

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

**SECOND APPEAL NO. 828 OF 2018
WITH
CIVIL APPLICATION NO. 6500 OF 2018**

- 1] M/s Balubhai Pragji & Company
Nandurbar
(Partnership firm through partners)
- 2] Chimanlal @ Bhurabhai Shah,
since deceased through L.Rs.
- 2A] Bhupendra Bhurabhai Shah,
since deceased through his L.Rs.
- 2A-1] Smt. Pravinaben w/o Bhupendrabhai
Shah, age 69 years, occ.agril.,

R/o Aadeshwar Nagar,
Sanjay Mill Compound,
Taloda Road, Nandurbar,
- 2B] Mahendra Bhurabhai Shah,
since deceased through L.Rs.
- 2B-1] Ketankumar Mahendrabhai Shah,
age 43 years, occ. Business,
R/o Dadawadi, Nandurbar,
- 2B-2] Diptyben Nileshkumar Shah,
age 44 years, occ. Household,
R/o Sarigam (Bhilad) Gunjrath
- 2B-3] Purviben Bhaveshkumar Shah,
age 34 year, occ.household,
R/o Joshi Mohalla, Dudhiya,
Talab Road, Navsari (Gujrath),
- 2C] Rajnikant Bhurabhai Shah,
age 65 years, occ. Agril.
And business, R/o Nandurbar,
Tq. And Dit. Nandurbar,
- 2D] Chanchalaben Bhurabhai Shah
(deceased)

- 3] Sau. Palakben w/o Rahulkumar
Shah, age 43 year, occ. Household,
R/o 16, Sai Apartment,
Nanpura, in front of Kadam Bhavan,
Surat (Gujrath),
- 4] Meghanaben Bhaveshkumar Shah,
age 40 year, occ. Household,
R/o Remand Circle, Adjan Road,
Surat (Gujarath),
- 5] Dipesh Bhupendrabhai Shah,
age 37 years, occ. Service,
R/o 56, Bond Street,
Apartment No. 33,
Irving Texsos,
75938, U.S.A.
- ...Appellants
[Orig. Plaintiffs]

VERSUS

- 1] Radhabai w/o Govindsing Pardeshi,
since deceased through L.Rs.
- 1A] Sariyabai w/o Kashianth Pardehi,
age 80 year, occ. Household,
R/o Pardehipura, Nandurbar,
DitRICT Nandurbar,
- 2] Kashinath Tikaram Pardeshi,
since deceased through L.Rs.
- 2A] Ranvirsing Kahinath Pardeshi,
(Raghuvanshi),
Age 64 years, occ. Busines,
- 2B] Rajesh Kashinath Pardeshi,
age 59 years, occ. Business,
- 2A & 2B R/o Pardeshipura,
Nandurbar, Dist. Nandurbar,
- 2C] Manorama Dinesh Raghuvanshi,
age 54 year, occ. Household,
R/o Raghukul Nagar, Bypass Road,
Nandurbar, Dist. Nandurbar,
- ...Respondents
[Original Defendants]

3] Sau. Dakshaben w/o Prakash Shah,
age 34 years,
R/o C/o P.L.Shah,
Plot No.11, 3rd Floor,
Aahirvad Cooperative Housing
Society Ltd.
S.V.Road, Andheri (W),
Mumbai-58,

4] Shri Nilesh Bhupendrabhai Shah,
age 46 year, occ. Business
and agriculture,

R/o Aadeshwar Nagar,
Sanjay Mill Compound,
Taloda Road, Nandurbar

...Repondents
[Orig.Plaintiffs]

...

Mr. R.R.Mantri, advocate for appellants

Mr. A.S.Abhyankar, advocate for Respondent nos. 2A
to 2C

...

CORAM : SUNIL K.KOTWAL, J.

DATE OF RESERVING

THE JUDGMENT : 30.11.2018

DATE OF PRONOUNCEMENT

OF JUDGMENT : 11.12.2018

J U D G M E N T :

This Second Appeal is filed by original plaintiffs against the judgment and decree, passed by the learned Principal District Judge, Nandurbar, in Regular Civil Appeal No. 78 of 2012, dismissing the appeal preferred by plaintiffs against the judgment and decree, passed by the learned Civil

Judge, Senior Division, Nandurbar, in Regular Civil Suit No. 26 of 1972.

2. Respondents nos. 1A and 2A to 2C are the legal representatives of original respondent nos. 1 and 2, respectively. Respondent nos. 3 and 4 are also original plaintiffs.

3. Facts, leading to institution of this appeal, are that the plaintiffs filed suit for separate possession of his half share in the suit land described in para no.1 of the plaint and for obtaining execution of registered document from defendant no.1 in respect of the suit land, if required. Contention of the plaintiffs, in brief, is that defendant no.2 is son-in-law of defendant no.1. Defendant no.2 used to look after all transactions on behalf of defendant no.1, as he was the husband of only one daughter of defendant no.1. Defendant no.2 approached plaintiffs on behalf of defendant no.1 and made proposal to purchase the suit land by way of equal sharing the consideration for purchase of the suit land. The said proposal

was accepted by plaintiffs and the total consideration was fixed as Rs.5,000/-. The plaintiffs agreed to pay Rs.2,500/- towards half consideration and Rs.100/- towards expenses of the registration. It was also agreed that the sale deed should be executed in the name of only defendant no.1. Accordingly, on behalf of plaintiffs and defendant no.1, defendant no.2 settled agreement of sale of the suit land with original owner. Accordingly, on 1.2.1960, registered sale deed of the suit land was executed in the name of defendant no.1. As per agreed terms of above said contract, the plaintiffs paid Rs.2,600/- to defendant no.2 on 24.2.1960 and obtained receipt from him on behalf of defendant no.1. Defendant agreed to deliver separate possession of half share of plaintiffs on demand. Even, subsequently defendant no.1 acknowledged the half share of plaintiffs in the suit land under agreement, dated 4.5.1965 executed in favour of third person.

4. On 11.12.1971, plaintiffs served notice

through their advocate to the defendants demanding separate possession of their $\frac{1}{2}$ share and on 21.12.1971 the defendants sent inland letter to the plaintiffs informing that their advocates would reply the notice after returning to the station. Subsequently, on 11/12.1.2072 the notice of the plaintiffs was replied and defendants denied the right and interest of plaintiffs in the suit land. Therefore, the plaintiffs were constrained to file the suit.

5. Defendant no.1 filed separate written statement (Exh.18) and denied the claim of plaintiffs. Defendant no.1 specifically denied that defendant no.2 acted on behalf of defendant no.1. She contended that she never orally or by executing power of attorney authorized defendant no. 2 to enter into any transaction. According to defendant no.1, under registered sale deed, dated 1.2.1960, she has become absolute owner of suit land. The consideration of that sale deed was paid by defendant no.1 out of her own separate income. If defendant no.2 has accepted Rs.2,600/- from the

plaintiffs, it is not binding on defendant no.1 and the plaintiffs would be at liberty to recover the same from defendant no.2. Defendant no.1 has specifically denied even the joint possession of the plaintiffs over the suit land. According to defendant no.1, she never admitted the right or interest of the plaintiffs in the suit land in any document.

6. Defendant no.2 adopted the written statement filed by defendant no.1.

7. On behalf of plaintiffs, Madanlal Shah (PW 1) was examined and on behalf of defendant no.1 Ranveer Kashinath Raghuwanshi (DW 1) was examined.

8. After considering the evidence placed on record by the parties, the Trial Court dismissed the suit and imposed compensatory costs against the plaintiffs.

9. The decree, passed by the Trial Court, in Regular Civil Suit No. 26 of 1972, was challenged

in Regular Civil Appeal No. 78 of 2012. Even the First Appellate Court upheld the judgment and decree, passed by the Trial Court, however, set aside part of the decree regarding compensatory costs awarded by the Trial Court.

10. Heard Shri R.R.Mantri, learned counsel for the appellants and Shri A.S.Abhyankar, learned counsel for respondent nos. 2A to 2C.

11. Learned counsel for the appellants submits that this appeal cannot be admitted unless substantial question of law is formulated by this Court. His contention is that while dismissing the suit claim, learned Trial Court did not touch even the evidence placed on record by the plaintiffs. Therefore, it was not fair trial. He submits that the Trial Court has given findings in conflict with the pleadings of defendant nos. 1 and 2. He submits that even the Trial Court did not consider the provisions under Sections 41 and 43 of the Transfer of Property Act. He submits that even the admission given by defendant no.1 in Sauda Pawati

executed in favour of third person regarding title of the plaintiffs in the suit land is ignored by the Trial Court as well as by the First Appellate Court.

12. Next objection of learned counsel for appellants is that even the Appellate Court did not frame point of limitation and did not award opportunity to the appellants. He submits that even the issue of limitation is erroneously decided by the Appellate Court, as there was no plea of adverse possession raised by the defendants. He proposed following substantial questions of law.

(i) Are the plaintiffs entitled to decree under Order XII Rule 6 of the Code of Civil Procedure on admission, when there is admission of title of half portion of the suit land ?

(ii) Whether unfair trial or an appeal is recognized by law ?

(iii) Whether case of appellants is unfairly tried without observing principles of natural justice ?

(iv) Whether the Appellate Court is justified in raising and deciding the new point of limitation while writing the judgment without giving opportunity to the appellant ?

(v) Whether the Trial Court and the Appellate Court excluded oral evidence from assessment and applied double standard while passing the judgment and decree ?

(vi) Whether for receipt of Rs.2,600/- by defendant no.2 false explanation was given by the respondents ?

(vii) Whether receipt, entry in the book of account and Sauda Pawati is properly interpreted ?

(viii) Whether the Trial Court and the Appellate Court failed to consider Sections 41 and 43 of the Transfer of Property Act ?

13. Learned counsel for the appellants placed reliance on "**Dinesh Kumar vs Yusuf Ali**" [2010 (12) SCC 740] and "**Haryana Financial Corporation vs Jagdamba Oil Mills**" [2002 (3) SCC 496].

14. In reply, learned counsel for respondent nos. 1 and 2 raised preliminary objection that respondent nos. 3 and 4, against whom decree was passed by the Trial Court, did not file First Appeal. As per the order of this Court, respondent nos. 3 and 4 are now transposed as appellants. As these respondents did not file appeal against the decree passed by the Trial Court, the Second Appeal is not tenable.

Next contention of learned counsel for respondent nos. 1 and 2 is that the view taken by the Trial Court is possible view, after considering the oral and documentary evidence placed on record by the parties. Even full opportunity was given to the plaintiffs to cross-examine the witnesses examined by the defendants. Therefore, it cannot be said that the trial was unfair.

His next submission is that while determining the point regarding bar of limitation, opportunity was given to both the parties. He has pointed out that even the Trial Court framed the issue of limitation and decided it. He submits that as prayer for possession was added by way of

amendment after more than 12 years from the date of filing of the suit, the suit claim for possession is barred by limitation, as cause of action arose when in reply notice the defendant denied right claimed by the plaintiffs in the suit.

Next submission of learned counsel for respondent nos. 1 and 2 is that no evidence is placed on record by the plaintiffs to prove that defendant no. 2 held any power of attorney or any authority to enter into contract with the plaintiffs. Even if there is any contract in between the plaintiffs and defendant no.2, the same is not binding on defendant no.1.

Next contention of learned counsel for respondent nos. 1 and 2 is that on 1.2.1960 under registered sale deed of the suit land executed by original owner, defendant no.1 has become exclusive owner of the suit land. Therefore, only on the basis of payment of Rs.2,600/- to defendant no.2 on 24.2.1960, the plaintiffs cannot acquire title in the suit land or absolute title of defendant no.1 cannot be divested.

Next contention of learned counsel for

respondent nos. 1 and 2 is that even erroneous appreciation of evidence and erroneous finding of fact given by the Trial Court and the Appellate Court, do not amount to substantial question of law. Contention of learned counsel for respondents is that as no substantial question of law arises in the present Second Appeal, it cannot be admitted and deserves to be dismissed.

15. Regarding preliminary objection raised by the learned counsel for respondents about tenability of appeal, as the respondent nos. 3 and 4, are transposed as co-appellants, who did not file appeal against the decree passed by the Trial Court against them, it is suffice to say that though this Court permitted transposition of respondent nos. 3 and 4 as co-appellants, they are not actually transposed by amending the appeal memo. Therefore, this preliminary objection holds no substance.

16. However, it cannot be ignored that this appeal, being Second Appeal under Section 100 of

the Code of Civil Procedure, it can be admitted only if substantial question of law arises in the appeal. The Apex Court in "**Gurudev Kaur and others vs Kaki and others**" [(2007) 1 SCC 546], after considering various judgments of the Apex Court, settled following principles of law.

(a) The finding of fact by the Courts below were wrongly or roughly inexcusable, that by itself would not entitle the High Court to interfere, in absence of clear error of law.

(b) The High Court should be satisfied that the case involves substantial question of law and not mere question of law. The reasons for permitting the plea to be raised should also be recorded.

(c) The High Court has duty to formulate the substantial question of law and put the opposite party on notice and give fair and proper opportunity to meet the point.

(d) It is the duty cast upon the High Court to formulate substantial question of law involved in the case even at the

initial stage.

(e) When the findings of fact by lower Appellate Court are based on the evidence, the High Court in Second Appeal cannot substitute its own findings on re-appreciation of evidence, merely on the ground that another view was possible.

(f) Even if the First Appellate Court commits an error in recording finding of fact, that itself will not be a ground for the High Court to upset the same.

17. In **"State Bank of India vs S.N.Goyal"**

[(2008) 8 SCC 92], the Apex Court held that :

(a) In the context of Section 100 of the Code of Civil Procedure, any question of law, which affects the final decision in the case, is a substantial question of law as between the parties.

(b) Question of law, which arises incidentally or collaterally having no bearing on final outcome will not be a substantial question of law.

18. In "**Kondiba Kadam vs Savitribai**" [(1999) 3 SCC 722], the Apex Court held that the concurrent findings of fact, however, erroneous, cannot be disturbed under Section 100 of the Code of Civil Procedure.

19. Taking into consideration the above said position of law, if the judgment delivered by the First Appellate Court in Civil Appeal No. 72 of 2012 is examined, it reveals that the Appellate Court has duly considered the pleadings of both the parties as well as the oral and documentary evidence placed on record.

20. As per the case of the plaintiffs, initially only defendant no.2 approached the plaintiffs and settled the terms of the agreement for joint purchase of the suit land for consideration of Rs.5,000/-, which is to be equally shared by the plaintiffs and defendant no.1. While appreciating this contention of plaintiffs, the Appellate Court as well as even the Trial Court rightly held that as defendant no.2 had not

expressed written or oral authority to enter into contract with the plaintiffs on behalf of defendant no.1, the so-called oral agreement in between plaintiffs and defendant no.2 is not binding on defendant no.1. It is to be noted that as per the case of the plaintiffs on their behalf as well as on behalf of defendant no.1, even the agreement of sale with original owner, was executed in between defendant no.2 and original owner. Thus, obviously there was no privity of contract in between the original owner of the land and the plaintiffs. Even there was no privity of contract in between the plaintiffs and defendant no.1, in absence of express authority to defendant no.2 to enter into any contract with the plaintiffs. Thus, the trial Court as well as the Appellate Court has not committed any error of facts or law, rejecting the claim of the plaintiffs on the basis of oral agreement in between the plaintiffs and defendant no.2.

21. It is also to be noted that the sole witness Maganlal (PW 1), examined by the plaintiffs

to prove their contention, has admitted in his cross-examination that till 24.2.1960 he had no concern with the suit land. He has also admitted that since 24.2.1960 till recording of evidence, neither the original owner of the suit land nor defendant nos. 1 and 2 had executed sale deed of the suit land in favour of the plaintiffs. He has admitted in clear words that neither prior to 1.2.1960 nor after that date till the date of recording of evidence, possession was delivered to the plaintiffs by original owner or defendant nos. 1 and 2. He admits that since 1.2.1960 i.e. from the date of execution of registered sale deed in favour of defendant no.1, the plaintiffs never paid land revenue of the suit land and they never took any income from the suit land. These clear admissions of the star witness of the plaintiffs has totally wiped out their case that in accordance with the prior oral agreement with defendant no.2 the sale deed was executed on 1.2.1960 in the name of defendant no.1 and they subsequently paid Rs.2,600/- towards half share in the consideration and jointly possessed the suit land.

22. The Appellate Court considered the above admission of Maganlal (PW 1) and assigned detailed reasons while rejecting the case of the plaintiffs.

23. Though much reliance has been placed on the receipt, dated 24.2.1960 (Exh.278) executed by defendant no.2 in favour of the plaintiffs, this receipt does not show that it was signed by defendant no.1. Therefore, if on 24.2.1960, defendant no.2 accepted Rs.2,600/- from the plaintiffs, that would not bind defendant no.1, who had already acquired absolute title in the suit land on 1.2.1960 under registered sale deed. For the same reason also, the entry taken by the plaintiffs in the books of account (Exhs. 279 and 280) regarding payment of Rs.2,600/- on 24.2.1960 is not binding on defendant no.1.

24. During the course of arguments, much importance was given to the admission of defendant no.1, in Sauda Pawati executed by defendant no.1 in favour of third persons, on 4.5.1965. However, after going through this Sauda Pawati, it becomes

clear that the so-called admission in the said receipt is absolutely vague and it is not clear admission of title of plaintiffs in the suit land. The relevant recitals of this Sauda Pawati are as under :

“ On East: Half portion of Survey No. 240/1

On West : Survey Nos. 241/242

On South : Survey No. 240/2 - 271

On North : Survey No. 598

Accordingly, half share within these four boundaries, excluding western half portion of Chimanlal Babubhai, has been converted into non-agricultural land.”

25. Thus, obviously, the above said admission is vague as well as in conflict with even pleading of plaintiffs. As per the case of plaintiffs, they were in joint possession of suit land along with defendant no.1. It is not their case that western half portion of the suit land was in their separate possession. Therefore, on the basis of vague admission, which is in conflict with the pleadings of plaintiffs, it cannot be held that the

plaintiffs have proved their title in the half portion of the suit land. It is also settled position of law that admission does not transfer the title. Therefore, otherwise also, on the basis of this admission, the plaintiffs cannot prove any right or interest in the suit land, as rightly held by the Appellate Court.

26. Thus, as observed above, the Appellate Court has considered in detail the oral as well as documentary evidence relied on by the plaintiffs and had given findings of fact that the plaintiffs failed to prove their title in the suit land as co-purchasers. Even the Trial Court has given same finding. Thus, this concurrent finding of fact cannot be disturbed in this Second Appeal, when no substantial question of law arises in this appeal.

27. Learned counsel for the appellants raised objection of unfair trial due to non-consideration of oral and documentary evidence by both the courts below. After going through the judgment, passed by the Trial Court, it emerges that even the Trial

Court has rightly considered and discarded the oral evidence of Maganlal (PW 1), receipt, dated 24.2.1960, entries in the books of account and Sauda Pawati. Undisputedly, opportunity of cross-examination of witness examined by defendant was given to the plaintiffs. Therefore, by no stretch of imagination, it can be held that the plaintiffs did not get fair opportunity to contest their contention.

28. On the other hand, as observed above, the Appellate Court as well as the Trial Court has duly considered the evidence placed on record by the plaintiffs and has taken possible view. Even the issue of limitation was framed and decided by the Trial Court. Therefore, if the Appellate Court considered the point of limitation, it cannot be said that opportunity was not given to the appellants to contest that point. Otherwise also, as the plaintiffs cannot prove any right or title in the suit land, the issue of limitation cannot be considered as substantial question of law, which may change the decision of the litigation.

29. Regarding application of Sections 41 and 43 of the Transfer of Property Act, it is suffice to say that these both Sections are not relevant in the case at hand, for the reason that it is not the case of plaintiffs that the suit land was purchased from ostensible owner. Therefore, the substantial question of law on the basis of Sections 41 and 43 of the Transfer of Property Act cannot be formulated as contended by the plaintiffs. As the Courts below have considered available oral and documentary evidence while giving the findings of facts, and as fair opportunity was given to both the parties to lead the evidence and substantiate their respective contentions, it cannot be said that it was unfair trial.

30. The authorities relied on by Shri Mantri, learned counsel for the appellants are distinguishable on facts.

31. Therefore, no substantial question of law can be formulated as proposed by the learned counsel for the appellants. I hold that no

substantial question of law arises in the present Second Appeal. Therefore, the concurrent finding recorded by the Trial Court and the First Appellate Court regarding failure of the plaintiffs to prove their title or right in the suit land, cannot be disturbed in this Second Appeal. In other words, this appeal cannot be admitted and it stands dismissed.

In view of dismissal of Appeal, Civil Application No. 6500 of 2018 for grant of temporary injunction stands rejected.

Parties to bear their respective costs of the appeal.

[SUNIL K.KOTWAL, J.]

32. After delivery of judgment, learned counsel for the appellants prays for extension of interim relief for next three months. Learned counsel for respondent nos. 1 and 2 opposes this prayer on the ground that there are three concurrent decisions against the appellants. However, as the interim relief was granted till passing of this judgment,

to give fair and reasonable opportunity to the appellants, the interim relief is extended for next two months from today.

[**SUNIL K.KOTWAL, J.**]

dbm