

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

932 SECOND APPEAL NO.171 OF 2017

VIJAY RAMCHANDRA DEMEWAR

VERSUS

VENKAT RAMCHANDRA DEMEWAR AND ORS

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Mr. M.M. Parghane, Advocate for the appellant

Mr. H.H. Padalkar, Advocate for the respondent Nos.1 to 3

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 10th JULY, 2019

PER COURT :

1 Present appeal has been filed by the original plaintiff challenging the concurrent findings in the Judgment and Decree passed in R.C.A. No.56/2009 by learned District Judge-1, Biloli, Dist. Nanded dated 26.10.2016 and R.C.S. No.18/2008 by Joint Civil Judge Junior Division, Biloli, Dist. Nanded dated 16.11.2009, whereby his suit for injunction came to be dismissed and the appeal preferred by him was also dismissed.

2 The present appellant-original plaintiff had come with a case that he is the owner of the house property admeasuring 29' x 24' bearing

No.4/1 situated at village Hipparga Mal, Tq. Biloli, Dist. Nanded. Defendants are his real brothers. Plaintiff is not residing with the defendants. He contended that there was an oral partition between him and the defendants and the suit property was allotted to him in the year 1997. After the partition, in fact, they all started residing separately. Mutation entries have been taken in respect of the partition. It was also stated by him that the suit house as well as agricultural land admeasuring 81 Ares from Gat No.328 was given to his share. In fact, the said portion of the land was given to his mother in her lifetime. When it was decided to divide the said land equally amongst the brothers, it is stated that defendant No.3 got a gift deed in respect of the said land on 18.04.2007 executed from mother. It is his contention, that thereafter the defendants started obstructin him over the possession of the suit house and therefore, he filed simplicitor suit for injunction.

3 Defendants contested the claim of the plaintiff by filing written statement. They admitted that there was partition in the year 1997, but it was contended that it was restricted to the extent of agricultural lands only. It was, therefore, contention that no question arose for partition in the house, as the plaintiff was residing separately at Nanded. He runs a grocery shop there and had constructed a house in Nanded. According to them, plaintiff

has relinquished his rights over the suit house by accepting amount of Rs.1,00,000/- from defendant Nos.1 and 2. No document was got executed regarding relinquishment due to the faith and relationship between them. Plaintiff never resided in the said house and therefore, even on the date of the suit he was never in possession of the same. As regards the agricultural land is concerned, it is stated that 81 Ares from Gat No.328 was given exclusively to their mother. Mutation Entry No.741 was effected to that extent. Thereafter, their mother Bhagabai executed gift deed on 18.07.2004 in favour of defendant No.3. As a result of which, the plaintiff got dissatisfied and therefore, the false suit has been filed.

4 Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record and after hearing both sides as aforesaid the suit was dismissed and the appeal preferred by the present appellant was also dismissed by the First Appellate Court. Hence, this Second Appeal.

5 At the outset, it is required to be seen, as to whether any substantial question of law has been pointed out by the original plaintiff, for exercising jurisdiction of this Court under Section 100 of the Code of Civil Procedure. As per the law laid down by Supreme Court in catena of

decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of CPC, after the 1976 amendment, is confined only when the Second Appeal involves as 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.

6 A reliance can be placed on decision in **Ishwar Dass Jain vs. Sohan Lal** reported in **(2000) 1 SCC 434**, wherein it has been observed that

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“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.”

Therefore, it is now required to be seen, whether any substantial question of law can be raised by the appellant, taking into consideration the facts as well as evidence that has been adduced.

Therefore, taking into consideration the observations in the

above said case and also on the decision in Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar reported in (1999) 3 SCC 722, wherein it has been held that

“In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

- (i) Contrary to the mandatory provisions of the applicable law;
OR
- (ii) Contrary to the law as pronounced by the Apex Court;
OR
- (iii) Based on in-admissible evidence or no evidence.

Further, it is observed in the said case that if 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.

7 Plaintiff had filed simplicitor suit for injunction, which contemplates that he was in exclusive possession of the suit property on the date of the suit. However, it is to be noted that the defendants not only challenged the title of the plaintiff over the suit property, in addition they

challenged the contention that plaintiff is having exclusive possession over the suit property. Under such circumstance, the basic question was, whether suit for simplicitor injunction was maintainable or not ? Though the first issue that was framed and taken up was in respect of ownership, rights, yet it is to be noted that the plaintiff had not prayed for declaration. It would be the consequential discussion under the circumstance, when plaintiff claims exclusive possession over the suit properties. The defendants had not disputed that there was partition in 1997, but according to them, it was restricted to agricultural lands only. Admittedly, that partition was oral partition. If at all the plaintiff intended to say that in the said oral partition itself the suit property was given to him, then the documents ought to have been produced regarding his exclusive ownership from 1997 till 2007. Whatever has been disposed of by the mother by way of gift to defendant No.3 is the agricultural land which is not the subject matter of this suit. Under such circumstance, the partition is restricted to the subject matter i.e. house property admeasuring 29 x 24'. Both the Courts have minutely considered the boundaries of the suit house told by plaintiff in his testimony that the extract of list of assessment, which was produced by the plaintiff himself. A specific observation has been made, that they do not match with each other. If the plaintiff was in possession of the property, then it would have been easy for him to give the boundaries. The said fact is required to be

taken into consideration for the simple reason, that both the parties have come to the conclusion that there was oral partition in 1997. According to plaintiff, it was in respect of the properties; whereas according to defendant, it is restricted to agricultural land only. Description of the property has been held to be wrongly given by the plaintiff and it is not matching with the documentary evidence adduced by him. We may not go in detail of the same because our appreciation of facts is not contemplated while dealing with the Second Appeal. In fact, whether plaintiff can be said to be in possession of the property, was required to be assessed on the basis of evidence and the appellant has failed to prove that there is any kind of perversity in the findings arrived at by both the Courts below. Under such circumstance, there is no merit in the present appeal. No substantial question of law is arising. Hence, the Second Appeal is disposed of as "**Not admitted**".

(Smt. Vibha Kankanwadi, J.)

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