

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.401 OF 2021
WITH
CIVIL APPLICATION NO.10474 OF 2021
IN SA/401/2021**

SHIKHARCHAND S/O NEMICHAND AJMERA

VERSUS

SHIVAJI S/O ANANTRAO SHEJUL

.....
Advocate for Appellant/Applicant : Mr. A. D. Kasliwal
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CORAM : SMT.VIBHA KANKANWADI, J.

**DATE OF RESERVING THE ORDER :
06-10-2021.**

**DATE OF PRONOUNCING THE ORDER :
25-11-2021.**

ORDER :

1. Present appeal has been filed by the unsuccessful plaintiff to challenge the concurrent Judgment and decree.
2. The appellant/plaintiff had filed R.C.S.No.244 of 2008 before 3rd Joint Civil Judge Junior Division, Majalgaon, District Beed, for declaration and permanent injunction. The said suit came to be dismissed on 30-01-2014. R.C.A.No.14 of 2014 preferred by the

present appellant before learned District Judge-1, Majalgaon, District Beed, came to be dismissed on 26-03-2021. Hence, this second appeal.

3. Heard learned Advocate Mr. A. D. Kasliwal for appellant.

4. Apart from the factual submissions, the learned Advocate for the appellant while laying hand on the point that substantial questions of law are arising in this case relied on *Ishwar Dass Jain (dead) through LRs v. Sohan Lal (dead) by LRs*, reported in AIR 2000, Supreme Court 426, wherein it has been held that :-

“Though the High Court is required to interfere with the finding of fact, in exceptional cases, yet the interference is permissible when material or relevant evidence is not considered by the Courts below.”

He also relied on *Yeshwant Bhaduji Ghuse vs. Vithobaji Laxman Ladekar*, reported in 2010 (3) Bom.C.R. 373, Kolhapur Bandu Lakade vs. Yallappa Chinappa Lakade, Dead., Thru. Pooja @ Poojari Y. Lakade and Ors., reported in 2011 (3) Bom.C.R. 807, to support Civil Application No.10474 of 2021 for appointing D.I.L.R. as Court Commissioner for measuring the suit land.

5. In view of *Ashok Rangnath Magar vs. Shrikant Govindrao*

Sangvikar, reported in (2015) 16 SCC 763, it is not necessary to issue notice to the respondent at this stage unless the appellant shows substantial questions of law and they are so framed by this Court.

6. The facts of the case would show that plaintiff as well as defendant were claiming to be the owners of the disputed plot. According to the plaintiff, the disputed plot is plot No.28 out of Survey No.385 situated at Majalgaon which he purchased from one Gafoorkhan Ahmedkhan Pathan on 25-07-1994. Per contra, the defendant is contending that the disputed plot is plot No.30 which he had purchased from one Ashruba Rambhau Jadhav on 23-05-1994 and it was purchased by said Ashruba from Gafoorkhan Pathan from the plots made in Survey No.385. According to him, in fact plot Nos.28 and 29 are not in existence at all. Both the Courts have held that the plaintiff has failed to prove that he is owner of plot No.28 from Survey No.385. It appears that Court Commissioner was appointed by the Trial Court who was not an expert but then his report was on record. We cannot forget a fact that both the parties have registered instrument in their favour. Plaintiff examined son of his vendor as PW 4. He has also examined the other witnesses,

whereas the defendant had examined certain other witnesses as well as his predecessor in title. Both the properties were entered to the Municipal record and they are paying Municipal taxes. Defendant in his cross-examination admitted that he has no concern with plot No.28 and it has been purchased by the plaintiff. Conversely even the plaintiff is admitting that defendant had purchased Plot Nos.27 and 30. Under such circumstances, the proper person to prove the lay out and plotting would have been PW 5 Mansoorkhan s/o Gafarkhan. Both the Courts below have disbelieved him. When it is the question of identity of the plot/land then it is required to be seen as to whether the plaintiff had proved it by cogent evidence or not. Though the learned Advocate for the appellant is relying upon the case of *Yeshwant Bhaduji Ghuse (Supra)* it was concerning the suit against encroachment. Further, he relied upon the case of *Kolhapuri Bandu Lakade (Supra)* which was the pronouncement of this Court on the basis of ratio laid down in *Haryana Waqf Board vs. Shanti Sarup, 2008 (8) SCC 671*, wherein it was held that in a case of dispute about demarcation of land, it is appropriate to direct investigation by a Court Commissioner under Order 26 Rule 9 of the C.P.C. which would necessary for just decision of the case. Here in this case, it is not the demarcation of land which is dispute but the

identity itself in dispute and, therefore, it is definitely certain that the application for the appointment of DILR as Court commissioner cannot be allowed as it would amount to collection of evidence which is not at all contemplated under Order 26 of C.P.C. However, whatever evidence has been adduced by the parties can be appreciated by this Court in order to see whether the finding arrived at by them is proper or not. At the cost of repetition it can be said that when both the parties were claiming title on the basis of registered sale deed then what could have been the intention of the parties and how they tried to identify the property whose sale deed was prior in time etc., are the points involved. Therefore, case is made out to admit the second appeal. Hence, the second appeal stands **admitted**.

7. Following are the substantial questions of law :-

- (1) Whether both the Courts below justified in holding that plaintiff has failed to prove his ownership and possession over the suit property Plot No.28 in Survey No.385 in spite of having registered sale deed in his possession ?
- (2) Whether interference is required ?

8. Issue notice to the respondent, returnable on 17-01-2022.
9. Call for record and proceedings.
10. Pending Civil Application No.10474 of 2021 for appointment of DILR as Court commissioner for carrying out measurement of Plot No.28 in Survey No.385 situated at Majalgaon Dist.Beed, stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-