

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

Second Appeal No. 0783 of 2016

District : Nanded

Madhav Digambar Shinde,
Age : 50 years,
Occupation : Agriculture,
R/o. Jamb (Bk),
Taluka Mukhed,
District Nanded.

.. Appellant
(Original
plaintiff)

versus

1. The State of Maharashtra,
Through Collector, Nanded.
2. The Chairman,
S.L.D.T. & Tahsildar,
Mukhed, Taluka Mukhed,
Dist. Nanded.
3. Vishnupant @ Dhondopant
s/o. Wamanrao Jambkar,
(Died) Through his L.Rs.,

3A. Rukminibai Vishnupant
Jambkar, Age : 72 years,
Occupation : Household,
R/o. Kandhar,
Taluka Kandhar,
Dist. Nanded.

3B. Shyamsundar Vishnupant
Jambkar,
Age : 46 years,
Occupation : Service,
R/o. Bhokar,
Taluka Bhokar,
Dist. Nanded.

.. Appeal dismissed
as against
respondents no.
3A & 3B.

3C. Raghvendra Vishnupant
Jambkar,
Age : 44 years,

Occupation : Service,
R/o. at present Kandhar,
Taluka Kandhar,
Dist. Nanded.

3D. Bhaskar Vishnupant Jambkar,
Age : 54 years,
Occupation : Service
(Newspaper, Sakal),
R/o. Nanded, Dist. Nanded.

3E. Shyambai w/o. Prakashrao
Talegaonkar,
Age : 56 years,
Occupation : Household,
R/o. Opposite Multipurpose
High School, Vajirabad,
Nanded, Dist. Nanded.

3F. Mangala w/o. Prabhakar Joshi,
Age : 50 years,
Occupation : Household,
R/o. Shivajinagar, Nanded,
Dist. Nanded.

3G. Satu w/o. Vinayak Digedhar,
Age : 34 years,
Occupation : Household,
R/o. Chaitanyanagar,
Nanded, Dist. Nanded.

3H. Rani Suhas Kivalekar,
Age : 48 years,
Occupation : Household,
R/o. Chaitanyanagar,
Nanded, Dist. Nanded.

.. Appeal
dismissed
as against
respondents
no.3F, 3G &
3H.

4. Baban @ Kishanrao
s/o. Keshavrao Jamkar,
Age : 59 years,
Occupation : Service,
R/o. Sankalpa Building,
Pavan Nagar, Taroda Naka,
Nanded, Dist. Nanded.

5. Balu @ Prabhakarrao
s/o. Keshavrao Jamkar,
Age : 56 years,

Occupation : Contractorship,
R/o. Sanmitra Colony,
Workshop, Nanded,
Dist. Nanded.

6. Anil s/o. Keshavrao Jamkar,
Age : 50 years,
Occupation : Service,
R/o. Bhavsar Chowk,
Malegaon Road,
Nanded, Dist. Nanded.

7. Sunil s/o. Keshavrao Jamkar,
Age : 48 years,
Occupation : Service,
R/o. D.R.D.A., Bhavityanagar,
Malegaon Road, Nanded,
Dist. Nanded.

.. Respondents
(Original
defendants)

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Mr. D.R. Irale Patil, Advocate, for the appellant.

*Mr. R.B. Bagul, Assistant Government Pleader, for
respondents no.01 and 02.*

*Appeal dismissed as against respondents no.3A,
3B, 3F, 3G and 3H as per Court's order dated
03-09-2018.*

Mr. P.F. Patni, Advocate, for respondent no.3C.

Respondents no.3D and 3E served (Absent).

*Mr. Dhananjay M. Shinde & Mr. G.P. Jambkar,
Advocates, for respondents no.04 to 07.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 01ST OCTOBER 2019

ORDER :

01. Present appeal has been filed by the original plaintiff challenging the concurrent judgment and decree passed in Regular Civil Appeal No. 03 of 2009 by learned District Judge-1, Kandhar, Link Court, Mukhed, District Nanded, dated 22-08-2016 and Regular Civil Suit No.94 of 2003 (New), Regular Civil Suit No. 31 of 2003 (Old), Regular Civil Suit No. 61 of 2002 (Old), by learned Civil Judge (Senior Division), Kandhar, dated 09-01-2009, whereby the suit and the appeal filed by the present appellant came to be dismissed.

02. Heard learned Advocate Mr. D.R. Irale Patil appearing for the appellant. Heard learned AGP Mr. R.B. Bagul appearing for respondents no.01 and 02. Heard learned Advocate Mr. P.F. Patni appearing for respondent no.3C. Heard learned Advocate Mr. D.M. Shinde appearing for respondents no.04 to 07. Appeal is already dismissed as against respondents no.3A, 3B, 3F, 3G and 3H. None for respondents no.3D and 3E, though served.

03. It has been vehemently submitted on behalf of the appellant - original plaintiff, that both the Courts below have not considered the facts and evidence properly. The suit was restricted to area admeasuring 01 hectare 46 R which was the southern portion of the entire gut number. Both the Courts

proceeded on negative note. Issues were not properly framed, so also, points were also not properly framed. Both the Courts failed to see that the suit was brought within six months from the dispossession by the plaintiff and therefore, it was under Section 6 of the Specific Relief Act. Plaintiff had proved possession prior to the dispossession and therefore, possession ought to have been restored. The other part of the property that was 15 acres land to which the agreement of sale was entered into and then sale deed was executed, none of the defendants had ever got the said sale deed cancelled and therefore, the suit ought to have been decreed.

04. Per contra, learned Advocates appearing for the respondents supported the reasons given by both the Courts below while dismissing the suit and the appeal respectively.

05. At the outset, it is to be noted that for taking cognizance of second appeal, as contemplated under Section 100 of the Code of Civil Procedure, 1908, the appellant should show existence of substantial questions of law. 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.

06. 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.”

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.

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 thus :-

“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, taking into consideration the above said legal position, it is now required to be seen as to whether there was any error or illegality committed by the learned Courts below.

07. The first and the foremost point that is required to be elaborated is that the suit of the plaintiff is as clumsy as it can be, including everything which might be within the jurisdiction of a Civil Court, or not and ranging from the facts from years together. The suit was for declaration, recovery of possession, perpetual injunction and mesne profits. Both the Courts have definitely taken note of the fact that the suit is restricted to southern side 01 hectare 46 R from Block no.128 i.e.

Survey No.30 situated at Jamb (Bk.), Taluka Mukhed, District Nanded. However, then it is also to be noted that at the same time, the plaintiff had sought declaration in respect of 17 acres and 17 gunthas of the same land and sought injunction in respect of the same. Therefore, it cannot be stated that the suit property was restricted to 01 hectare 46 R only. The declaration was sought that the suit property is not the surplus land of defendants no.04 to 07 as per the order of S.L.D.T. The learned first appellate Court has rightly held that since it is a different forum available to declare any land as surplus or not, the jurisdiction of the Civil Court to grant such declaration is barred. When the order was already passed by S.L.D.T., Mukhed, on 28-08-1988, it ought to have been challenged before the appellate forum provided under the Act itself and it appears that the order was in fact, challenged by defendants no.04 to 07 by filing Writ Petition No. 2205 of 1988 and the said writ petition was dismissed. When the land was then belonging to defendants no.04 to 07 and the order passed in writ petition had attained finality, it could not have been gone into again by any other Civil Court.

08. Further, as regards the other facts and reliefs are concerned, it is to be noted that according to the plaintiff, he was the owner of the suit property and was possessing it; but then the

defendants had taken forcible possession of the same. Both the Courts below have taken note of the civil suit filed by defendant no.03, bearing R.C.S. No. 43 of 1966 in respect of land Survey No.138 and 156. It is stated that the suit land went to the share of father of defendants no.04 to 07; but then plaintiff had come with a case that those defendants i.e. defendants no.04 to 07 had agreed to sell said land for consideration of Rs. 2,65,020/- (Exhibit 97) on 11-04-1985. Though the plaintiff had produced the said agreement to sell, he has not led any evidence as to whether sale deed was executed in respect of the same land or not, though he had come with a case that there was a subsequent sale deed in the year 1994. It cannot be forgotten that the suit property itself was attached in the year 1984 under the orders of the Court and therefore, it could have been agreed to be sold by anybody on 11-04-1985. It was in the suit filed by defendant no.03, the suit property was attached and thereafter defendants no.04 to 07 appears to have lost their title and possession on 06-03-1984. The sale certificate was also issued which was pursuant to the attachment order and defendant no.03 had received the possession of the suit property through Court. All these proceedings were taken up in Regular Darkhast No.23 of 1983. Now, after so many years, in a suit which was filed in the year 2002, the plaintiff was asking declaration that the said attachment of the property

in said Regular Darkhast No. 23 of 1983 be declared as illegal and not binding on him, cannot be said to be a relief which can be granted as singularly it was time barred and it also shows that the plaintiff had not come with clean hands. Further, when the property was attached and sold pursuant to an execution proceedings, then another suit by any person was not tenable under Section 47 as well as under Order XXI Rule 101 of the Code of Civil Procedure. When there was prohibition for transfer of the property in view of the attachment order, basically, plaintiff's father could not have entered into any agreement to sell.

09. Now, it appears that at the second appellate stage, the appellant has come with a novel point that the suit was under Section 6 of the Specific Relief Act. This point was never raised before both the Courts below and therefore, it cannot be considered at all. As regards the point, that both the Courts did not frame issues / points properly, it was for the plaintiff also to see that the issues were properly framed. Only after framing of the issues, the trial proceeded and now, he cannot have any grievance that any issue is not framed by the trial Court.

10. Both the Courts have considered all the facts and legal points correctly. On the contrary,

the suit of the plaintiff is as cryptic as vague, as clumsy as it can be and therefore, no relief could have been granted by any of the Courts.

11. In the light of above, there is absolutely no merit in the second appeal. It is disposed of as '**Not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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