

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

**SECOND APPEAL NO.139 OF 2022
WITH CA 3348 OF 2022 IN SA 139 OF 2022**

Sameer Pandurang Phule,
age 41 years, Occ. Agri and Business,
R/o Plot No.3, Utkarsh Housing Society,
Hudco, Aurangabad. ..Appellant..
(orig. defendant)

Versus

Ms. Neha Sameer Phule,
age 35 years, Occ. Private Service,
R/o Prasanna Housing Society,
P.No. 20, Radhaswami Colony,
Jatwada Road, Aurangabad. ..Respondent..
(orig plaintiff)

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Mr. S.S. Kazi, Advocate for the appellant.
Mr. N.S. Salunke h/f Mr. A.T. Jadhavar advocate for
respondent.

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**CORAM : S.G. CHAPALGAONKAR, J.
Reserved on : 21st June, 2023.
Pronounced on : 30th, 2023**

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JUDGMENT :-

1. The appellant/original defendant impugns the judgment and decree dated 12.11.2021 passed by the Ad-hoc District Judge-2, Aurangabad in Regular Civil Appeal No.189 of 2019 thereby confirming the judgment and decree dated 5.4.2019 passed by the 6th Jt. Civil Judge J.D., Aurangabad in Regular Civil Suit No.514 of 2016.

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2. The respondent-plaintiff had approached the Civil Court vide Regular Civil Suit No.514 of 2016, seeking the decree of partition and separate possession against defendant in respect of the agricultural land admeasuring 22R out of S.No.259/3 situated at Harsool, Tq. & District Aurangabad (hereinafter referred to as the 'suit land'). According to plaintiff, she has jointly purchased the suit land alongwith defendant-husband under the registered sale deed dated 13.4.2012 for valuable consideration of Rs.6,38,000/-. Consequent upon the sale-deed, mutation has been recorded vide M.E. No.17152. The plaintiff contends that she had contributed Rs.4,50,000/- borrowed from her father, towards sale consideration of Rs.6,38,000/-. She claims share of 15.5. Are land out of the suit property. Pertinently, the plaintiff and defendant are husband and wife. After matrimonial discord, they have initiated litigation before the Family Court as well as before the Court of Judicial Magistrate First Class, at Aurangabad. The plaintiff seeks partition of the suit land owing to such dispute.

3. In response to the suit summons, defendant failed to appear before the Trial Court, consequently, on 20.3.2018 an ex-parte order came to be passed against him below exhibit 1. In-spite of such order, although defendant appeared, he failed

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to make application for setting aside the ex-parte order. Instead, he chosen to file an application under order 7 Rule 11 (d) seeking rejection of the plaint, alleging non-compliance of Order 4 Rule 1 and Order 6 Rule 15 of Civil Procedure Code. The Trial Court after satisfying compliance of both requirements in plaint, rejected his prayer. Said order attained finality. Trial Court framed the issues considering the averments in the plaint. Plaintiff recorded her oral evidence as well as her father (PW2). She relied upon documentary evidence in form of certified copy of the 7/12 extract. Certified copy of the Registered sale deed No.2739 of 2012 dated 13.4.2012.

4. Trial Court, after considering the evidence on record, partly accepted the case of the plaintiff thereby declaring that the plaintiff and defendant have one half share each in the suit land and upon partition, half share be put into possession of the plaintiff. The separate inquiry under order XX Rule 12 (1) (c) of the Civil Procedure Code for mesne profit has been directed. Aggrieved defendant approached the District court in appeal under section 96 of the Civil Procedure Code. However appellate court affirmed the decree passed by the Trial Court after recording concurrence with the findings on facts of law.

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5. By this second appeal filed U/S 100 of CPC, the appellant/defendant raises challenge to the concurrent findings of the fact recorded by two courts. Mr. Kazi, learned advocate appearing for the appellant would submit that the Courts below have erroneously placed reliance on inadmissible document i.e. certified copy of the sale deed dated 13.4.2012. He would submit that the averments in plaint do not disclose that original sale-deed was either not available or it was possessed by defendant. He would submit that non-compliance of section 65 of the Evidence Act is fatal and decree based on such document would not be sustainable. Mr. Kazi, would submit that, the Trial Court failed to grant sufficient opportunity to the appellant/defendant to cross examine the plaintiff and her witnesses. Relying upon the ground Nos .D, F and H, carved in appeal memo, he urge that the present second appeal involves substantial question of law. The substantial question of law proposed on behalf of the appellant reads thus:-

“D. Whether the secondary evidence could have been permitted when the original documents was available?”

E Whether the secondary evidence stand proved is one of the substantial question of law involved in the appeal ?

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H. Whether the Courts below committed an error by not allowing / permitting the appellant/original defendant to cross examine the plaintiff and her witness ?”

6. So far as question of law pertaining to denial of sufficient opportunity to the appellant/defendant to cross examine the plaintiff and her witness is concerned, on specific query from the court, learned advocate appearing for the appellant could not point out from the record that any attempt was made on behalf of the defendant to cross-examine the plaintiff or her witness. Pertinently, the defendant did not appear before the Court during the course of trial. He was proceeded ex-parte, but no attempt was made to seek recall of such order. Although an application for rejection of plaint was filed by defendant, resorting provisions of Order 7 Rule 11 (d) of CPC, no attempt was made to participate in further proceeding or contest the suit. In that view of the matter, the appellant cannot take benefit of his wrong to allege denial of opportunity to cross examine plaintiffs' witnesses. This Court hold that hollow question of law has been attempted to urge on behalf of appellant, without foundation in the evidence.

7. Second question of law posed into service is regarding the admissibility of secondary evidence in the form of the

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certified copy of sale deed dated 13.4.2012 that has been relied by plaintiff to prove her title. Pertinently, the appellant does not deny execution or existence of sale-deed. In grounds of appeal, either before the First Appellate Court or before this Court, the appellant does not dispute existence of the sale deed. Even, it is not his case that certified copy of the sale deed is false or manipulated document. The appellant is basically raising the dispute that consideration towards the land transaction was borne by him. The plaintiff was not capable of contributing anything for purchase of the land. Such a stand taken on behalf of the appellant nullifies his challenge to the certified copy of the sale deed. Both the Courts have concurrently recorded elaborate reasons for accepting the sale-deed as title document. The plaintiff herself is signatory of the document. She recorded her oral evidence before the Trial Court in support of the document. She relied upon evidence of PW 2 to support her contention. The 7/12 extract which is a public document shows that mutation entry is carried in revenue record based on the sale-deed. Sufficient foundation is laid in pleading and evidence in support of transaction under the sale deed. Although, the plaintiff had claimed 70% share in the suit property, in absence of specific averments in the sale-deed regarding apportionment

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amongst the co-purchasers, the Court below have rightly decreed the suit affirming 50% share of the plaintiff.

8. Mr Kazi learned Advocate for appellant would submit that secondary evidence in the form of certified copy of the sale-deed could not have been considered without adhering to the procedure under section 65 (c) of the Evidence Act. At this stage, reference can be given to the judgment of the Supreme Court in the matter of **Dhanpat Vs. Sheo Ram reported in (2020) 16 Supreme Court Cases 209**. Paragraph no.22 of the said judgment reads thus :-

“22. There is no requirement that an application is required to be filed in terms of [Section 65\(c\)](#) of the Evidence Act before the secondary evidence is led. A party to the lis may choose to file an application which is required to be considered by the trial court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed.”

9. Applying the aforesaid principle of law in the facts of the present case, no fault can be found in the approach of the Courts below in accepting the certified copy of the sale-deed or admitting certified copy of the sale deed in evidence and also placing reliance on the same. It can be observed in facts of present case that although, the application as contemplated
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under section 65(c) of the Evidence Act was not filed, the plaintiff has laid foundation for leading the secondary evidence during the course of her evidence, which is supported by the public document in the form of 7/12 extract. Even, the defendant has not taken specific stand as regards to existence/execution of the document. Pertinently, vendor of the land under the sale deed is not before the Court. The plaintiff while securing his own interest trying to offend the right of the defendant in the suit land and attempting to approbate and reprobate at same time.

10. The result of the discussion above, leads this Court to conclude that no substantial question of law is involved in this second appeal for consideration. Resultantly, following order is passed.

O R D E R

- i. Second appeal stands dismissed with costs.
- ii. Pending civil application, if any, also stands disposed off.

(S. G. CHAPALGAONKAR)
JUDGE

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