

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 401 OF 2009
WITH
CIVIL APPLICATION NO. 5805 OF 2009
IN
SECOND APPEAL NO. 401 OF 2009

WITH
CIVIL APPLICATION NO. 10387 OF 2011
IN
SECOND APPEAL NO. 401 OF 2009

WITH
CONTEMPT PETITION NO. 327 OF 2012
IN
SECOND APPEAL NO. 401 OF 2009

Dagdu S/o Rangnath Shingan,
Age 38 years, Occu. Agriculturist,
R/o. Pakharsangvi, Taluka and
District : Latur.

**...Appellant
(Original Plaintiff)**

Versus

1. Sau. Meenabai W/o Venkatrao Shingan,
Age : 42 years, Occu. : Agril, and Household,
2. Nagorao S/o Ganpati Yelurkar (died)
Through his Legal heirs.

2-A. Ishwar S/o Nagorao Yelurkar,
Age : 45 years, Occu: Service,

2-B. Shivhar S/o Nagorao Yelurkar,
Age : 43 years, Occu: Agri,

2-C. Siddheshwar S/o Nagorao Yelurkar (died)
Through his Legal heirs.

2-C1. Mangalabai Wd/o Siddheshwar Yelurkar,
Age : 55 years, Occu: Household,

2-C2. Amol s/o Siddheshwar Yelurkar,
Age : 34 years, Occu: Agri,

All Respondents No. 1 and 2 to 2-C2 are R/o Pakharsangvi, Taluka and District Latur.

2-C3. Sau. Anuradha w/o Nagesh Kore,
Age : 32 years, Occu: Household,
R/o: Koad, Taluka and District : Osmanabad.

2-D. Sau. Mahanandabai W.o Maharudra Bulbule,
Age : 52 years, Occu: Household.

2-E. Smt. Sukumar W.o Limbraj Bulbule,
Age : 47 years, Occu: Household.

The Respondents No.2-D to 2-E, both R/o Samangaon , Post, Chikudi Taluka and District Latur.

**...Respondents
(Original Defendants)**

...

Advocate for Appellant : Mr. B. R. Kedar h/f Mr. S. B. Talekar
Advocate for Respondent No.1 : Mrs. Madhaveshwari S. Mhase
Advocate for Respondent No.2 : Mr. Milind Patil

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CORAM : BHARAT P. DESHPANDE, J.
RESERVED ON : 27 JULY, 2022.
PRONOUNCED ON : 02 AUGUST, 2022.

JUDGMENT :

1. Original Plaintiff is challenging concurrent findings of both the Courts below in the present Second Appeal. On 30.11.2010, this appeal was admitted on the following questions of law;

“(i) When both the Courts have held that Shankar has sold 2 hectares 6 ares land to the Plaintiff and when the compromise decree on record shows that the Shankar has received half share i.e. 4 hectares 12 ares land then whether the Plaintiff can be non-suited only on the ground that Plaintiff could not prove that at the time of sale deed he was put in possession of the said land, more particularly, when there is no case of adverse possession by the Defendants ?

(ii) Whether the measurement is legal and proper ?”

2. In nutshell, Plaintiff filed a suit bearing RCS No. 12/1993 before the Civil Judge, Junior Division, Latur for possession and mesne profits against Defendants/Respondents herein. The prayer clauses in the suit read thus;

(1) That, a decree for possession of the land adm. 9R, from southern side of the suit land which is shown in blue colour in the map and 80R. which is shown in red colour in the map be passed and the Plaintiff be put in khas possession by evicting the Defendants.

(2) A decree for past mesne profits of Rs.5000/- be passed against the Defendants proportionately according to the portion encroached upon by them.

(3) A decree for future mesne profits be passed.

(4) That, the cost of the suit may be awarded to the Plaintiff.

(5) Any other relief to which the Plaintiff is entitled may kindly be granted.

3. Plaintiff's case is that he purchased a land ad-measuring 2H 6R (from Gat No. 14 of village Pakhar sangvi Tq. Latur) from Shankar s/o Sanpati Yelurkar on 08.05.1991. He was put in possession of the said land on the basis of an agreement dated 20.07.1990 executed between

him and Shankar with the boundaries as to the

East land of Bhagwat Baban;

West land of Defendant No.2;

South land purchased by the Defendant No.1 out of the land bearing block no.14 and

North land of Dnyanoba Bapurao Shingan (hereinafter called as suit land).

4. The Plaintiff carried out mutation entry in the survey records and started digging well in his land and at that time Defendants obstructed by claiming that said portion is belonging to Defendant No.1 which she purchased from the earlier owner Shankar and is in possession of it. Plaintiff submitted an application in the office of Tahasildar at Latur through his vendor for measurement. Thereafter Plaintiff found that the Defendant No.1 made encroachment over a portion admeasuring 93R from the southern side of his land. Subsequently the plaint was amended and thereafter it is a case of Plaintiff that Defendant No.1

encroached over the portion of land admeasuring 9R from the southern side, whereas Defendant No.2 encroached to the extent of 80R from the western side.

5. Both the Defendants contested the suit by filing separate written statement. Defendant No.2 – Nagorao, brother of Shanakar (predecessor in title of the Plaintiff) claimed that the allotment of land to Shankar as claimed in the plaint is incorrect. It is his contention that Shankar initially sold 1H to Balaji and thereafter 1H 5R to Meenabai (Defendant No.1) and only then remaining land available to the share of Shankar was sold to the Plaintiff, which was not having area of 2H 6R as claimed in the plaint. Therefore, it is specific case of Defendant No.2 that though sale deed executed in favour of Plaintiff shows an area of land of 2H 6R, actual possession was given to the Plaintiff of less area and not the area shown in the sale deed. Thus, it is the contention of Defendant No.2 that there was no encroachment. He further submitted that while orally partitioning the property between

him and Shankar, more area was allotted to him being less fertile and Shankar was allotted less land, which was more fertile. Therefore there was no equal division of land between Nagorao and Shankar as claimed in the deed of partition.

6. Defendant No.1 in her written statement reiterated the same aspects as claimed by Defendant No.2. She submitted that land allotted to the share of Shankar out of Gat No.14 on the eastern side was only 3H 48R and not 4H 6R as claimed by the Plaintiff. It is specific case of Defendant No.1 that what was sold to the Plaintiff by Shankar was only 1H 43R and not 2H 6R. It is her specific case that Shankar sold 1H portion out of Gat No.14 to Balaji and thereafter she purchased land admeasuring 1H 5R from Shankar, which is adjacent to the northern side of the portion of Balaji. Only thereafter Shankar executed sale deed in favour of the Plaintiff for remaining land of his share, which was in fact 1H 43R. However, the area in the sale deed is shown as 2H 6R. Plaintiff was put in possession only 1H 43R and not

the portion, which is recorded in the sale deed. Hence both the Defendants claimed that since the Plaintiff was put in possession of less land as shows in the sale deed, his contention regarding encroachment is incorrect.

7. The learned trial Court framed issues vide Exhibit 27 and thereafter Plaintiff as well as Defendants led evidence. Learned trial Court in the impugned judgment dated 21.01.2007 observed that Plaintiff failed to prove its case of possession of 2H 6R and there was no any encroachment by the Defendants. Accordingly the suit was dismissed.

8. Plaintiff challenged the said decision of the learned trial Court before the First Appellate Court however vide judgment dated 18.02.2009, appeal filed by the Plaintiff was dismissed.

9. Heard. Mr. Kedar, learned Counsel appearing for the Appellant,

Mrs. Mhase, learned Counsel for Respondent No.1 and Mr. Patil, learned Counsel for Respondent No.2 respectively at length. I have perused the entire record of the trial Court and the First Appellate Court and with the assistance of the learned Counsels, considered the material, which was placed before the trial Court by the respective parties.

10. First of all it is necessary to observe that there are concurrent findings against the Plaintiff and therefore it is necessary to find out whether Plaintiff is entitled for any relief on the substantial question of law framed and quoted above.

11. Learned Counsel for the Appellant/Plaintiff strenuously urged that both the Courts below failed to appreciate the fact and law as compromise decree between Shankar and Nagorao, both brother was acted upon, which proved that land admeasuring 8H 23R was partitioned amongst them equally. There was a suit filed for partition

bearing RCS No. 23/1987 in which compromise petition was filed and accordingly a decree was passed. The said decree is produced at Exhibit – 154. According to it, eastern side admeasuring 4H 11R was allotted to Shankar, whereas western side admeasuring 4H 11R was allotted to Nagorao. Accordingly mutation entries were effected on 26.06.1987 vide Exhibit – 104. Such compromise decree was never challenged. He then submitted that Shankar sold 1H land to Balaji, which is southern side of his portion. Later on Shankar sold 1H 5R land to Meenabai (Defendant No.1) in the year 1990. This portion is adjacent to a portion sold to Balaji. In the year, 1991, Shankar sold remaining land, out of his share admeasuring 2H 6R to the Plaintiff. Thus he claimed when the sale deed of the Plaintiff is admitted, it does not lie in the mouth of Defendants to dispute about the area mentioned in the sale deed. In this regard, he claimed that the documentary evidence must prevail over the oral admission of the vendor as tried to be projected by the Defendants.

12. Learned Counsel for the Plaintiff then claimed that when Plaintiff started digging well in the year 1992, Defendant No.1 objected claiming that such portion belongs to her. Accordingly, Plaintiff approached the office of Talathi for measurement of his land. A survey conducted in the year 1992 found that out of the suit property 93R was encroached by Defendant No.1 and 13R land was encroached by Defendant No.2.

13. Learned Counsel for the Plaintiff then submitted that after the dismissal of suit and during pendency of the appeal, the matter was remanded back for resurvey. After the land was resurveyed, it was found that area of 9R is encroached by Defendant No.1 and area of 80R is encroached by Defendant No.2 out of the suit land. He then submitted that as written statement of Defendant No.1 and 2 clearly admit about the sale deed executed in favour of the Plaintiff by Shankar, suit ought to have been decreed. He further submitted that defense raised in the written statement is contrary to the compromise

decree and therefore such defense cannot be looked into. In fact both the Defendants admit that Plaintiff was put in possession of the land as mentioned in the sale deed. He invited attention of this Court to the deposition of Plaintiff and Defendants' witnesses to buttress his argument. Finally he invited attention of this Court to the deposition of PW-5, a panchanama at Exhibit - 136 and the plan at Exhibit – 137 prepared by PW-5 being the Court Commissioner/Surveyor and claimed that it is clear from the said plan that Defendant No.1 and 2 encroached upon a suit land.

14. In the alternative, he claimed that if this Court comes to the conclusion that the report of Court Commissioner is having discrepancies and cannot be acted upon, this Court is empowered to remand the matter directing the trial Court to appoint fresh Surveyor to remeasure the land and to decide the dispute afresh as Plaintiff should not suffer due to the inconsistency committed by the Court Commissioner.

15. Learned Counsel appearing for Respondent No.2/Defendant No.2 forcefully submitted that main question which the Plaintiff was required to answer is whether he was put in possession of the land as mentioned in the sale deed. According to him, Plaintiff failed to answer such question. He submitted that prior to the compromise decree executed between Nagorao and Shankar, there was oral agreement between the parties during which more area was allotted to Nagorao than Shankar, as the land allotted in favour of Nagorao was less fertile as compare to the land allotted to Shankar. He submitted that the compromise decree was never acted upon. In the alternative he claimed that such compromise decree cannot be accepted in evidence as it was never registered as required under Section 17(1)(B) and in absence of it, is inadmissible in evidence. He invited attention of this Court to the deposition of vendor of the Plaintiff, who clearly admitted of earlier oral partition between him and Nagorao and allotment of more land in favour of Nagorao.

16. Learned Counsel for Defendant No.2 further submitted that the Court Commissioner examined as PW-5 by the Plaintiff nowhere mentioned in his report or plan that Balaji or Meenabai were holding excess land then the one purchased by them so as to consider aspect of encroachment into the suit land. Report and the plan show that the portion allotted to Meenabai is the same as disclosed in her sale deed, however out of that the Commissioner has shown a portion of 9R as encroached by her, which is contrary to her sale deed. The Court Commissioner has failed to adopt a procedure under the Act for carrying out the measurement. He failed to follow guidelines while measuring Gat No.14.

17. Learned Counsel then pointed out that the Plaintiff/Appellant filed Civil Application No. 10213/2022 in present proceedings, praying for resurvey of the land. However it was withdrawn unconditionally vide order dated 15.07.2022 and therefore now he cannot reiterate such ground. He then pointed out that points framed

by the First Appellate Court in the regular Appeal and more particularly point no. 1 and 2 together with findings against it, clearly disprove the case of Plaintiff.

18. Learned Counsel appearing for the Respondent No.1/Defendant No.1 forcefully submitted that in fact there is no substantial question of law involved in the present appeal and therefore appeal needs to be rejected on that ground itself. She submitted that first question of law, which is framed by this Court at the time of admission is having two parts and if bifurcated, both questions are purely questions of fact. She tried to submit that the first part is whether Plaintiff purchased 2H 6R land from Shankar and the second question would be whether Plaintiff was put in possession of said portion by Shankar. According to her, both these sub questions are purely question of facts and decided by the trial Court as well as First Appellate against the Plaintiff and therefore while considering second appeal, this Court should not reappreciate these questions of facts. She then submitted that question of raising a

plea of adverse possession was not at all necessary for the Defendants as it is specific case that they are in possession of the land, which they purchased prior to the sale deed executed by the Plaintiff and they are the title holders of such area. The Plaintiff is not having any right over the portions purchased by Defendant No.1 and therefore there was no question of raising plea of adverse possession.

19. Learned Counsel then submitted that in the plaint there are no pleadings that Plaintiff was put in possession of the area of 2H 6R land at the time of sale deed. In fact the Plaintiff claimed that he was put in possession of the land at the time of agreement of sale dated 20.07.1990, which is unregistered document and therefore cannot be looked into in evidence. She then submitted that it was for the Plaintiff to discharge this burden by proving that he was put in possession of the land as mentioned in his sale deed. This aspect is purely a question of fact and when Plaintiff failed to prove it before two Courts, the same cannot be agitated again before this Court.

20. Learned Counsel then submitted that initially the suit was filed with specific averments regarding encroachment by the Defendants. However, subsequently plaint was amended in the year 2007 by changing the area encroached by Defendant No.1 and 2. However depositions of Plaintiff and his witnesses were recorded much before plaint was amended. In fact deposition of the last witness of the Plaintiff i.e. PW-4 was recorded on 03.09.1997. After amendment was carried out to the plaint in the year 2007, neither Plaintiff, nor his witnesses were recalled to prove amended plea and therefore the suit and the contention raised therein are not at all proved.

21. Learned Counsel for the Plaintiff/Appellant placed reliance on the following decision;

(i) Vijay Shrawan Shende & Ors. Versus State of Maharashtra & Ors. Reported in 2009 (5) AIR Bom. C. R. 306.

(ii) Byram Pestonji Gariwala Versus Union Bank of India, reported in 1991 DGLS(SC) 720

(iii) Roop Kumar Versus Mohan Thedani reported in 2003 DGLS(Soft) 70; 2003(6) SCC 595.

22. Learned Counsel for Respondent No.1/ Defendant No.1 placed reliance on the following decisions;

(i) Bondar Singh and Others Versus Nihal Singh and Others, reported in (2003) 4 SCC 161.

(ii) The National Textile Corporation Ltd. Versus Nareshkumar Badrikumar Jagad and Others on 5th September, 2011.

(iii) Hardeep Kaur Versus Malkiat Kaur, reported in (2012) 4 SCC 344.

23. Learned Civil Court while deciding the suit, framed in all five issues and issue nos. 1, 2 and 3 are material, which put the burden on the Plaintiff to establish the case as set out in the plaint. Issue no.1 is whether Shankar and Nagorao equally partitioned Gat No. 14 amongst themselves. Issue no.2 is whether Plaintiff proved that he purchased from Shankar, land admeasuring 2H 6R out of Gat No. 14 and received possession of the same area. Issue no.3 is whether Plaintiff proved that Defendant No.1 encroached 9R, whereas Defendant No.2 encroached 80R land from the suit property. All above issues were answered in negative.

24. Plaintiff unsuccessfully challenged decision of the Civil Court before the First Appellate Court and while deciding the First Appeal, points of determinations were framed. The first point is whether Plaintiff has proved that the land sold to him by Shankar Yelurkar, was 2H 6R and he was put in possession of the said area at the time of the sale deed. The findings of the First Appellate Court to the above point is that though Plaintiff has proved that land admeasuring 2H 6R was sold to him by Shankar, however he failed to prove that he was actually put in possession of entire area mentioned in the sale deed.

25. Point no.2 framed by the First Appellate Court is whether Plaintiff has further proved that Defendants encroached over his land as alleged. Answer to this point no.2 is in negative.

26. Therefore both the Courts on facts and on appreciation of oral as well as documentary evidence, found that though, Plaintiff purchased land from Shankar, he was not put in possession of the entire area as mentioned in the sale deed but he was put in possession of less area as

Shankar was not having ownership of the area of 2H 6R at the time of executing sale deed in favour of the Plaintiff. It is also observed by both the Courts that during oral partition between Nagorao and Shankar, there was no equal distribution of the land as Nagorao got more land than Shankar, since his part was less fertile, which has been admitted by the witnesses.

27. The case thus, revolved around limited question as to whether the findings recorded by the Courts below holding that the Plaintiff has failed to prove an encroachment in his land, is legal and proper. Hence the law governing fact finding on the point of proof of fact and extent of encroachment is the subject matter together with the fact finding on the point of proof, whether the Plaintiff was actually put in possession of 2H 6R land at the time of executing sale deed.

28. If there are undisputed boundaries, encroachment can be a question or a matter of fact which can be seen by a person, where

encroachment was witnessed. In such case, fact of encroachment also could be matter of oral evidence, if the admitted boundaries are destroyable and have been destroyed in presence of the witness by the party making encroachment. However, in this matter it is clear from the evidence brought on record and admitted by the Plaintiff that at the time of executing sale deed in his favour by Shankar or even prior to it that is at the time of agreement of sale between him and Shankar, there was no measurement of land or putting of boundaries marks/stones therein, so as to confirm the area which Shankar proposed to sell to the Plaintiff by the agreement of sale. Thus, it clearly shows that the vendor/Shankar as well as Plaintiff presumed that the area which is mentioned in the sale deed executed in favour of Plaintiff is in fact admeasuring 2H 6R. Therefore it is not the case of destroying admitted boundaries for the purpose of encroaching the land of Plaintiff on the part of Defendants.

29. The proof of extent of encroachment is thus required to be

established by way of actual measurement by an expert. The extent of encroachment i.e. the area actually encroached is therefore not a matter to be adjudicated upon only by oral evidence of any number of witnesses, as it is not the case of Plaintiff that he saw the Defendants encroaching into his plot of land.

30. The witnesses i.e. the Expert/Surveyor, who may be the person, who have measured the land allegedly encroached, with reference to the public record in relation to the survey number or Gat Number of the respective parties, can certainly prove the fact of encroachment in terms of length, breadth and area of the land encroachment.

31. In the matter in hand, fact of encroachment by the Defendants was sought to be proved by the Plaintiff on the basis of reports of the Surveyor. Admittedly, there are two reports produced initially at the time of trial before the Civil Court. However both these reports were not accepted by the Court. During the First Appeal, it was observed by

the First Appellate Court that there is need to appoint Court Commissioner in order to find out whether there is encroachment in the suit property. Thus, after the Court Commissioner measured the land and prepared his report as well as plan, Plaintiff amended his plaint by showing exact area encroached by Defendant No.1 and Defendant No.2 respectively. Thus a case of the Plaintiff was sought to be proved on the basis of report of Court Commissioner, who was examined as PW-5 after remand.

32. The evidence of Court Commissioner clearly goes to show that he carried out such measurement without recording length and breadth as well as area of Gat No.14, the area divided between Shankar and Nagorao, area sold by Shankar in favour of Defendant No.1 and Balaji, which sale deed were prior to Plaintiff purchasing the said land. Thus, such Commissioner's report was not accepted by the First Appellate Court.

33. The questions therefore required to be answered in the present Second Appeal, are as disclosed earlier as substantial questions of law framed while admitting this appeal.

34. In these premises, considering the pleadings of the respective parties with the fact that sale deed by which Plaintiff purchased suit property from Shankar showing area of land of 2H 6R, whether Plaintiff succeeded in proving encroachment in the land possessed by him by the Defendants.

35. The Defendant No.1 and 2 though admitted that Plaintiff purchased land from Shankar, it is their specific case that at the time of such sale, Shankar was neither possessing, nor owner of land admeasuring 2H 6R. In this respect both the Defendants claimed that during partition between Shankar and Nagorao, more land was given to Nagorao, whereas less land was given to Shankar and therefore though a compromise decree shows that land was equally divided amongst

them, infact Shankar was possessing less land. In this respect, learned Counsel appearing for Respondent No.2 strongly contended that the compromise decree executed between Nagorao and Shankar was never acted upon. He invited attention of this Court to cross-examination of Plaintiff himself, who admits that there is a *bandh* existing in between property allotted to Shankar and that of Nagorao which runs from North to South. He also admits that there is *bandh* in between the property of Balaji and Meenabai. Such *bandh* is in existence since 1968, which runs from East to West. Plaintiff admitted that there is a well, wherein Meenabai fixed Electric Motor for fetching water.

36. Learned Counsel then pointed out that Plaintiff examined his own Vendor by name Shankar as PW-3 and his evidence clearly goes to show that the consent decree was not acted upon by the parties and in fact land allotted to Shankar was less as compared to land allotted to Nagorao. Shankar admitted during cross-examination that during life time of his father, there was partition between him and Nagorao, since

then there is *bandh* in between properties allotted to them, which exist till date. He admitted that such partition between him and Nagorao was oral and since then there is *bandh* running from South to North. He also admits that the land allotted to him is more fertile than the land allotted to Nagorao. Thereafter, he admits that out of Survey No. 6, Nagorao was allotted 2H 17R, whereas out of Survey No.7, 2H 58R was allotted to Nagorao. Then he admits that he received 1H 65R from Survey No.6 and 1H 83R from Survey No.7. He further admitted that in the year 1973, the District Measurement Officer surveyed the land in the village as per the possession of the respective parties. He then admitted that Plaintiff is in possession of 3 Acres 8 Gunthe. Shankar then specifically admitted that after selling land to Balaji and Meenabai out of his share, he was possessing only 3 Acres 23 Gunthe land. He admitted that in the sale deed executed in favour of the Plaintiff though there is mentioned that said land is bounded by the land of Balaji, it is incorrect. He further admitted that in the sale deed executed in favour of the Plaintiff, a reference regarding southern side

land belonging to Balaji is incorrect.

37. Another witnesses of the Plaintiff i.e. PW-4 by name Ganpati, who is a signatory to the sale deed in favour of Plaintiff also supported case of the Defendant on material particulars.

38. Learned Counsel for Defendant No.2 then submitted that Defendants stepped into the witness box and proved their contention specifically that the consent decree on which the Plaintiff is placing heavy reliance was never acted upon and Shankar was not in possession of 2H 6R land on the basis of such consent decree. In fact he received less land much prior to the consent decree.

39. Learned Counsel for Respondent No.2 submitted that such consent decree cannot be looked into in evidence as the same was never registered as required under the law for the purpose of effecting partition between the co-owners. There is substantial force in the submission of the learned Counsel for the Respondent on both counts.

40. Learned Counsel for the Appellant while placing reliance in the case of Byram Pestonji Gariwala (supra) forcefully submitted that the compromise decree executed between Nagorao and Shankar is squarely binding upon the parties and Defendants cannot be allowed to deviate from the contents of it, unless it is challenged on ground of fraud, misrepresentation, misunderstanding or mistake. He submitted that such consent decree is an effective estoppel between the parties. Such consent decree clearly shows that the total land was divided in two equal portions amongst Nagorao and Shankar.

41. As against this, learned Counsel for Respondent No.1 submitted that consent decree was on the basis of compromise deed between Nagorao and Shankar and by such deed property has been partitioned amongst them. Therefore, such document was required to be registered as per Section 17(1)(B) of the Registration Act, 1908. In absence of such registration, such document cannot be looked into in evidence as the proof of partition of equal share amongst Nagorao and Shankar.

42. No doubt, it is a fact that the compromise decree was drawn between Shankar and Nagorao, thereby dividing the property belonging to their father amongst them in equal share. However, there is substance in the submissions of learned Counsel for Defendant No.2 that such compromise decree executed on the basis of compromise deed between Shankar and Nagorao cannot be looked into in evidence in absence of registration as provided under Section 17(1)(B). Thus, a reliance placed on decision of the Apex Court in the case of Byram Pestonji Gariwala (*supra*) will not be helpful to the Plaintiff for simple reason that the compromise deed is not a registered document, as any partition amongst a co-heirs is compulsorily required to be registered and only then it could be looked into in evidence.

43. In the case of Vijay Shrawan Shende (*supra*), the facts were totally different and the question of law framed therein is to the effect that whether it is permissible for any Court to record finding about the encroachment in absence of fact as to the encroachment and extent

thereof being ascertained on the basis of authentic public record and with regard to authentic boundaries. While answering the said question, it was observed that the extent of encroachment cannot be proved in absence of public record and procedure emerging from Section 36 and Section 60 of the Evidence Act. Section 36 deals with relevancy of statements in maps, charts and plans, whereas Section 60 of Evidence Act deals with oral evidence must be direct. In this case, learned First Appellate Court appointed Court Commissioner and remanded matter to the trial Court for ascertaining, whether there is any encroachment in the suit plot. PW-5 was therefore examined before the trial Court on the basis of plan prepared by him. It is a matter of record with deposition of PW-5 is in fact supporting a contention raised by the Defendants. He clearly admitted that in his village office, there are maps, notes etc. of the land. He admitted that a plan prepared by him at Exhibit-137 does not show the area of Gat No.14. When his deposition was recorded, he failed to bring a plan available in his office of Gat No.14. He admitted that unless the area

mentioned in survey number and Gat number are found accurate, it is not possible to show encroachment. He then specifically admitted that while measuring Gat No.14, he found 1H 10R land area less. He tried to claim that such area is shown as Gat No.16. Thus, it clearly shows that even First Appellate Court remanded the matter and granted opportunity to the Plaintiff to establish his case of encroachment as alleged. However, such evidence is also rejected by both the Courts by giving reasons. Such material is based on facts.

44. Section 91 and 92 of the Evidence Act deals with evidence regarding written contracts and when oral evidence is permissible. In this respect, Section 92 (Proviso-1) of Evidence Act, provides that any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

45. Thus, oral evidence with regard to a written contract is permissible on the above eventualities. In the present matter, it is specific case of the Respondents that compromise decree executed between Nagorao and Shankar cannot be looked into for want of due execution or for want of acting upon. Such submission is borne out of the record and the evidence of the parties and therefore needs to be accepted.

46. The contention of the Plaintiff that he purchased land admeasuring 2H 6R vide the sale deed dated 09.05.1991 is proved by the document itself. However, fact remains that prior to execution of the sale deed, there was an agreement of sale, which is unregistered document dated 20.07.1990. The Plaintiff admitted that at the time of execution of sale deed dated 20.07.1990, he was put in possession of the said land. Admittedly, prior to execution of sale deed in favour of Plaintiff, Shankar sold two portions of the land belonging to him in favour of Balaji and Meenabai.

47. Thus, question remains as to whether Shankar was in actual possession and ownership of the land admeasuring 2H 6R so as to execute sale deed in favour of the Plaintiff. This aspect was answered by both the Courts below in negative. There are concurrent findings of fact which cannot be overruled while considering Second Appeal. Hence decision in Roop Kumar (supra) will not be helpful the Plaintiff.

48. Learned Counsel appearing for Respondent No.1 placed reliance on the decision of the Hon'ble Apex Court in the case of Hardeep Kaur (supra) and more specifically Paragraph No.12, wherein the Apex Court observed that as a matter of law, a Second Appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the Second Appeal.

49. Learned Counsel for the Respondent No.2 then raised another interesting aspect by saying that initially suit was filed with specific pleadings claiming that Defendant No.1 and 2 encroached certain portion on the suit land. Since the trial Court rejected the said suit, the matter was taken up in appeal, wherein First Appellate Court directed for appointment of Court Commissioner and remanded the matter to the trial Court. After the Court Commissioner submitted his report, Plaintiff amended the plaint and substituted its earlier pleadings thereby substantially changing the plea and more particularly the area allegedly encroached by the Defendant No.1 and 2. However, neither Plaintiff, nor his witnesses were recalled to prove the amended pleadings. Therefore, the evidence of the Plaintiff and his witnesses recorded prior to amendment of the plaint remain on record as it is, which is contrary to the amended plaint.

50. She therefore, submitted that the suit itself needs to be rejected on the ground of variance between pleadings and proof.

51. Be that as it may, the fact remains that learned First Appellate Court directed appointment of Court Commissioner and remanded matter to the trial Court. Accordingly the Court Commissioner was examined as PW-5, a deposition of this witness alongwith his report and the map clearly goes to show that he nowhere mentioned that there was any encroachment on the part of Defendant No.1 in the portion which was possessed by Plaintiff. In fact there are no measurement disclosed in the plan and the panchanama drawn while conducting inspection of the said land. He only marked the boundaries of Gat No.14, divided it equally in two parts and then marked the portion sold to Balaji, Meenabai and only thereafter he tried to show land purchased by the Plaintiff admeasuring 2H 6R.

52. First of all, the Commissioner failed to state that Defendant No.1 or 2 are in possession of excess land than the one purchased by them from Shankar. This was important for the purpose of measuring alleged encroachment by them into the portion of the Plaintiff, as they purchased respective portions much prior to Plaintiff.

53. Having said so, the findings of facts recorded by Courts below cannot be faulted with while answering first substantial question of law since admittedly Plaintiff never measured the land, which he was put in possession by Shankar either at the time of agreement of sale, execution of the sale deed or thereafter till file of the suit. Therefore, the evidence brought on record by Defendants and also from the cross-examination of the Plaintiff and his witnesses is more probable showing that the Plaintiff was never put in possession of the land mentioned in the sale deed as 2H 6R. In such circumstance, claiming encroachment by the Defendants is of no consequence as vendor of the Plaintiff by name Shankar had already sold two portions of land, which was in his possession to Balaji and Meenabai and they were in possession of it as owners. Consequently, the land allegedly encroached by Defendant No.1 and 2 is in fact owned and possessed by them as title holders. Thus, the aspect of remanding matter to the trial Court for fresh measurement will not arise at all. Accordingly question no.2 is answered against the Plaintiff.

54. In sum and substance, the Plaintiff/Appellant failed to establish his case and prove his possession. Thus, there was no occasion for the Defendants, who are actually owners of their respective portions on the basis of title documents to raise the plea of adverse possession.

55. The Second appeal therefore, deserves to be rejected. The substantial question of law no. 1 and 2 are answered against the Plaintiff. Hence, the following order.

ORDER

- (i) The Second Appeal stands rejected.
- (ii) Party shall bear their own costs.
- (iii) The Second Appeal and all Civil Applications, Contempt Petition therein, are disposed of accordingly.

[BHARAT P. DESHPANDE, J.]

Najeeb...