

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

**930 SECOND APPEAL NO.320 OF 2017
WITH CA/5776/2017 IN SA/320/2017**

BALAJI HARIBHAU SUL

VERSUS

ANKUSH RAMRAO GAIKWAD AND ANOTHER

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Mr. R.D. Biradar, Advocate for the appellant

Mr. B.M. Dhanure, Advocate for the respondent No.1

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 31st JULY, 2019

PER COURT :

1 Present application has been filed by the original plaintiff challenging the concurrent findings, Judgment and Decree passed in R.C.A. No.48/2012 by learned District Judge-5, Latur dated 30.01.2017, whereby the Judgment and Decree passed in R.C.S. No.202/2007 by learned 6th Joint Civil Judge Junior Division, Latur dated 04.08.2010 came to be confirmed.

2 The present appellant had filed the suit for declaration of ownership and permanent injunction. He had come with a case that in view of compromise between him and his brother in R.C.S. No.1016/1987, he had

become owner of the middle portion admeasuring 02 H 40 R out of 07 H 19 R from Gat No.109, Sy.No.53 and 54 situated at village Arvi, Tq. Latur. It is stated that Gat No.109 has been divided for plots and some plots have been sold and remaining plots are belonging to plaintiff. It was stated that out of those plots, plot No.16 was sold by his grandmother on 28.11.1976 to one Shaikh Najir Shaikh Sajan. Said Shaikh Najir sold the same plot to defendant No.2 on 13.11.1980. Further, defendant No.2 sold the same plot to defendant No.1 on 05.09.1991. However, it is stated that the defendant No.2 gave wrong boundaries in the sale deed and thereby sold plot No.18 rather than plot No.16 and therefore according to the plaintiff, the said sale deed is not binding on him. Thereafter, defendant No.2 had effected a correction deed on 13.02.2006 and corrected the boundaries. However, still the defendants are obstructing his possession over plot No.18 and hence, suit was filed.

3 Defendant Nos.1 and 2 filed their separate written statement and contended that since all the plots from Gat No.109 have been sold out, plaintiff is not at all the owner of any plot. The same facts have been reiterated in respect of sales, those had taken place in respect of said plot. It is stated that though initially plot No.16 sold by Prayagbai to Shaikh Najir, later on it was renumbered as plot No.18 and therefore, there is no illegality.

The same plot has been shown which was not belonging to the plaintiff. It was also stated that the suit is not within limitation.

4 Taking into consideration the rival contentions raised by all the parties, issues were framed. Parties have led oral as well as documentary evidence. The suit came to be dismissed on 04.08.2010 and the appeal came to be dismissed on 30.01.2017. Hence, present Second Appeal.

5 Heard both sides. In order to cut short, it can be said that both the learned Advocates have made submissions supporting their respective contentions.

6 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.

7 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.

8 Now, turning towards the present case, at the outset, it can be seen from the pleadings in the plaint itself, that first sale instance took place on 28.11.1976 by the grandmother of the plaintiff. It was tried to be contended, that she had no authority to sale out the land, but it appears that sale deed was never challenged by the plaintiff. The further sale deeds those had taken place on 13.11.1980 as well as on 05.09.1991 were also not challenged within the period of limitation. Now, merely because a correction deed was executed by defendant No.2 in favour of defendant No.1 on 13.02.2006, it will not give plaintiff a cause of action and therefore, at the outset, it can be said that both the Courts below held in writing that the suit

was not within limitation.

9 The title of the plaintiff was challenged by the defendants and therefore, it was for the plaintiff to prove that he is the owner of plot No.18 from Gat No.109. According to him, he had received a property in compromise decree in R.C.S. No.1016/1987. Important point to be noted is that when the matter was before the Trial Court, he had not even filed the said compromise decree on record, but when the matter was in appellate Court he filed it and therefore, the learned First Appellate Court had allowed the plaintiff to produce that decree on record. It was the further part for plaintiff to prove that plot No.18 was the part of the middle portion, which according to him, he had received in the compromise decree. The similar fact is required to be considered is, that it is not the case of the plaintiff that the present defendants were party to that compromise decree. If they were not the parties to that decree, then how that decree can be said to be binding on the defendants, is a question. Another fact is, that both the Courts which were dealing with the fact finding in the case had concluded, that plaintiff has failed to prove that plot No.18 is situated in the middle portion of the land, which according to plaintiff, he received in the compromise decree. In fact, these aspects are sufficient to non suit the plaintiff. It appears that the plaintiff had not produced any sanctioned map or even a rough sketch which

was prepared at the time of preparing plots in order to prove the boundaries. Under such circumstance, when the identification of the property itself was not proved, much less the ownership over the same by the plaintiff, both the Courts were justified in holding that the plaintiff is not the owner of plot No.18, which was sold by his grandmother to Shaikh Najir, Shaikh Najir to defendant No.2 and then defendant No.2 to defendant No.1. Further, when the suit itself is not filed within limitation, both the Courts were justified in dismissing the suit and the appeal respectively. No substantial question of law is arising in this case. Hence, the Second Appeal stands disposed of as **“Not admitted”**. Pending Civil Application stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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