

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO. 495 OF 2002
AND
CIVIL APPLICATION NO. 13922 OF 2017 IN SA/495/2002;
CIVIL APPLICATION NO. 7511 OF 2002 IN SA/495/2002;
CIVIL APPLICATION NO. 11138 OF 2014 IN SA/495/2002**

- 1] Mohd. Kasim Wali Mohd.,
(deceased), through his legal representatives:

(Amended made as per order dated 13-1-2019)

- 1A. Zarinobano W/o Mohd. Kasim
Age 48 years, Occu. Household
Resident of Railway Station, Aurangabad
- 1B. Mohd. Afzal S/o Mohd. Kasim
Age 26 years, Occu. Business
Resident of Railway Station, Aurangabad
- 1C. Mohd. Imran S/o Mohd. Kasim
Age 23 years, Occu. Business
Resident of Railway Station, Aurangabad
2. Abdul Rauf S/o Wali Mohd.,
(Deceased), through his LRs.

(Amendment made as per order dated
25-07-2014)

- 2A. Ashiyan W/o Abdul Rauf,
Age 46 years, Occup. Household,
Resident of Railway Station, Aurangabad
- 2B. Mohd. Shakeel S/o. Abdul Rauf
Age 28 years, Occu. Household,
Resident of Railway Station, Aurangabad
- 2C. Mohd. Adil S/o Abdul Rauf
Age 24 years, Occup. Business,
Resident of Railway Station, Aurangabad
- 2D. Rumana Bano D/o Abdul Rauf
Alias Rumanbano W/o Ashfaq Noorni
Age 27 years, Occup. Household,
Resident of Iqbal Nagar, Ward No. 10, Buldhana

2E. Razwana Bano D/o Abdul Rauf,
Alias Rizwana W/o Mohd. Irfan Isani
Age 25 years, Occup. Housheold,
Resident of Gulmohar Colony, Sailu,
Dist. Parbhani

.. APPELLANTS

VERSUS

- 1] The State of Maharashtra,
Through Collector,
Aurangabad
- 2] Executive Engineer
Mah. Jeevan Pradhikaran,
(Urban & Rural),
Vedant Nagar, Near Railway Station
Watertank, Railway Station,
Aurangabad

(Amendment as per leave of Court
granted vide order dated 07-05-2014
in CA/380/2009)

- 3] Govt. College of Education,
Aurangabad through its Principal
- 4] Devgiri Mahavidyalaya,
Aurangabad through its Principal

.. RESPONDENTS
(Defendants)

...
Mr. V.J. Dixit, Sr. Advocate i/b. Mr. G.L. Deshpande, Advocate for appellant
Mr. N.T. Bhagat, AGP for respondents no. 1 and 3
Mr. R.S. Deshmukh, Sr. Advocate i/b. Mr. A.G. Vasmatkar, Advocate for
respondent no. 2
Mr. D.J. Chaudhari, Advocate for respondent no. 4
Mr. G.D. Jain, Advocate for the intervenor
...

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 06 APRIL 2022
PRONOUNCED ON : 19 APRIL 2022

JUDGMENT :

I have heard the arguments of the learned senior
advocates representing both the sides as also the other advocates.

2. The second appeal was admitted by the order dated 13-02-2017 on following substantial questions of law :-

- (i) Whether findings by the trial court, reversed by the appellate court, are sustainable on the touchstone of the guidelines given by the Apex Court in case of “Santosh Hazari V/s. Purushottam Tiwari died by LRs.” reported in 2001 (3) SCC 179 ?
- (ii) Whether it can be said that non observance of procedure under Order XLI, Rule 31 of the Civil Procedure Code, has caused prejudice to the parties ?
- (iii) Whether evidence on record adduced by the parties bears out nexus between grant under Exhibit-65 and CTS 18311 ?

3. The facts giving rise to such substantial questions can be summarised as under :-

(a) The appellants are the original plaintiffs who filed a suit for declaration of their title to the suit property described as CTS no. 18311 corresponding to municipal house no. 5-4-76/P of Osmanpura, Aurangabad and for consequential relief of injunction restraining the respondents who are the original defendants from obstructing their possession over the suit property.

(b) The appellants claimed that their father was the original owner of the suit property and was in its exclusive possession during his lifetime

till 1970. After demise they have been in its exclusive possession. They paid monthly taxes and their names were recorded in the municipal record.

(c) They averred that on account of their occupation, they migrated to Gujarat. The city survey was conducted in their absence in the year 1971. Though during that enquiry, the property was shown as owned by the respondent no. 4 - Education Society, it was recorded behind their back erroneously. They further averred that subsequently even the area of the suit property that was recorded in the city survey record was reduced from 33365 square meters to 21.618 square meters without assigning any reason, thereby carving out city survey no. 18311/1 and shown to be in possession of the respondent no. 4.

(d) They further averred that the respondent no. 4 was allotted only portion admeasuring 5 Acre 30 Guntha, by the order of the Collector in the year 1963 which was allotted City Survey no. 18314. There is no such similar order of allotment of City Survey no. 18311/1 in its favour. Taking advantage of their absence, the respondents are trying to encroach over the suit property hence they prayed for declaration of title and injunction.

(e) The respondents by their respective written statements denied title and possession of the appellants over the suit property. They asserted that the suit property was part and parcel of land which vested

in the State Government and was allotted to various government departments and the respondent no. 4 – Education Society.

(f) The trial court decreed the suit by holding that the suit property was granted by the *Nizam* by his order – Exhibit – 65 in the name of one Mohammed Kasim who subsequently sold it to the appellants' father under a sale deed. It also concluded that the respondents had failed to prove that the suit property was owned by the Government.

(g) By the judgment and order under challenge, in an appeal on behalf of the State, the district court has quashed and set aside the trial court's judgment and decree and dismissed the suit. Hence this appeal.

4. The learned senior advocate Mr. Dixit for the appellants would vehemently submit that the copy of grant issued by the *Nizam* was produced on the record along with its English translation. Even a copy of the sale deed under which the appellants' father purchased it was also produced on record. These documents were sufficient to uphold exclusive title of the appellants. The trial court had rightly considered such ancient documentary evidence while upholding the appellants' title. There was no perversity or arbitrariness much less any illegality. The district court has not squarely met the grounds and the reasoning given by the trial court.

5. Learned senior advocate Mr. Deshmukh, learned AGP and the learned advocates for the rest of the respondents would support the judgment and order of the district court under challenge. They would submit that since it was an issue regarding title, heavy burden was on the appellants to prove it, which they miserably failed to. The original documents under which they have been claiming title was never produced on the record, only its photocopies were produced. Even there was no affidavit of any person translating it from Urdu to English. The documents under which the appellants' father is stated to have purchased the suit property also is an unregistered document. No permission to lead secondary evidence was also obtained. These documents were not squarely proved. The trial court grossly erred in overlooking all these material defects which have been precisely pointed out by the district court and those are unassailable.

6. The learned advocates would further submit that there was absolutely no evidence led before the trial court to demonstrate in what manner the suit property can be identified as the property in respect of which the *Nizam's* grant and the subsequent sale deeds relate to. Even this aspect has been considered by the district court. Decision by the district court takes a plausible view and this court cannot upset it with a limited jurisdiction under section 100 of the Code of Civil Procedure.

7. Since the dispute pertains to the claim of the appellants seeking a declaration of their title to the suit property, it was highly imperative for them to have come out with the particulars and specific averments in the plaint as to the source of the title. That is why I have reproduced herein-above the averments in the plaint. There is absolutely no whisper as to the source of the title. It has been vaguely averred that appellants' father was the owner and after his demise they inherited the property. Pertinently, even in the testimonies of the appellants' witnesses one of whom was examined as PW1, the source of the title was not disclosed. It appears that no attempt was made by the appellants to disclose the source of their title till the time they closed their oral evidence.

8. In spite of such state-of-affairs, it appears that abruptly, photocopies of couple of documents in Urdu were produced on record along with their purported English translation. Even no affidavit of any translator was filed.

9. Apart from such state-of-affairs, though permission to lead secondary evidence may not be required and a party is entitled to make out grounds under section 65 of the Evidence Act entitling it to lead secondary evidence would suffice, in spite of the fact that the photocopies were being produced purportedly of a grant and a sale deed, absolutely no ground under section 65 of the Indian Evidence Act was even attempted to be established during the testimonies of the

appellant Mohammed Kasim (PW1) or the witness Gulam Khan (PW3). Therefore, though the district court was not legally correct in observing that permission to lead secondary evidence was not sought when it is not the requirement of law, as reiterated by the supreme court in the matter of **Dhanpat Versus Sheo Ram (Deceased) Through Legal Representatives and others; (2020) 16 Supreme Court Cases 209**, the fact remains that the grounds which entitle a party to lead secondary evidence under section 65 of the Evidence Act were not made out.

10. Resultantly, trial court could not have legally referred to and relied upon such photocopies of the documents which were not duly proved to be secondary evidence. The district court has rightly marked this illegality committed by the trial court in referring to and even relying upon the documents which were neither the originals nor they could have been admitted as secondary evidence and still one of them, the grant, was exhibited even though the other document purportedly a sale deed was not even treated by the trial court as duly proved and was not rightly not exhibited.

11. Apart from the above state-of-affairs, the document in Urdu which purports to be a copy of the sale deed in the name of the appellants' father is clearly a sale deed which has not been registered in spite of it being compulsorily registrable under section 17 of the Registration Act. This document has seen the light of the day after

coming into force of the Registration Act and the Transfer of Property Act and by virtue of section 17 of the former and section 54 of the latter, when it purports to transfer an immovable property for a consideration of Rs.1500/- executed on 02-08-1956, it was not admissible in evidence in view of the bar contained under section 49 of the Registration Act.

12. The trial court had committed gross illegality in ignoring this fact even when the dispute pertains to title and the appellants claim to have derived title under such an unregistered sale deed. Suffice for the purpose to observe that the practise of such transfer / covenants of immovable property on the basis of such documents which require by law to be registered but are not registered, has been deprecated by the supreme court in the matter of **Suraj Lamp and Industries Private Limited Vs. State of Haryana and another; (2012) 1 SCC 656**.

13. Consequently, the observations and the conclusions of the district court holding that both these documents; the initial grant and the subsequent sale deed were not the original, there was no proof regarding existence of grounds entitling the appellants to lead secondary evidence and still were erroneously relied upon by the trial court, deserve to be upheld.

14. As is pointed out by the district court, there is one more aspect in the matter. Even if these documents are taken at their face value, there is a serious dispute as to the identification of the suit

property and the property that was referred to in both these documents. Absolutely no evidence is led by the appellants about this aspect.

15. One cannot record conclusive findings for want of evidence that the property that was described in the grant and the sale deed, as a property out of 20 Acres that was given to the *Resaldar* in lieu of his services and subsequently transferred to his successor - Mohammed Kasim and out of which he sold to the appellants' father, a portion of 4 Acre 4 Gunthas portion from out of those 20 Acres portion, is the same i.e. the suit property. The district court has, therefore, rightly concluded that there is dearth of evidence to demonstrate that the suit property is nothing but the property out of the 20 Acres portion and that was subsequently transferred in the name of the appellants' father.

16. In view of such objective analysis undertaken by the district court in concluding that the trial court had not considered the evidence in the proper perspective, in the light of the above infirmities, in my considered view, it has rightly considered all the aspects of the matter in dispute and has rightly exercised the powers in the four corners of law as laid down by the supreme court in the case of **"Santosh Hazari V/s. Purushottam Tiwari died by LRs."; 2001 (3) SCC 179** and under Order XLI Rule 31 of the Code of Civil Procedure even while concluding that there was no evidence to establish any

nexus between the grant (Exhibit - 65) and the suit property CTS no. 18311.

17. Hence I answer the substantial question no. 1 in the affirmative and questions nos. 2 and 3 in the negative.

18. There is no merit in the second appeal. It is dismissed.

19. Pending civil applications stand disposed of.

[MANGESH S. PATIL]
JUDGE

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