

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

SECOND APPEAL NO.739 OF 2014

WITH

CIVIL APPLICATION NO.10139 OF 2018

Indersing Premsing Chahel, Died through L.Rs.

...Versus...

Kuldeepsing Premsing Chahel and others.

...

Mr. A.G. Talhar, Advocate for the appellants

Mr. A.M. Gholap, Advocate for the respondent Nos.1, 2B and 2C

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 11th FEBRUARY, 2019.

PRONOUNCED ON : 29th MARCH, 2019.

ORDER :

1 Present appeal has been filed by the legal representatives of original plaintiff to challenge the Judgment and Decree in Regular Civil Appeal No.61/2004, wherein their appeal came to be dismissed by learned Adhoc District Judge-2, Jalgaon on 27.06.2012. In the said appeal they had challenged dismissal of the suit filed by their predecessor i.e. Regular Civil Suit No.433/1983 by Joint Civil Judge Junior Division, Bhusawal on

19.01.2004.

2 Original plaintiff had come with the case that he is the owner of CTS No.13/1 new Gat Nos.23, 24 and 25 situated at Bhusawal and which is more particularly described in para No.1 of the plaint. Defendant Nos.1 to 4 are his brothers. They all came from Punjab to Bhusawal in 1965 and by staying separately each one of them was earning his livelihood. Plaintiff purchased the suit properties on 25.03.1968 from one Sonu Dula Patel for a consideration of Rs.7,500/-. He was cultivating the said lands. However, taking disadvantage of his nature and illiteracy, defendant Nos.1 to 3 obtained his signatures on various blank stamp papers. Defendants have no right, title or interest in the suit properties. Taking disadvantage of the fact that plaintiff used to do the occupation of Truck driver and was remaining absent from Bhusawal, defendants took forcible possession of suit properties about 5-6 years prior to the suit. He requested the defendants to hand over the possession, however, they avoided, therefore, he ultimately issued notice through Advocate. Defendants did not reply the said notice nor they gave possession. It is stated that the defendants have got mutated their names to the suit properties vide Mutation Entry No.372, however, they have not received ownership title. It is stated that the possession of the defendants over the suit lands is unauthorized. It is also contended that it is false that land Gat No.23 is acquired for MSEB Power Station. He is still

the owner of said land. Hence, he filed suit for possession and in the alternative he also prayed that if it is not possible to give the possession then the suit lands should be valued and the price together with interest should be given to him.

3 Defendant Nos.1, 2 and 4 filed written statement and denied all the contents of the plaint. They contended that defendant No.3 was employee as 'A' grade Fireman with Central Railway, Bhusawal in 1950. Thereafter, defendant No.2 came to Bhusawal in 1965 and took education at Bhusawal. Thereafter, he started doing job and thereafter defendant No.1 brought plaintiff, defendant Nos.2 and 4 from Punjab to Bhusawal. They were staying together in 1965. Defendant No.3 was serving. It is stated that in the year 1968 all the brothers collected the amount, which they had earned and also took some amount from their father as well as brother from Punjab and bought the suit properties. By consent of all the brothers and father the suit properties were taken in the name of plaintiff. Now, plaintiff is taking disadvantage of the said fact. However, the suit properties was the Joint Hindu Family properties of the plaintiff and defendants. It is also stated that in the year 1972 there was partition between plaintiff and defendants in respect of suit properties as well as the other movable properties. Plaintiff and defendant Nos.1 and 2 had raised loan for pipeline as well as for tractor and crop from Union Bank of India,

Branch Bhusawal to the tune of Rs.68,300/-. At that time they had mortgaged the suit properties. The said loan has been repaid by the family prior to 1977. There was written partition in 1977 and at that time the truck, which was in the name of defendant No.4 was given to the share of plaintiff and then plaintiff has sold the same to a person from Kalyan. Prior to that plaintiff had raised loan on 23.09.1968 for the land and it has been repaid by plaintiff as well as defendants. The details of the partition have been given in para No.9 of the written statement. It is stated that land Gat No.23 was acquired by Government of Maharashtra for Thermal Power Station for Bhusawal. The compensation amount has been received by defendant Nos.1, 2 and 3 and the possession of Gat No.23 was given to Government on 10.10.1983. Therefore, they say that plaintiff has no right or share in the suit property.

4 Taking into consideration the rival contentions issues came to be framed, parties have led oral as well as documentary evidence on record. Taking into consideration evidence on record the learned Trial Court has dismissed the suit. During the pendency of the appeal i.e. Regular Civil Appeal No.61/2004, original appellant/plaintiff died and therefore, his legal representatives have been brought on record. After hearing both sides the learned First Appellate Court has dismissed the appeal on 27.06.2012 and hence present Second Appeal is filed.

5 Heard learned Advocate Mr. A.G. Talhar for the appellants and learned Advocate Mr. A.M. Gholap for the respondent Nos.1, 2B and 2C.

6 It has been vehemently submitted on behalf of appellants that both the Courts below have not considered the evidence properly. Though there was some documentary evidence to show that the loan was obtained that would not have led to the presumption that the properties were joint. In fact, the property was purchased by the plaintiff in his own name and he has given the account as to how he had collected the amount required for purchase of the properties. There was no relinquishment deed got executed from him at the time of alleged partition and without the same transfer would not have been possible. There was absolutely no proof of partition adduced by the defendants and therefore, the substantial question of law is involved in this case, that whether in absence of proof of partition or relinquishment deed, any transfer of property could be valid. Further, whether there was presumption of jointness available to the defendants. Mere revenue entries could not have given title to the defendants or could not have led to the presumption of jointness. He, therefore, prayed for admitting the matter.

7 Per contra, the learned Advocate appearing for the respondent Nos.1, 2B and 2C submitted that there is concurrent findings of both the Courts below. Declaration in respect of Mutation Entry No.2372 was sought

in the civil suit and not before the revenue Court. The mutation entry had taken place in the year 1979 and it was challenged in the suit which was filed in 1983. There were admissions given by the original plaintiff, which showed that there was a presumption of jointness. The revenue record was the piece of evidence for oral partition. The oral partition which had taken place in the year 1972 has been proved. There were three equal shares. That application, to have the mutation, was in fact filed by the plaintiff himself to Talathi and after due inquiry, the mutation has been carried out. There is a presumption regarding proceeding that was adopted by the Tahsildar and therefore, now, the plaintiff cannot deny his own acts of presentation of the said application. The evidence, that was adduced by both the parties, has been appreciated by both the Courts below and therefore, no substantial question of law is arising in this matter.

8 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.

9 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.”

Further note of the decision in Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar reported in (1999) 3 SCC 722, is required to be taken; 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”. Thus, now it is required to be seen as to whether appellant has raised any substantial question of law in this matter.

10 The first and the foremost fact, that is required to be considered is that according to the plaintiff, he had come to Bhusawal in the year 1965 and then he says that he purchased the suit properties on 25.03.1968 for a consideration of Rs.7,500/-. In his cross examination he has stated that when he came to Bhusawal he had only Rs.5/- in his pocket. He has claimed ignorance that defendant No.1 had also come along with defendant No.3 to Maharashtra from Punjab. He claimed ignorance that defendant No.1 took education at Bhusawal and then he started doing minor work and thereafter defendant No.1 called defendant Nos.2 and 4. They are the real brothers. Under such circumstance, conveniently he was blowing hot and cold by saying that at some point of time they were together and at some point they were separate and he had no knowledge

about whereabouts of defendants. In clear terms, he has also admitted that it did not happen that prior to the purchase of the lands at Bhusawal he was collecting amount and then it is hard to believe that within three years he has collected amount of Rs.7,500/-. In plaint he says that he never parted with the possession of the land to defendants. But then in cross he says that 3 to 4 years after purchase of lands he gave the possession of the suit land to defendants and further in clear and unequivocally terms he says that his brothers have never taken the possession of the suit lands illegally or forcibly. According to him, his signatures were taken on blank stamp papers but then he has not taken any steps against defendants in respect of the same. He has not agitated about the same to the concerned authorities nor he tried to seek information as to where those stamps have been used. Thereafter, again a stand has been taken by him in cross stating that defendant No.1 has imitated his signature at various places, but then such plea has not been taken by him in plaint. There was no explanation by the plaintiff regarding acquisition of land Gat No.23 by Government and payment of compensation to defendant Nos.1, 2 and 4. He never objected to the same. Lastly, it can also be seen that the partition has been proved through mutation entry also and the evidence that has been led, was on the basis of the application filed by plaintiff himself. He has not made any complaint against Tahsildar. Definitely, when the said application filed by

plaintiff was processed by Tahsildar, we will have to presume, unless contrary is shown that Tahsildar had adopted appropriate procedure. Defendants have produced oral evidence to prove the partition. According to defendants, there was a partition in 1972, but since there was some hitch as stated in para No.9 of the written statement, there was a re-partition in 1977. Therefore, whatever evidence has been led by the defendants appears to be probable on the test of preponderance of probabilities. Therefore, the conclusion can be drawn on the basis of that is, both the Courts below have taken possible view. Plaintiff himself is not sure about his own stand. Under such circumstance, no case is made out for substantial question of law. Therefore, the Second Appeal is disposed of as '**Not admitted**'. Since Second Appeal is not admitted, Civil Application is also disposed of.

(Smt. Vibha Kankanwadi, J.)

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