

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.428 OF 1993
WITH
CIVIL APPLICATION NO.2108 OF 1995
IN SA/428/1993
WITH
CIVIL APPLICATION NO.4127 OF 1993
IN SA/428/1993**

Suppa Miyan s/o Abdul Miyan,
Deshmukh died through his
L.Rs.

- (A) Halimabi w/o Suppamiyan,
Age 75 years, Occup. Agriculture,
R/o Golegaon, Tq. Sillod,
Dist. Aurangabad. (Died. Thr. L.Rs.B to F)
- (B) Durrabi w/o Nawajmiyan,
Age 55 years, Occup. And
R/o as above. (Died. Thr.L.Rs.)
- (B1) Nawaj Miyan Latif Miyan,
Age 70 years, Occup. Agri.,
R/o Golegaon, Tq. Sillod
Dist. Aurangabad.
- (B2) Sultanabi w/o Mustafa Miyan,
Age 40 years, Occup.Agri.,
R/o as above.
- (B3) Hakim Nawaj Miyan,
Age 45 years, Occup. And
R/o as above.
- (B4) Munni w/o Younus Patel,
Age 45 years, Occup. Agri.,
R/o At Post Tanav, Tq. Gangapur
Dist. Aurangabad.

- (B5) Guddan w/o Maddu Patel,
Age 32 years, Occup.Agri.,
R/o Devgaon, Tq. Badnapur
Dist. Jalna.
- (B6) Wasim Nawaj Miyan,
Age 30 years, Occup.NIL,
R/o Golegaon, Tq. Sillod
Dist. Aurangabad.
- (C) Sardar Miyan s/o Suppa Miyan,
Deshmukh, Age 55 years,
Occup. And R/o as above.
- (D) Hamid Miyan s/o Suppa Miyan
Deshmukh, Age 54 years,
Occup. And R/o as above.
(Died. Thr. L.Rs.)
- (D1) Maimuna Hamid Miyan Deshmukh,
Age 60 years, Occup.Household,
R/o Golegaon Tq. Sillod,
Dist. Aurangabad.
- (D2) Moiz Hamid Miyan Deshmukh,
Age 42 years, Occup. And R/o
As above.
- (D3) Javed Hamid Miyan Deshmukh,
Age 38 years, Occup. And R/o
As above.
- (D4) Mufeed Hamid Miyan Deshmukh,
Age 30 years, Occup. And R/o
As above.
- (D5) Dawood Hamid Miyan Deshmukh,
Age 24 years, Occup. And R/o
As above.

- (D6) Nazema Alim Patel,
Age 22 years, Occup.Household,
R/o nandgir Wadi, Tq. Kannad,
Dist. Aurangabad.
- (D7) Humera Basid Patel,
Age 21 years, Occup. Household,
R/o Takli, Tq. Khuldabad,
Dist. Aurangabad.
- (D8) Kazima Raju Patel,
Age 36 years, Occup.Household,
R/o Beri Bagh, Harsool, Aurangabad.
- (E) Sajida Bee w/o Sami Patel,
Age 53 years, Occup. Agri.,
R/o Devgaon Tq. Badnapur
Dist. Jalna.
- (F) Rukhya Bee w/o Yunus Patel,
Age 35 years, Occup. And
R/o As above.

...Appellants

VERSUS

Raju Miya s/o Azizmiya Deshmukh,
Age 44 years, Occup.Agriculture,
R/o Golegaon, Tq. Sillod, Dist.
Aurangabad.

...Respondent

.....
Advocate for Appellants : Mrs. A. N. Ansari
Advocate for Respondent: Mr. V. K. Patni a/w Mr. R. M. Sharma

.....
CORAM : ARUN R. PEDNEKER, J.

**Date of Reserving the Judgment :
25/07/2023**

**Date of Pronouncing the Judgment:
08/08/2023**

JUDGMENT :

1. By the present second appeal the appellant is challenging the order passed by the Appellate Court whereby the Appellate Court set aside the order of the Trial Court and decreed the suit of the plaintiff for possession of the suit property and the defendant is directed to hand over the possession of the suit property to the plaintiff.

2. This Court admitted the second appeal on 30/11/1993 on the grounds No.1 to 4 which are treated as substantial question of Law as under :-

(I) Whether the defendant proved that he is in possession of the suit land in part performance of contract and has right to protect his possession under Section 53-A of the Transfer of Property Act.

(II) Whether the finding of appellate court believe the evidence of the plaintiff and disbelieve the evidence of suffers from substantial error of the evidence on merits.

(III) Whether Appellate Court committed error in not considering and giving finding regarding the entries recorded in the name of defendant in the cultivation column and when plaintiff did not give any explanation about the entries under such circumstances adverse inference ought to have been drawn under Section 114 of

the Evidence Act against the contention of the plaintiff regarding the dispossession in May, 1975.

(IV) Whether Appellate Court rightly and correctly compared the signatures of the plaintiff on Isar Pavti which are at Exhibit 24 and Exhibit 25 in the Lower Court file, by exercising powers under Section 73 of Indian Evidence Act, when the Trial Court also examined the documents Exhibit 24 and Exhibit 25 along with signature of the plaintiff on Vakalatnama Exhibit 2 and arrived to the conclusion that signature tally with each other.

3. Brief facts giving rise to the questions of law can be summarised as under :-

It is the case of the plaintiff that he is the owner of land Gut No.341 of village Golegaon Tq. Sillod to the extent of 2 Acres 24 Gunthas as a share of 'Mathuka Property'. His father died 16-17 years before filing of the plaint, and thereafter, the plaintiff is the exclusive owner of the suit property. The consolidation scheme was made applicable to the village in the year 1970-71, and accordingly, the suit land is entered in the name of plaintiff in the consolidation record as owner. After the consolidation scheme in the year 1975 in the Month of October-November, the plaintiff had gone to Faizpur Soida for earning livelihood and he was there up to April-1976, and

thereafter, plaintiff returned back to his village. He noticed that the defendant (Step uncle of the plaintiff) was illegally in possession of the suit land. The plaintiff asked defendant to hand over the possession of the suit land. The defendant gave abusive reply. Hence, the plaintiff was compelled to file the suit for possession of the suit property.

4. The defendant filed written statement and contended that the suit land bearing Gut No.341 was entered in the revenue record in the name of Azia Miya, who was father of the plaintiff, to the extent of his share along with his brothers. The suit land was thereafter distributed among the sons of Azia Miya and 2 Acres 24 Gunthas land came to the share of plaintiff. It is further contended by the defendant that the plaintiff executed agreement to sell in his favour along with Dastgir, brother of plaintiff, and that his possession over the land is not illegal.

5. It is contended by the defendant that he is in possession of the suit land on the basis of agreement to sell. The plaintiff is not entitled for possession of suit premises. It is further contended that the plaintiff and his brother Dastgir jointly executed agreement of sale to the extent of 1 Acre of land for Rs.6000/- and subsequent

agreement of sale in respect of remaining half land was also executed for consideration of Rs.9,000/-, and the said sale is effected in the village is on a simple paper with revenue stamp.

6. It is further contended by the defendant that his name is accordingly entered in revenue record by effecting mutation and that he is ready and willing to perform his part of the contract. He denied that he has taken possession of suit land behind back of the plaintiff. He further submits that he is in possession of the land under an agreement of sale and as per Section 53 A of the Transfer of Property Act his possession of the suit land has to be protected.

7. The Regular Civil Suit No.138 of 1981 was dismissed by Judgment dated 17/03/1981. Appeal against the same was allowed and decreed by order dated 19/04/1984. The said order was challenged in the High Court and by order dated 15th and 16th April, 1986, the second appeal was allowed and the case was remanded to the Trial Court for deciding in accordance with law. The parties were allowed to amend their pleadings and lead their evidence, if necessary. After the remand of the suit by the High Court to the Trial Court, the plaintiff has amended the plaint and added paragraph No.12 and contended that he has not agreed to sell any

portion of the suit land to the defendant as alleged by the defendants. The plaintiff denied that he has executed any agreement to sell for Rs.6,000/- (Exhibit 24) and also for Rs.9,000/- (Exhibit 25). It is contended that he never handed over the possession of any part of the land as alleged by the defendant in respect of both the agreement of sale. The defendant, thereafter, filed written statement and denied the contention of the plaintiff in respect of the said amendment. It is contended by the defendant that the plaintiff handed over the possession of portion of land mentioned in two agreement of sale, and hence, he prayed for dismissal of the suit.

8. The Trial Court on examination of the pleadings, framed issues. The Trial Court on consideration of the evidence of the plaintiff Isar Pavti (Exhibits 24 and 25) and the evidence of the handwriting expert Bhalchandra and that the plaintiff proved that he is the owner of the suit land and he is in possession of the said suit land till October 1975. The Trial Court held that the defendant in possession of the suit land in part performance of the contract and as per Section 53-A of the Transfer of Property Act the possession of the defendant over the suit land was protected. The Trial Court thus

dismissed the suit of the plaintiff.

9. In an appeal filed by the plaintiff, the Appellate court formulated the following points for consideration :-

	<u>POINTS</u>	<u>FINDINGS</u>
1)	<i>Does plaintiff prove that defendant dispossessed him illegally as alleged by plaintiff in May 1976 ?</i>	<i>...Yes</i>
2)	<i>Does defendant prove that he is in possession of suit property as per two agreements of sale executed by plaintiff in his favour as part performance of said contract as alleged by him ?</i>	<i>...No</i>
3)	<i>Is plaintiff entitled for possession of suit property from the defendant ?</i>	<i>...Yes</i>
4)	<i>Is defendant entitled for compensatory costs ?</i>	<i>...No</i>
5)	<i>Is plaintiff entitled for post mesne profit and future mesne profit ?</i>	<i>...Yes</i>
6)	<i>What order</i>	<i>As per final order</i>

10. The Appellate Court observed that the defendant is the uncle of the plaintiff. According to the plaintiff, in May, 1976 the defendant dispossessed the plaintiff from the suit land and that it is the contention of the plaintiff since then the defendant is in possession of the suit land as a trespasser and the plaintiff is seeking possession of the suit land. Dealing with the contention of the defendant that he is in possession of the suit land in part performance of the contract to sell as per the two agreements of

sale executed by the plaintiff in his favour, and that his possession is not that of a trespasser and is protected under Section 53 A of the Transfer of Property Act, and his possession is required to be protected, the Appellate Court at paragraph No.12 and 15 has held as under :-

"12. The fact is that it is the plaintiff who has come in the Court with a specific case that he is dispossessed by the defendant in May 1976, the initial burden is on the plaintiff to prove his said contention. The fact is that in order to prove his said contention plaintiff has examined himself and his said evidence is at Exhibit 18 and he states that the defendant is his step uncle. He owns land G.No.341. It is 2 Acres 24 Gunthas. It is known as Sheri of village Golegaon. The said land is owned by him ancestral property. Previously it was in possession of his father. His father died 18-20 years back. Thereafter it is owned and it was possessed by him about 7-8 years back the consolidation scheme was made applicable to the lands of his village. At that time said land was measured and entered in his name. He has produced on record the consolidation statement about the suit land, it is at Exh.19 and 7/12 extract showing that suit land is entered in his name. The same is at Exhibit 20. The suit land was in his possession till 1975. In November 75 he had been to Faijapur for earning his livelihood. He was there up to 7-8 months. When he returned he saw

that suit land was in possession of defendant and defendant was ploughing same...."

"15.....The fact is that after the matter was remanded back to the Trial Court, it is the defendant, who submitted application to the Trial Court to send Exh.24 and 25 to the handwriting expert for examining the said signatures of plaintiff on Exh.24 and 25 with the signatures of plaintiff on plaint, Vakil Patra and also with plaintiff's specimen signatures which were taken for the same. It appears that as per the request made by the defendant, said application was allowed and documents were sent to the Handwriting Expert for giving opinion about the signatures on Exh.24 and 25 along with admitted signatures on plaint, V.P. and specimen signatures of the plaintiff. The same were examined by the handwriting expert Ramchandra and he has submitted opinion that signatures on Exh.24, 25 are not signatures of plaintiff. The fact is that said opinion given by handwriting expert also comes to support the version of plaintiff. Thus it is also one more additional suspicious circumstance to the contention of defendant about the execution of Exh.24 and 25 as discussed above from the evidence adduced by the defendant of himself and his witness Arjun."

11. The Appellate Court on detailed examination of the evidence on record held that agreement to sell is a fabricated document. It

has relied upon evidence of the Court Commissioner who gave his expert opinion and also the evidence that no attempt was made by the defendant to get their sale deeds executed and that there was no reason for the defendant why the sale deeds were not executed when full consideration was paid, no reason for the same is mentioned in the agreement to sell. Further the possession was parted under the agreement to sell and it was necessary that the document ought to have been proved. There are interpolations in the agreement to sell. The Appellate Court thus disbelieved the case of the defendant that he is in possession of the suit land by virtue of an agreement to sell and held that the agreement to sell are fabricated documents, not executed by the plaintiff. In view of the same, the defendants were directed to hand over the possession of the suit land to the plaintiffs.

12. Coming to the questions of law raised as regards the question of law No.1, the Appellate Court has held that the agreement to sell itself is a fabricated document and thus there is no question of the defendant put in possession of the suit land by virtue of the said agreements to sell, and as such, the possession of the plaintiff cannot be protected under Section 53-A of the Transfer of Property

Act. The Appellate Court has held that the defendant has trespassed into the property of the plaintiff in absence of the plaintiff and taken illegal possession of the same. In view of the same, it cannot be said that the defendant has proved that he is in possession of the suit land in part performance of the contract. The findings recorded by the Appellate Court are not perverse. The question of law No.1 is answered accordingly.

13. As regards the question of law No.2, the Appellate Court has relied upon the evidence of the Court Commissioner. The Court Commissioner's report is an expert opinion that the document i.e. agreement to sell is a fabricated document, so also there is other evidence on record that is no sale deed was executed although entire consideration was allegedly paid and the documents to sell are also not proved indicates that the document is not a genuine one. In view of the same, the second question of law does not arise for consideration.

14. As regards third question of law in respect of mutation entries made in favour of the defendant, the mutation entries are made on the basis of a forged documents. As such, no credibility can be given to the mutation entries made in pursuance of a fraudulent

documents. Hence, the question of law No.4 does not arise for consideration. That the Isar Pavti was compared (Exhibit 24 and 25) along with the signature of plaintiff on Vakalatnama. Although the Trial Court held that on examination found that both the signatures are same, the Appellate Court held that the signatures are not of the same person. It is to be noticed that the Appellate Court has relied upon the evidence of an expert witness. The findings recorded by the Appellate Court cannot be lightly interfered with unless they are perverse. The Appellate Court has reached the above findings on the basis of the material on record, no interference is called for. Hence, the second appeal is dismissed. Pending civil applications stand dismissed.

(ARUN R. PEDNEKER, J.)

15. After pronouncement of the Judgment, the learned Advocate for the appellants prays for extension of interim relief, operating during the time of admission of the matter, for a period of eight weeks.

16. The interim order, granted earlier, is continued for a period of eight weeks from today.

(ARUN R. PEDNEKER, J.)