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

**908. SECOND APPEAL NO. 742 OF 2014
WITH
CIVIL APPLICATION NO. 13218 OF 2014
IN
SECOND APPEAL NO. 742 OF 2014**

Avesh Abdullahkhan Pathan
age 36 years occupation Nil
R/o at present abroad,
through his Power of Attorney Holder
Miss Atiya Abdullahkhan Pathan,
age 47 years occupation Nil
R/o Mehtab Cottage, Mukund Nagar,
Nagar Tal. and Dist. Ahmed Nagar.

... APPELLANT
(Orig. defendant No.1)

versus

1. Saifunnissa Ibrhimkhan Pathan
age 82 years occupation household
2. Anis Saifulla Khan,
age 55 years occupation service in District Court

Nos. 1 & 2 R/o Sohel Bungalow, Opp. Nurani Colony,
Tapneshwar, Tal. Jamkhed Dist. Ahmed Nagar.

(Original plaintiffs No. 1 & 2)

3. Abdullahkhan Mehboobkhan Pathan,
age 76 years occupation Nil
R/o Mehtab Cottage, Mukund Nagar,
Nagar Tal. & Dist. Ahmed Nagar

(Original Defendant No.2)

...RESPONDENTS

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**WITH
SECOND APPEAL NO. 228 OF 2015
WITH
CIVIL APPLICATION NO. 6744 OF 2015
IN
SECOND APPEAL NO. 228 OF 2015**

Avesh Abdullahkhan Pathan
age 36 years occupation Nil
R/o at present abroad,
through his Power of Attorney Holder
Miss Atiya Abdullahkhan Pathan,
age 47 years occupation Nil
R/o Mehtab Cottage, Mukund Nagar,
Nagar Tal. and Dist. Ahmed Nagar.

... APPELLANT
(Orig. defendant No.1)

versus

1. Saifunnissa Ibrhimkhan Pathan
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(Original plaintiffs No. 1 & 2)

3. Abdullahkhan Mehboobkhan Pathan,
age 76 years occupation Nil
R/o Mehtab Cottage, Mukund Nagar,
Nagar Tal. & Dist. Ahmed Nagar

(Original Defendant No.2)

...RESPONDENTS

Mr Wagh S.S., Advocate for Appellant,

Mr Kulkarni Sanket S. for Respondent No. 1

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CORAM : N.W. SAMBRE, J.

DATE : 28th June, 2017

ORAL ORDER

The present appellants in both Second Appeals are original defendants in both Regular Civil Suit Nos. 94/2012 and 95/2012.

2. The parties to the suit are alleging that they have a common ancestor by name Maheboobkhan, who died in 1972, whose first wife Sardarbi predeceased him. His second marriage with Mehtabbi has given birth to defendants i.e. present appellants before this Court, Abdullakha out of his marriage given birth to defendant No.2 Avesh, who is appellant in the present appeal.

3. Original plaintiff Saifunnissa is the wife of Ibrahimkhan, son, born to Sardarbi and Mehboobkhan, whereas, plaintiff No.2 Anis is the daughter of plaintiff No.1 Saifunnisa. It is case of the plaintiffs i.e. respondents herein, before the learned Trial Court that defendant No.1 Abdullakha, who claimed to have been born out of marriage of Mehtabbi with Mehboobkhan, had no title and interest to the suit property, still he proceeded to execute two sale deeds being sale deeds dated April 10, 2012, registered at serial Nos. 618 and 619 of 2012, in favour of present

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appellant/defendant No.2. It is claimed that it is Ibrahimkhan, who has only share in the suit property. As such, declaration for cancellation of sale deeds and permanent injunction is sought.

4. The learned Trial Court vide its judgment and decree dated January 18, 2014, dismissed both the suits after having framed an issue as regards whether the sale deeds are bogus one and whether the plaintiffs are in possession of the suit property. An issue as regards share of defendant No.1 Abdullahkhan/respondent No.3, in the suit property, was answered in his favour.

5. The learned Trial Court after assessing the evidence, by judgment and decree dated January 18, 2014, dismissed both the suits, which was subject matter of challenge before the learned Adhoc District Judge, Ahmed Nagar, in Regular Civil Appeals No. 69/2014 and 70/2014. These two appeals are allowed by Judgment and decree dated July 30, 2014. As such, this Second Appeal by the original defendants. As a consequence of lower Appellate Court's judgment, both suits of the plaintiffs i.e. respondents herein, came to be decreed.

6. Shri Wagh, learned Counsel for the appellant/defendant No.2 would urge that lower Appellate Court has failed to re-appreciate the evidence

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and deal with the same in the backdrop of pleadings of respective parties. He would then urge that the plaintiffs were duty bound to prove their case, and the Appellate Court in its judgment, has shifted burden for the same on the defendants and recorded finding that since defendants have failed to prove certain facts, suit is required to be decreed. Shri Wagh, learned Counsel for the appellant, then took me through the cross-examination of plaintiff No.2 Anis, so as to submit that admissions given by the said witness are not at all dealt with by the Appellate Court in its judgment, particularly, about the documents, which were executed and are 30 years old.

7. According to him, both the appeals need to be allowed by remanding back matter to the First Appellate Court for deciding appeal afresh.

8. Shri Kulkarni, the learned Counsel for the respondents/original plaintiffs would support the Judgment and decree of the lower Appellate Court. According to him, in a suit for partition, the husband and father of plaintiffs No.1 and 2, respectively, denied the relationship of Abdullakhan being son of Mehboobkhan. According to him, said fact is not proved by the defendants while discharging their burden, hence learned Appellate Trial Court was right in decreeing the suit. He would then refer to the

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observations made by the Appellate Court, so as to substantiate the said contention, particularly, the observations made in paragraph No. 29. According to him, though the earlier suit is dismissed, an application for restoration thereof is pending. However, the same has to be rightly read to the detriment of present appellant/original defendants and order of the Trial Court is required to be maintained.

9. Having gone through the rival submissions of the parties, from the record of the Trial Court, it is required to be noted that the plaintiffs in support of their claim have examined plaintiff No.2 Anis at Exh. 55 and she was re-examined at Exh. 79, who was subjected to cross-examination on behalf of appellant/original defendants. D.W.1 Inaytulla was examined at Exh. 83. In addition to above, certain documentary evidence is brought on record in the form of mutation entry No. 37 at Exh. 58 and 7/12 extract at Exh. 59. In addition to above extracts, birth register was produced by defendants/present appellant at Exh. 91. Mutation entries No. 307 at Exh. 58 and 59 were also relied upon by them.

10. The Trial Court while dealing with the claim, has answered the issue, particularly, whether present appellant had share in the suit property or not, in the affirmative, however, dismissed the suit having recorded that no case to that effect is made out after analysing the

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evidence.

11. The First Appellate Court thereafter has re-assessed the pleadings and evidence of the parties and decreed both the suits.

12. In the aforesaid backdrop, the question of law that is required to be dealt with by this Court is, whether lower Appellate Court has committed an error in not appreciating the evidence of the witness of the plaintiffs i.e. P.W.1 and D.W 1 in the backdrop of the pleadings of the respective parties, (b) whether lower Appellate Court has committed an error in shifting burden to prove the fact as regards alleged relationship between plaintiff and defendants on the defendants, and (c) whether lower Appellate Court in the backdrop of law laid down by the Apex Court in the matter of **Santosh Hajari Vs Purushottam Tiwari** reported in **AIR 2001 Supreme Court 965**, has considered findings recorded by the Trial Court while analysing the same, in the backdrop of the evidence and pleadings of the parties.

13. This Court intends to decide the substantial question of law on point No.1 initially. Upon reading evidence of plaintiffs' witness No.1, particularly, her cross-examination, what could be noticed is, certain admissions were given by the said witness. So far as those admissions

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are concerned, while dealing with such admissions and documentary evidence, the lower Appellate Court has recorded finding that the documents, which were shown to this witness, are shown in bulk and hence not admissible. The Appellate Court was expected to deal with them in details, which was duty of the lower Appellate Court. The lower Appellate Court was duty bound to appreciate rival contentions out of pleadings of parties, the oral and documentary evidence brought on record, and then in the backdrop of the same, upon analysis of record and findings, should have recorded as to how Trial Court has committed an error in not considering the same. At the cost of repetition, it is worth to observe here that the Apex Court in the matter of **Santosh Hazari**, cited supra, has discussed duties of the lower Appellate Court while dealing with the issues, which are brought before it, particularly, while upsetting the judgment of the Trial Court. The Apex Court has also observed that findings of the Trial Court are required to be inspected and while upsetting the same the Appellate Court must record appropriate reasons for disagreeing with the findings of the Trial Court.

14. As noticed from the Judgment of the Appellate Court, the Appellate Court has not discussed in detail the evidence of P.W.1 and D.W.1. However, in casual manner, has discarded the documentary evidence, particularly, the documents which are appreciated by the Trial Court viz.

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mutation entries, birth extract register and other revenue record.

15. In the aforesaid backdrop, in my opinion, the question of law and points No. 1 and 3, framed here-in-above are required to be answered in favour of present appellant, particularly, when no findings are recorded as regards shifting the burden on defendants to prove a particular issue, which point falls for consideration of lower Appellate Court.

16. In view of above, both these appeals are allowed.

I. The judgment and decree passed by the Adhoc District Judge, Ahmed Nagar on July 13, 2014 in Regular Civil Appeal No. 69/2014 and 70/2014 is hereby quashed and set aside. Both the appeals stand restored to the file of learned lower Appellate Court.

II. The Lower Appellate Court is directed to decide both the appeals afresh, after affording reasonable opportunity of hearing to parties.

III. Parties to the appeal shall co-operate for expeditious disposal of appeal, keeping in mind that they are litigating for last about five years.

IV. Hearing of both the appeals are expedited, and it is directed that both the appeals shall be decided within six months from today.

V. Parties undertake that they shall file written notes of argument before the lower Appellate Court for their convenience and convenience of the Court.

VI. Both the parties are directed to maintain status-quo in relation to the suit property during pendency of both the appeals before the learned lower Appellate Court.

VII. Parties agree that they shall appear before the lower Appellate Court on 13th July 2017. As such, issuance of fresh notice to the parties is not warranted.

17. In view of disposal of Second Appeals, pending Civil Applications do not survive and stand disposed of accordingly.

(N.W. SAMBRE, J.)

pjm