

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.317 OF 2017

Shri Onkar Narayan Patil,
Age 72 years, Occupation Retired
Medical Officer and Agriculture,
R/o Shahada Tq. Shahada
Dist. Nandurbar.

...Appellant.

VERSUS

1. Shri Sanjay Shankar Patil,
Age 37 years, Occupation Agriculture,
R/o Mohida Tq. Shahada
Dist. Nandurbar.
 2. Vimalbai Shankar Patil,
Since deceased hence through
Legal Representatives.
 - 2A. Sau Ranjanabai Rohidas Patil,
Age 50 years, Occupation Household,
R/o Narkhede Tq. Shahada
Dist. Nandurbar.
 3. Shri Ravindra Shankar Patil,
Age Major, Occupation Agriculture,
R/o Press Maruti Nagar, Above
Dr. Atul Patil Hospital, Shahada
Tq. Shahada Dist.Nandurbar.
 4. Dr. Jagdish Shankar Patil,
Age Major, Occupation Medical
Practitioner, R/o Opposite Janak
Hospital At Byara Tq. Byara
Dist. Surat (Gujrath).
- ...Respondents.

...
Mr. M. S. Kulkarni, Advocate for appellant.
Mr. S. V. Natu, Advocate for respondents No.1, 2A, 3
and 4.

...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 11-02-2019.

ORDER :

1. Present appeal has been filed by the original plaintiff challenging the Judgment and decree passed in Civil Appeal No.15 of 2015 by learned District Judge -1, Shahada Dist. Nandurbar, dated 03-03-2017, whereby his appeal came to be dismissed. In the said appeal he had challenged the Judgment and decree passed in Regular Civil Suit No.43 of 2012 (Old Regular Civil Suit No.28 of 2007 and S.C.S. No.19 of 2011), by learned Civil Judge, Senior Division, Shahada dated 19-12-2014, wherein his suit for declaration, mandatory injunction, possession and for perpetual injunction came to be dismissed.

2. Heard learned advocate Mr. M. S. Kulkarni, appearing for appellant and learned advocate Mr. S. V. Natu for respondents No.1, 2A, 3 and 4. It has been vehemently argued on behalf of the appellant that, the relationship between the parties is admitted. Defendant No.1 is the nephew of plaintiff. Other defendants are the sister and brothers of defendant No.1. Plaintiff had come with a specific case that, as regards ancestral properties / joint family properties of the family were concerned there was a partition in the year 1959, and since then everyone was enjoying respective

property. Plaintiff purchased suit properties i.e. Grampanchayat No.517, 518 and 519 respectively by three sale deeds on 10-06-1974. According to the plaintiff, he is the exclusive owner and possessor of the suit properties which are the open plots. Plaintiff noted construction activity on 28-03-2007, and therefore, made enquiry and then came to know that the defendants are going ahead with a plan to have a permanent structure on the suit plot. Hence, he initially filed the suit for injunction. Thereafter during the pendency of the suit when the construction was over, plaint was amended and relief of possession was sought. Thus, the plaintiff had sought the possession of the suit property on the basis of the fact that, it is his self acquired property. The partition in the year 1959 was proved on the basis of mutation entry No.1767 dated 10-03-1959 (Exhibit 184) as well as mutation entry No.1053 dated 16-05-1959 (Exhibit 185). Those were the partial partitions but since then each one of them were possessing respective shares. This fact has not been properly appreciated by both the Courts below. Much stress has been given on the point that, on the date of the sale deed plaintiff had no sufficient income to purchase those properties. Under that circumstance, the defence put forward by defendants that the suit properties were joint family properties of their father, plaintiff and their brother Vishwanath Narayan Patil was held to be proved. Further the partition of 1992 in which suit properties were

received by the father of defendants was held to be proved on the basis of wrong appreciation of the documents. He relied on the decision in, *Hero Vinoth (Minor) Versus Sheshammal*, reported in (2006) 5 Supreme Court Cases 545, wherein it was observed that,

"A substantial question of law has to be distinguished from a substantial question of fact and High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law.

Here non-appreciation of evidence properly has led to the perversity and therefore the appeal deserves to be admitted.

3. Per contra, the learned advocate appearing for the respondent submitted that, both the Courts have given concurrent finding on facts. All the documents which were filed by both the parties to support their respective contentions have been properly appreciated. Under that circumstance there is no question of law involved in the case much less any substantial question of law. The first and the foremost fact that is required to be considered is that, plaintiff had come with a case that, there was a partition of joint family property in 1959 and in order to prove the same he relied on Exhibits 184 and 185. But perusal of those mutation entires would clearly show that, there was no partition of the house properties of the joint family property. Partition cannot take place in pieces of the properties. Plaintiff is not coming with a case that, why there was partial

partition each time. It has been rightly observed by the learned trial Court that, taking into consideration the age of the plaintiff if it is to be considered that there was a partition in 1959 then at that time his age would have been 15 years, then the question is, who had given consent for the minor to have partition. Further as regards suit properties are concerned, plaintiff in his testimony has admitted that, he was medical practitioner in Ayurved and completed his education in 1971. He joined the service in 1973 and at that time his salary was Rs.300/- to 350/-. He had wife, son and two daughters to maintain. The sale deeds were executed on 10-06-1974 for a consideration of Rs.3000/- in total in respect of two properties and one more property on 02-11-1974 for a consideration of Rs.47,500/-, i.e. total of Rs.50500/-. Therefore, the question as to how he had collected amount of consideration during the said short span. This fact together with the evidence for partition in the year 1992 proved the defence taken by the defendants that, there was partition of the suit properties only in 1992 and the suit properties were put to the share of the father of the defendants. Therefore, no error or illegality has been committed by both the Courts below requiring admission of the matter.

4. 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.

5. 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.

6. 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.

7. The ratio laid down in *Hero Vinoth (Minor) Versus Seshammal (Supra)* is also on the line of above said authorities and the fact is reiterated that, appellant should show substantial question of law and not a mere question of law. Therefore, it was

observed that, the word 'substantial', as qualifying question of law means of having substance, essential, real, of sound worth, important or considerable. As regards scope under Section 100 of Code of Civil Procedure is concerned, re-appreciation of evidence is almost not permissible. Both the Courts below in this case have considered the effect of mutation entry Exhibits 184 and 185, and held that, they do not prove partition between plaintiff and defendants. Further as regards suit properties were concerned, defendants were admitting that the sale deeds were in the name of plaintiff but they contend that, at that time when the suit properties were purchased, the family was unite or there was nucleus between them. It is their case that, properties were partitioned only in 1992 and in order to prove the same they have produced documentary evidence as well as witness who was present at the time of partition. Plaintiff has not proved that, he had the entire amount of consideration when the properties were purchased. The admissions extracted in his cross examination as narrated above would definitely show that it was hard for him to collect amount of Rs.50500/- within the limited span of two to three years. Therefore, when both the Courts below have thoroughly appreciated the evidence, minutely considered each and every entry in the record of right also together with oral evidence and specifically the admissions, no substantial question of law can be said to be arising

in this case. There can be oral partition amongst Hindus and it can be proved through cogent evidence. Entries in the record of rights supporting the said oral evidence can be considered. Especially in this case both the parties are coming with a case of oral evidence and then reflection of the same in mutation entries. However, plaintiff has not explained as to why there was partial partition at the time of Exhibit 184 and again at the time of Exhibit 185. Therefore, the theory of partition in 1959 as contended by the plaintiff has been rightly discarded. Therefore, the appeal is disposed of as **not admitted**.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.