

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

**917 SECOND APPEAL NO.78 OF 2015
WITH
CIVIL APPLICATION NO.2860 OF 2015**

**LATIF BANEMIYA DESHPANDE, DECEASED, THROUGH, LRS RADHIDABEE
AND OTHERS**

VERSUS

**KHALIL RAJJAKMIYA DESHPANDE, DECEASED, THROUGH LRS REKHA @
REKHANA AND OTHERS**

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Mr. Girish S. Rane, Advocate for appellants

Mr. Y.M. Khan, Advocate for respondent Nos.1A to 1F, 2, 4A to 4D and 5

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 22nd OCTOBER, 2021

ORDER :

1 Present appeal has been filed by the legal representatives of original defendant to challenge the concurrent Judgment and Decree.

2 Present respondent Nos.1 to 5 are the original plaintiffs, who had filed Regular Civil Suit No.248/1985 before learned Civil Judge Junior Division, Erandol, Dist. Jalgaon for possession of the suit property. The said

suit came to be decreed on 20.10.2004. The said decree was then challenged by the present appellants by filing Civil Appeal No.271/2004 before learned Principal District Judge, Jalgaon. The appeal came to be dismissed on 21.03.2014. Hence, this Second Appeal.

3 Heard learned Advocate Mr. Girish S. Rane for appellants and learned Advocate Mr. Y.M. Khan for respondent Nos.1-A to 1-F, 2, 4-A to 4-D and 5.

4 It has been vehemently submitted on behalf of appellants that both the Courts below have not considered the evidence as well as the legal points involved in proper perspective. The parties were Muslim, especially the plaintiffs, who were claiming to be the tenants-in-common as the heirs of original owner Rajjakmiyan, who expired on 19.10.1972. Rajjakmiyan was survived by four sons and two daughters, out of them A. Taleb had entered into transaction with the defendant and in fact, the other plaintiffs i.e. plaintiff Nos.1 to 3 had agreed to sell the suit land to the defendant for a consideration of Rs.11,000/- on 07.05.1973. Earnest amount of Rs.4,000/- was paid on the same day and the possession of the suit property was handed over by executing a separate possession receipt. Thereafter remaining amount of Rs.7,000/- was paid on 30.05.1974 and the Bharna Pavati has

been executed by deceased Taleb and the plaintiffs. Therefore, it has not been seen by both the Courts below that the defendant was possessing the suit land since 07.05.1973 and no action was taken by the plaintiffs till 16.10.1985 for getting the possession back. Therefore, the point of limitation as well as effect and scope of Section 53-A of the Transfer of Property Act was not considered properly by both the Courts below. The defendant had proved the execution of the agreement to sell Exh.51, possession receipt Exh.50 and the Bharna Pavati of payment of entire consideration Exh.48; yet both the Courts have held that the possession of the defendant is not legal which is perverse. Both the Courts failed to consider that the mutation entry had also been taken in the revenue records regarding the possession of the defendant and it was never challenged by the plaintiffs. The plaintiffs avoided to enter the witness box, especially the plaintiff No.4, from whom the plaintiff Nos.1 to 3 got the knowledge in the year 1985 regarding the illegal mutation entry and the possession of the defendant. Further, the point of not adding the legal representatives of A. Taleb, other brother and sister of one Janumiyan was not considered properly by both the Courts. Both the Courts below misconstrued the evidence of handwriting expert and recorded erroneous conclusion that the report of handwriting expert is not supporting the defendant. Defendant had proved that he possess the suit property adversely to the title of the plaintiffs. The suit ought to have been dismissed, so also, in

absence of appropriate appreciation by the Trial Court the learned Principal District Judge, Jalgaon being the First Appellate Court ought to have interfered with the erroneous decree. Substantial questions of law are, therefore, arising in this case, requiring admission of the Second Appeal.

5 Per contra, the learned Advocate appearing for respondent Nos.1A to 1F, 2, 4A to 4D and 5 supported the reasons given by both the Courts below and submitted that no substantial question of law is arising in this case.

6 At the outset, it is to be noted that the plaintiffs, who are admittedly the legal heirs of one Rajjakmiyan were the owners of 2 Acres 8 Gunthas out of 01 H 29 R land Gat No.29 situated at village Fulpat, Tq. Erandol, Dist. Jalgaon. Plaintiffs contended that after death of their father their elder brother A. Taleb was addicted to liquor and by using his addict the defendant got certain documents prepared from A. Rajjak. Mutation entry was taken by Talathi and Circle Officer on 01.01.1974 stating that the plaintiffs have relinquished their right in the suit property. A. Taleb had executed certain documents without taking consent of the plaintiffs. Even a false entry in respect of partition has been taken in the mutation register. Original defendant had taken illegally possession of the suit property on

02.12.1982 and, therefore, they have issued registered post notice through their Advocate to the defendant on 01.07.1985, which was then replied by the defendant.

7 Per contra, the defendant had come with a case that deceased Taleb and present plaintiff Nos.1 to 3 had agreed to sell the suit land by entering into agreement to sell on 07.05.1973. On the same day earnest amount was paid and the possession was given by executing another document titled "possession receipt". Thereafter on 30.05.1974 remaining amount of consideration was paid to the plaintiff Nos.1 to 3 and deceased Taleb. By virtue of part performance to the agreement to sell the defendant is cultivating the land continuously for more than 12 years. It was also contended that the suit was beyond the period of limitation.

8 After considering the evidence of the plaintiffs and defendant, as aforesaid, the suit was decreed and the appeal was dismissed. It can be definitely said that both the Courts have taken into consideration all the points involved in the case. Appreciation of the evidence and the observations are correct. It has been rightly considered that after Rajjakmiyan expired on 19.10.1974; as per the Muslim Personal Law, each of the heirs would get his own separate share. There is no concept of Karta or

Manager of the joint family in Muslim Law, though for some practical reasons the brothers and in some cases even sisters would be residing together. As per the Muslim Personal Law, after death of original owner the heirs would get definite share, that too, as tenants-in-common and not as co-sharers. One tenant-in-common cannot act and dispose of property on behalf of another co-tenant-in-common. Therefore, it cannot be said that A. Taleb was acting as Karta of the family. When the plaintiffs were having a specific share, then there is no question of relinquishment only by way of mutation entry. There can only be transfer of ownership by way of permissible mode under the Transfer of Property Act or any other personal law e.g. Gift Deed, Will etc. When deceased A. Taleb had no authority to enter into any transaction for and on behalf of all the legal heirs of Rajjakmiyan, then the alleged agreement to sell cannot have any legal effect.

9 Both the Courts have rightly held that the agreement, the alleged possession receipt are not properly proved by examining the Scribe. Plaintiffs had denied that they had ever executed such document. It appears that attempt was made to get the handwriting expert's opinion. However, the best evidence would have been to examine the Scribe or the person who was present at the time of execution of the document. PW 1 Abdul Khalil has specifically denied his signature on Exhs.48, 50 and 51. Important point to

be noted is that one of the mutation entries is stated to be in respect of relinquishment of shares by the plaintiffs in favour of A. Taleb. If that mutation entry had taken place prior to the execution of the agreement to sell, then why the defendant would have allegedly taken the signatures of the plaintiffs on the agreement to sell, Bharna Pavati and even handing over of possession (Exhs.48, 50 and 51). As aforesaid, the relinquishment cannot be only on the basis of mutation entry, as the plaintiffs had their own independent share in the property. A. Taleb was not the person, who could have entered into the agreement to sell and would have had authority to put defendant in possession.

10 The defendant has not explained as to why inspite of payment of entire consideration amount as alleged by him on 30.05.1974, sale deed was not got executed from A. Taleb and the plaintiffs. It cannot be said that merely because he has paid the entire amount and nothing was remained to be performed by him and then he does not get the sale deed executed by him then he was and is ready and willing to perform his part of the contract. The readiness and willingness to perform the contract would be till the end, that is, till the moment the sale deed would be executed. Therefore, the protection under Section 53-A of the Transfer of Property Act cannot be given to the defendant, even if it is held for the sake of arguments that the

defendant had proved Exhs.48, 50 and 51. As aforesaid, we could see in this particular case that no authenticity and legality could be given to the mutation entries as they are not based on legal effects and, therefore, mere entry regarding the possession of the defendant in the mutation entry will not be sufficient to say that the defendant was in possession.

11 Defendant cannot blow hot and cold at the same time only on the basis of Exhs.48, 50 and 51. He cannot say that the ownership/title was transferred to him in absence of the sale deed. Sale deed can be the only document of title which he has not got executed in his favour inspite of allegedly paying the entire consideration. When title itself was not transferred and whatever was claimed by the defendant was by way of protection under Section 53-A of the Transfer of Property Act, then ownership by adverse possession will not come for consideration. Similarly, when the title of the plaintiffs is not extinguished and the alleged possession of the defendant had not started adversely nor it was so claimed and proved, the suit was within limitation.

12 When all the points are considered properly and legally by both the Courts below, there is no question of interference by this Court. No substantial question of law, as contemplated under Section 100 of the Code

of Civil Procedure, is arising, in this case, requiring admission of the Second Appeal. It deserves to be dismissed. Accordingly, it is dismissed. Civil Application stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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