

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

SECOND APPEAL NO. 629 OF 2003

Yeshwant Vithoba Padale	... Appellant.
V/s.	
Kissan Kushoba Padale & Ors.	... Respondents

Mr. P. B. Shah for the appellant.
Mr. V. S. Gokhale for the respondents.

**CORAM : K. K. TATED, J.
DATED : 14/09/2015.**

P.C.:

. Heard learned Counsel for the parties.

2 This Second Appeal is preferred by plaintiff challenging the concurrent findings of fact recorded by both the Courts below.

3 In the present proceeding, the appellant plaintiff filed Regular Civil Suit no. 1769 of 1976 on 12.10.1976 for an order of injunction restraining respondents defendants from disturbing his possession in respect of suit properties i.e. Survey Nos. 28/12, 27/08, 28/10, 25/3 situated at Village Mahulange, Taluka- Mulshi, Dist. Pune on the ground that the same were his self acquired properties. In that proceeding, the plaintiff preferred application below Exh.5 for interim relief. The Trial Court on 14.10.1976 granted ad-interim relief. Thereafter, the ad-interim relief was confirmed by the Trial Court on 12.11.1976.

4 Being aggrieved by the interim relief granted by the Trial Court in Regular Civil Suit no. 1769 of 1976, the respondents defendants preferred Misc. Civil Appeal No. 6 of 1977 on 05.01.1977. That Misc. Civil Appeal was allowed by the Appellate Court on 19.08.1978 in respect of land bearing Gat No. 25/3 & 27/8.

5 Thereafter, the Trial Court dismissed the Regular Civil Suit no. 1769 of 1996 filed by the plaintiff by the Judgment and Decree dated 28.02.1989.

6 Being aggrieved by the decree passed by the Trial Court, the plaintiff preferred Civil Appeal No. 648 of 1989 in the Court of 2nd Additional District Judge, Pune. That appeal was dismissed by the Appellate Court on 14.06.2000.

7 Being aggrieved by the decree passed by the Appellate Court, the plaintiff preferred present Second Appeal in the month of November, 2000.

8 The learned Counsel Mr. P. B. Shah appearing on behalf of plaintiff submits that both the Courts below erred in coming to the conclusion that plaintiff has not made out any case for an order of injunction restraining respondents/defendants from disturbing his possession in respect of the suit land. He submits that both the Courts below have not considered the possession of the plaintiff, at the time of passing the impugned decree. He submits that both the Courts dismissed the plaintiff's suit as well as appeal only on the ground that subsequently the defendants filed Special Civil Suit no. 157 of 1977 for

partition and separate possession of HUF property including suit property and that suit was decreed. He submits that both the courts failed to consider the plaintiff's case of possession and injunction independently. Hence, though concurrent findings of facts are recorded by both the Courts below, same required to be set aside.

9 On the other hand, the learned Counsel Mr. V.S. Gokhale appearing on behalf of the respondents/defendants vehemently opposed the present Second Appeal. He submits that both the Courts below concurrently held that the plaintiff failed and neglected to make out any case for an order of injunction restraining the defendants from disturbing their possession in respect of suit properties. He submits that these defendants preferred Special Civil Suit no. 157 of 1977 for separate possession as per their shares in HUF properties including suit properties. He submits that, that suit was decreed on 20.02.1989 by the Trial Court. Thereafter, present plaintiff preferred Civil Appeal No. 658 of 1989. That Appeal stands dismissed on 14.06.2000 and thereafter, the plaintiff preferred Second Appeal no. 618 of 2000. He submits that in view of subsequent development i.e. decree passed in Special Civil Suit no. 157 of 1977, nothing survives in the suit filed by the plaintiff and therefore, both the Courts below correctly held that plaintiff failed to make out any case for an order of injunction. Hence, there is no substance in the Second Appeal and same to be dismissed with costs.

10 I heard both the sides at length. It is to be noted that in the present proceeding, during the pendency of Regular Civil Suit no. 1769 of 1976 filed by the plaintiff for injunction, the respondents defendants

preferred Special Civil Suit no. 157 of 1977 for their separate possession of the HUF properties. In that suit, the Trial Court framed the following issues:

“ISSUES

- 1 *Do the plaintiffs prove that they have a share in the suit properties?*
- 2 *If so, what are their shares?*
- 3 *Are the plaintiffs entitled to claim the partition of the properties by metes and bounds?*
- 4 *Is the valuation of the suit for the payment of Court fees is proper?*
- 5 *Are the defendants entitled to claim compensation costs and if so, how much?*
- 6 *Any other reliefs to the parties?*
- 7 *Whether it is proved that the properties mentioned in 1(a) at Sr. Nos. 1, 2, 4, 5, 6, 9, 10 and in 1(b) at Sr. No. 1 and 2 in 1(d) at Sr. Nos. 1, 3, 4, 5, 6 and in 1(c) and self acquired properties of the defendant nos. 1 to 6?*
- 8 *Whether it is proved that the properties mentioned in para 1(a) to (b) of the plaint are joint family properties?*
- 9 *Whether it is proved that the defendant no. 12 was given his $\frac{1}{4}$ share in Regular Civil Suit No. 1843 of 1975 and remaining property was kept joint?*
- 10 *What order?”*

Issue no. 7 is whether suit properties are self acquired properties of the plaintiff.

11 The Trial Court decreed the said suit by decree dated 28.02.1989. The operative part of the said decree, reads thus:

“ORDER

- 1 *The suit is decreed with costs.*
- 2 *It is hereby declared that the plaintiffs are entitled for $\frac{1}{3}$ rd share in the suit properties described in paragraph no. 1-A to 1-D, 1-F of the plaint. The property be partitioned by metes and bounds through a Court Commissioner and then the*

separate possession be given to plaintiffs. The preliminary decree be drawn for making the division of the property by metes and bounds. A Court Commissioner be appointed for the above work and then final decree be drawn on receipt of his report. The possession be handed over on final decree.”

12 Being aggrieved by the said decree, the plaintiff preferred Civil Appeal No. 658 of 1989. The same was rejected by the Appellate Court. Thereafter, the plaintiff preferred Second Appeal no. 618 of 2000. That Second Appeal was admitted by this Court on 05.08.2014 and following order is passed in Civil Application no. 7721 of 2000, which reads thus:

“Heard the learned Counsel appearing for the parties. The proceedings for partition and separate possession may go on, however, possession of the parties shall not be disturbed without prior permission of this Court and the parties shall be at liberty to move this Court at that stage. Civil Application stands disposed of.”

13 It is to be noted that the Apex Court in the matter of **Gurvachan Kaur and Others V/s. Salikram (dead) Through Lrs. (2010) 15 Supreme Court Cases 530** held that under Section 100 of Code of Civil Procedure, 1908, interference with finding of fact not permissible in absence of perversity in factual finding. Paragraph 10 reads thus:

“ 10. It is settled law that in exercise of power of under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent.”

14 In similar way, the Apex Court in the matter of **Gian Kaur V/s. Raghbir Singh (2011) 4 Supreme Court Cases 567** held that High Court's interference on erroneous appreciation of admitted facts and question of law in second appeal with concurrent findings of courts below is unsustainable.

15 Considering the law declared by the Apex Court and subsequent order passed by this Court in Civil Application no. 7721 of 2000 dated 05.08.2014, I do not find any substance in the present Second Appeal.

16 Hence, Second Appeal stands rejected.

(K.K.TATED, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed order.