

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

Second Appeal No. 0590 of 2017

District : Nanded

Avtarsingh S. Gurudayalsingh Sodi,
Age : 50 years,
Occupation : Business,
R/o. Nagina Ghat, Nanded.

.. Appellant
(Original
defendant)

versus

Nagorao s/o. Sambhaji Indrakshe,
Age : 70 years,
Occupation : Retired,
R/o. Tirumala Nagar,
Near Kabra Nagar,
Nanded, Dist. Nanded.

.. Respondent
(Original
plaintiff)

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Mr. Anand I. Deshmukh, Advocate, for the appellant.

*Mr. A.P. Bhakkad & Mr. P.S. Bhakkad, Advocates,
for the respondent.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 04TH MARCH 2019

ORDER :

01. Present appeal has been filed by original defendant. Present respondent had filed Regular Civil Suit No. 265 of 2013 for declaration, recovery of possession, perpetual injunction and mesne profits. It came to be decreed on 18-11-2014 by 7th Joint Civil Judge Junior Division, Nanded. Original plaintiff had

come with a case that he is the owner of plot No. 7 out of land Survey No. 30 (old), New Survey No. 30/A situated at village Wadi (Bk), Taluka and District Nanded, admeasuring 50 feet north-south and 30 feet east-west. He had purchased the said land by a registered sale-deed dt. 14-09-1981 from one Dagdusinh Nathusinh Thakur for a consideration of Rs.4,000/-. Possession of the said plot was given to plaintiff. Said Dagdusinh had converted his 86 R land out of said Survey number into plots and sold it to different persons. Plaintiff had mortgaged the land to Godavari Urban Co-operative Bank Ltd., Vazirabad branch, Nanded. Defendant has no right, title or interest over the said plot. Defendant made construction of a room in loose bricks and tin sheet in the suit plot on 01-04-2013. Plaintiff was resisted by defendant and it was told that he has purchased it from the sons of Dagdusinh. Plaintiff contends that the said sale-deed is illegal and void. He had requested defendant to hand over the possession of the suit plot to him, but he refused; hence, the suit.

02. Defendant has resisted the claim of the plaintiff by filing written statement. He has denied the ownership claim of the plaintiff. He has stated that Dagdusinh was the owner of 2 acres and 5 gunthas only i.e. having $1/4^{\text{th}}$ share in 8 acres 19 gunthas. He had no right to sell entire land to different people. The sale-deed in favour of plaintiff is bogus and

false. Possession of the suit plot was never handed over to plaintiff. It is also contended that Dagdusinh had no legal necessity to sell the land. Nagrajsinh and his brothers were the sons of Dagdusinh. They formed joint family. After death of Dagdusinh, the sons became owners and possessors of the property. He gave public notice in daily newspaper on 13-01-2013 expressing his intention to purchase the suit plot. Neither the plaintiff nor any other person raised any objection. He therefore, purchased the suit plot on 29-03-2013 by a registered sale-deed from the sons of Dagdusinh. His name is mutated to the revenue record. It is also tried to be contended that plaintiff and his friend were the brokers and taking disadvantage of illiteracy of Dagdusinh, they might have got the document executed. Plaintiff has not challenged his sale-deed and therefore, suit is not maintainable.

03. Taking into consideration the rival claims, issues came to be framed. Parties have led oral as well as documentary evidence. Learned 7th Joint Civil Judge Junior Division, Nanded, District Nanded has decreed the said suit on 18-11-2014. Defendant had challenged the said judgment and decree, in Regular Civil Appeal No. 159 of 2014. The said appeal was heard by learned District Judge-4, Nanded and dismissed it on 17-07-2017. Hence, this second appeal by original defendant.

04. Heard learned Advocate Mr. Bhapkar holding for Mr. A. I. Deshmukh appearing for appellant / original defendant.

05. It has been submitted on behalf of appellant that both the Courts below have not considered evidence and law involved in the matter properly. Plaintiff in this case had come with a case that he is the owner of the suit property. He had merely produced the sale-deed, but had not proved it by examining concerned witnesses. Defendant had specifically challenged the sale-deed on the ground that Dagdusinh had no authority to execute the sale-deed. Therefore, both the Courts ought to have addressed the issue from that angle. Defendant's advocate remained absent and therefore, there was no cross-examination of the witnesses examined by plaintiff; but that does not relieve the plaintiff from discharging his burden of proof. Appellant had prayed for remand of the matter in the alternative, to give him a chance to contest the matter; however, the learned First Appellate Court did not consider the said prayer properly. Judgment and decree passed by both the Courts below are without giving proper opportunity to the defendant to contest the matter by leading proper evidence. When the principles of natural justice have been not adhered to, then substantial questions of law are arising in this matter, requiring admission of the Second Appeal.

06. After considering both the judgments and arguments submitted on behalf of appellant, it is not even necessary to issue notice to respondent / original plaintiff. At the outset, it is required to be seen, as to whether any substantial question of law has been pointed out by the original defendant, 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. 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 -

“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.”

07. Further in **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar** reported in **(1999) 3 SCC 722**, 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.

08. Therefore, taking into consideration the above-said legal position, it is required to be seen as to whether any substantial question of law arises in this matter. Perusal of plaint as well as evidence led by plaintiff would show that he had produced sale-deed, which was executed in his favour by deceased Dagdusinh on 14-09-1981 at Ex.36. He had also examined

the attesting witness PW 1 Madhav Patil. Thereafter, he had examined himself. He had done the act of ownership by mortgaging the land vide deed of mortgage Ex.39. He has also produced other documentary evidence on record to show that he was dealing with the property as owner thereof. Important point to be noted is that all the said pieces of evidence have gone unchallenged on record as the defendant and his Advocate remained absent during the course of leading evidence. The act of leading evidence has not been completed in one day. There was opportunity to defendant to show the reason for his absence and pray for cross-examination and then adduce his own evidence. The learned First Appellate Court has perused the record and rightly concluded that defendant had filed applications for adjournment from time to time. Record shows that proper opportunity was given to defendant to rebut the evidence led by plaintiff as well as to lead his own evidence. Defendant had pleaded that after the matter was transferred from one Court to another at the time of trial, he was not communicated by his Advocate; however, those adjournment applications appear to be of subsequent period. Therefore, defendant can not take advantage of his own wrong. If opportunities were granted to defendant, but then he failed in grabbing those opportunities, then Courts will not come to rescue such negligent litigant. No case was made out for remand of the matter. Whether to remand the matter

or not, was within the discretion of the learned First Appellate Court. Defendant / appellant ought to have shown proper, reasonable and cogent ground for remand. Merely because he was absent and therefore could not cross-examine the witnesses examined by plaintiff and could not adduce evidence, will not be the just and reasonable ground to remand the matter. He was required to give proper and appropriate reason for his absence. When the record showed otherwise, the learned First Appellate Court was justified in not exercising discretion in favour of defendant. No substantial question of law will arise on this point.

09. Thus, whatever evidence was adduced by the plaintiff had gone unchallenged on record. Plaintiff had proved how he derived the title, how he has exercised the right of ownership over the suit land. The sons of Dagdusinh had not got the said sale-deed Ex.36 set aside. Therefore, the sale-deed had created title in favour of plaintiff. It also shows that Dagdusinh had handed over the possession of suit land to plaintiff on the date of sale-deed Ex.36. When defendant had allegedly purchased the said land, the sons of Dagdusinh had no title to the suit land. Defendant can not raise the point that Dagdusinh had no title to sell the suit land. When sons of Dagdusinh had no better title over the suit land, they could not have created better title in favour of defendant. Both the Courts below have considered the evidence and law

involved in the matter correctly. No fault can be found in the decisions given by both the Courts below.

10. For the afore-said reasons, it can be concluded that no substantial question of law is arising in this matter, requiring admission of the matter. Hence, the second appeal is disposed of as **Not admitted.**

(Smt. Vibha Kankanwadi)
JUDGE

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