

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

Second Appeal No. 0133 of 2018

District : Osmanabad

Subhash Nagnath Birajdar,
Age : 60 years,
Occupation : Agriculture,
R/o. Lohara, Taluka Lohara
District Osmanabad

.. Appellant
(Original
plaintiff)

versus

1. Ramdas Gopal Poddar,
Age : 63 years,
Occupation : Agriculture,
R/o. Lohara, Taluka Lohara,
District Osmanabad.
2. Kusumbai Ramdas Poddar,
Age : 58 years,
Occupation : Household,
R/o. as above.
3. Prashant Ramdas Poddar,
Age : 38 years,
Occupation : Service,
Mechanic, R/o. as above.
Defendant No.3
(Died - Deleted).
4. Pramod Ramdas Poddar,
Age : 35 years,
Occupation : Trade,
R/o. Lohara, Taluka Lohara,
District Osmanabad.
5. Pradip Ramdas Poddar,
Age : 33 years,
Occupation : Trade,
R/o. as above.

.. Respondents
(Original
defendants)

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Mr. N.L. Jadhav, Advocate, for the appellant.

*Mr. G.J. Kore, Advocate, for respondents
no.01, 02, 04 & 05.*

Respondent no.03 died - deleted.

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving the
Order : 18th February 2019.**

**Date of pronouncing the
Order : 04th April 2019.**

ORDER :

01. Present appeal has been filed by the original plaintiff challenging the judgment and decree passed in Regular Civil Appeal No. 25 of 2010 by learned District Judge-1, Omerga, dated 05-11-2015, whereby his appeal challenging the dismissal of his suit i.e. Regular Civil Suit No. 77 of 2008 (old R.C.S. No.109 of 2004) filed before Civil Judge (Junior Division), Lohara, dated 10-08-2010 came to be confirmed.

02. Heard both sides.

03. Learned Advocate appearing for the appellant submitted that both the learned lower Courts have not appreciated the evidence properly, so also, did not consider the documentary evidence. The entries in the Grampanchayat assessment register as well as

sale deed were not properly considered. The finding as regards possession over the suit property is perverse when both the Courts have held that plaintiff has failed to prove lawful possession over the suit property. In fact, both the Courts below erred in going into the title of the previous owner of the plaintiff when they ought to have restricted the issue to the extent of plaintiff's title. Defendants had also not produced any documentary evidence to prove their title over the suit property. Under such circumstance, better documents ought to have been considered. Therefore, substantial questions of law are arising in this case. He relied on the decision in *Smt. Sarladevi wd/o. Kundanlal Vs. Shailesh s/o. Gourishankar Namdeo & others* [1996 (3) Bom.C.R. 537] in which it has been held by this Court that once possession is proved, then injunction can be granted even against true owner till he dispossess him by due process of law.

04. Per contra, learned Advocate appearing for the respondents supported the reasons given by both the Courts below and submitted that when plaintiff has to stand or fail on his own feet, then he should produce cogent and material evidence. Plaintiff had come with a case, that he had purchased the land from Balaji Potdar but he failed to show how Balaji Potdar had received title to the property. The document of sale deed is bogus and in fact, Balaji had no title

to sell out that property to plaintiff. Under such circumstance, that document cannot be held to be legal document to prove either title or possession over the suit property. Therefore, both the Courts below have taken concurrent view and, therefore, no substantial question of law is arising.

05. Unless substantial question of law is shown, a second appeal cannot be entertained under Section 100 of the Code of Civil Procedure, 1908. When there are concurrent findings of fact and also mingled with relevant law, then this Court would be slow in interfering with the said findings. If it is demonstrated that the approach of both the Courts below or the first appellate Court was wrong in law or perverse, then only there can be interference.

06. In this case, both the Courts below have considered the documentary evidence. Neither plaintiff nor defendants had produced 7/12 extract or other documents showing original ownership of the land in dispute. However, the facts that emerge in the pleadings by defendant and in the evidence especially cross examination of the plaintiff and examination in chief of defendant's witness, is that, suit plot was part of Survey No. 152/2/1 and 152/2/2 situated at Lohara. Those plots were belonging to one Dattatray Maktedar. He had sold some portion of his land at the request of the State Government to

one Company, by name, Universe Nature Research Development Foundation which was a construction company from Hyderabad after the heavy earthquake in Latur District. It appears that 2 hectares 52 R land from those survey numbers was sold to the said Company on 28-11-1996 by a registered sale deed. As per the 7/12 extract, Dattatraya Maktedar was owner to the extent of 4 hectares 41 R from Survey No. 152/2/2. Thus, out of the said holding, he had sold 2 hectares 52 R land for the Company. It is stated that thereafter Company had constructed houses in 132 plots and then handed it over to Government of Maharashtra, through Collector, Osmanabad, for allotment to the earthquake affected persons. The remaining portion i.e. the open plot where construction was not done, it was in possession of Dattatraya Maktedar. Plaintiff has not come with a case that the suit plot on which he is claiming ownership was in the possession of Dattatraya Maktedar. He has not produced any documentary evidence showing that Dattatraya Potdar had transferred the suit plot either by way of sale deed, gift, mortgage, etc to Balaji Potdar. No doubt, plaintiff got sale deed from Balaji Potdar and on the basis of that, he is contending that he became owner but then when his ownership was in question, that too, with a specific pleading and the fact is supported by other documentary evidence, then both the Courts below were justified in considering as to

whether the predecessor of the plaintiff had title to sell out the suit plot to plaintiff, or not. In his cross examination, the plaintiff has clearly admitted that he does not possession any document to show that how Balaji Potdar became owner of the suit plot. Sale deed Exhibit 32 produced by the plaintiff is also silent on that point. Under such circumstance, if Balaji Potdar himself had no title, nor had any document to prove that he had possession over suit plot, then it cannot be stated that he had transferred it to plaintiff lawfully.

07. No doubt, in an injunction suit, the main factor that is required to be considered is, who is in possession but then that possession will have to be shown to be referable to a lawful title. Plaintiff is not coming with a case that his entry into the suit plot is unauthorized and then he can claim injunction against a true owner also. When his vendor had no title, no documentary evidence showing that he is in possession, he could not have handed it over to the plaintiff and, therefore, both the Courts below were justified in coming to the conclusion that the plaintiff has failed to prove possession referable to the title over the suit plot. Further, both the Courts were justified in not using discretion in favour of plaintiff. The decision in *Smt. Sarladevi's case (supra)* is not helpful to the plaintiff for the aforesaid facts. No substantial

question of law has been raised by the plaintiff to upset the concurrent findings of both the learned lower Courts.

08. In the light of above, the second appeal is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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