

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

SECOND APPEAL NO.464 OF 2017

Bhikan Asaram (**Died**)
Through L.Rs. Uma w/o Parbat Kasture,
Age 61 yrs., Occ. Household,
R/o C/o Dharma Rama Salampure,
New Pahadsingpura, Aurangabad.

... Appellant.

... **Versus** ...

- 1 Sk. Akhtar s/o Sk. Babu,
Age 60 yrs., Occ. Agri.,
R/o Cantonment, Aurangabad.
- 2 Syed Rahim s/o Syed Ahmad (**Died**),
Since deceased through L.Rs. -
 - i) Shahin Begum w/o Syed Ahmed,
Age 68 yrs., Occ. Household,
R/o House No.729, Pensionpura,
Cantonment, Aurangabad.
 - ii) Syed Ifteqar s/o Syed Rahim,
Age 49 yrs., Occ. Business,
R/o as above.
 - iii) Syed Zaheer s/o Sayed Rahim,
Age 47 yrs., Occ. Business,
R/o as above.
 - iv) Shaista Tarannum w/o Syed Aslam,
Age 53 yrs., Occ. Housewife,
R/o as above.
 - v) Tabassum w/o Laeeq Quadri,
Age 45 yrs., Occ. Housewife,

R/o Azam Colony, Roshan Gate,
Aurangabad.

- 3 Mirza Rafat Baig s/o Mirza Khalid,
Age 51 yrs., Occ. Business,
R/o Ganesh Colony, Aurangabad.
- 4 Mohd. Rizwan Siddiqui s/o Ahmad Najiboddin,
Age 55 yrs., Occ. Business,
R/o Kaisar Colony, Aurangabad.
- 5 Hema Girdhar Salampure (**Died**),
Since deceased through L.Rs. -
 - i) Seetabai d/o Hema Salampure,
Age 73 yrs., Occ. Agri.,
R/o Harsool, Dist. Aurangabad.
 - ii) Kamalbai w/o Bheema Devre,
Age 53 yrs., Occ. Household,
R/o Teesgaon, Dist. Aurangabad.
 - iii) Bhagubai w/o Ganesh Sale,
Age 50 yrs., Occ. Household,
R/o Mama Chowk, Jalna.
 - iv) Radhabai w/o Keshu Ghalade,
Age 48 yrs., Occ. Household,
R/o Golwadi, Dist. Aurangabad.
- 6 Durgaji Bhagat (**Died**),
Since deceased through L.Rs. -
 - i) Smt. Jamnabai w/o Durgaji Salampure,
Age 68 yrs., Occ. Household,
R/o Harsool, Dist. Aurangabad.
 - ii) Smt. Laxmibai Durgaji Salampure,
Age 53 yrs., Occ. Household,
R/o as above.

- iii) Chhagan Durgaji Salampure,
Age 50 yrs., Occ. Agri.,
R/o as above.
 - iv) Sau. Kalyanbai d/o Durgaji Salampure,
Age 48 yrs., Occ. Household,
R/o as above.
 - v) Bhurya Durgaji Salampure,
Age 44 yrs., Occ. Household,
R/o as above.
 - vi) Sau. Hirabai d/o Durgaji Salampure,
Age 44 yrs., Occ. Household,
R/o as above.
 - vii) Girdharilal s/o Durgaji Salampure,
Age 40 yrs., Occ. Agri.,
R/o as above.
 - viii) Sheetal d/o Durgaji Salampure,
Age 38 yrs., Occ. Household,
R/o as above.
 - ix) Sau. Radhabai d/o Durgaji Salampure,
Age 34 yrs., Occ. Household,
R/o as above.
 - x) Lalchand Durgaji Salampure,
Age 53 yrs., Occ. Agri.,
R/o as above.
- 7 Bansi Laddu,
Age 65 yrs., Occ. Agri. & Service,
R/o Pahadsingpura (new), Aurangabad.
- 8 Raju Rama (Died)
Since deceased through L.Rs. -
- I) Sakhanbai w/o Raju Salampure,
Age 48 yrs., Occ. Household,

- ii) Sangita d/o Raju Salampure,
Age 31 yrs., Occ. Household,
- iii) Santosh Raju Salampure,
Age 30 yrs., Occ. Household,
- iv) Sunil Raju Salampure,
Age 46 yrs., Occ. Household,

All are r/o Pahadsingpura, Begumpura,
Aurangabad.

... **Respondents.**

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

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 01st AUGUST, 2019

PRONOUNCED ON : 27th SEPTEMBER, 2019

JUDGMENT :

1 Present appeal has been filed by the original plaintiff No.2 challenging the concurrent Judgment and Decree passed in Regular Civil Appeal No.258/2008 by learned Adhoc District Judge-3, Aurangabad dated 20.02.2017, thereby the appeal filed by the present appellant along with other appellants came to be dismissed and thereby confirming the decree passed in Regular Civil Suit No.747/1992 by learned 10th Joint Civil Judge

Junior Division, Aurangabad on 28.07.2008.

2 The said suit was filed by the original plaintiffs including the present appellant for declaration of sale deeds dated 07.12.1991 and 23.03.1992 as null and void, recovery of the possession of suit property and for perpetual injunction restraining the defendant Nos.1 to 4 from obstructing possession of the plaintiffs over the suit property. The land in dispute was Sy.No.252/1 to the extent of 7 Acres 19 Gunthas situated at village Harsool, Tq. & Dist. Aurangabad. Plaintiffs claimed that Gat No.252 was in all earlier admeasuring 36 Acres 36 Gunthas, which was owned and possessed by one Chhoteram. Out of that, most of the portion was acquired by the Government for construction of dam and only 7 Acres 18 Gunthas land remained. The genealogy has been given in the plaint and the plaintiffs contend, that after demise of Chhoteram the said land devolved upon the heirs left by Chhoteram. According to the plaintiffs, it was the joint family property. It remained in the name of Tarachand, who has also received the compensation for the acquisition of the land. However, other persons filed application for distributing the compensation amongst the heads of the family and accordingly the distribution was made. It is then stated that, taking disadvantage of their names entered to the revenue record, defendant Nos.5 and 6 transferred the suit property in favour of defendant Nos.1 to 4, by way

of those two sale deeds. It is stated that those sale deeds are null and void and not binding on the plaintiffs. Hence, the suit.

3 The defendants filed written statement and denied all the averments in the plaint. It was denied that the suit property was a joint family property. It is stated that after the acquisition of some of the portion from Gat No.252, the ancestors of the defendant Nos.5 and 6 became the owners and possessors of the suit property. Plaintiffs have no concern with the suit property, so also, the suit is bad for non-joinder of necessary parties and not maintainable in the form, the plaint has been produced. It has been contended, that at the time of acquisition it was mutually settled between the ancestors, that whatever compensation amount would be received by Dharamchand and would be settled in between legal heirs of Khemchand and Ramchand. Accordingly, the settlement has been arrived at and the ancestors of Khemchand and Ramchand have become owners of the suit property. They had every right to transfer the suit property, accordingly, they have sold the property to defendant Nos.1 to 4. Defendant Nos.1 to 4 are stated to be the bona fide purchasers for value without notice. It was also contended that since the plaintiffs have taken inconsistent pleas, they cannot seek injunction against co-owner, as well as seek ownership over the property. It is also stated that the suit is barred by limitation and the ancestors of defendant

Nos.5 and 6 have become owners by adverse possession.

4 Taking into consideration the rival contentions, issues were framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, the learned Trial Court had held that the plaintiffs have failed to prove that the suit properties are joint family properties. They have also failed to prove that sale deeds are not binding on them. They failed to prove their possession over the suit lands and obstruction at the hands of defendants. It was also held that the defendant Nos.1 to 4 are bona fide purchaser for value without notice. Defendants have proved that the suit is not within the period of limitation. The suit is also bad for non-joinder of necessary parties and therefore, the plaintiffs are not entitled to get any of the reliefs claimed. Suit was thus, dismissed. The said Judgment and Decree was challenged in the aforesaid appeal and after hearing both sides the learned First Appellate Court has dismissed the appeal. Hence, the present Second Appeal.

5 Heard learned Advocate Mr. D.R. Bhadekar for appellant. Since the *sine qua non* of Second Appeal is that it appellant should show case for framing of substantial question of law, it was not necessary to issue notice to the respondents in this case.

6 It has been vehemently submitted on behalf of the appellant, that both the Courts below have not considered the evidence and the law points involved in proper perspective. Both the Courts failed to consider that for accepting the defence of adverse possession, the defendants have to admit that the plaintiffs are owners of the property. When plaintiffs are owners of the property and their right could not have been extinguished and the defendants did not bring on record such acts, which would amount to perfection of their title by adverse possession, it ought to have been held by both the Courts, that the plaintiffs are the owners of the property, as it is their joint family property. Mere long standing revenue entries will not prove the adverse possession or the title of predecessor of defendant Nos.5 and 6. The compensation amount was deposited in the Civil Court and though the said suit was for declaration of title and it was decreed to the extent of half share of the parties, the Judgment by the Appellate Court in that matter i.e. in the earlier round of litigation would speak for itself. It was clearly observed, that the suit land is a joint family property and plaintiffs are not excluded from the said family. Co-owner had no right, title and interest to sell out the specified portion of land and therefore, both the sale deeds were illegal, as plaintiffs are not the signatories to the sale deed. It cannot be stated that the defendant Nos.1 to 4 are the bona fide purchaser for value without notice.

7 At the outset and at the costs of repetition it is to be noted, that the present appeal is under Section 100 of the Code of Civil Procedure, 1908 and therefore, unless it is shown by the appellant that there are substantial questions of law arising in the matter, cognizance of the Second Appeal cannot be taken. 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.

8 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, 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.

9 Thus, taking into consideration the above said legal position, the facts and law point involved in this case, it is required to be considered, whether both the Courts below were justified in dismissing the claim of the plaintiff. Again, at the outset, from the face of the record itself, it can be seen

that from the genealogy, that has been given in the plaint or the Judgment of the Trial Court, only certain persons have been added as party to this suit. If all these persons are taken to be the members of joint family, then all of them, who are alive, ought to have been added as a party. Date of death of any of the member has not been conveyed. When the relief of injunction, which is in the form of equitable relief was claimed, then the plaintiffs ought to have added all those persons/members as party to the suit, who have share or interest, if any, in the suit property. There is absolutely no explanation by the plaintiffs, as to why some of them have been left out. Unless plaintiffs show that they are the owners of the property, they cannot get declaration in respect of sale deed and recovery of possession. For relief of injunction they should show, that they are in possession of the property. Therefore, both the Courts have rightly held that the suit is bad for non-joinder of necessary parties. In the written statement itself, the defendant had raised the said point and accordingly, even issue was framed, yet there was no attempt by resorting to Order 1 Rule 10 of the Code of Civil Procedure, to get those left out persons added as party to the suit.

10 Plaintiffs have come with a case that the suit property is their joint family property and it is not their contention that it was ancestral property. Definitely there is difference between these two concepts. How the

property devolved on the family, has not been stated. Even if, we accept, that in a way the defendants had admitted, that there was a joint family but then the defendants have come with a specific case, that at the time of compensation, compromise was arrived at and thereafter their predecessor had become owner of the suit property by adverse possession. In order to support the said contention documentary evidence was produced and the original papers in land acquisition proceedings No.1112/15/Jamabandi/1953 were called. The learned Trial Court has made the observations after perusing the said record. There was no attempt on the part of the plaintiffs or their predecessor, to get the said decree or order, by which they received the payment, set aside by competent authority. The consistency in the stand taken by the defendants, would be seen from a fact that after the compromise was arrived at, the mutation stood in the name of the predecessor of defendant Nos.5 and 6 only. The earlier suit was filed on 01.08.1955 and it was disposed of on 29.09.1955, wherein it has been observed that the presumption of jointness of the family was rather weak, in the case, as the parties are separated from each other by several decree. The Appellate Court in Civil Appeal No.160/4 of 1955 has made the said observation, but then further observations have been made, that there was no exclusion of defendants from the enjoyment of the property and that branch of the family was shown as having its due share in its own land. There, those plaintiffs did

not satisfactorily prove the exclusion of the defendant from joint family property that the knowledge of the defendants and it was held that they have failed to prove their adverse possession over the suit land. It is to be noted that according to even the plaintiffs, in this case, the said suit was in respect of compensation only and the defendants, who were the appellants/plaintiffs there, have come with a case, that after the decision in appeal on 29.09.1955 the said compromise has taken place. In spite of such a dispute, there was no attempt as it appears from the record, that the plaintiffs had ever tried to exercise their right of ownership over the suit properties. The admissions given by the plaintiffs' witnesses in the present case are fatal. In spite of assertion of their ouster in the earlier round of litigation, yet for about more than 40 years the plaintiffs have allowed the name of the other branch to appear in the revenue record, is the one of the piece of evidence showing adverse possession.

11 Thus, it is to be noted, that when plaintiffs were blowing hot and cold at the same time, in the form, that at one breath they were contending that the property is joint family property, yet did not include all the members of the family as party to the suit and then praying for recovery of the possession by seeking declaration in respect of the sale deeds, yet did not come forward to file a suit for partition and separate possession. Therefore,

both the Courts have taken correct view. No substantial questions of law are arising in this case. Hence, the appeal stands disposed of as “**Not admitted**”.

(Smt. Vibha Kankanwadi, J.)

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