

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

**SECOND APPEAL NO. 727 OF 2016
WITH
CA/14216/2016 IN SA/727/2016**

SAYYED SHAFIYODDIN SAYYED BASHIRODDIN AND
ANOTHER
VERSUS
SAYYED TAHERODDIN SAYYED GAUS MOHIYODDIN
AND OTHERS.

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Advocate for Appellants : Mr. Kazi S.S.
Advocate for Respondent 1 : Mr Vivek Bhavthankar
Respondent Nos. 2 to 4 served.

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**CORAM : V.K. JADHAV, J.
Dated: February 26, 2018**

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PER COURT :-

1. Heard finally with consent at admission stage.
2. The respondent No.1/plaintiff has instituted the suit for declaration of ownership, recovery of possession and a decree of perpetual injunction in respect of the suit property. According to the respondent no.1/plaintiff that he had purchased the suit property agricultural land block no.100 ad-measuring 1H 98 R to the extent of 02R as per the boundaries detailed in the plaint from his brother Mr. Sayed Khaja Moinoddin s/o Gaus

Mohiyoddin under the registered sale deed bearing serial no.4228/2011 for taking a bore-well for irrigating his agricultural land bearing block no.37. Since, the appellants/original defendant nos. 4 and 5 have denied the title, possession of the respondent/plaintiff over the suit land, the plaintiff constrained to institute the suit for the aforesaid reliefs. It has been also submitted that, the appellants/defendant nos. 4 and 5 have illegally dispossessed the plaintiff and started making construction over the suit property.

Appellants/original defendant nos. 4 and 5 have strongly resisted the suit by filing their written statement exh.28. They have denied all adverse contentions. It has been denied that the plaintiff became the owner and possessor of the suit property on the strength of the registered sale deed executed in his favour. It has been contended that the appellants/defendant nos. 4 to 5 had purchased the property bearing block no.46 under the registered sale deed dated 30/10/1986 from the same vendor i.e. brother of the plaintiff. Appellant/original defendant

no.4 is in possession of the said property right from the date of execution of the sale deed in his favour. He also got mutated his name in the Village Panchayat record of village Saigaon as owner and possessor of the said property. Even, he had obtained building permission on 2.6.2012 and started making construction over the said premises. It has been specifically contended that, the plaintiff got executed false and bogus sale deed of the property bearing block no.100 measuring 66 x 33'. In the said sale deed, plaintiff has deliberately mentioned wrong boundaries, however, possession was never delivered in favour of the plaintiff. It has also contended that, defendant no.4 dug a bore-well in the said premises for raising construction of the building.

3. Though, defendants no.1 to 3 have made their appearance in the matter, they did not contest the suit by filing written statement and ultimately suit also dismissed against said defendant nos. 1 to 3 for the reasons that they are not concerned with the suit property.

4. Learned counsel for the appellants/original defendant nos. 4 and 5 submits that, the findings recorded by the Courts below suffered from perversity. Both the Courts below have ignored the admissions and concession given by the plaintiff and his witnesses in his cross-examination and recorded findings erroneous to the effect that the properties under both the registered sale-deed are different. Learned counsel submits that, the Court Commissioner has not followed the specific directions given by the Trial Court while executing the commission and, even though, he has given admission in his cross-examination to the effect, the Court below ignored his admission. Learned counsel submits that, the trial court as well as first appellate court has relied mainly upon the evidence of the Court Commissioner and, the map prepared by him. Learned counsel submits that, the appellants/original defendant nos.4 and 5 are in possession of the suit property right from the year 1987 and there is sufficient evidence on record to substantiate it. Learned counsel submits that, in the backdrop of the above submissions

his appeal is required to be admitted as the Courts below have ignored the admissions given by the witnesses and, in such a case in the second appeal this court can interfere.

5. Learned counsel for the appellants, in order to substantiate his contentions, placed his reliance on the following judgments.

1. Yadarao Dajiba Shrawane (dead) by L.Rs. Vs. Nanilal Harakchand Shah (Dead) reported in (2002) 6 Supreme Court Cases 404.
2. Hero Vinoth (Minor) Vs. Seshmmal reported in (2006) 5 Supreme Court Cases 545.

6. Learned counsel for respondent no.1/original plaintiff submits that, there is no substantial question of law involved in this appeal. Both the courts below have recorded concurrent findings about the title, entitlement for the possession in respect of the suit property on the basis of the oral and documentary evidence. Both the courts below have recorded findings to the effect that properties under the registered sale deeds of the year 1987 and 2011 are different. Learned

counsel submits that, the Court Commissioner has not given any admissions. On the other hand, he has stated on oath that he has served the notice on both the parties. The Courts below have recorded their observations to the effect that, though, notices issued by the Court Commissioner was served on the appellants/original defendant nos. 4 and 5, they remained absent for the reason best known to them. Learned counsel submits that, before the First Appellate Court, though, present appellants/original defendant nos.4 and 5 have filed an application for appointment of the Court Commissioner, in order to clear the doubts, however, the appellants herein have not pressed the said application before the first appellate Court.

7. On careful perusal of the judgment and decree passed by the trial court and confirmed by the first appellate court in appeal and oral and documentary evidence lead by the parties in respect of their rival contentions, I do not find any substantial question of law involved in this appeal. The appellants/original

defendant nos.4 and 5 are claiming that the suit property is the part and parcel of block no.46 and both the Courts below have recorded a specific finding on facts on the basis of oral and documentary evidence adduced by the respective parties that the suit property is part and parcel of block no.100. On careful perusal of oral evidence of the plaintiff and his witnesses, I do not think that the plaintiff and his witnesses have given specific admissions in favour of the appellants/original defendant nos. 4 and 5 with regard to the suit property. On perusal of the sale deed Exh.83, it appears that, same pertains to block no.46. Though, the appellant no.4 has obtained construction permission in respect of the Gram Panchayat House no.749, the Courts below have observed that there is nothing on record to show that said house property is the part and parcel of the block no.46 as alleged by the appellants/defendant nos. 4 and 5. In order to clear the doubts, the trial court has appointed the Court Commissioner. P.W. 3 the Court Commissioner, who happened to be a surveyor of the office of the Deputy Superintendent of Land Records,

Ambajogai. According to him, he had served the notices of the proposed commission on both the parties and, thereafter, measured the lands, however, present appellants/original defendant nos. 4 and 5 remained absent at the time of measurement. I do not think that any prejudice is caused in carrying out the said measurement only because the notices are not served on the respective counsel though directed by the trial Court. In fact, P.W.3 Court Commissioner has not given any admissions as vehemently submitted by the learned counsel for the appellant. On perusal of the map exh.62 and 63, it appears that, Court Commissioner has measured both the lands and, accordingly, deposed before the Court in accordance with the measurement and map. It appears that, the appellants/original defendant nos. 4 and 5 deliberately remained absent at the time of measurement and now taking undue advantage of the same. Both the Courts below have given due weightage to the evidence of the Court Commissioner and map drawn by him. I do not find any substance in this second appeal. There is no

substantial question of law involved in this appeal.

8. In a case **Yadarao Dajiba Shrawane (dead) by L.Rs. Vs. Nanlal Harakchand Shah (Dead) and others** reported in 2002 (6) Supreme Court 404 relied upon by the learned counsel for the appellants, in paragraph no. 31 and 32 the Supreme Court has made following observations :-

- “31. From the discussions in the judgment it is clear that the High Court has based its findings on the documentary evidence placed on record and statements made by some witnesses which can be construed as admissions or conclusions. The position is well settled that when the judgment of the final Court of fact is based on misinterpretation of documentary evidence or on consideration of inadmissible evidence or ignoring material evidence the High Court in second appeal is entitled to interfere with the judgment. The position is also well settled that admission of parties or their witnesses are relevant pieces of evidence and should be given due weightage by Courts. A finding of fact ignoring such admissions or concessions is vitiated in law and can be interfered with by the High Court in second appeal. Since the parties have been in litigating terms for several decades, the records are voluminous. The High Court as it appears from judgment has discussed the documentary evidence threadbare in the light of law relating to their admissibility and relevance.
32. On perusal of the judgment of the High Court and on consideration of the matter we do not find that the judgment suffers from any serious illegality or infirmity which calls for interference in this appeal filed by special leave. Accordingly, the appeal fails and is dismissed with costs.”

9. In the facts of the present case and in view of the discussion above, I do not think such contingency arises in this matter as observed by the Honourable Apex Court. Both the courts below have recorded the findings on facts that the properties under two sale deeds are different and accordingly the suit instituted by respondent no.1 decreed by the trial court, and, First Appellate court has confirmed the said decree in the appeal.

10. In the case of **Hero Vinoth (Minor) Vs. Seshammal** relied upon by the learned counsel for the appellants, the Supreme Court has considered as to meaning of “What is the substantial question of law” as referred in section 100 of Civil Procedure Code and further held that, it will depend on facts and circumstances of each case whether question of law is a substantial one and involved in the case or not, the paramount overall consideration being to strike a judicious balance between the indispensable obligation to do justice and the impelling necessity of avoiding

prolongation in life of any lis, words and phrases.

11. In view of the above discussion, since no substantial question of law is involved in this appeal, I proceed to pass the following order.

O R D E R

- I. Second appeal is hereby dismissed with costs.
- II. Second appeal is accordingly disposed of.
- III. Pending civil application, if any, also stands disposed of.

12. At this stage, the learned counsel for the appellants/original defendant nos.4 and 5 submits that, the appellants/original defendants have made construction of two storied building over the suit land and, even during the pendency of this appeal, their possession was protected. Even during the pendency of the appeal before the First appellate Court, possession of the appellant was protected. Learned counsel submits that, interim order passed by this court may be

extended for a period of 12 (Twelve) weeks so as to enable the appellants to approach the Supreme Court.

13. In view of the above and considering the aforesaid submissions, the interim relief, granted by this Court is extended by EIGHT (8) WEEKS from today so as to enable the appellants to approach the Apex Court.

(V.K. JADHAV)
JUDGE

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