

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.358 OF 2017

Mahadeo s/o Krushnaji Mane

... APPELLANT

Versus

Nivrutti s/o Rambhau Dhabekar and others

... RESPONDENTS

.....

Mr. Amit. A. Mukhedkar, Advocate for appellant.

Mr. S.S. Wakure, Advocate for respondent Nos.1 to 4, 5-A to 5-C, 6, 7, 8-A to 8-C.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 19th September, 2019.

ORDER :

. Present appeal has been filed by original defendant challenging the judgment and decree passed in Regular Civil Appeal No.115 of 2016 by learned District Judge-2, Osmanabad dated 20-02-2017, thereby the judgment and decree passed in Regular Civil Suit No.565 of 2014 passed by learned 2nd Joint Civil Judge, Senior Division, Osmanabad dated 06-09-2016 came to be confirmed.

2. The said civil suit was filed by the present respondents for permanent injunction. They had come with the case that amongst the plaintiffs' Nivrutti, Maruti and the predecessors of plaintiff Nos.3 to 8-D(iv), viz, Dattatray and Ganpati had purchased agricultural land bearing survey No.130/2003 admeasuring 4 Acres 9 Gunthas, survey No.130/2004 admeasuring 4 Acres 14 Gunthas and Survey No.130/2006 admeasuring 4 Acres 14 Gunthas from one Jayram Krushna Mane and Chaturbhuj Krushna Mane on 02-06-1976 for consideration of Rs.10,000/-. The possession of the said agricultural lands was handed over to the plaintiffs prior to the sale deed and by way of said sale deed, the said possession was confirmed. Names of the plaintiffs were not mutated as per the said sale deed and then the consolidation scheme was implemented. At the time of consolidation, mistakenly, the names of the representatives of vendor came to be recorded. Thereafter, Chaturbhuj, Jayram and Gopal had filed Regular Civil Suit No.578 of 1988 for declaration for ownership and permanent injunction in respect of suit properties against the plaintiffs. The said suit came to be dismissed on 22-04-1991. The appeal preferred i.e. Regular Civil Appeal No.133 of 1991 was dismissed. It was specifically held in the said proceedings that the plaintiffs are the owners and possessors of the suit properties. Thereafter, when plaintiff - Maruti filed an application to

the Tahsildar for mutating their names in the cultivation as well as ownership column, it was resisted by the defendant. The defendant was intending to alienate the suit property and thereby entered into an agreement to sale in favour of one Shaikh Shakir Abdul Samad and Kazi Irfan Abbas Ali. The notice was published in respect of the said transaction on 13-09-2014 in newspaper and thereafter, the defendant started obstructing the peaceful possession of the plaintiffs. Hence, suit was filed by the plaintiffs.

3. The defendant resisted the claim by filing written statement and he denied all the averments in the plaint. It was denied that the plaintiffs are the owners of the suit property by virtue of sale deed dated 02-06-1976. It is also denied that since then the plaintiffs are in possession of the suit properties. Since the boundaries have not been mentioned of the suit properties, the suit is barred under Order VII Rule 3 of Civil Procedure Code. It is denied that due to mistake, his name is appearing in the 7/12 extract. The earlier litigation has been admitted by him. It is denied that he has obstructed the possession of the plaintiffs. It was contended that defendant's father was the owner and possessor of the suit properties in the year 1976. Chaturbhuj Mane and Jayram Mane are his

brothers. Though they had executed sale deed in favour of the plaintiffs, yet, in fact, Chaturbhuji as well as Jayram were not owners of the suit properties and therefore, the said sale deed is *void ab initio*. Their father was possessing the suit property till 12-01-1987 and after his death, name of the defendant is appearing in the 7/12 extract. He is possessing the property and by virtue of the consolidation scheme that was implemented in the year 1987-1988 his name has been mutated in the revenue record. Since he is in possession of the suit properties, plaintiffs are not entitled to get any relief.

4. Taking into consideration the said rival contentions, issues were framed. Parties have laid oral as well as documentary evidence. After considering the evidence on record, the learned trial Court has held that the plaintiffs are owners of the suit property. Defendant has failed to prove that his brothers had no right, title or interest to sale the suit properties. Plaintiffs possess the suit properties and as it has been obstructed, they are entitled to get the relief of permanent injunction. Thereby, the suit came to be decreed and in appeal which was filed by the original defendant, the said decree has been confirmed by dismissing the appeal. Hence, this second appeal.

5. Heard learned Advocate Mr. A. A. Mukhedkar for appellant and learned Advocate Mr. S. S. Wakure for respondent Nos.1 to 4, 5A to 5C, 6, 7, 8A to 8C, 8 D(i) to 8 D(iv).

6. It has been vehemently submitted on behalf of the appellant-original defendant that both the Courts below have failed to consider that there was no compliance of Order VII Rule 3 of Civil Procedure Code, as the property was not properly described by giving boundaries. Both the Courts below failed to consider that the brothers of the defendant had no authority to sell the suit land and since the suit land was standing in the name of the defendant and he, being the owner of the same, the said sale deed was not binding on him. The revenue record shows that the defendant is the owner and possessor of the suit properties and therefore, the suit ought to have been dismissed. The learned appellate Court has not considered all the points properly, though it was specifically pointed out and argued before it.

7. Per contra, the learned Advocate appearing for the respondents supported the reasons given by the learned trial Court as well as the learned first appellate Court.

8. At the outset, for taking cognizance of a second appeal, it is incumbent on the appellant to show substantial questions of law as contemplated under Section 100 of Civil Procedure Code. In **Gurnam Singh (D) By LRs and others Vs. Lehna Singh (D) By Lrs and others**, [Civil Appeal No.6567 of 2014] decided by Hon'ble Apex Court on 13-03-2019, it has been observed that "as per the law laid down by this Court in catena of decisions, the jurisdiction of High Court to entertain second appeal under Section 100 of Civil Procedure Code after the 1976 Amendment, is confined only when the second appeal involves a substantial question of law. The existence of 'substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of the Civil Procedure Code. As observed and held by this Court in the case of **Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar**, [(1999) 3 SCC 722], in a second appeal under Section 100 of the Civil Procedure Code, 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.

It is further observed by this Court in the aforesaid decision that if the 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. The trial Court could have decided differently is not a question of law justifying interference in second appeal". Further in **Ishwar Dass Jain (Dead) Through LRs Vs. Sohan Lal (Dead) By Lrs**, [(2000) 1 SCC 434] it has been observed that :

"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."

Thus, taking note of the legal position in respect of the second appeal to be entertained under Section 100 of Civil Procedure Code, especially when there is concurrent findings and decree, it is now required

to be seen as to whether the appellant has made out any substantial questions of law.

9. The admitted fact on record was that in Regular Civil Suit No.578 of 1988 which was filed by the brother of the defendant against the plaintiffs of which judgment and decree has been produced at Exhibit-44 and the judgment and decree in Regular Civil Appeal No.133 of 1991 has been produced at Exhibit-45, it is clearly held that the plaintiffs are the purchasers and title holders of the suit property. When the question is of title, then the decree that has been passed, will have to be taken as *in rem*. Even if for the sake of arguments, it is taken that the defendant was not party to that proceeding and the question of *res judicata* may not be involved, yet, what we cannot forget is that by the said decree, plaintiffs were declared to be the owners and possessors of the suit lands. The defendant has come with the case that his brothers had no title to sell out the suit properties but then he has not made it clear as to when he came to know about the said sale deed. He has not given any reason as to why he has not taken any action either to get that sale deed cancelled or he had not filed any suit for getting his title declared even after the said decree was passed. The facts which have been admitted rather show that

defendant was also a party to the said suit along with his brothers and they had fought the said litigation for assertion of their title and possession on the basis of alleged adverse possession. Definitely, the said decision in Regular Civil Suit No.578 of 1988 Exhibit-44 is binding on the defendant and the said decree has been confirmed in appeal. Therefore, the defence, that has been taken by the defendant, is clearly barred by *res judicata* as contemplated under Section 11 of Civil Procedure Code. Therefore, from any angle, if we consider the facts in the suit filed by the present respondents, it was not necessary for the plaintiffs to seek declaration of their title once again.

10. The defendant has much relied on the revenue record which is stated to be by virtue of the implementation of the consolidation scheme. The first and the foremost fact is that in Regular Civil Suit No.578 of 1988, no such stand was taken by defendant that his brothers had no right, title or interest to sale out the suit properties to the present plaintiffs. Even at that time also, he intended to rely on the same revenue records, but that attempt has been failed. Since no relief in respect of the sale deed was granted or prayed; defendant cannot once again raise the point that his brothers had no title to sell out the suit property way back in the year 1976

to the plaintiffs. Another fact to be noted is that according to the defendant, the properties belonged to their father, under such circumstance, how he alone can claim exclusive title to the suit properties to the exclusion of his brothers is a question. The mutation appears to be in the name of defendant alone. When according to the defendant himself, the property belonged to his father till his death, then it would have been naturally inherited by the legal representatives of his father. The defendant then cannot become exclusive owner of the suit properties. Even though the revenue records stood in his name alone, he cannot be said to have acquired any exclusive right, title in himself, nor it would have been extinguished the title of his brothers. Reliance can be placed on the decision in **Bhimabai Mahadeo Kambekar (D) Thr. LRs Vs. Arthur Import and Export Company and others, [2019 (6) Mh.L.J. (4)]**, wherein it has been observed by Hon'ble Supreme Court that "the law on the question of mutation in the revenue records pertaining to any land and what is its legal value while deciding the rights of the parties is fairly well settled by a series of decisions of this Court.

This Court has consistently held that mutation of a land in the revenue records does not create or extinguish the title over such land nor it has any presumptive value on the title. It only enables the person in whose

favour mutation is ordered to pay the land revenue in question.”

Therefore, when the execution of the sale deed in favour of the plaintiffs is admitted and in the previous litigation, the plaintiffs were held to be the owners and possessors of the properties, then the obvious finding on the point would be in favour of the plaintiffs. It appears from the record that persistently, the defendant is obstructing the plaintiffs in one or the other manner. Under such circumstance, the learned trial Court was justified in using the judicial discretion in favour of the plaintiffs while passing an order of permanent injunction against the defendant. Thus, no substantial questions of law can be said to be arising in this case for the aforesaid reasons. Under such circumstance, the second appeal is hereby disposed of as not admitted.

(SMT. VIBHA KANKANWADI, J.)

SCM