

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 651 OF 2016
AND
CIVIL APPLICATION NO. 12103 OF 2015

Mujahidmiya @ Mansabmiya
S/o Yakubmiya Deshmukh,
Age : 75 years, Occu. : Agril.,
R/o. Kingaon, Tq. Ahmedpur,
District : Latur

.. Appellant
(Orig. Defendant)

VS.

Yakubmiya @ Nizammiya S/o.
Jahedmiya Deshmukh,
Age : 50 years, Occu.: Agril.,
R/o. Kingaon, Tq. Ahmedpur,
District : Latur

.. Respondent
(Orig. Plaintiff)

Mr. Balaji S. Shinde, Advocate h/f Mr. S.J. Salgare, Advocate for the
appellant

Mrs. A.N. Ansari, Advocate for the respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 29-03-2017

ORAL JUDGMENT :

1. Original defendant in regular civil suit no. 127 of 2009, is before this court in second appeal, challenging judgment and decree passed by appellate court dated 11-02-2015 in regular civil appeal no. 277 of 2011 granting decree of declaration that present respondent (plaintiff in R.C.S. no. 127 of 2009) is owner and possessor of 1 Hectare, 14 Are land from survey no. 148(1), situated

at village Kingaon, Tq. Ahmedpur, Dist. Latur and restraining present appellant – defendant from obstructing and interfering with plaintiff's possession over aforesaid property, in the process, reversing and setting aside dismissal of suit under the judgment and decree of trial court dated 31-10-2009 in regular civil suit no. 127 of 2009.

2. Primary thrust of submissions on behalf of the appellant is on that, appellant – defendant had been deprived of opportunity to appear before the courts hitherto as suit summons had not been properly served on two occasions. In the first place in the suit, and, secondly, in the appeal at the plaintiff's instance. As a matter of fact, during trial, suit summons had not been served and the signature appearing of him, purportedly showing service on him, is not his signature. He further submits that even during the appeal, the defendant – appellant had, in-fact, not been served and only a spurious report came to be made about him having shown unwillingness to accept the summons when he was tried to be served. Plaintiff's regular civil suit no. 127 of 2009 had been dismissed by trial court. According to learned counsel, the record depicting service on him is not proper and genuine.

3. Learned counsel for the appellant – defendant submits that had an opportunity come the way of defendant, he could have cross-examined the witnesses who have ostensibly proceeded to

give deposition in favour of the plaintiff, and, that opportunity has been lost under dubious record of service of summons in the suit on the defendant. According to learned counsel, opportunity of appearing in appeal has also been lost due to creation of record which apparently is not proper and reliable. He submits that in the wake of aforesaid, it would be expedient that the matter be remanded for retrial enabling the appellant to appear and defend the case.

4. Learned counsel for the appellant submits that although it is the contention of the plaintiff – respondent that 1/3rd share each went to brothers of deceased *Gulam Maheboob*, yet, there is no evidence on record depicting the same, since despite direction by the trial court to produce certified copy of the settlement, the certified copy had not been produced before the trial court and only a photocopy had been produced which could not be taken into account as evidence. Trial court, as such, rightly declined to take the same into account. He further refers to that trial court has observed in paragraph no.11, that, although the plaint of regular civil suit no. 75 of 2005 depicts survey no. 148(1) had been orally partitioned among the brothers, the same is inconsistent with the evidence given by plaintiff in the present matter. Trial court has further referred to that land survey no. 252/A : 252/2 had been contended to have been acquired from the income of other

properties and had been purchased in the name of *Gulam Maheboob* and after his death, it had been given to plaintiff in regular civil suit no. 374 of 1998 *viz. Ezaz Deshmukh* and that the contentions in the suit were not denied by plaintiff in the present matter by written statement or in any other way. Trial court had further considered that there is no corroboration to the theory of *hiba* either by *Mujahidmiya* or for that matter by *Ikbalmiya* and, as such, had dismissed the suit.

5. Learned counsel submits that the appellate court has erroneously considered that there is evidence led by plaintiff about *hiba*, and, only thing is that, it was not effected in record of right. He submits that the evidence in respect of *hiba* had been discussed by the trial court and trial court had disbelieved the same, however, such a discussion does not find place in the judgment of the appellate court, nor does it refer to as to how the same depicts *hiba* having been proved. The statement of *Khayyum* being inconsistent and incompatible with the pleadings filed by him, could not have been believed at all. Appellate court has failed to appreciate the same.

6. Learned counsel submits that it cannot be said that in absence of appearance on behalf of the defendant that *hiba* has been held to be proved, and, further that the plaintiff had failed to

produce certified copy of the settlement in regular civil suit no. 75 of 2005. As such, no material can be said to be available entitling plaintiff to the grant of decree nor do the order of appellate court depicts according to learned counsel, the application of Muslim personal law. He further refers to that the trial court has found it difficult to consider that revenue record would depict deceased Gulam Maheboob to be absolute owner of suit land. All these material aspects impinging upon, will affect the entitlement claimed by the respondent – plaintiff.

7. Mrs. Ansari, learned counsel appearing for the respondent - plaintiff contends that the appellant - defendant had chosen to abstain from the proceedings in the suit, and, further during the appeal, and, as such, does not deserve any indulgence into his request for remanding the matter.

8. Although learned counsel for respondent has opposed the second appeal, yet, learned counsel for the respondent - plaintiff is not in a position to dispute veracity of the contention on behalf of the appellant about there being doubtful service.

9. The question thus emerges;

“ Whether the matter deserves to be remanded for retrial, letting opportunity to the defendant, to defend the case ? ”

10 It appears that it is the case of the plaintiff – respondent that *Gulam Maheboob* alias *Hannamiya* was owner of land admeasuring 3 Hectare, 22 Are of survey no. 148(1) and 3 Hectare, 50 Are of survey no. 252/A. He had three brothers, namely, *Ikbalmiya*, *Jahidmiya* and *Mujahidmiya*. He had granted suit property by oral gift (*Hiba*) to him, *Ikbalmiya* and *Mujahidmiya* in presence of witnesses. Each of the three brothers of *Gulam Maheboob* received 1 Hectare, 14 Are land from survey no. 148(1), and, accordingly, the three brothers were cultivating their shares of the lands. However, appellant – defendant got entered his name to entire 3 Hectare, 42 Are, with reference to which defendant – appellant is trying to interfere with and obstruct cultivation of 1/3rd share of plaintiff from survey no. 148(1), and, as such, suit had been filed seeking declaration and injunction.

11. After death of *Gulam Maheboob*, One *Ezazmiya Deshmukh* had instituted regular civil suit no. 374 of 1998 against *Ikbalmiya* and others.

12. Son of *Ikbalmiya*, namely, *Khayyum* had instituted regular civil suit no. 75 of 2005 against *Mujahidmiya* – present appellant and others in respect of land survey no. 148(1), seeking declaration of ownership and injunction which culminated into a settlement accepting 1/3rd share each of brothers of deceased *Gulam*. Copy had

been produced thereof *albeit* certified copy is not produced. With reference to the same, the trial court had dismissed the suit of the plaintiff, whereas the appellate court had considered certified copy may not be necessary.

13. In the present case, it appears that there had been a direction by trial court for production of certified copy of decision in Regular Civil Suit No. 75 of 2005, and yet same had not been filed. While trial court has considered that pleadings of plaintiff, who had appeared in the present proceedings, is apart from his evidence in present matter, which aspect appears to have skipped attention of appellate court. According to appellate court, there has been evidence with regard to *Hiba*, however, only for the reason that there is no corresponding record, evidence in respect of the same cannot be disbelieved in the absence of challenge to such evidence.

14. Defendant has been consistently claiming that he has not been properly served on two occasions, in the suit and in the appeal preferred by the plaintiff from decree of dismissal of suit. According to him, record maintained in respect of service raises doubts about service. The report submitted upon service in appeal about him unwilling is a got up report and ought not to be relied on.

15. In aforesaid scenario, it appears to be expedient, in order to make available an opportunity to the appellant – defendant, as well

as to the parties concerned to meet out the case being submitted on their sides. In the process, it may cause some inconvenience to respondent – plaintiff, however, that can be mended by awarding costs. This appears to be expedient in the face of contentions of the appellants.

16. As such, the question is answered accordingly. The judgment and decree passed by trial court dated 31-10-2009 in regular civil suit no.127 of 2009, and, judgment and decree of appellate court dated 11-02-2015 in regular civil appeal no.277 of 2011, are set aside, and, second appeal is allowed. The matter is remanded to the trial court from the stage of filing of written statement, and, the suit is restored, to be proceeded with accordingly, and, disposed of expeditiously within a period of one year from today, subject to payment of costs of Rs.15,000/- (Rs. Fifteen Thousand), to be paid to the respondent - plaintiff.

17. The costs be deposited in the trial court within a period of twenty (20) weeks from today for onward disbursal to the respondent - plaintiff.

18. Parties to the suit to appear before the trial court on 17th July, 2017 obviating notice after remand to the parties.

19. Second appeal accordingly stands disposed of.

20. Consequently, civil application no. 12103 of 2015 also stands disposed of.

[SUNIL P. DESHMUKH]
JUDGE

arp/JUD-651-2016