathuji
Gawande, reported in 2014(10) LJSOFT 106,

11) Vasant Tukaram Prabhu vs. Smt. Xalinibai
Borcar alias Smt. Shalinibai Borkar (Expired)
represented by her L.R's. & anr., reported in 2014
(10) LJSOFT 138,

12) Manikrao Ramji Chawake vs. Ashok Ambadas
Gawande and anr., reported in 2014(4) LJSOFT 8,

13) Bhupendra s/o Bhagwat Turkar vs. Homraj s/o
Zituji Meshram, reported in 2014(6) LJSOFT 164,

14) Vachhalabai w/o Kundlik Gavane (Died) and
ors. vs. Chinkaji s/o Malhari Jadhav and ors.,
reported in 2012(7) LJSOFT 84,

15) Vijay Shrawan Shende and ors. vs. State of
Maharashtra and ors., reported in 2009 (10) LJSOFT
117,

16) Kashinath s/o Ramkrishna Chopade vs.
Purushottam Tulshiram Tekade and ors., reported in
2005 (12) LJSOFT 148,

17) Sau. Rukhmabai w/o Rambhau Bhad vs.
Samadhan s/o Pandhari Ingle and ors., reported in
2014(6) LJSOFT 260.

5. Learned Advocate for the appellant, therefore, prayed that the
matter be remanded to the Court below to carry out the

measurement and decide the matter afresh after considering the existence of the land.

6. Per contra, the learned Advocate appearing for the respondent No.1/original plaintiff supported the reasons given by both the Courts below and submitted that all the aspects involved in the suit and the dispute have been considered properly by both the Courts below. It has been demonstrated by the plaintiff as to how no land was left towards his East which could be sold by defendant No.2 to defendant No.1. By giving wrong boundaries if such sale deed is brought into existence and on the basis of said sale deed if defendant No.1 is trying to disturb the possession of the plaintiff then definitely plaintiff has every *locus standi* to challenge the said document. Defendants have not produced on record any such evidence to show about the existence of the land and, therefore, there is no question of sending the matter back to the Trial Court for getting the land measured and deciding it afresh.

7. At the outset, it is to be noted that the fact which is admitted is that the plaintiff is the owner of agricultural land admeasuring 45 R out of land Gut No.51 situated at Salukheda, Taluka Khultabad, District Aurangabad. He had purchased it from defendant No.1 by

way of registered sale deed dated 20-07-1988. Defendant No.1 had purchased 47 R land from one Chandrakant Warkad by way of registered sale deed dated 11-06-1987 and out of that 47 R land, 45 R land was sold to plaintiff. That means, only 2 R land remained with defendant No.1 which is stated to have been used as path way. It is not in dispute that since the sale deed the plaintiff is possessing 45 R land.

8. It was the contention of the plaintiff that defendant No.2 falsely showed that she is owner of 11 R land from the same gut number and she had sold it to defendant No.1 and the said land is stated to be situated towards the Western side of 2 R land of defendant No.1.

9. Plaintiff had produced not only his sale deed at Exhibit 30 but the certified copy of sale deed between Chandrakant Warkad and defendant No.1 was produced at Exhibit 32. It is to be noted that Chandrakant Warkad is the predecessor of defendant No.1 and defendant No.1 is the vendor of plaintiff. The sale deed of defendant No.1 in respect of 47 R land is not disputed by defendant No.1 himself. Therefore, the boundaries those were shown of that 47 R land will have to be considered as admitted fact and situation on the

site. In that sale deed Exhibit 32 towards the Western side of the strip of 2 R land, there was land of one Laxman Vithoba. Further, in the present sale deed dated 10-06-1997 between defendant No.2 and 1, they have shown the land of Laxman Vithoba after that 11 R of land. In fact, defendant No.1 was estopped from contending some other situation than that is stated in sale deed Exhibit 30 and 32. It appears that even Chandrakant Warkad who sold the land to defendant No.1 was examined as DW.3. Defendant No.2 is the wife of said Chandrakant Warkad. It is to be noted that according to the DW.3 Chandrakant, name of his wife was recorded about three years on the basis of partition deed. It appears that he did not produce the said partition deed on record. In his cross-examination DW.3 Chandrakant has stated that name of his wife was recorded in respect of 4 Acres of land on the basis of partition deed. Even if we take it as it is, it cannot give ownership to defendant No.2 to the extent of 11 R. Further, the admissions given by DW.3 Chandrakant has shown that there was no land on the Southern side of the Nala which was belonging to his ownership and some portion of the Southern side of Nala was sold by him before any land was transferred in the name of his wife. Therefore, both the Courts below have considered the oral as well as documentary evidence on

record, especially the admissions given by DW.2 in her testimony as well as by her husband DW.3 Chandrakant. When the predecessor of defendant No.1 could not establish the existence of 11 R land, there is no scope for directing measurement of the land. The catena of Judgments which have been relied by the learned Advocate for the appellant are on the point of encroachment over the suit land where the existence of land will not be in question. In those cases, the fact of possession would be in question and for that purpose how much is the encroachment can only be brought on record by appointing an expert in the said field of measurement has been considered. However, as regards existence of a fact is concerned, it has to be proved by the person who is affirming it positively that such fact exist. Negative burden cannot be put to prove the non-existence of the same. Only when a *prima facie* existence is shown, the pendulum of onus may come to the other side to prove the non-existence.

10. Taking into consideration the fact that when no such property was in existence, yet a sale deed has been got executed and on the basis of that sale deed, as per the contention and proof of plaintiff, his possession is disturbed then definitely plaintiff will get *locus*

standi to challenge such transaction/document.

11. In view of the fact that both the Courts below have consistently held that the averments and facts alleged by the plaintiff are proved, this Court need not go into the facts once again for assessment. Those facts could have been reassessed to the some extent by this Court just to consider whether the findings of fact by both the Courts below or either of the Court below is perverse. No such perversity has been pointed out and, therefore, no substantial questions of law arises in this case requiring admission of the second appeal. Hence, the second appeal stands dismissed. Pending civil application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-

GAWADE
VIRENDRA
J

Digitally signed
by GAWADE
VIRENDRA J
Date:
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