

Varsha

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD  
SECOND APPEAL NO. 20 OF 1985**

Hussaina Begum w/o Osman Khan died his Lrs

1. Osman Khan s/o Vazir Khan(Husband)  
R/o Kiradpura, Aurangabad.
  2. Abdulla Khan s/o Osman Khan(Son)  
R/o As above
  3. Aman Khan s/o Osman Khan(Son)  
R/o As above
  4. Habibunnisa Begum d/o Osman Khan(Daughter)  
w/o Abdul Salam Shaikh, as above.
  5. Mehmood Khan s/o Osman Khan(Son)died  
through legal heirs
    - 5-A. Anisabegum w/o Mehood Khan,  
R/o Kiradpura, Aurangabad.
    - 5-B. Izag Khan Mehmood Khan.
    - 5-C. Hamid Khan Mehmood Khan
    - 5-D. Aslum Khan Mehmood Khan
 E-2 to E-4 under guardianship of  
their mother, Anisabegum Mehmood
  6. Yusuf Khan s/o Osman Khan (Son)  
R/o as above.
  7. Fatemabegum d/o Osman Khan(Daughter)  
R/o as above.
  8. Ausha Begum d/o Osman Khan(Daughter)  
R/o as above.
- ... Appellants

Vs.

1. Moiz Ahmed s/o Gulam Ahmed  
(died) through legal heirs

- R1-A) Ahmedi Begum w/o Sifakar Khan  
R/o Baijipura, Infront of Nurani Masjid,  
Aurangabad, Tq and Dist: Aurangabad.
2. Ekbal Ahmed s/o Nawab Asad Ali
3. Mumtaz Begum w/o Ekbal Ahmed
4. Hariba Kishan Misal
5. Shankar Kishan Misal, died  
Through Lrs
- 5-A) Sarubai Shankar Misal
- 5-B) Krushna Shankar Misal
- 5-C) Bhagwan Shankar Misal
- 5-D) Nana Shankar Misal  
All R/o Pangari, Tq. Sillod,  
District: Aurangabad.
6. Deorao s/o Kisan Misal, Died  
Through Lrs  
6-A. Dadarao Deorao Misal  
R/o. Pangari, Tq Sillod,  
District: Aurangabad.
7. Bhaurao s/o Hariba .... Respondents

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

Mr. Suvidh S. Kulkarni – Advocate for the Respondents.

**CORAM : GAURI GODSE, J.**

**RESERVED ON : 16<sup>th</sup> FEBRUARY 2023**

**PRONOUNCED ON : 3<sup>rd</sup> 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 29<sup>th</sup> September 1984 passed by Joint Judge, Aurangabad in Regular Civil Appeal No. 39 of

1982. By the said Decree, the Suit is dismissed by setting aside the Judgment and Decree dated 26<sup>th</sup> February 1982, passed by the learned Civil Judge Junior Division, Sillod in Regular Civil Suit No. 5 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 20<sup>th</sup> February 1985 by passing the following Order:

*“Miss Pisolkar for Appellant. Admit as the substantial question of law that arises is whether the Plaintiff established her title to the suit land and was entitled to a decree for joint possession.”*

3. The deceased Appellant had filed suit for possession of the suit property being Survey No. 31, admeasuring 2 Acres 10 Gunthas out of 36 Acres 7 Gunthas and Survey No. 44, admeasuring 2 Acres 36 Gunthas out of 23 Acres 17 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 13<sup>th</sup> 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 and her name was entered in the consolidation scheme in respect of the suit property. Plaintiff further contended that her father, Gulam Ahmed Ali expired on 15<sup>th</sup> 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. 2 to 7 appeared in the suit and filed written statement, and denied the suit claim. The said Defendants claimed to have purchased the suit property. Defendants claimed that Defendant No.7, along with Defendant No.5, had purchased 4 Acres from Survey No. 44 by registered sale deed dated 18<sup>th</sup> July 1974 from the father of Plaintiff. Defendants, therefore, denied the suit claim on the basis that they had purchased the suit property. Defendants disputed the sale deed in favour of the Plaintiff. They contended that Defendant Nos. 4 to 6 are real brothers, and previously they were joint tenants of Survey No. 44 to the extent of 11 Acres 19 Gunthas, and they were in possession of the same. It was further contended that one Ramlal Motilal was also the tenant of Defendant Nos. 1 to 3. The said Defendants, thus, disputed that Plaintiff was anytime in possession of the suit property and further contended that the said tenants were in possession of the same. The said Defendants also contended that Survey No. 31 was in possession of one Rama Khandu and Punja Senphadu as tenants of deceased Gulam Ahmed Ali. Thus, the Plaintiff was not concerned with the suit property, and she was never in possession of the same.

**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 Defendants were in illegal possession of the same. The Learned Trial Judge relied upon the sale deed in favour of the Plaintiff, and the revenue record in the name of Plaintiff produced on record by the Plaintiff. Thus, it was 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 were unable to prove title over the suit property and, thus, they were illegally in possession of the same. 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 to 3 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 numbers 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 further referred to the contents of the sale deed and noted that, at the most, as per the sale deed, the portion of the suit property in the one-fourth share belonging to Gulam Ahmed Ali was sold to Plaintiff.

7. Thus, it was held that the reference in the Sale Deed that part of the one-fourth share was sold to Plaintiff 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 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 land, a decree for part of the land 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, Defendants dispossessed Plaintiff. Therefore, the suit was filed on the ground of title.

9. In the document of sale deed in favour of the Plaintiff, it is stated that one-

fourth share belonged to Gulam Ahmed Ali. 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 payment receipt clause recording that the consideration amount was paid. Plaintiff had produced an extract of the entry in the consolidation scheme in the name of Plaintiff with respect to the suit property at Exhibits 38 and 39. In her oral evidence, Plaintiff had mentioned the description of the suit property.

10. Thus, considering the 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 registered sale deed executed in favour of Plaintiff and entries in the consolidation scheme in the name of Plaintiff were 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.

11. The Defendants had not produced any evidence in support of their claim of title to the suit property. Pleadings of the Defendants showed that they were not in possession of the suit property, and the suit property was in possession of

some tenants. 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.

12. Learned counsel for the Appellant submitted that during the pendency of the First Appeal, an application at Exhibit 34 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 Ahmed 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:**

13. The learned counsel for the Respondents submitted that the title with respect to the suit property never passed on to the Plaintiff from her father. He submitted that perusal of the oral evidence of Plaintiff would show that Plaintiff herself had admitted that she was not put in possession of the suit property. Learned counsel submitted that the Plaintiff had never paid the consideration

amount pursuant to the sale deed, and therefore there is no valid transfer of the suit property in her favour. He submitted that the boundaries were not described in the sale deed, and hence for want of a proper description of the property and for want of payment of consideration, no right, title or interest was transferred in favour of the Plaintiff. Learned counsel for the Respondents supported the Judgment passed by the First Appellate Court and submitted that the First Appellate Court has rightly held that there was nothing produced on record to show that the consideration amount was paid pursuant to the sale deed executed in favour of the Plaintiff. Learned counsel further submitted that even if the Plaintiff is held to be the owner of the suit property, no relief can be granted in her favour for want of description of the suit property. Plaintiff has failed to establish title over the suit property. Plaintiff did not describe any boundaries to the suit property, and no particulars were pleaded as required under the provision of subsection 3 of section 7 of the Civil Procedure Code, 1908 ("CPC"). He, therefore, submitted that no decree could be passed in favour of the Appellants.

14. In response to the submissions made on behalf of the Respondents, the learned counsel for the Appellants submitted that there was a presumption in favour of the Plaintiff in view of the registered sale deed executed in her favour. The execution of the sale deed of the Plaintiff was never under-challenge. The learned counsel, in support of her submissions, relied upon the decision of this Court in the case of *Shivdas Loknathsing and others v Gayabai Shankar Surwase*<sup>1</sup>.

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<sup>1</sup> 1993(2)Mh.L.J.16231

**CONSIDERATION OF SUBMISSIONS AND FINDINGS:**

15. I have considered the submissions made on behalf of both parties. 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 Others*** 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 the suit property out of the one-fourth share of Gulam Ahmed Ali. The revenue entries and the entries in the consolidation scheme in the name of Plaintiff support the case of Plaintiff that Gulam Ahmed Ali's right, title interest in the suit property, stood transferred in her favour. Thus, the findings recorded by the first appellate Court not accepting the title of the Plaintiffs are erroneous. So far as ownership and possession of Defendants is concerned, they have not produced any supporting evidence. The Defendants have pleaded that some tenants are in possession of the suit property. They have not produced on record any document of title in their favour.

16. I have perused the documents and evidence on record. There is nothing on record to show in what manner Gulam Ahmed Ali's one-fourth share was

demarcated and divided. 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 with respect to the suit property in his one-fourth share stood transferred to Plaintiff. There is no supporting evidence to show that the one-fourth share of Gulam Ahmed Ali 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. The said prayer was rightly rejected by the first appellate Court.

17. 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 facts and evidence and recorded findings regarding the area sold to Plaintiff. 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 an area divided and demarcated as per the Sale Deed. For the reasons recorded above, it is clear that the Plaintiff has stepped into the shoes of Gulam Ahmed Ali-the original owner, in respect of suit property in his undivided one-fourth share. However, Plaintiff is not entitled to any relief of exclusive possession of the suit property as prayed.

18. 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 Vs. Ganesh Yeshwant and Others*<sup>2</sup>, a decision of Allahabad High Court in the case of *Pandohi Ahir Vs Faruq Khan*<sup>3</sup>, a decision of Rajasthan High Court in the case of *Furkan Vs Mst Mumtaz Bega*<sup>4</sup> and a decision of Allahabad High Court in the case of *Hanuman Prasad Narain Singh Vs Mathura Prasad Narain Singh*<sup>5</sup>.

19. 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, 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 the Sale Deed executed in favour of the Plaintiff.

20. The Suit is filed for a decree ordering to put the Plaintiff in possession of the suit property. In view of the reasons recorded above, Plaintiff has

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<sup>2</sup> AIR 1956 BOMBAY 243

<sup>3</sup> AIR 1954 ALLAHABAD 191

<sup>4</sup> AIR 1971 RAJASTHAN 149

<sup>5</sup> 1928 SCC Online All 88

established her title in respect of the suit property in the undivided one-fourth share of Gulam Ahmed Ali. In the absence of any evidence on the division and separate possession of Gulam Ahmed Ali, and in the absence of other co-sharers, it is not possible to grant any decree for joint possession in favour of 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 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.

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

[ GAURI GODSE, J.]