

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

Second Appeal No. 0061 of 2016

District : Parbhani

1. Ahamad Habib Abasha,
Age : 75 years,
Occupation : Agriculture,
R/o. Near Bangali Panja,
Bholashah Dargah, Nagpur.
2. Munnasingsh s/o. Gopalsingh
Tehra,
Age : 50 years,
Occupation : Business,
R/o. Tehra Automobiles,
Station Road, Nanded,
Taluka & District Nanded.
3. Mohd. Haji Dilawar
Abubakar Thara,
Age : 40 years,
Occupation : Business,
R/o. Mahavirnagar, Purna,
Taluka Purna,
District Parbhani.
4. Saber Chaus
s/o. Naser Chaus,
Age : 37 years,
Occupation : Agriculture,
R/o. Mandai, Nanded,
Taluka & District Nanded.

.. Appellants
(Original
defendants)

versus

1. Zilla Parishad, Parbhani,
Zill Parishad Middle School,
Purna,
Through
Block Education Officer,
Parbhani.

.. Respondent

2. ~~Radheshyam Rameshwar Agrawal,~~
~~Age : 50 years,~~
~~Occupation : Business,~~
~~R/o. Main Road, Purna,~~
~~Taluka Purna,~~
~~District Parbhani.~~

.. Respondent
no.02 deleted.

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Mr. Shailendra S. Gangakhedkar, Advocate, for the appellants.

Mr. Vivek V. Bhavthankar, Advocate, for respondent no.01.

Respondent no.02 deleted as per Court's order dated 10-11-2017.

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 08th February 2019**

**Date of pronouncing
the judgment : 19th March 2019**

JUDGMENT :

01. Present appeal has been filed by the original defendants. Present respondent is the original plaintiff who had filed Regular Civil Suit No. 33 of 2006 before learned Civil Judge (Junior Division), Purna, District Parbhani, for perpetual injunction. Plaintiff had come with a case, that it is a body corporate established under the Act. Various schools are run under Zilla Parishad at different places. Land bearing Survey No.14 situated at town Purna was the Government property. Portion

admeasuring 02 Hectares 02 R was given out of the said survey number to the plaintiff for running a school. Plaintiff constructed school building in 2200 sq. feet area consisting of RCC building and the remaining space was kept open for using it as play ground and other activities of the school. The portion that was allotted to the plaintiff was given Survey No.14/9 and the school is being run in that place since last more than 50 years. Out of the said survey number, certain portions have been allotted to Boudha Vihar, Boudha Vidyarthi Gruha and Scheduled Caste hostel which is on the eastern side of the Zilla Parishad school. After deducting the said area, the plaintiff is actually possessing 03 Acres 35 Gunthas land. The boundaries of the same have been given in the plaint. It is stated that a specific municipal council house property number was given to the suit property. The Zilla Parishad has covered the area by fencing it which is abutting Purna Road. It is stated that the defendants no.01 and 02 are doing business of plotting as well as development of sites. The suit property is situated in the heart of Purna town and with ill intention to grab the open space adjacent to Purna-Nanded road out of the suit property, they are exposing the property belonging to one Ahemad Habib Abasha and defendant no.02 is holding power of attorney for him. They are claiming right and interest in the suit property. Defendants went to suit property on 08-06-2006 and

prepared plots by marking the land. They were obstructed by the headmaster. There was temporary stoppage by defendants. However, again they came to suit property on 16-06-2006 with proposed purchasers. Therefore, the plaintiffs have apprehended obstruction to their possession over suit property and, therefore, suit for perpetual injunction has been filed.

02. Defendants no.01 and 02 resisted the suit by filing written statement and defendants no.03 and 04 adopted the said written statement by filing Pursis. Defendants no.01 and 02 have filed the counter claim in their written statement in respect of land Survey No. 14/1 to the extent of 68 R. They have denied that plaintiff possessed an area admeasuring 03 Acres 35 Gunthas. It is stated that they are care takers and, therefore, suit cannot be filed against them. It is also stated that the area and boundaries of Survey No.14/9 given by the plaintiff in the plaint is wrong. It is stated that the plaintiff possessed only 84 R land which is covered by fencing. The boundaries of the land which is in occupation of plaintiff has been given in the written statement. Defendants contend that one Habib Abasha was the owner and possessor of land Survey No. 14/1 admeasuring 85 R. Out of that, Municipal Council, Purna, acquired 16 R during the lifetime of Habib Abasha. Habib Abasha expired in 1985 and, therefore,

the land came to be mutated in the name of his son Ahemad Habib vide mutation entry no.1996. Ahemad Habib had given application to the municipal council to put wire fencing to his property on 02-06-1997. It is also stated that Joint Director of Land Record, Aurangabad, had passed an order on 18-05-1998 and cancelled the measurement dated 30-12-1990 of the suit property and it was directed that Taluka Inspector of Land Record should measure the land afresh. Accordingly, measurement was carried out on 29-08-2000 in respect of lands Survey No.14/1 and 14/9. The boundaries have been fixed. It is also contended that Survey No.14/1, area of 68 R is divided into two portions because of the road passing in between. Ahemad Habib has given power of attorney to defendants no.01 and 02 and by virtue of that document, they possess and manage the said land. They have, therefore, prayed injunction against plaintiff in respect of 68 R out of Survey No. 14/1.

03. The plaintiff filed written statement to the counter claim and denied all those contentions raised by way of counter claim. It is stated that measurement dated 29-08-2000 was false and fabricated. It is also stated that one Uttam Dajisaheb Kadam had filed Regular Civil Suit No. 33 of 2003 as a power of attorney holder of Ahemad Habib against one Sayyed Noor in respect of the suit property. However, the said suit was dismissed on

25-07-2005 and, therefore, the counter claim is hit by principles of *res judicata*. It is stated that no cause of action arose for the defendants to file counter claim.

04. Taking into consideration those rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. After considering the evidence on record, learned trial Court has decreed the suit. Defendants, their agents or anybody claiming through them have been restrained perpetually from causing obstruction and interference in the peaceful possession of plaintiff over the suit property. The counter claim filed by the defendants was dismissed.

05. The said judgment and decree was challenged by the defendants in Regular Civil Appeal No. 157 of 2010 before District Court, Parbhani. The said appeal was heard by learned Ad hoc District Judge-1, Parbhani and it has been dismissed on 09-10-2015. This judgment and decree passed by the first appellate Court is under challenge in this second appeal.

06. Heard learned Advocate Mr. S.S. Gangakhedkar appearing for the appellants. Also, heard learned Advocate Mr. V.V. Bhavthankar appearing for respondent no.01.

07. It has been vehemently argued by learned Advocate appearing for the appellants, that the first and the foremost fact that is required to be considered is that the plaintiff had not filed any documentary evidence to prove ownership over 03 Acres 35 Gunthas out of Survey No. 14/9. The land was stated to be given by Collector and the plaintiff is Zilla Parishad. Under such circumstance, unless there would have been documents, the title would not have transferred. Therefore, it was incumbent upon the plaintiff to prove document of title. The admissions given by the witnesses who were examined by the plaintiff were not at all considered by both the Courts. The Block Development Officer, who was examined on behalf of the plaintiff, was unable to answer many questions. In clear terms, he has admitted that documents regarding ownership of the plaintiff have not been produced on record. Further, though measurement dated 30-12-1990 was challenged by him, in his examination in chief, he admitted that in fact, defendant no.01 preferred appeal at Aurangabad challenging the said measurement. It was clearly contended in that appeal itself, that defendant had become owner of Survey No. 14/1. In the said appeal, the measurement that was carried out on 30-12-1990 was cancelled and it was directed that entire area of Survey No.14 should be measured. The re-measurement was made on the basis of application given by

headmaster of the school. The measurement was challenged again in 2005 before Director of Land Record at Aurangabad. In fact, both the Courts below as well as the witnesses have tried to rely on the court commissioner's report dated 26-08-2008 in respect of measurement that was carried out on 21-04-2008. The suit was for injunction simplicitor. Yet, measurement was ordered under Order XXVI Rule 09 of C.P.C. The basic principle was not adhered to, that measurement cannot be ordered to collect evidence or, in other words, the court commissioner cannot be appointed to collect evidence.

08. Learned Advocate for the appellants placed reliance on the decision in *Dnyandeo Vithal Salke & others Vs. Dagdu Kadar Inamdar* [2017(3) Mh.L.J. 314], wherein this Court at Nagpur Bench has held, that *when the suit has been filed for injunction simplicitor, then order directing appointment of Taluka Inspector of Land Record to submit report on actual possession amounts to collection of evidence and the same is not permissible in the eye of law.* Similar ratio was also laid down in *Nalubai Narayan Shinde & others Vs. Gopinath Dagdu Shinde* [2011(3) Bom.C.R. 167] and *Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade, deceased through Pooja @ Poojari Y. Lakade & others* [2011(3) Bom.C.R. 807]. It has been further submitted that the evidence that was submitted on behalf of the defendants was not at all considered by both the Courts below. They had produced no objection

certificates, N.A. permissions to show their possession over portion of 68 R land out of Survey No.14/1. Further, while framing points, learned first appellate Court has misunderstood the concept of burden of proof and only a single point was framed regarding proof of title and possession of the defendants over land Survey No. 14/1. In fact, the appeal that was preferred by the defendants was challenging the entire judgment and decree passed by the trial Court. Therefore, substantial questions of law are arising in this matter.

09. Per contra, learned Advocate appearing for the respondent has submitted that it was not in dispute, that original land Survey No.14 was a Government land. It was also not in dispute, that Zilla Parishad is running a school in land Survey No.14/9. It was also not in dispute, that Collector, Parbhani, had allotted different size of land from the survey number to various institutions. In his cross examination, defendant's witness has clearly admitted that plaintiff is the owner and possessor of land Survey No.14/9. Under such circumstance, there was no necessity for the plaintiff to prove ownership and possession over the suit land by producing documents on record. Defendants by way of counter claim had come with a case that still some land is remaining and the number given to that land is Survey No.14/1 admeasuring 68 R. Therefore, burden was on

defendants to prove title to the same. Therefore, the point has been rightly framed by the first appellate Court. As regards court commissioner is concerned, there were different measurements on record and, therefore, a court commissioner was appointed. No objection was raised by the defendants at that time. Under such circumstance, for the first time in second appeal, objection cannot be taken. Even if we keep the said evidence aside, yet, there was such evidence on record produced by the plaintiff to prove their ownership over suit land. The conduct of the defendants was sufficient to hold that they were raising obstruction over the possession of the plaintiff over the suit land and, therefore, the suit was rightly decreed and the counter claim was rightly dismissed by the trial Court. The appeal has also been decided on facts as well as on the point of law. No substantial question of law is arising.

10. The first and the foremost fact that is required to be considered is that in this case, there are concurrent findings of the Courts below. Recently, in *Gurnam Singh, deceased by L.Rs. & others Vs. Lehna Singh, deceased by L.Rs.*, in Civil Appeal No. 06567 of 2014, decided by Hon'ble Supreme Court on 13-03-2019, the Hon'ble Supreme Court has reminded the High Court about limitation while considering second appeal under Section 100 of C.P.C. It has been observed thus :-

" Before parting with the present judgment, we remind the High Courts that the jurisdiction of the High Court, in an appeal under Section 100 of the CPC, is strictly confined to the case involving substantial question of law and while deciding the second appeal under Section 100 of the CPC, it is not permissible for the High Court to re-appreciate the evidence on record and interfere with the findings recorded by the Courts below and/or the First Appellate Court and if the First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal."

Therefore, when in this case, concurrent finding has been given that the plaintiff is the owner and possessor of land Survey No.14/9, then the scope of this second appeal is very much limited.

11. Further, in the aforesaid judgment, Hon'ble Apex Court has again considered the view taken in Ishwar Dass Jain (Dead) through L.Rs. Vs. Sohan Lal (Dead) by L.Rs. [(2000) 1 SCC 434], wherein it was specifically observed and held thus :-

" Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to

formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise. "

12. Again reliance can be placed on the observations in Gurnam Singh's case (*supra*), wherein it has been observed thus :-

" While passing the impugned judgment and order, it appears that High Court has not at all appreciated the fact that the High Court was deciding the Second Appeal under Section 100 of the CPC and not first appeal under Section 96 of the CPC. As per the law laid down by this Court in the catena of decisions, the jurisdiction of High Court to entertain second appeal under Section 100 CPC after the 1976

Amendment, is confined only when the second appeal involves a substantial question of law. The existence of 'a substantial question of law' is a sine qua non for the exercise of the jurisdiction under Section 100 of the CPC."

Further, in *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar & others* [(1999) 3 SCC 722], it was held that in a second appeal under Section 100 of C.P.C., the High Court cannot substitute its own opinion for that of first appellate court unless it finds that the conclusions drawn by the lower court were erroneous being (1) contrary to the mandatory provisions of applicable law; or (2) contrary to the law as pronounced by the Apex Court; or (3) based upon inadmissible evidence or no evidence.

13. In this case, plaintiff had specifically come with a case, that Collector had allotted land admeasuring 03 Acres 35 Gunthas from land Survey No.14/9. In the written statement, defendants no.01 and 02 had not seriously challenged the fact that plaintiff is running a school in Survey No.14/9. Only contention that was raised by them was that, plaintiff has given boundaries of Survey No.14/1 and contended that it is Survey No.14/9. Under such circumstance, learned first appellate Court has rightly put burden on the defendants to prove their title and possession over land Survey No.14/1.

Another fact that is also required to be considered is that in the written statement to the counter claim, the plaintiff has categorically stated that in a suit filed by one Uttam Dajisaheb Kadam, in the capacity as power of attorney holder of Ahemad Habib i.e. Regular Civil Suit No. 33 of 2003, it was held that he is not the owner of Survey No.14/1. Plaintiff in this case had also challenged the ownership of defendants no.01 and 02. Therefore, in view of the decision in *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs. & others* [AIR 2008 SC 2033], where there is a cloud raised over plaintiff's title (herein defendants' title) and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Further, it is observed that "*Where there are necessary pleadings regarding title and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the Court may decide the issue regarding title, even in a suit for injunction.*" No doubt, such cases are stated to be exceptional but when in this case, there was a cloud over the title of the defendants, they ought to have prayed for declaration for their title. The fact about dismissal of the earlier suit has been taken note of by the appellate Court in this case.

14. Witnesses who have been examined by defendants have admitted the existence of the school

at the said place since last many years and, therefore, if the defendants intended to say that any part which is in possession of the plaintiff is actually part of Survey No.14/1, then the burden was clearly on the defendants to prove the same. Merely on the basis of revenue entries, defendants cannot be held to be the owners of the said property. Though it has been tried to be contended by the defendants, that layout has been sanctioned in respect of Survey No.14/1 and necessary permissions have been obtained for selling the plots after dividing the said land into 41 plots, yet, it can be seen from the cross examination of DW 01 Munnasing Tehra, that he was unable to say as to how much area was owned by Habib Abasha. He claimed ignorance that Survey No.14 was Government land but then admitted that Habib Abasha got about 1½ Acres of land but he was unable to give boundaries. He was not aware as to whether any *panchanama* was done at the time of handing over the said land by the Government to Habib Abasha or Ahemad Habib Abasha. He was also not able to say what was the reason or by which document Ahemad Habib Abasha was given 1½ Acres of land by the Government. Thus, he was absolutely not aware about the facts of the case. Yet, he was examined on behalf of the defendants to prove alleged ownership of the defendants over Survey No.14/1 and, therefore, both the Courts below have rightly come to the conclusion that defendants have not proved their ownership and

possession over the suit land.

15. When there is concurrent finding that plaintiff is the owner and possessor of land Survey No.14/9, no substantial question of law can be said to be arising on that point. As regards appointment of Taluka Inspector of Land Record as court commissioner to gather information as to who is in actual possession is concerned, definitely, taking into consideration the judgments which have been relied by the learned Advocate for the appellants, it can be said that such appointment ought not to have been made. However, if we brush aside the said report of the court commissioner, yet, there is evidence on record to show that plaintiff was the owner and possessor of land Survey No.14/9 i.e. the suit property.

16. Taking into consideration the concurrent finding and the law laid down in *Gurnam Singh's case (supra)*, no substantial question of law is arising in this case and hence the second appeal is disposed of as not admitted.

(Smt. Vibha Kankanwadi)
JUDGE

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