

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.861 OF 2016

1. Smt. Shantabai Shivdas Chaudhari,
Age 65 years, Occupation Household,
2. Sau. Shakuntalabai Ravindra Chaudhari,
Age 45 years, Occupation Household,
3. Shri Ravindra Daulat Chaudhari,
Age 52 years, Occupation Agricultural,
4. Shri. Prashant Shivdas Chaudhari,
Age 27 years, Occupaiton Agricultural,

All R/o Mhasvad Tq. Shahada
Dist. Nandurbar.

...Appellants.

VERSUS

Shri. Kashinath Yadav Chaudhari,
Age 66 years, Occupation Agricultural,
R/o Mhasavad Tq. Shahada
Dist. Nandurbar.

...Respondent.

....

Mr. J. R. Shah, Advocate for appellants.
Mr. S. P. Shah, Advocate for respondent.

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CORAM : SMT.VIBHA KANKANWADI, J.
Date : 26-03-2019.

ORDER :

1. Present appeal has been filed by the original defendants. Present respondent had filed Regular Civil Suit No.33 of 2006 for declaration, possession and perpetual injunction before Joint Civil Judge, Junior Division, Shahada Dist. Nandurbar. The said suit came to be decreed on 29-10-2013. Original defendants had challenged the said Judgment and decree by filing Regular Civil Appeal No.37 of

2013 before Adhoc District Judge-1, Shahada Dist. Nandurbar. After hearing both sides the appeal came to be dismissed on 10-12-2015. Hence, present second appeal.

2. Heard Mr. J. R. Shah, Advocate for appellants and Mr. S. P. Shah, Advocate for respondent.

3. It has been vehemently argued on behalf of the appellants that, both the learned Courts below have not considered the evidence as well as law points involved in the matter properly. Plaintiff had come with a case that, one Ratan Narayan Chaudhary had sold house No.596 (C.S.No.573) of village Mhaswad Tq. Shahada Dist. Nandurabr on 29-06-1986. In fact the said house was admeasuring 810 Square Feet. According to plaintiff Uttam Kathu Chaudhari who was the uncle of plaintiff transferred the property by oral partition and plaintiff became owner. However, it is to be noted that, the defendants had come with a case that, a partition took place between Ratan Narayan Chaudhary and his sons in 1977-1978. They were Jadhav Ratan, Shivdas Ratan, Bansi Ratan, Subhash Ratan and Vijay Ratan. City Survey No.573 admeasuring 63.7 Square Meters came to the share of Shivdas Ratan who was the husband of defendant No.1 Shivdas was occupying said property till his death and after him, the defendants No.1, 2 and 4 have become owner of the suit property. Plaintiff has not led any evidence as to how the properties were numbered when in fact as per the sale deed the Grampanchayat number which was noted in the same was 525. Boundaries have not been mentioned in the plaint, and therefore, burden has been unnecessarily placed on the defendants to prove the identity of the property. When plaintiff had come with a specific case about his ownership then plaintiff has to stand on his own feet. Reliance has been placed on the decision in *Union of India (UOI) and Ors. Versus Vasavi Co-op. Housing Society Ltd. and Ors.*, reported

in *AIR 2014 SC 937*. Plaintiff had come with a case that, defendants have taken forcible possession of the suit property on 03-06-2006, however the documentary evidence would show that since prior to that Shivdas and his family was residing in the said suit house. Under such circumstance both the Courts below have erred in holding plaintiff as owner of the property and that he was dispossessed by the defendants. Substantial questions of law are arising in this case.

4. Per contra, the learned advocate for the respondent has argued that, defendants had claimed that in the year 1977-1978 the property came to the share of Shivdas, however no supporting document has been produced on record. Plaintiff has established the identity of the property. In fact father of Shivdas i.e. Ratan himself had executed the sale deed. The said sale deed was never challenged by Shivdas or his brothers. Therefore, definitely after Uttam who had partitioned the suit land and gave it to plaintiff, plaintiff was possessing the same till he was dispossessed in 2006. Plaintiff had filed a criminal complaint in respect of his dispossession also and in that criminal proceedings the defendants have been convicted. Though the appeal is pending yet it is a piece of evidence in support of the contention of the plaintiff. Admissions have been given by the witness for the defendants especially the defendant No.3 Vijay Ratan Chaudhary who was the son of vendor of uncle of the plaintiff. In fact Shivdas himself had no title over the suit house, and therefore, he could not have passed it to the defendants under alleged partition. Plaintiff has exercised ownership rights by inducting tenants in the suit premises for about ten years. Plaintiff had also paid the taxes. Under such circumstance both the Courts have rightly held that plaintiff is the owner of the property. Further after the sale deed by Ratan in favour of Uttam, his name was

mutated in the Municipal record and after partition, plaintiff's name is recorded. Those entries were never objected by either Shivdas or his heirs. This fact goes against the defendants, and therefore, when the plaintiff has been dispossessed in 2006, his suit for possession has been rightly decreed and in appeal the said decree has been rightly confirmed. No substantial questions of law are arising in this case.

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 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 Code of Civil Procedure, after the 1976 amendment, is confirmed 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 Code of Civil Procedure.

6. A reliance can be placed on decision in *Ishwar Dass Jain (Dead Through LRS. Versus Sohan Lal (Dead) By LRS.*, reported in (2000) 1 Supreme Court Cases 434, in which it was laid down,

“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.

7. Therefore, taking into consideration the observations in the above said case and also on the decision in *Kondiba Dagadu Kadam Versus Svitgribai 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 inadmissible 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.

8. Plaintiff has produced sale deed executed by Ratan in favour of his uncle Uttam on 19-06-1986 on record. That sale deed has not

been challenged by defendants at any point of time. In their written statement a mere mention has been made that the said sale deed is Sham and bogus, but when it was executed by the predecessor of Shivdas and it was never challenged by either Ratan himself or Shivdas then defendants who are the heirs of Shivdas cannot take a defence that it was Sham and bogus. Further it is to be noted that, the Grampanchayat record has been mutated in the name of Uttam on the basis of said sale deed. Plaintiff has also examined P.W. Subhas who was the son of Ratan Chaudhary as well as P.W.3 Bharat who was the son of Uttam. Both of them have corroborated to the fact of execution of sale deed by Ratan in favour of Uttam. The other documentary evidence in the form of assessment list, payment of house tax are in favour of plaintiff.

9. Defendants have come with a case that, Shivdas got the suit property in partition that was effected in 1977-1978. Interestingly, it appears from the record that he did not tried to get his name mutated in view of the said partition. Under such circumstance it is hard to believe that, Shivdas would have got the suit property in the partition that was effected in 1977-1978. If that fact was a true fact then after the sale deed was executed by Ratan in favour of Uttam in 1986, Shivdas was bound to challenge that sale deed which he failed to.

10. Defendants have come with a case that, the property which was sold by Ratan in favour of Uttam was different than the property which is owned by them. Under such circumstance when they are coming with a positive case then they should prove it. The ratio laid down in *AIR 2014 SC 937 (Supra)* will not be helpful to the defendants. Specific boundaries have been mentioned in the sale deed itself which was never challenged by Ratan, Shivdas or even by the defendants after Shivdas. When plaintiff has proved ownership

as he has further stated that, in the year 1990 Uttam had transferred the suit property to him in the partition, and the said fact is not challenged by Uttam's heir P.W.3 Bharat Chaudhary, plaintiff has every right over the suit property. He has come with a specific case that, he was dispossessed on 03-06-2006 by the defendants by breaking open the locks. The said fact is further proved by the oral evidence which cannot be considered as law point in second appeal under Section 100 of Code of Civil Procedure. Therefore, when both the Courts below have concurrently held as to how the property came to plaintiff and he is the owner thereof which was supported by oral as well as documentary evidence it cannot be stated that, there is any perversity in the finding. No substantial question of law is pointed out, hence the second appeal stands disposed of as **not admitted**.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.