

Varsha

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

SECOND APPEAL NO. 19 OF 1985

1. Hussaina Begum w/o Osman Khan, died
through his Lrs
- A) Osman Khan s/o Vazir Khan(Husband)died
R/o Kiradpura, Aurangabad.
- B) Abdulla Khan s/o Osman Khan(Son) as above
- C) Aman Khan s/o Osman Khan(Son)as above
- D) Habibunnisa Begum d/o Osman Khan(Daughter)as above
- E) Mahmood Khan s/o Osman Khan(son) died as above
- F) Yusuf Khan s/o Osman Khan(Son)as above
- G) Fatemabegum d/o Osman Khan(Daughter)as above
- H) Ausha Begum d/o Osman Khan (Daughter)as above... Appellants

Vs.

1. Ramchandra s/o Bala
2. Vithal s/o Bala
3. Mahboob Ali s/o Gulam Dastagir
(died) through legal heirs
- R3-A) Sayyed Kudrat Ali s/o Mahboob Ali
R/o Dak Bangala, Bhokardan, District Jalna.
- R3-B) Sayyed Mazhar Ali s/o Mahboob Ali, Died
through legal heirs
- 3-B-1) Kamroonnisa Begum w/o Sayyed Mazhar Ali
- 3-B-2) Nafeesa Begum d/o Sayyed Mazhar Ali
- 3-B-3) Mujahed s/o Sayyed Mazhar Ali
All R/o Near Bungalow, Tq: Bhokardan,
District Jalna.
- R3-C) Sayyed Vasim Ali s/o Mahboob Ali,
R/o Dak Bangala, Bhokardan, District Jalna.
- R3-D) Sayyed Ajmal ali s/o Mahboob Ali,
R/o Badod Bazar Zopadpatti,
Taluka Sillod, District Aurangabad.

R3-E) Safiya Begum w/o Shabhir

R/o as above.

R3-F) Ganushiya Begum w/o Shabbir,

R/o Dhanshi Badad Bazar,

Aurangbad.

R3-G) Sayyed Aref Ali s/o Mahboob Ali died

through legal heirs

3-G-i) Shanaz w/o Sayyed Aref Ali

3-G-ii) Ayesha d/o Sayyed Aref Ali

3-G-iii) Uzma d/o Sayyed Aref Ali

3-G-iv) Uzaif s/o Sayyed Aref Ali

3-G-v) Saniya d/o Sayyed Aref Ali

3-G-vi) Siddiqa d/o Sayyed Aref Ali

Respondent Nos. 3G ii) to 3G vi) under

guardianship of Respondent No. 3G i)

All R/o Sayyed Colony, Fardapur,

Tq: Soygaon, District Aurangabad. Respondents

Mrs C.S. Deshmukh and Ms. Pisolkar- Advocate for Appellants.

Mr. Suvidh S. Kulkarni – Advocate for Respondents.

CORAM: GAURI GODSE, J.

RESERVED ON : 9th FEBRUARY 2023

PRONOUNCED ON: 3rd MAY 2023

JUDGMENT:

BRIEF FACTS:

1. This Appeal is preferred by the heirs and legal representatives of the original Plaintiff for challenging the Judgment and Decree dated 29th September 1984 passed by the learned Joint Judge, Aurangabad in Regular Civil Appeal No. 66 of 1982. By the said Decree, the Suit is dismissed by setting aside the Judgment and Decree dated 30th April 1982, passed by the learned Civil Judge Junior Division, Sillod in Regular Civil Suit No. 6 of 1978. By the Judgment and

Decree passed by the Trial Court, the Suit was decreed, and Respondents/Defendants were directed to hand over possession of the suit property to the Appellants/Plaintiff. The First Appellate Court has reversed the Decree and dismissed the suit.

2. The Second Appeal was admitted on 2nd February 1985 by passing the following Order:

“ Miss Pisolkar for the Appellant. Admit as substantial question of law that arises is whether the Plaintiff had established her title on basis of sale deed dated 15-9-76 and was entitled to a decree for joint possession.”

3. The deceased Appellant had filed suit for possession of the suit property bearing Survey No. 46, admeasuring 1 Acre, 8 Gunthas out of 28 Acres 32 Gunthas situated at village Pangri (“suit property”). It was contended by the Plaintiff that she is the owner of the suit property in view of the registered sale deed dated 13th February 1967, executed by her father in her favour in respect of Survey No. 46 to the extent of 1 Acre 8 Gunthas, Survey No. 31 to the extent of 2 Acres 10 Gunthas and Survey No. 44 to the extent of 2 Acres 36 Gunthas (“said land”). She contended that in pursuance of the said sale deed executed in her favour, she was put in possession of the said land, and she continued to be in possession of the suit property till the date of her dispossession by the Defendants. She contended that by Mutation Entry No. 405, her name was entered in the revenue in respect of the said Survey Nos. 31 and 44, however, in respect of the suit property, her name was not entered though she was in possession of the same pursuant to the registered sale deed. Plaintiff further

contended that her father, Gulam Ahmed Ali expired on 15th September 1976. Thereafter she learnt that Defendants had got their names entered in respect of the suit property. It was the contention of Plaintiff that her brother, in collusion with the concerned village officer, had got the names of Defendants entered in the revenue record. Plaintiff thus contended that from the month of October and November 1976, the Defendants illegally occupied the suit property, hence, she filed the suit for possession.

4. Defendants Nos. 1 and 2 appeared in the suit and filed written statement, and denied the suit claim. Defendant Nos. 1 and 2 disputed that Plaintiff has purchased the suit property from her father. They also disputed that Plaintiff was anytime in possession of the same. By way of an additional written statement, Defendant Nos. 1 and 2 contended that Survey No. 46, admeasuring 23 Acres 30 Gunthas was in possession of Gulam Ahmed Ali, who was the owner of the said land. He had sold 5 Acres and 10 Gunthas on the southern side to Defendant Nos. 1 and 2 by executing a registered sale deed dated 23rd May 1969. Defendant Nos. 1 and 2 further contended that in the Civil litigation between Gulam Ahmed Ali and his real brother Gulam Dastagir, there was a compromise entered into and 5 Acres of land on the northern side from Survey No. 46 and 31 were given to one Bala Dhondiba. Defendant Nos. 1 and 2 further contended that there was partition effected between Gulam Ahmed Ali and his other brother and after deducting the said 5 acres as per the compromise, Gulam Ahmed Ali became the owner of the said land to the extent of 5 Acres 10 Gunthas from the northern side. It was further contended that the said Gulam Ahmed Ali sold said 5 Acres 10 Gunthas land to Defendant Nos. 1 and 2, and they were put in possession of the same. Defendant Nos. 1 and 2

further contended that sons and daughters of Gulam Ahmed Ali, brother Dastagir, Mehboob, Kutub, Asmatoli, Sultana, Hafizali had agreed to sell their own portion of land i.e. the middle portion of Survey No. 46 to the extent of 6 Acres, 3 Gunthas and they executed agreement in favour of Defendant No.1 and one Kachru Dagdu and thus were put in possession in furtherance of the said agreement. Defendant Nos. 1 and 2 thus claimed to be the owners of the suit property and disputed the ownership of the plaintiff and thus denied the suit claim.

TRIAL COURT PROCEEDINGS:

5. Learned Trial Court decreed the suit by holding that the Plaintiff was the owner of the suit land by virtue of the sale deed executed in her favour. The learned Trial Court accepted that Plaintiff was in possession of the suit property till October and November 1976 and that Defendant Nos. 1 and 2 were in illegal possession of the same. The Learned Trial Judge referred to the certified copy of the sale deed produced by Defendant Nos. 1 and 2 in respect of ownership of 5 Acres and 10 Gunthas, which they claimed to have purchased from Gulam Ahmed Ali. The learned Trial Judge further also referred to the correction Deed dated 16th June 1969 for correction of the area mentioned in the Sale Deed 23rd May 1969, placed on record by the Plaintiff. Thus, it was held that as per the correction deed out of Survey No. 46, only 3 Acres and 23 Gunthas were sold to Defendant Nos. 1 and 2. Thus, the learned Trial Judge has held that as per the sale deed executed by Gulam Ahmed Ali in favour of his daughter, it was clear that Plaintiff was the owner of the suit property. The learned Trial Judge, on the basis of evidence on record, held that Defendants Nos. 1 and 2 were unable to prove title over land admeasuring 5 Acres and 10 Gunthas of land as claimed

by them, and thus they were illegally in possession of the suit property. Thus, the learned Trial Judge decreed the suit, and Plaintiff was held entitled to recover the possession of the suit property from the Defendants.

FIRST APPEAL COURT PROCEEDINGS:

6. Being aggrieved by the decree passed by the learned Trial Court, Defendants Nos. 1 and 2 preferred the Appeal. Learned First Appellate Court disbelieved the case of the Plaintiff that she became the owner of the suit property pursuant to the sale deed executed by her father. The First Appellate Court held that the sale deed did not provide any boundaries with respect to the portion of said survey number sold to Plaintiff. Learned Judge noted that even the plaint did not provide any description of the suit property. The First Appellate Court, on examining the evidence on record, has held that Plaintiff was unable to prove that the consideration amount was paid pursuant to the sale deed in her favour. The learned Judge also noted that the name of the Plaintiff was never mutated in the revenue record as the owner of the suit property. The learned Judge further referred to the contents of the sale deed and noted that at the most it can be said that as per the sale deed, one-fourth portion of the share belonging to Gulam Ahmed Ali, equivalent to 1 Acre 8 Gunthas was sold to the Plaintiff.

7. Thus, it was held that reference in the Sale Deed that part of the one-fourth share was sold, shows that a specific portion was not sold to Plaintiff. Thus, the learned First Appellate Court did not accept the title of the Plaintiff to the suit property. The learned Judge has held that there was no real intention to transfer any title to the Plaintiff. The learned Judge held that the Plaintiff even failed to

show boundaries of the portion purchased by her and that she was in possession of the same. The learned Judge, thus, held that out of the entire Survey No. 46, admeasuring 23 Acres and some gunthas, a decree for 1 Acre and 8 Gunthas without any specific boundaries would be a vague decree and not executable. Thus, for want of description of the suit property, the First Appellate Court reversed the Decree passed by the Trial Court and dismissed the suit. Hence, the heirs and legal representatives of Plaintiff preferred the Second Appeal.

SUBMISSIONS ON BEHALF OF APPELLANTS:

8. The learned counsel for the Appellants submitted that; the father of the Plaintiff was the joint owner and in possession along with his brother with respect to Survey Nos. 31, 44 and 46. By executing a registered sale deed, Plaintiff's father sold the suit property to Plaintiff. After the death of the father of Plaintiff sometime in the year 1976, Defendant Nos. 1 and 2 dispossessed Plaintiff. Therefore, the suit was filed on the ground of title. Defendant No. 3 was the stepbrother of Plaintiff, and the suit proceeded ex-parte against him.

9. In the document of sale deed in favour of the Plaintiff, Survey No. 46 is shown admeasuring 23 Acres and 32 Gunthas, and from this area, 5 Acres were shown to have already been alienated. The sale deed further stated that out of the remaining 18 Acres, 32 Gunthas, one-fourth share belonged to Gulam Ahmed Ali i.e. 4 acres and 28 Gunthas. From this area, 1 Acre and 8 Gunthas were sold to Plaintiff. The document of sale deed specifically records that the sale deed was executed for the consideration of Rs. 1,500/- and possession was handed over to the Plaintiff as owner. The sale deed also

contains a receipt clause recording that the consideration amount was paid.

10. As per the sale deed in favour of Defendant Nos. 1 and 2, Survey No. 46 was shown admeasuring 23 Acres 32 Gunthas, and from this area, 5 Acres 10 Gunthas on the northern side was shown to have sold to Defendant Nos. 1 and 2. The area mentioned in the sale deed was on an ad-hoc basis, and the actual area was required to be verified as per the boundaries mentioned in the sale deed. Thus, after actual measurement on the site, only 3 Acres and 20 Gunthas were found as per the boundaries mentioned in the sale deed. Thus, by correction deed, the area sold to Defendant Nos. 1 and 2 was corrected as 3 Acres and 20 Gunthas.

11. As per the correction deed, 3 Acres 20 Gunthas was sold to Defendant Nos. 1 and 2. As per the Sale Deed of Plaintiff, 1 Acre 8 Gunthas is sold to Plaintiff. Therefore, total area comes to 4 Acres, 28 Gunthas. The sale deed shows that the northern side of 5 Acres 10 Gunthas was sold to Defendant Nos. 1 and 2 by specifying boundaries. The description of the suit property can, therefore, be very well ascertained on the basis of the boundaries shown in the sale deed in favour of Defendant Nos. 1 and 2. Once the area sold to Defendant Nos. 1 and 2 is demarcated as per the boundaries mentioned in their sale deed, the remaining area to the southern side would be the area that was sold to Plaintiff.

12. Thus, in view of said evidence on record, the First Appellate Court ought not to have dismissed the suit of the Appellant for want of boundaries and identification of suit property. The area sold to Defendant Nos. 1 and 2 is identifiable on the basis of evidence on record. The registered sale deed executed in favour of Plaintiff was unchallenged. The sale deed also contains a

receipt clause recording that the consideration amount was paid. Therefore, the findings recorded by the First Appellate Court for not accepting the title of the Plaintiff over the suit property were erroneous. Trial Court had rightly held that the Plaintiff had proved her title over the suit property on the basis of the sale deed executed in her favour. Once the sale deed itself records the receipt of the consideration amount, the finding recorded by the First Appellate Court that the sale deed was not for any consideration amount paid was without any supporting evidence, and thus, the said finding was baseless and erroneous.

13. The Plaintiff being the owner of the suit property, is entitled to possession of the same. In view of the documents and evidence on record, it is possible to identify the suit property. The First Appellate Court erred in reversing the decree passed by the Trial Court on the ground that the suit property was not an identifiable property.

14. Learned counsel for the Appellant submitted that during the pendency of the First Appeal, an application at Exhibit 28 was filed on behalf of the Plaintiff seeking leave to amend the prayer clause of the plaint to add a prayer for partition. The said application was rejected. It was submitted that rejection of the said application is challenged in the present Second Appeal by raising a ground of objection in the appeal memo. It was submitted that there cannot be any dispute that the right, title and interest of Gulam Ahmed Ali in the suit property stood transferred to the Plaintiff in view of the registered Sale Deed. She, therefore, submitted that in the peculiar facts and circumstances of the case, the prayer for partition and separate possession of the Plaintiff be considered by allowing the said application for amendment.

15. It was further submitted that in any event, there cannot be any dispute that the undivided share of Gulam Ali in respect of the suit property out of his one-fourth share stood transferred to Plaintiff. Thus, the substantial question of law framed be answered in favour of the Appellants, and they be held owners of the suit property pursuant to the registered Sale Deed in favour of the Plaintiff, and they be held entitled to joint possession of the suit property. Thus, the Second Appeal be allowed to the extent of granting a decree for ownership and joint possession of the suit property.

SUBMISSIONS ON BEHALF OF RESPONDENTS:

16. The Respondents, though served, were not represented by any Advocate. The second Appeal was partly heard on 17th January 2023 and was listed on 31st January 2023. The second Appeal was adjourned to 2nd February 2023. However, it was not listed on the board. Hence, the Second Appeal was taken on the production board. None appeared for Respondent. The second Appeal was adjourned to 9th February 2023 at 2:30 p.m., and the learned counsel for the Appellants had agreed to inform the learned Advocate for the Respondents with respect to the next date of hearing. On 9th February 2023, the learned counsel for the Appellants placed on record a copy of the email by which she had informed the learned Advocate for the Respondents about listing the Appeal. However, the learned Advocate for the Respondents replied the e-mail and informed that he has given no objection to the Respondents as he is not attending the matter as he has shifted to Supreme Court. Thus, none appeared on behalf of the Respondents. Hearing of the Second Appeal was concluded on 9th February 2023, and it was closed for Order.

CONSIDERATION OF SUBMISSIONS AND FINDINGS:

17. I have considered the submissions made on behalf of the Appellants. I have perused the record of the Second Appeal. A perusal of the registered Sale Deed in favour of Plaintiff contains a receipt clause regarding payment of consideration amount. I do not see any reason to disbelieve that, as per the contents of the Sale Deed consideration amount was paid. The learned counsel for the Appellants has rightly relied upon the decision of this Court in the case of *Shivdas Loknathsing and Ors v Gayabai Shankar Surwase*¹ to support her submission that there is a presumption of the entry made under Section 58(1)(c) of the Registration Act because of the provision of Section 60(2). For want of description of the area sold to the Plaintiff, the Sale Deed cannot be discarded. Gulam Ahmed Ali, during his lifetime, never disputed the Sale Deed in favour of the Plaintiff. Thus, pursuant to the sale deed in favour of Plaintiff, she became the owner of 1 Acre, and 8 Gunthas out of 4 Acres and 28 Gunthas being one-fourth share of Gulam Ahmed Ali. Thus, the findings recorded by the first appellate Court not accepting the title of the Plaintiffs is erroneous.

18. So far as ownership of Defendants is concerned, as per the sale deed and correction deed in their favour, they are owners of the remaining 3 acres and 20 gunthas out of said one-fourth share of Gulam Ahmed Ali. Sale Deed in favour of Defendant Nos. 1 and 2 shows that the northern side of the Survey No. 46 was sold to Defendant Nos. 1 and 2 as per the boundaries mentioned in the sale deed.

19. The sale deed in favour of Respondent Nos. 1 and 2 specifically provided

¹ 1993(2)Mh.L.J. 1623

the boundaries of the land sold to them. A perusal of the sale deed in favour of Defendant Nos. 1 and 2 shows that 5 Acres 10 Gunthas of the northern side out of 23 Acres 32 Gunthas of Survey No. 46 was sold to Defendant Nos. 1 and 2 as per boundaries given in the sale deed subject to actual measurement on the site. On carrying out actual measurements as per the described boundaries in the sale deed, the area on the site was 3 Acres, 20 Gunthas. Thus, the Correction Deed was executed. As per the sale deed and the correction deed, 3 Acres and 20 Gunthas of land was sold to Defendant Nos. 1 and 2. The correction deed was not produced on record by Defendant Nos. 1 and 2, and they relied only on the original sale deed. However, the correction deed was produced on record by the Appellant, and the same was admitted in evidence. It is not in dispute that the correction deed was executed in favour of Defendant Nos. 1 and 2.

20. The learned counsel for the Appellants is right in making the following submissions; The sale deed in favour of Plaintiff records that Survey No. 46 was admeasuring a total area of 23 Acres, 32 Gunthas, from the said area, 5 Acres were already alienated. It further records that the remaining area is 18 Acres and 32 Gunthas. In the said remaining area, Gulam Ahmed Ali had one-fourth share, which comes to 4 Acres 28 Gunthas. From this area of 4 Acres, 28 Gunthas, 1 Acre, and 8 Gunthas was sold to the Plaintiff. As per the sale deed and the correction deed, 3 Acres and 20 Gunthas of land was sold to Defendant Nos. 1 and 2. Thus, the area sold to Plaintiff as well as the area sold to Defendant Nos. 1 and 2, makes a total of 4 Acres and 28 Gunthas, which was the one-fourth share of Gulam Ahmed Ali in the remaining area of 18 Acres and 32 Gunthas out of total 23 Acres and 32 Gunthas of Survey No. 46.

21. I have perused the documents and evidence on record. There is nothing on record to show which part of 5 Acres out of the total area of Survey No. 46 was already alienated and to whom, as stated in the Sale Deed of the Plaintiff. Similarly, there is nothing on record to show that in what manner Gulam Ali's one-fourth share was demarcated and divided. Thus, though in the Sale Deed of Defendant Nos. 1 and 2 description of the area sold to them is mentioned, there is nothing on record to show the division and demarcation of the undivided share of Gulam Ahmed Ali. Thus it cannot be said that Defendant Nos. 1 and 2 are entitled to exclusive physical possession of the said area sold to them. A perusal of the evidence on record does not show any supporting evidence that Defendant Nos.1 and 2 were put in exclusive physical possession of the area sold to them. Thus, on the basis of documents and evidence on record, at the highest, it can be said that the right, title, and interest of Gulam Ahmed Ali in his one-fourth share, i.e., 4 Acres and 28 Gunthas in the area of 18 Acres and 32 Gunthas out of a total of 23 Acres and 32 Gunthas of Survey No. 46 stood transferred to Plaintiff and Defendant Nos. 1 and 2 respectively.

22. There is no supporting evidence to show that the one-fourth share of Gulam Ali in Survey No. 46 was divided and demarcated. Thus, the submission on behalf of the Appellants to permit amendment of the prayer clause of the plaint to add a prayer for partition cannot be considered in the absence of other co-sharers of Survey No. 46. The said prayer was rightly rejected by the first appellate Court.

23. The suit is dismissed on the ground that the suit property is not identifiable for want of boundaries. The title of the Plaintiff over the suit property is also not accepted by the first appellate Court. In my view, the first Appellate Court being

the last fact-finding Court, ought to have properly appreciated the aforesaid admitted facts and evidence and recorded findings regarding the area sold to Plaintiff and the area sold to Defendant Nos. 1 and 2. Now the question to be decided is whether any relief can be granted to the Plaintiff as per the prayers made in the suit. The suit is for possession of the suit property based on the title of the Plaintiff. I have already held that the Plaintiff has proved her ownership over the suit property in view of the registered Sale Deed in her favour. However, there is no evidence to show that Plaintiff is the owner of any exclusive area divided and demarcated as per the Sale Deed. For the reasons recorded above, I have held that Plaintiff and Defendant Nos. 1 and 2 have stepped into the shoes of Gulam Ahmed Ali-the original owner, in respect of his undivided one-fourth share of 4 Acres and 28 Gunthas in the area of 18 Acres and 32 Gunthas out of a total of 23 Acres and 32 Gunthas of Survey No. 46. Thus, the Plaintiff is not entitled to any relief of exclusive possession of the suit property as prayed.

24. So far as Plaintiff's entitlement for a decree for joint possession is concerned, the learned counsel for the Appellants has submitted that in the peculiar facts of the case, this Court should exercise powers under Order VII Rule 7 of the Code of Civil Procedure 1908 ("CPC") and adjust the rights of the parties by granting a decree for joint possession. She, thus, submitted that the question of law framed in the Second Appeal be answered in favour of the Appellants, and a Decree for joint possession be granted. In support of this submission, she relied upon the decision of this Court in the case of *Shingounda Shidgounda v Ganesh Yeshwant and Others*², a decision of

² AIR 1956 Bombay 243

Allahabad High Court in the case of *Pandohi Ahir Vs Faruq Khan*³, a decision of Rajasthan High Court in the case of *Furkan Vs Mst Mumtaz Baga*⁴ and a decision of Allahabad High Court in the case of *Hanuman Prasad Narain Singh Vs Mathura Prasad Narain Singh*⁵.

25. Second Appeal is admitted on the substantial question law whether the Plaintiff had established her title on the basis of the sale deed and was entitled to a decree for joint possession. Thus, for the reasons recorded above, I am of the opinion that Plaintiff has established her title on the basis of the sale deed in her favour. Hence, the first part of the question of law framed in the Second Appeal is answered in favour of the Plaintiff/Appellants that they have established their title over the suit property on the basis of Sale Deed executed in favour of the Plaintiff.

26. The Suit is filed for a decree ordering to put the Plaintiff in possession of the suit property Survey No. 46, admeasuring 1 Acre, 8 Gunthas out of 28 Acres 32 Gunthas situated at village Pangri. In view of the aforesaid respective Sale Deeds, Plaintiff and Defendant Nos. 1 and 2 have established their respective title in respect of the undivided one-fourth share of 4 Acres and 28 Gunthas in the area of 18 Acres and 32 Gunthas out of a total of 23 Acres and 32 Gunthas of Survey No. 46. In the absence of any evidence on the division and separate possession of Gulam Ahmed Ali, and in absence of other co-sharers it is not possible to grant any decree for joint possession in favour of the Plaintiff. Thus, the decisions relied upon by the learned counsel for the Appellants are of no assistance to the Appellants. Hence, the second part of the question of law

3 AIR 1954 Allahabad 191

4 AIR 1971 Rajasthan 149

5 1928 SCC Online All 88

framed in the Second Appeal cannot be answered in favour of the Appellants. The Appellants are not entitled to any decree for joint possession. However, the Appellants will be at liberty to file a suit for partition and separate possession as permissible in law.

27. Second Appeal is dismissed. There will be no order as to costs.

[GAURI GODSE, J.]