

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

SECOND APPEAL NO. 503 OF 2017
WITH CA/9973/2017 & CA/2241/2020

1. Shivshankar S/o. Nagnath
Raiwade,
Age : 37 years, Occ: Agri,
R/o. Renapur, Tq. Renapur,
Dist. Latur.
2. Sou. Mahima W/o. Yuvraj
Kawale,
Age : 40 yrs, Occ: Household,
R/o. Ashiv, Tq. Ausa,
Dist. Latur.
3. Sou. Usha W/o. Rajendra
Shivpuje,
Age : 40 yrs, Occ: Household,
R/o. Barsi, Dist. Solapur.
4. Sou. Asha W/o. Sanjay Gawhare,
Age : 36 yrs, Occ: Household,
R/o. Killari, Tq. Ausa,
Dist. Latur

...Appellant
(Orig. Defendants)

Versus

1. Trimbak S/o. Venkati Katle,
Age : Major, Occ: Agri,
2. Pandit S/o. Venkati Katle,
Age : Major, Occ: Agri,
3. Uttam S/o. Ventaki Katle,
Age: Major, Occ: Agri,

All R/o. Renapur, Tq. Renapur,
Dist. Latur

...Respondents
(Orig. Plaintiffs)

Mr. S. S. Halkude, Advocate for the Appellants.
Mr. P. S. Chavan, Advocate for Respondents.

CORAM : R.M. JOSHI, J.

RESERVED ON : APRIL 11, 2023

PRONOUNCED ON : APRIL 25, 2023

JUDGMENT

1. This appeal is filed under Section 100 against concurrent judgments and decree passed in R.C.S. No. 49/2008 dated 16th November, 2013 and R.C.A. No. 2/2014 dated 12th September, 2016.

2. Appellants are original Defendants in R.C.S. No. 49/2008 which was filed by the Plaintiffs for declaration and injunction about the suit land along with well. It is claimed that the Shivling Raiwade was the ancestor/Karta of family of defendants and they owned and possessed Gut No. 887 admeasuring 12H 57R land and Gut No. 812 admeasuring 2H 70R land. It is stated that after effecting sale of the some portion of the land, Shivling allotted to his wife – Subhadrabai 2H land and 3H 13R land was allotted to Laxmibai. Plaintiffs claim that after the death of Subhadrabai, her share came to Nagnath as her legal heir and after death of Nagnath, the same came to the share of Laxmibai and present defendant as his legal heirs. It is contended by the Plaintiffs that Laxmibai sold 1H

67R land to Gajrabai Gadgale out of 3H 13R, which was allotted to her in partition. Out of remaining 1H 46R, she sold 86R land to Shivaji Lande under registered sale deed dated 19.05.1997. Plaintiffs purchased the said land from Shivaji Lande. It is claimed that in the said land there was debri like well, which was dilapidated and not in use and therefore, there was no mention about the same in the sale deed. It is claimed that while effecting the sale, Laxmibai did not reserve any right in respect of the said well. On the basis of sale deed, Plaintiffs claim to have become owner of the entire land purchased by them from Laxmibai. It is further claimed that Laxmibai in the year 2001 gave an application to Talathi for entering well in her name, which was objected by the Plaintiffs. It is alleged that in collusion with the measurement officers the well was shown in the northern side adjoining land. When Plaintiffs got their land measured, the measurement disclosed the well to be situated within Plaintiffs land. Plaintiffs, therefore, filed suit for declaration to be owner and in possession of the suit land along with well and injunction against defendant.

3. Defendant nos. 2 and 3 filed their written statement and denied the contentions of the Plaintiffs. It is further admitted that Laxmibai sold land in favour of Gajrabai and Shivaji Lande. It is also not in dispute that she sold 31R land to Plaintiffs. It is denied that the well was also transferred by Laxmibai at the time of execution of the sale deed. It is claimed that the well in question is assigned to Laxmibai under Jawahar Rojgar Scheme and after completion of the said well, it was entered in her name in records. It is specifically averred that after selling land to the Plaintiffs, Laxmibai was still holding 35R land out of her share towards eastern side of northern side of the 31R land sold to the Plaintiffs.

4. Before trial Court Plaintiff examined himself and also led evidence of Surveyor who had carried out measurement at Exh. 72. Evidence was also led of Shivaji, witness to the sale deed in respect of 86R land and 31R land purchased by Plaintiffs from Laxmibai. They also led evidence of adjoining agriculturist – Gundappa Chitkote and Shivaji Lande. On

the other hand, Defendant no. 3 – Usha examined herself and also led evidence of Shivkumar Raiwade. They also examined Surveyor who carried out the measurement as per the application made by Laxmibai on behalf of defendants.

5. Learned Counsel for the Defendants states that both the Courts below committed serious error in appreciating the evidence on record. It is pointed out that as per the measurements carried out by Trimbak, well is shown to be situated outside the land belonging to Plaintiffs. It is further submitted that without their being contrary evidence and clear proof that the well was within the area sold by Laxmibai to the Plaintiffs, the suit ought not to have been decreed. Challenge is also raised to the findings recorded by the First Appellate Court by stating that the material evidence on record in the form of document is ignored and that the First Appellate Court has wrongly drawn conclusion against defendants. He submits that the First Appellate Court has committed serious error in interpreting the sale deed and interpretation of a document is substantial question of law. In support of

his submissions he placed reliance on following judgments : S. Madasamy Thevar Vs. A. M. Arjuna Raja, AIR 2000 MADRAS 465 & Bijibai Saldhana Vs. Rama Manohar Thannu Mishra and Another, AIR 1969 BOMBAY 103

6. The impugned judgments are supported by the Counsel for the Plaintiffs by submitting that there is no error committed by the Courts below while appreciating the evidence on record and that in absence of any substantial question of law being involved in this appeal, the same deserves to be dismissed.

7. Plaintiffs in order to discharge initial burden on them led oral as well as documentary evidence. Plaintiffs proved sale deeds Exh. 68 and 69. There is no dispute about the fact that suit properties were sold to Plaintiff by Laxmibai. The dispute is restricted as to who is owner of the well. Plaintiffs in order to prove that the well is situated in the suit property, has examined Cadestral Surveyor (PW 3), who has carried out the measurement of the suit property and submitted map showing that well is situated within the suit property. In the cross-examination of this witness it is suggested that he has carried out the

measurement behind the back of Laxmibai and did not take measurement of the field of the defendants. He also did not verify the well had water or not. There is however, nothing brought on record that map does not correctly shows position of situation of well. Neighbouring agriculturist has deposed that there was dry well situated in the suit property, which is in possession of the Plaintiffs. Shivaji, vendor of the Plaintiffs, has accepted that the well was being used by the Laxmibai and that there was a electric connection on it. He further denied the suggestion that Laxmibai sold the suit property to the Plaintiffs after reserving her right to the said well. The said suggestion coupled with the fact that the Laxmibai does not dispute the sale of the suit property to the Plaintiffs goes to show that the well exists in the suit land belonging to the Plaintiffs. There is suggestion made to the Plaintiffs witness which goes to show that the said well is situated within the suit property i.e., 31R land sold by Laxmibai to the Plaintiffs.

8. Now question arises as to whether the recitals of the sale deed are sufficient to indicate that the well situated in the said land is also sold by Laxmibai to the Plaintiffs. In this regard, according to the Plaintiffs recitals of sale deed (Exh. 69) show that everything attached to the earth is also sold and therefore, well being imbedded into earth becomes part of sale. Section 3 of Transfer of Property Act defines "attached to earth" means – (a) rooted in the earth, as in the case of trees and shrubs; (b) imbedded in the earth, as in the case of walls or buildings; or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. Section 3(19) of General Clauses Act defines Immovable property as "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

9. The definition of the things attached to the earth is inclusive in nature which states that the things which are attached to the earth and hence, by no stretch of imagination it can be said that the well dug

in the land is not thing attached to the earth. Similarly, in view of definition of immovable property in Section 3(19) of General Clauses Act, this Court finds no substance in the contention raised by the Defendants that there is error committed by the First Appellate Court in interpreting the sale deed. No doubt, interpretation of sale deed can become a substantial question of law, provided it is wrongly interpreted. Herein this case, interpretation done by the First Appellate Court is not erroneous and hence, no substantial question of law is involved in this appeal.

10. Plaintiffs, on the basis of evidence led before the Trial Court, has substantiated their case on proving their title and possession over the suit land including well. The burden, therefore, was shifted on the Defendants to prove their case. Though defendants have placed on record electric bills and receipts Exh. 113, the said bills do not show that they pertain to the well situated in the suit land. It is settled position of law that the findings of fact cannot be interfered with unless there is perversity. Even error

committed by the Courts in appreciation of the fact cannot become ground unless perverse to cause interference in the impugned judgments. In such circumstances, the findings recorded by the both Courts being probable cannot be interfered with while exercising the jurisdiction under Section 100 of CPC.

11. In the result, Appeal stands dismissed. Pending applications are also disposed of.

(R.M. JOSHI, J.)

Malani