

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

**SECOND APPEAL NO.297 OF 2003
WITH CA/2999/2003 IN SA/297/2003 WITH CA/3001/2003 IN
SA/297/2003**

**JANARDHAN WAMAN SARODE
VERSUS
ARUN RAU PAWAR AND OTHERS**

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Advocate for Appellant : Mr. Bajaj Anil S.
Advocate for Respondent Nos.1-A to 1-E : Mr. Subodh P Shah

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CORAM : S.G. MEHARE, J.

DATED : OCTOBER 11, 2023

PER COURT:-

1. This Court, by order dated 30.09.2003, had dismissed the appeal summarily as no substantial question of law was involved. The present appellant had filed Civil Application No.3001 of 2003, along with the appeal memo, for leave to lead additional evidence under Order 41 Rule 27 of the Civil Procedure Code.

2. Since the appeal was summarily dismissed, the present appellant/plaintiff knocked on the doors of the Hon'ble Supreme Court by way of Civil Appeal No.5265 of 2012. The Hon'ble Supreme Court remanded the matter to the High Court with direction to pass the appropriate orders on merit on the application under 41 Rule 27 of the Civil Procedure Code (Civil Application No.3001 of 2003) in accordance with the law. The Hon'ble Supreme Court has clarified that it has not expressed any opinion on the merits of the case

regarding the admissibility of the additional evidence sought to be filed by the appellant.

3. After the remand, the matter was listed for hearing. This Court passed the order on 08.06.2022 that the applicant wants to produce a certified copy of a registered sale deed. The question of the production of documents under Order 41 Rule 27 of the Civil Procedure Code would come first, and then whether to have recourse to Order 41 Rule 27 of the Civil Procedure Code would be the next question and therefore, the present application would be decided along with the second appeal. Hence, the application has been heard along with the second appeal.

4. After marathon arguments of the learned respective counsels, the Court is of the view that the admission of the appeal should also be considered simultaneously. Hence, a few facts of the suit need to be narrated. It is not in dispute that the plaintiff along with the vendor of defendant no.1 and 2 others, had purchased the plot bearing no.11 out of the layout gut survey no.102. It was a joint sale deed. However, consideration was not proportionate; hence, as per the consideration paid by each of them, they had divided the plot into four parts. The plaintiff got the northeast corner of the said plot, and the original co-owner, joint purchaser Shashikala, got the northwest portion of the plot. The plaintiff had a case that since that plot was divided, it was agreed that from all four corners of the plot, a

strip of land shall be kept open for the enjoyment of his share and shares of the other side owner. Accordingly, the office town planner sanctioned the map, and they started enjoying their respective strips. They have constructed the buildings on their respective portions. However, the original co-purchaser, Shashikala, sold her portion, which was an open plot located towards the northwest side of the portion of the plaintiff by a registered sale deed. The purchaser was defendant no.1, Arjun Rao Pawar. The plaintiff had already constructed the house and was using and enjoying the west-east 7-foot strip (suit strip) to reach on the west side 20 Feet Road. However, defendant No.1 obstructed the use and enjoyment of the suit strip and literally blocked the suit strip by constructing a wall. Therefore, he had filed the suit for injunction and declaration that he has right over the suit strip for enjoying the benefit and use of his portion of land arising out of plot no.11. He had also submitted that the original purchasers of the plot had oral agreement that the said strips will be kept open for the peaceful and useful enjoyment of their respective portions. Therefore, the map was sanctioned by the Village Panchayat.

5. Defendant No. 1, who was contesting the suit, appeared and filed a written statement. He had a case in brief that the strips left open within the boundaries of plot no.11 were not left for the common use of the co-owners of the plot to enable them to approach their houses. The plaintiff has a 30 ft road from east to his portion,

and he was using and enjoying the said road. The plaintiff had no right to use the suit strip. The plaintiff has also erected the latrine, platform, bathroom, and water tank towards the northern and eastern sides of the said strip, causing danger and obstruction. The plaintiff did not raise objections until the construction of the plinth as per the approved map. At the time of the partition of the plot, it was decided that plaintiff and defendant no.3 would use the road from the eastern side, and defendant nos.1 and 2 would use the road from the western side as those were the nearest roads to the parties. His construction is nowhere obstructing the plaintiff's right to enjoy his portion. In a nutshell, the right claimed by the plaintiff over the suit strip was specifically denied as 30 30-foot road on the eastern side in field Gat No.104/1B was available.

6. Both parties entered the witness box. The learned trial Court held that the plaintiff did not prove that, as per the approved plan of construction, the suit strip was left open for his ingress and egress. He also failed to prove his right of way from the suit strip and dismissed the suit. The first appeal preferred by the plaintiff was also dismissed, and the judgment and decree of the trial Court was confirmed.

7. At the time of filing the second appeal, for the first time, an application under Order 41 Rule 27 was filed along with the appeal memo itself. The present civil application has been filed on the

ground that the appellant/applicant was not aware of the contents of the sale deed executed by respondent no.4 in favour of respondent no.1 (defendant no.1). He tried to get a copy of the sale deed from the registration officer, but he could not get the same as the said document was not available for issuance of certified copy as it was with the photozinco press. However, defendant No.1 was aware of the contents of the said document, but he did not produce it before the Court. He received the certified copy of the sale deed of defendant no.1 on 17.02.2003, and it has been revealed from the recitals of the said sale deed that the suit strip was left open for ingress and egress of the plaintiff and defendant No.1. Defendant no.1 has purchased the share from defendant no.4 subject to the right of way of eastern side share that was used and enjoyed by the plaintiff.

8. On the basis of the submission, learned counsel for the appellant has vehemently argued that the appellant/applicant had no knowledge about the recitals of the sale deed between defendant no.1 and defendant no.4, wherein they specifically recognized the right to enjoy the suit strip. The right of the plaintiff was protected by way of an agreement, and it was written in the sale deed. He would also argue that the suit came to be dismissed for want of any such material. Though some admissions supported the contentions of the plaintiff, those were not considered. The learned trial Court only emphasized the easement of necessity. Both Courts were of the view

that there is an alternate way. Hence, no right could exist. Apart from the conduct of the parties as they had raised constructions in their respective portions, the Court has formed an opinion that there was no agreement of leaving strips for the enjoyment of the respective shares of the joint purchasers. He has referred to certain documents on record to emphasize that when the layout of survey no.102 was sanctioned, one plot no.9 was adjoining to the share of the plaintiff's portion, covering his 1/3rd portion. The layout of survey no.104/1B was sanctioned after their partition. It was a coincidence that the service road was led in gut no.104/1B. He has specifically argued that the case of the plaintiff was of easement of grant and not easement of necessity. In such circumstances, though there was another way available, the right to enjoy the suit strip as agreed amongst the co-purchasers cannot be obstructed or creating the road in the adjoining survey number that the plaintiff may use would also not cease his right of easement of grant. This is a substantial question of law involved in the case. The plaintiff did not know about the recitals of the sale deed as it was sent to photozinco. He immediately applied for additional evidence when he obtained a copy of that sale deed. He relied on the case of North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (Dead) by Lrs., (2008) 8 SCC 511. In this case, Clause (b) of sub-rule (1) of Rule 27 Order 41 of the Civil Procedure Code has been discussed, and it has been held that

evidence may be admitted by an appellate authority if it "requires" to enable it to pronounce judgment "or for any other substantial cause". The Privy Council in the case of Parsotim Thakur & Ors. Vs. Lal Mohar Thakur & Ors has observed that the provisions of Section 107 as elucidated by Order 41 Rule 27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal, it was observed as follows:

"Under Cl. (1) (b) it is only where the appellate Court 'requires' it, (i.e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands some inherent lacuna or defect becomes apparent.'"

9. In para 20, it has been observed that in any event, had the Court found the additional documents sought to be admitted necessary to pronounce the judgment in the appeal in a more satisfactory manner, it would have allowed the application and, if not,

the application would have been dismissed. Nonetheless, it was bound to consider the application before taking up the appeal.

10. On the above arguments, learned counsel for the appellant has prayed to allow the application and substantial questions of law to be formulated.

11. Per contra, vehement arguments have been advanced by the learned counsel for the contesting respondent/original defendant no.1 that the application filed for the additional evidence is not within the requirements under Order 41 Rule 27. Admittedly, the sale deed which has been produced for the first time was not before the trial Court and the first appellate Court. However, to seek a leave of this Court to lead the additional evidence, the appellant was to establish that even after due diligence, he could not procure or produce the document he wanted to produce by way of additional evidence. For the first time, he is coming up with a case that the sale deed of defendant No.1 could not be collected as it was sent to photozinco press. There is nothing on record to show that the present appellant/applicant ever made an attempt to seek a copy of the sale deed from the office of the Sub-Registrar. He never applied before the Sub-Registrar. Another source for proving the documents was that he could have called the Sub-Registrar as a witness. The next source was to ask the defendant to produce the sale deed from his possession. He never went to the office of the Registrar, Pune. He did not use all the

possible resources to procure the documents. It could not be said that he could not procure the said documents after due diligence. Therefore, the case of the appellant does not fall under Clause (aa) of Order 41 Rule 27 of the Civil Procedure Code. He has also argued that the burden was on the plaintiff to prove that there was an agreement to keep a suit strip open. He did not discharge his burden. Therefore, the learned trial Court has correctly evaluated the evidence, the conduct of all the parties and their respective ways of approaching their houses or the portions. Since sufficient evidence was available before the trial Court, this document is absolutely not necessary or essential for adjudicating the dispute. Therefore, Clause (b) of Order 41 Rule 27 would also not help the appellant. The plaintiff has also raised certain constructions in the said suit strip. Therefore, for violating breach of the agreement by himself, his claim is barred under the Section 16 of the Specific Relief Act. There are two concurrent judgments on the facts. Further recitals of the sale deed reveal that the rights were given or conferred upon defendant no.. 1 to raise the construction as per the approved map or revised map. So, if the document is admittedly directly in the appeal, he would have no opportunity to explain what rights the vendor had transferred to him. He would rely on the case of *Oriental Fire and General Insurance Company Ltd Vs. Hemlata wd/o Lakshmanan and Others, 1993 Mh.L.J. 1549*, in which the production of additional evidence under

Clause (aa) of sub-rule 1 of Rule 27 Order 41 of the Civil Procedure Code was declined on the facts that there was a bare statement of the applicant that the insurance policy was misplaced and it could not be traced out during the pendency of the proceeding. The application was without any averments or any material on record to show what efforts he had made to trace out the policy. There was no correspondence between the offices of the insurance companies. He also relies on the case of Jasumatiben Hakimchand Jhatakia and others Vs. Narendra B. Mantri, 2016 SCC Online Bom 9701. In this case, the Bombay High Court at Principal Seat has considered the ratio laid down by the Hon'ble Supreme Court in the case of Union of India Vs. Ibrahim Uddin, (2012) 8 SCC 148, in para 6, the Apex Court has observed that the general principle is that the appellate Court should not travel outside the record of the lower Court and cannot take any evidence in appeal. Order 41, Rule 27 of C.P.C. enables the appellate Court to take additional evidence in exceptional circumstances. The appellate Court may permit additional evidence only and only if the conditions laid down in the Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply when on the basis of evidence on record, the appellate Court can pronounce a satisfactory judgment.

12. He further relied on the case of Ashabai w/o Ramchandra Kotecha and Others Vs. Mohanlal s/o Bhika Badode (died), 2012 (6) Mh.L.J. 176, in which this Court has pronounced that Rule 27 (aa) does not permit the Court to allow such application unless the parties show due diligence.

13. Bearing in mind the law laid down by the Hon'ble Apex Court and the Bombay High Court in the above cases, it is to be examined whether the production of the sale deed is essential for adjudicating the dispute, and this Court requires the said document to enable it to pronounce the judgment or for any other substantial cause.

14. Clause (aa) of the sub-rule 1 of Rule 27 of Order 41 of the Civil Procedure Code provides that if the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed. This section has been divided into two parts. However, the common thread is due diligence. In the first part, even after due diligence, the parties seeking the production of additional evidence did not know the particular fact. In the second part, he fails to receive the same after due diligence. If, in a case, the party had knowledge about some facts, that could be procured by exercising some due diligence. In the

circumstances of failing to produce the documents at the time of the evidence before the trial Court, the burden was on the applicant to prove that he could not produce such documents even after due diligence. Here, the applicant has a very specific case that only an Index-II copy was produced on record when the evidence was led. Some specific questions were asked about the custody of the sale deed to defendant No.1. However, he also did not produce the sale deed. It is a matter of common knowledge that all sale deeds were sent to the Pune Office of the State of Maharashtra for photozinco. That time, the purchaser had to wait till the sale deed was returned to the registering officer after photozinco. It was also not the case of the defendant that the use of the suit strip was ceased, or there were recitals in the sale deed that the suit strip was left only for the enjoyment of his predecessor in title. In all preponderance of probabilities, defendant no.1 might have known the recitals of the sale deed. Therefore, it was not produced. It was specifically recited in the said sale deed that he had to leave the open space towards the northern side as per the construction rules, and from that strip, which is a suit strip, he and the owner of the eastern side will use that strip from his side (owner of the eastern side.) In a nutshell, the right to use the suit strip was clarified in the sale deed. The intention of the vendor of defendant no.1 was clear that the said strip was left as per the agreement for the use and enjoyment of both the plaintiff and

vendor of defendant no.1. The certified copy of the sale deed was obtained from the office of the Sub-Registrar, Jalgaon where the sale deed was registered. This could be provided only after receiving the said copy after photozinco press. A specific pleading is there in the application under Order 47 Rule 27 of C.P.C., that the applicant tried to get the copy of the sale deed from the registration office but could not get it as it was not available for issuance of the certified copy as the sale deed was with the photozinco press. A specific pleading is there in the application that the applicant learnt about the recitals of the sale deed about the use of the suit strip on 17.02.2003; therefore, he has produced the same with the present applications.

15. The dispute was about using and enjoying the suit strip. The plaintiff has a specific case that the joint purchasers had an agreement that a strip should be left for the enjoyment of the respective shares holders of the four joint purchasers. The layout map reveals that towards the north, there is plot no.11 abutting the plot jointly purchased by the plaintiff and the vendor of defendant No.1 and two others. When the layout was done, no road existed on the eastern side. It was created subsequently by agreement. Considering the use of the suit strip, from the maps referred to this Court, it seems that unless the strip is kept open by defendant no.1, the plaintiff could not enjoy his portion of the land. Whether the existence of a road from another layout ceases his right to enjoy the suit strip and

whether the suit strip was kept open for the use and enjoyment of his portion for a limited period are the questions to be determined from the recital of the sale deed produced in this appeal. Therefore, it is difficult at this juncture to accept that the suit of the plaintiff is barred by personal bar as provided under Section 16 of the Specific Relief Act.

16. Considering the dispute, the Court is of the candid view that this Court requires the sale deed requested to be produced before the Court by way of additional evidence enabling it to pronounce the judgment and to make justice with all parties. This document would certainly help to find out the truth. Therefore, the application deserves to be allowed. Since learned counsel for defendant no.1 has raised a point that there are certain recitals in the sale deed giving him the right to construct as per the revised plan, he needs to explain that by such recitals, there was no right to use the suit strip as claimed by the plaintiff, the Court is of the view that the trial Court may be directed to take evidence and send it to this Court as provided under Rule 28 of Order 41 of the Civil Procedure Code.

17. Civil Application No.3001 of 2003 is allowed for the above reasons.

18. The learned trial Court is directed to take such evidence on the documents allowed to be produced here and send it to this Court within two months of receiving this order.

19. The parties will be at liberty to lead the evidence and cross-examine the witnesses only on the sale deed produced here.

20. Learned counsel for respondent no.1 submits that this Court has allowed the application to lead the evidence; the defendant will suffer hardship as the original purchaser and the vendor are no more. The Evidence Act has provided for the proof of documents in different situations. Hence, it cannot be said that the death of the parties to the documents would cause defendant No.1 any hardship.

21. After a marathon hearing, the Court formulates the following substantial questions of law :

(i) Whether the right to use the suit strip was an easement of necessity or easement of grant'.

(ii) Whether having another way to use and enjoy the portion of the plaintiff ceases his right over the suit strip.

22. Admit.

23. Issue notice to the respondents. Learned counsel Mr. Subodh P. Shah waives service of notice for respondent nos.1A to 1E.

24. Both civil applications stand disposed of.

25. Needless to say, the observations recorded in this case are only for deciding the civil applications.

26. List the matter after three months.

(S.G. MEHARE, J.)