

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.239 OF 2017
with
CIVIL APPLICATION NO.7298 OF 2021
CIVIL APPLICATION NO.4052 OF 2017

Kallyani s/o Vishwanath Solapure
(Deceased through L.rs.) -

1A) Mallamma w/o Vishwanath
Solapure and Ors. = APPELLANTS
(Orig.Plaintiff)

VERSUS

Municipal Council, Latur. = RESPONDENT

Mr.PR Katneshwarkar, Advocate for Appellant;

Mr.AD Sonkawade, Adv. h/for Mr.AV Hon, Adv for
Respondent (sole)

CORAM : SMT.VIBHA KANKANWADI, J.

RESERVED ON : 13/08/2021

PRONOUNCED ON : 31/08/2021

PER COURT :-

1. Present appeal has been filed by original plaintiff. Original plaintiff expired during pendency of the Second Appeal and his legal representatives have been brought on record. Original plaintiff had filed RCS No.334/2009 before the Civil Judge, Junior Division, Latur for declaration of ownership and perpetual injunction. The said suit came to be dismissed on 14.10.2011.

He preferred RCA No.224/2011 before the District court, Latur. The appeal was heard by learned District Judge-3, Latur and it was dismissed on 2.12.2016. Hence, this Second Appeal.

2. Heard learned Advocates appearing for the respective parties.

3. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the documentary as well as oral evidence and have come to a wrong conclusion that the plaintiff has failed to prove ownership. The suit land, admeasuring 6 *gunthas* from land Survey No.201, situated at Latur, Tq. & Dist. Latur, was originally owned by one Kaiksurji s/o Taimurji. Father of the plaintiff had purchased the land to the extent of 5 acres and 27 *gunthas* from the said survey number, by sale-deed dated 8th May, 1954 for a consideration of Rs.94 and 7 *Annas*. The plaintiff's father was enjoying the said property during his life time and thereafter the plaintiff is enjoying the same as an absolute owner thereof. They had erected a tin-shed and running a Pan shop

as well as Tea shop from the suit premises. His father had applied to Tehsil office, Latur for mutating his name to 7/12 extract of the suit land by filing applications on 5.9.1953 and 27.2.1959. However, mutation has not been carried out. It is then contended that some portion of the land out of Survey No.201/A, was acquired for Government hospital. Prior to that, some of the land was acquired by MSRTC and Post office. The plaintiff used to pay municipal taxes, however, the defendants and their servants, without any notice or intimation, went to the suit property on 5.7.2009 and tried to dispossess the plaintiff and, therefore, he filed the suit.

4. The defendant – Municipal Council though served and appeared in the matter, failed to file written statement and, therefore, the matter has proceeded without written statement. The plaintiff has led oral as well as documentary evidence. He has produced on record the sale-deed at Exh.29, which was in *Urdu* language and he has given translation of the same which is at Exh.32. He had also filed office copies of the applications made

by his father to the Tehsil office on 5.9.1953; 27.2.1959 at Exhibits 30 and 31. In spite of these documents, it was held by both the Courts below that the sale-deed is not properly proved. A wrong statement has been made that the plaintiff has not examined any attesting witness or scribe to the documents. The learned Trial Judge failed to consider the affidavit of one Kashinath Apparao Nawade, aged 80 at Exh. 9. He has stated that he was attesting witness to the document and by the said document executed on 8th May, 1954, the plaintiff's father had purchased 6 gunthas of land from Survey No.201 from Kaiksurji Taimurji. Further, both the Courts have failed to consider Death Certificate of said Kashinath Nawade, which was the notarized true copy, showing that he expired on 19.1.2010 in District Bidar Karnataka State. Therefore, it ought to have been presumed, since original document was coming from proper custody, that the said sale-deed has been proved by taking advantage of the fact that it was more than 30 years old document and had a presumptive value as per Section 90 of The Indian Evidence Act.

5. Much stress has been led by both the Courts below that after 1959, there was no attempt on the part of father of the plaintiff and then by the plaintiff himself to get their name mutated to the 7/12 extract of the suit land. The plaintiff is the possessor of the suit land since more than 50 years and all of sudden, the authorities of the defendant are planning to dispossess him. The suit ought to have been decreed and the first Appellate Court failed to exercise its jurisdiction by properly construing and interpreting the provisions of Section 90 of the Indian Evidence Act.

6. Per contra, learned Advocate appearing for the respondents, submitted that though the defendant had not properly contested the suit; yet it can very well defend and support the reasons stated by both the Courts below before this Court. Both the Courts have properly considered the presumptive value of Section 90 of the Indian Evidence Act. Though it may be, for the sake of arguments, it is taken that the sale-deed has been proved; yet location of the said land, which was allegedly purchased by the appellant, was not

proved by him.

7. At the outset, it is to be noted that as per the case of the plaintiff, his father had purchased the suit land by the said document dated 8.5.1954. The value of the said land is shown to be below the amount of Rs.100/-. The sale-deed has not been registered. The translation of that document has been given at Exh.32. One Kaiksurji Taimurji claimed to be owner of the land Survey No. 501, admeasuring 5 acres and 27 gunthas. There is absolutely no mention in the said sale-deed as to how much land was acquired by MSRTC and when ? The boundaries mentioned in Exhibit-32 show that towards east of that 6 gunthas land, there is post office. It is not clarified that the post office is existed on the land of same survey number. Further, it has not been brought on record as to when the post office had acquired the land. But, it must be prior to the sale-deed when the existence of the post office has been shown in that document. The said sale-deed appears to have been executed in the name of present plaintiff, who was shown to be aged 5 at that time and it is stated

that the possession of the land has been given to guardian of the minor. Now, as regards this document is concerned, though it is exhibited by the learned Trial Judge, may be tentatively by taking help of Section 90 of the Evidence Act.

8. Section 90 of the Indian Evidence Act raises presumption in respect of the signature and every other part of such document, which purports to be in the hand-writing of any particular person and in the course of a document executed or attested that it was duly executed and attested by the person by whom it purports to be executed and attested. The condition that is required to be fulfilled to attract the presumption, under this section, is that it will come from proper custody. Further, this section used the words "may presume". Section 90 of the Evidence Act, dispenses with the proof of the document as required under Sections 67 and 68 of the Act. That means, whenever a document, purporting or proved to be thirty years old, is produced from a proper custody, the Court may, either to dispense with the proof of execution of the document or to call for further proof in favour

of the document. The discretion is left to the Court to raise or not to raise presumption in respect of a document, depending by the circumstances of each case. But this discretion must be exercised judiciously and not arbitrarily.

9. Now, in this case, the affidavit of Kashinath Nawade was produced at Exh. 9. It was sworn on 28.7.2009 and interesting point to be noted is that the suit was filed on 29.7.2009. That means, on the next day of the said affidavit, the suit is filed. He was not brought before the Court when the matter came up for adducing evidence by the plaintiff and the reason now tried to be given by the appellant is, that he expired. If we consider the affidavit-in-chief filed by the present appellant, he has not reiterated and pinpointedly stated now the said witness has expired. Now, what has been produced on record is a photo copy of the Death Certificate on which, the stamp of a Notary and signature as "attested true copy" has been produced. The said notary is from Latur. When the original could be seen by the said notary and then he could attest the photo copy as "true

copy", then why original itself was not produced before the Court, has not been explained by the plaintiff. The said notary has not been examined. When Death Certificate is a public document, it's attested true copy cannot be taken as proof of the public document. Even if we consider that since the alleged sale-deed (Exh.29) was for a consideration below Rs.100/- and, therefore, was not required to be registered, and it is more than 30 years old document, presumption could have raised under Section 90 of the Evidence Act; yet another mode, that was available to the plaintiff, was to prove his title, then to prove the said unattested document, because the sale-deed is not compulsorily attestable document and for that purpose, the mode prescribed in Section 72 of the Evidence Act, ought to have been followed. Section 72 of the Evidence Act deals with proof of document, not required by law to be attested. The said section provides, attesting documents not required by law to be attested may be proved as if it was un-attested. Therefore, even if we keep the affidavit of said Kashinath Nawade aside, it is then required to be seen as to whether there was

any evidence adduced by the plaintiff to prove his ownership ?

10. As aforesaid, except that document at Exh.29, there is nothing on record. Natural conduct on the part of the person, who purchased the land, would be to get his name mutated in the revenue records. There are two documents on record at Exhibits 30 and 31, which are stated to be dated 27.2.1959 and 5.9.1958. According to the plaintiff, in spite of giving these two applications, the Tehsil office had not mutated either his father's name or his own name. There appears to be absolutely no attempt after 1959 till 2009 to get name of the plaintiff mutated. The plaintiff is not explaining as to how still the suit land is given survey number when it is within the limits of Municipal Council. The Civil Courts are required to go by preponderance of probabilities and, therefore, when there is absolutely no evidence to show that acts of ownership were exercised by the plaintiff after the alleged sale-deed at Exh.29, till filing of the suit, then both the Courts below appear to be justified in not accepting the

contents of the sale-deed as well as averments of the plaint. At the cost of repetition, further it can be said that the plaintiff has not explained as to when Survey No.201/A was created. 7/12 of that part of the land has not been produced on record. There was also no attempt to bring document on record when the plaintiff says that portion of the land (apart from and around the suit land) was acquired by the Government for hospital purposes. He then says that the part, which was acquired for MSRTC and Telephone Exchange, was mutated as Survey No.201/B and then says in Para No.5 that the land purchased by his father is in Survey No.201/C in the name of minor plaintiff under the guardianship of plaintiff's father.

11. Sale-deed at Exhibit-29 (translation of which is at Exh.32) though gives the boundaries, it was not sufficient to locate the property, has been observed by the first Appellate Court. Further, the appellate Court has correctly considered the 7/12 extracts on record which have been produced by the plaintiff himself. Though this documents have not been exhibited, it can be

seen that they are the public documents. Those documents depict now that Survey No.201 is divided into three parts, i.e. 201/A; 201/B and 201/C. Area of Survey No.201/A is 87 Ares and the holder is Government Hospital, Latur. Survey No.201/B is admeasuring 1 Are and holder is Postal Department. Survey No.201/C is shown as admeasuring 1 hectare and 20 Ares and out of that, 1 hectare and 4 Ares is in the name of Kaiksurji Taimurji and 16 Ares is in the name of MSRTC. At the cost of repetition, the plaintiff is not locating his 6 gunthas land in Kaiksurji's 1 hectare and 4 Ares land and the question then remains as to when all these mutations were taken place; why the plaintiff could not be agitated for recording of his name on the basis of Exh.29.

12. Since the evidence adduced before the Trial Judge has been properly considered together with the legal point involved in the matter, no substantial question of law is arising in this appeal and, therefore, in view of the decision in the case of Kirpa Ram (Deceased) Through L.Rs. And Ors. Vs. Surendra Deo Gaur and Ors. - (2021) 3

Mah.L.J. 250, the Second Appeal deserves to be dismissed and accordingly it stands dismissed. Pending civil application, if any, stand disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

Date : 31.8.2021

Later on :

. After the pronouncement of the decision, the learned Advocate appearing for the appellants seeks status quo to be maintained till the appeal period is over. At this stage, it can be said that all the three Courts, including this Court, have taken a consistent view. Under such circumstance, prayer for maintaining status quo is rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV