

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

Second Appeal No. 0238 of 2018

District : Beed

Sampatlal s/o. Kachardas Makhana,
Age 59 years,
Occupation Business,
R/o. Kada, Taluka Ashti,
District Beed.

.. Appellant
(Original
plaintiff)

versus

1. Gokuldas s/o. Anandrao Meher,
Age 64 years,
Occupation Business,
R/o. Kada, Taluka Ashti,
Dist. Beed.

.. Respondents
(Original
defendants)

2. Village Development Officer,
Grampanchayat Office, Kada,
Taluka Ashti, Dist. Beed.

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Mr. N.C. Garud, Advocate, for the appellant.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 18TH MARCH 2019

ORDER :

01. Present appeal has been filed by original plaintiff. He had filed Regular Civil Suit No. 287 of 2010 before learned Civil Judge Junior Division, Ashti for perpetual injunction. He had come with a case that suit property G. P. No. 622/11/B, City Survey No. 4,

described in para No. 1 of the plaint is possessed and controlled by Grampanchayat, Kada. However, Grampanchayat is not legal owner, however, vested with certain rights delegated to improve *gaothan* land. According to plaintiff, Government is the owner of the suit property. Grampanchayat used to allow the use of land on lease, by needy persons, after passing resolution. Grampanchayat did not transfer the land permanently to anybody. Plaintiff had requested Grampanchayat to allot the suit property for his business. On his request, he was allotted the suit property by resolution dt.30-12-1980 on lease. He executed lease agreement in favour of Grampanchayat and started using the same. He used to pay premium for the lease as agreed. His name is entered to the Grampanchayat record. Thereafter, his brother-in-law was ill and therefore, plaintiff was in need of money. He had borrowed amount of Rs.10,000/- from defendant No. 1. Defendant No. 1 had put a condition at that time that he should execute document in his favour. He had disclosed to defendant No. 1 that he is not owner of the suit property, but a lessee. However, defendant No. 1 insisted on executing sale-deed of suit property in his favour. It was orally agreed that defendant No. 1 will not enter his name in any register kept with Grampanchayat and will not create any right in the property. On this condition, sale-deed dt. 22-11-1994 was executed by plaintiff in favour of defendant No. 1 in respect of suit property. Defendant No. 1 had

agreed to reconvey document on repayment of Rs.10,000/-. Plaintiff repaid the amount on 30-01-2010 and demanded the reconveyance. However, defendant No. 1 denied it. Defendant No. 1 had also entered his name in the Grampanchayat record against the terms of oral agreement. It is stated that the document of sale-deed is illegal and has not created any right in favour of defendant No. 1. Defendant No. 1 filed Regular Civil Suit No. 81 of 2007 against plaintiff. In the said suit, present plaintiff had filed counter-claim for cancellation of sale-deed or reconveyance of the suit property. It was denied by defendant No. 1. The counter-claim was rejected on 10-10-2009. Hence, this suit for cancellation of sale-deed and injunction against defendant from disturbing his possession.

02. Defendant No. 1 contested the suit by filing written statement. He contended that he has purchased the suit property from plaintiff for a consideration of Rs. 10,000/- and since then he is enjoying the property. His name has been assessed to the Grampanchayat record. Plaintiff was disturbing his possession and therefore, he had instituted the said suit. His suit has been decreed. Plaintiff had filed counter-claim and it was rejected. Therefore, now present suit is barred by limitation. It was also contended that now plaintiff is estopped from contending that he was not the owner, when he had executed sale-deed in the capacity of owner. Defendant

No. 2 had not filed written statement.

03. Taking into considerations the rival claims, issues came to be framed. Parties have led oral as well as documentary evidence. Learned Civil Judge Junior Division, Ashti, District Beed has dismissed the said suit on 06-02-2013. Plaintiff had challenged the said judgment and decree, in Regular Civil Appeal No. 44 of 2013. The said appeal was heard by learned District Judge-4, Beed and dismissed it on 19-07-2017. Hence, this second appeal by original plaintiff.

04. Heard learned Advocate Mr. N. C. Garud appearing for appellant / original plaintiff. 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 was not at all the owner of the suit property, however, a sale-deed was got executed from him by the defendant No. 1, when plaintiff was in need of money. Plaintiff had no right to sale out the suit property to anybody. Therefore, defendant No. 1 has not received any right, title or interest in the property. He was not put in possession of the same. Under such circumstance, relief of cancellation of sale-deed and injunction ought to have been granted by Courts below. Substantial questions of law are arising in this matter, requiring admission of the Second Appeal.

05. After considering both the judgments and arguments submitted on behalf of appellant, it is not even necessary to issue notice to respondents / original defendants. 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. 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.”

06. 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.

07. 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 himself has come with a case that though he was fully aware about the fact that he is not the owner of the suit property, he had executed sale-deed dt. 22-11-1994. He can not take advantage of his own wrong. He himself had executed the said document and therefore, he was estopped from contending contrary or leading any contrary evidence. He had represented to defendant No. 1 at the time of sale-deed that he is the owner of the suit property. He has now come with a case that as he was in need of money, he executed document as required by defendant No. 1. A person who knowingly does any illegal act, can not seek equity. If he had no right to execute sale-deed, he has no authority or right to get recoveyance executed in his favour.

08. Both the Courts below have considered the factual evidence brought on record regarding possession over suit land. In unequivocal terms, it has been admitted by the plaintiff that since the date of the sale-deed, defendant No. 1 possesses the suit property. Therefore, the relief of perpetual injunction has been rightly refused.

09. Plaintiff himself had come with a case that in the suit filed by defendant No. 1 i.e. Regular Civil Suit No. 81 of 2007, he had filed counter-claim and prayed for cancellation of sale-deed. He also admits that his counter-claim has been dismissed on

merits. Learned Trial Court in this case has held that present suit is barred by principle of res-judicata. However, the learned First Appellate Court has rightly negatived the said finding. Though said suit was decided on 10-10-2011 i.e. prior in time; the appeal challenging the said judgment and decree was still pending before First Appellate Court. Thus, the said judgment and decree passed in RCS No. 81 of 2007 had not become 'final' when suit in the present matter was decided. Unless the decree or finding becomes 'final', it will not operate as res-judicata in subsequent suit.

10. Both the Courts have held that the suit is beyond the period of limitation. When plaintiff himself had filed counter-claim, which is just counter-suit and at that time he had given some cause of action and then the said counter-claim came to be dismissed on 10-10-2011; then how on the basis of same cause of action, suit could have been instituted after the period of 3 years from the said cause of action? Another fact is that present plaintiff had then pursuing the First Appeal filed by him challenging the judgment and decree in RCS No. 81 of 2007. Thus, it can be seen that plaintiff was pursuing both the remedies at same time, which is not permissible. Another aspect that is required to be considered is that the sale-deed was executed on 22-11-1994 and plaintiff was seeking relief of cancellation of the

same or reconveyance by filing suit on 11-06-2010. Therefore, the suit was hopelessly barred.

11. 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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