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

**SECOND APPEAL NO. 65 OF 2017
WITH
CIVIL APPLICATION NO. 1279 OF 2017**

Pandit s/o Baburao Shinde,
Age: 41 years, Occu: Agri.,
R/o Nevri, Tq. Hadgaon,
Dist. Nanded

..APPELLANT
(Orig.deft.No.2)

VERSUS

1. Vithalrao s/o Baliram Shinde,
Age: 62 years, Occu: Agril.,
R/o Newri, Tq. Hadgaon,
Dist, Nanded
2. Baburao s/o Madhaorao Shinde,
Died, through L.Rs. i.e.
Present Appellant and
Respondent Nos. 3 and 4
3. Deepak s/o Baburao Shinde,
Died, through Legal Representatives
- 3A. Smita w/o Deepak Shinde (Nakhle),
Age: 45 years, Occu: Household,
R/o 14, Shiv Sadan,
Sidharth Nagar Road No. 17,
Goregaon (West), Mumbai
- 3B. Prachi d/o Deepak Shinde,
Age: 16 years minor under guardian of
her real mother Resp. No.3A,
R/o as above
4. Shashruk s/o Baburao Shinde,
Age: 34 years, Occu: Business,
R/o as above
5. Shinde Pharmaceuticals,
B-22, MIDC, Station Road,
Aurangabad
Prop. The Resp. No.1

..RESPONDENTS
(Orig.Plntff & Dfts 1 & 3 to 6)

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Mr S. B. Bhapkar, Advocate holding for Mr G. G. Kadam, Advocate for appellant;
Mr M. V. Ghatge, Advocate for respondent No.1

CORAM : N.W. SAMBRE, J.

DATE : 13th July, 2017

ORAL ORDER

Based on the sale deed dated 30th September, 1986 / 1st October, 1986, respondent No.1 Vithalrao filed Special Civil Suit No.72 of 1988 for recovery of possession of agricultural land. In the said suit, the appellant-defendant No.2 filed his written statement and denied the claim. The father of the appellant-defendant No.1 Baburao admitted the claim of the present respondent-original plaintiff Vithalrao.

2. Since the appellant failed to adduce any evidence pursuant to the issues framed at Exh.33, the Trial Court upon appreciation of evidence of plaintiff, decreed the suit, vide judgment and order dated 15th February, 1994, which was confirmed in appeal. As such, this second appeal by original defendant No.2.

3. Learned Counsel for appellant-defendant No.2 would urge that for the reasons beyond control, the appellant could not appear through his lawyer at the relevant time before the learned Trial Court and cross-examine the plaintiff and could not place on record the documentary evidence. According to him, in an appeal, he took recourse to the provisions of Order XLI, Rule 27 of the Code of Civil Procedure by moving applications at Exhs. 22 and 23. Such applications were rejected by the learned appellate Court without considering the satisfaction of requirement of said provisions. So as to cause interference, he would draw support

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from the judgments of the Apex Court in the matter of **Muzaffar Ali vs. Dasaram**, reported in **2009 (4) Mh. L.J. 162** and in the matter of **D. R. Rathna Murthy vs. Ramappa**, reported in **2011 (3) Mh. L.J. 44**. He would then urge that even if the Courts below have concurrently recorded findings of fact, this Court is not handicapped in exercising jurisdiction, when findings of fact are not based on the ex-parte evidence and are contrary to the documents, which are produced vide sale deed along with list of documents at Exh.22 before the lower appellate Court. He suggests that the matter be remitted back to the Trial Court by putting present appellant to some conditions.

4. Per contra, the learned Counsel for the respondent-plaintiff would urge that appellant-defendant No.2 filed written statement and resisted the claim. According to him, it was never pleaded by the appellant that there was partition of the suit property and the property was never acquired by his father defendant No.1, being a self acquired property. He would then urge that appellant-defendant No.2 has neither filed suit for partition nor questioned the sale deed, based on which suit for possession is instituted. By inviting attention of this Court to certain findings of the Trial Court, he would urge that repeated opportunities were given to the appellant to lead evidence and same was not en-cashed by the appellant, rather appellant had shown complete dis-respect to the Trial Court. According to him, even before the appellate Court, though application to produce documents was moved under the Order XLI, Rule 27 of the Code of Civil Procedure, the appellant has not satisfied the ingredients therein and as such, appellate Court has rightly rejected the said application. According to him, the appeal being against concurrent findings needs to be dismissed.

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5. Having considered rival submissions, at the outset it is required to be noted that the present appellant i.e. defendant No.2 is the only person who is objecting the decrees passed by both the Courts below. His father – defendant No.1 Baburao had admitted the claim of plaintiff, whereas the other defendants i.e. brothers of the appellant have not questioned the judgments and decree of the Trial Court and the appellate Court. As such, these defendants have acquiesced the decree of both the Courts below.

6. It is then to be noted that the present appellant filed his written statement at Exh.13 and was given opportunities to lead evidence. In the said proceedings, the present appellant has stated that the suit property was not self acquired and exclusively owned and possessed by the defendant No.1 and it is then claimed that by virtue of partition, the defendant No. 1 received the suit property.

7. It is then required to be noted that the Trial Court framed issues at Exh.33 and answered that the suit property was self acquired and exclusively owned and possessed by the defendant No.1. While recording such finding, the evidence of respondent-plaintiff was taken into account. Though the matter was adjourned time and again at the behest of the present appellant, the appellant has failed to adduce any evidence in the form of oral or documentary and has also not cross-examined the plaintiff's witnesses. It is then to be noted that the Trial Court, accordingly proceeded to decree the suit, which was questioned by the present appellant before the learned District Judge, Nanded. The learned District Judge, in paragraph No.28 of the judgment, noted that after the issues were framed by the

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learned Trial Court on 16th June, 1993, on 9th November, 2013, plaintiff examined himself and also exhibited the documents, which were produced. On 20th November, 1993, defendant sought an adjournment and the matter was again adjourned at the behest of the defendant-appellant on 4th January, 1994 after he filed application for permission to cross-examine the plaintiff. Though the said application was allowed, neither costs was paid nor the plaintiff was cross-examined. Apart from above, the base for the alleged contention of the appellant that the suit property was ancestral property, no evidence was placed on record.

8. The appellant though moved an application Exh.23 under the Order XLI, Rule 27 of the Code of Civil Procedure stating that he be permitted to lead the evidence and by producing on record the documents to that effect, the appellate Court considered the said claim and rejected based on the aforesaid conduct of the appellant. The present appellant in application Exh.23, has neither demonstrated nor exhibited such grounds, which were beyond his control, which prompted him not to appear before the Trial Court along with the evidence.

9. The fact remains that the evidence was well within the knowledge of the appellant, however, the appellant was callous and negligent in conducting the matter before both the Courts below.

10. In the aforesaid background, the support sought to be drawn by the present appellant from the judgments of the Apex Court in the matter of Muzaffar Ali and Rathna Murthy (cited supra), will be of hardly any assistance as those judgments are delivered on altogether different context. In the matter of Muzaffar Ali, the application was moved under Order XLI, Rule 27 in second appeal demonstrating

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the ground, to which the Supreme Court got satisfied and ordered retrial in the matter. In the matter of B. R. Ratnamurthy, though the Apex Court is of the view that if perverse findings of fact are recorded, the appellate Court while exercising jurisdiction under Section 100 of the Code of Civil Procedure can interfere. So far as the case in hand is concerned, I hardly see any material so as to infer that the findings of the fact recorded by both the Courts below are perverse in absence of any material to that effect on record.

11. As a consequence of above, the second appeal lacks merit and stands dismissed. In view of dismissal of second appeal, pending civil application does not survive and same stands disposed of.

12. At this stage, the learned Counsel for appellant submits that, so as to show bona fides, particularly in the backdrop of money decree, the appellant had deposited Rs.3,00,000/- before the executing Court, the same in the aforesaid background, be refunded to him.

13. This Court having upheld the findings of both the Courts below, it will be appropriate to return the said amount to the executing Court as the executing Court may adjust the amount of money decree from the said amount. As such prayer for refund of amount stands rejected.

14. This Court had protected the possession of the present appellant vide order dated 28th April, 2017. The prayer is made that the protection to the possession of the present appellant be extended by eight weeks from today, which prayer is objected by the learned Counsel for the respondent-plaintiff.

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15. Having regard to the fact that the appellant is in possession of suit property for quite a long time, particularly since 1988, it will be appropriate to protect his possession for a period of eight weeks as prayed and is accordingly protected.

(N.W. SAMBRE, J.)

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