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

SECOND APPEAL NO.415 OF 2017

Shaikh Rahim s/o Babamiya Shaikh,
Age : 50 years, Occu. Business,
R/o Indiranagar, Baijipura,
Aurangabad

..APPELLANT
(Orig. Defendant)

VERSUS

Shaikh Naim s/o Babamiya Shaikh,
Age : 55 years, Occu. Business,
R/o Indiranagar, Baijipura,
Aurangabad

..RESPONDENT
(Orig. Plaintiff)

Mr Sambhaji S. Tope, Advocate for appellant;
Ms S.S. Kulkarni, Advocate holding for Mr K.M. Nagarkar, Advocate for
respondent

CORAM : N.W. SAMBRE, J.

DATE : 14th June, 2017

ORAL ORDER

The present appellant was original defendant in Regular Civil Suit No.399 of 2007, which was filed for simpliciter injunction.

2. The parties to the suit are the real brothers, who had common nucleus.

3. It is the case of the respondent-plaintiff before the Trial Court that vide registered sale deed dated 5th June, 2002, suit property – agricultural land bearing Gat No.19 at Mauje Hirapur, Talathi Sajja Warud Kazi, Dist.

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Aurangabad was purchased by him. Pursuant to the sale deed, mutation was effected vide entry no.444.

4. Since it was noticed by the respondent that the appellant-defendant had carried out mutation citing the consent deed dated 6th July, 2005 (Exh.44-C), he was required to file the suit for simpliciter injunction.

5. The present appellant-defendant resisted the claim in the suit by filing written statement at Exh.28 contending that the suit simpliciter for injunction was not maintainable as the relief of declaration of ownership was not claimed. It is further claimed that the mutation entry no.444 was cancelled and fresh mutation entry no.613 was taken in his name on 31st May, 2006. According to him, in view of above, the suit was liable to be dismissed.

6. The learned Trial Court framed issues at Exh.21 in relation to possession of the plaintiff over the suit property and whether the present appellant-defendant was intending to create third party interest in the suit property and answered the same in favour of respondent-original plaintiff. The judgment and decree of injunction dated 23rd August, 2012 was challenged in Regular Civil Appeal No.499 of 2012 and the learned District Judge-10, Aurangabad confirmed the said judgment and decree, vide judgment and decree dated 21st March, 2017. Thus, the present Second Appeal.

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7. Mr Tope, learned Counsel appearing on behalf of the appellant-original defendant would rely upon the two documents, viz. Exh.44-C a consent deed executed by the respondent-plaintiff in favour of the appellant-defendant thereby relinquishing the rights in favour of the appellant. He would also place reliance upon the testimony of father Babamiya, who was examined at Exh.76 so as to prevail upon this Court to frame a substantial question of law as to non-framing of necessary issues pursuant to the provisions of Order XIV, Rules 1 & 3 of the Code of Civil Procedure (for short "CPC") about validity of the consent deed and possession of the present appellant. In addition, Mr Tope would submit that if the testimony of the father at Exh.76 and recitals of the consent deed at Exh.44-C are appreciated, the only inference that can be drawn is present appellant is in possession by virtue of relinquishment deed and suit ought not to have been decreed in favour of the respondent. He would submit that this Court should remand the matter back to the Trial Court with a direction to frame additional issues.

8. Per contra, Ms Kulkarni, learned Counsel holding for Mr Nagarkar on behalf of the respondent-plaintiff would urge that the issues were framed after having regard to the provisions of Order XIV, Rules 1 & 3 of CPC. According to her, the pleadings of respective parties were appreciated and accordingly issues were framed, which at the relevant time were not objected by the appellant-defendant. She would then urge that since the suit was based on a title deed dated 5th June, 2002, it was very much maintainable as it was already alleged that by virtue of said

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deed, the plaintiff was owner and possessor of the suit property. She would then urge that though the initial mutation entry no.444 in the name of the present respondent was cancelled, still by order of Additional Collector which is at Exh.50, the mutation which was later on made in favour of the present appellant being mutation entry no.613 had already been cancelled and the property stood in the name of respondent. According to her, there are concurrent findings and the appeal is liable to be dismissed.

9. From the judgment of the Trial Court, what is required to be noted is, the suit for simpliciter injunction in relation to the suit property was instituted based on title deed dated 5th June, 2002, which is a registered document. It is then to be noted that the present appellant claimed that there was consent deed executed in his favour, which is at Exh.44-C and as such, he remained in possession of the property. It is to be noted that relinquishment deed Exh.44-C does not speak of passing of possession or that of exclusive possession of the appellant over the suit property. Apart from above, neither any counter claim of declaration that the relinquishment deed is binding of the respondent nor a plea as regards declaration of his possession was made by the defendant.

10. Though the defendant raised a plea of relinquishment deed, however, at the relevant time considering the case as was canvassed by the respondent-plaintiff and the response in defence given by the present appellant through the written statement, the Trial Court proceeded to frame issues under Order XIV, Rules 1 and 3 of CPC.

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11. It is then to be noted that though a reliance is placed on cancellation of mutation entry No. 444 and subsequent mutation of the suit property in the name of the present appellant, still Exh.50 is an order passed by the Additional Collector under the provisions of the Maharashtra Land Revenue Code, thereby cancelling the mutation entry in favour of the appellant. It is an admitted fact that such order of the Additional Collector at Exh.50 against the present appellant was not questioned by him and the said order has attained finality.

12. In the aforesaid backdrop, the claim of the appellant that the Trial Court should have framed an issue on the aspect of the consent deed Exh.44-C will hardly be of any assistance.

13. Apart from above, though it is sought to be canvassed that at Exh.76 Babamiya, who is father of both the parties to the appeal was examined, who has deposed in favour of the appellant, however, both the Courts below have appreciated the said evidence and noted a finding against the appellant. Unless any perversity is demonstrated, this Court should be slow in interfering, particularly upon appreciation of the evidence in the second appellate jurisdiction.

14. In the backdrop of the findings recorded by the learned Trial Court, the lower appellate court reconsidered the entire case and re-appreciated the entire evidence including that of the original sale deed Exh.68 and

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reached to a conclusion that the judgment of the Trial Court of ordering injunction does not call for any interference.

15. In the above background, in my opinion, no substantial question of law is involved in the instant second appeal. The second appeal lacks merit and stands dismissed. In view thereof, Civil Application does not survive and stands disposed of accordingly.

(N.W. SAMBRE, J.)

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