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

Second Appeal No. 0346 of 2018

District : Beed

1. Ishwar s/o. Kachardas Makhana,
   Aged 64 years,
   Occupation Business,
   R/o. Kada, Taluka Ashti,
   Dist. Beed.

2. Sampat @ Sampatlal
   s/o. Kachardas Makhana,
   Age 59 years,
   Occupation & R/o. as above.

3. Swapnil s/. Sampat Makhana,
   Age 33 years,
   Occupation & R/o. as above.

.. Appellants (Original defendants)

versus

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

.. Respondent (Original plaintiff)

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

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 18TH MARCH 2019

ORDER :

01. Present appeal has been filed by original defendants. Present respondent had filed Regular Civil

Suit No. 81 of 2007 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 was purchased by him from defendant No. 2 on 22-11-1994 vide registered sale-deed for a consideration of Rs.10,000/-. He was put in possession of the said land on the day of sale-deed. Thereafter his name was mutated in the property register card maintained by Grampanchayat, Kada. Now defendants have no right, title or interest over the suit land. Plaintiff is enjoying the suit land peacefully and continuously for more than 12 years. Defendants have raised obstruction to his possession on 30-01-2007 and 26-03-2007, hence suit.

02. Defendants have filed written statement as well as additional written statement. It has been contended that they are not the owners of suit land. However, Grampanchayat is the legal owner. 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. Defendant No. 2 had requested Grampanchayat to allot the suit property for business. On his request, Grampanchayat has 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, defendant No. 2 was in need of money. He had borrowed amount of Rs.10,000/- from plaintiff. Plaintiff had put a condition at that time that defendant No. 2 should execute document in his favour. He had disclosed to plaintiff that he is not owner of the suit property, but a lessee. However, plaintiff insisted on executing sale-deed of suit property in his favour. It was orally agreed that plaintiff 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 defendant No. 2 in favour of plaintiff in respect of suit property. Plaintiff had agreed to reconvey document on repayment of Rs.10,000/-. Plaintiff 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 plaintiff. The real nature of the document is mortgage. Plaintiff started construction in the suit property and therefore defendants asked him to reconvey the same. Defendant No. 2 expressed readiness to repay Rs.10,000/- to plaintiff. It was rather contended that plaintiff is trying to dispossess them. They are holding the property as owner denied by defendant No. 1. It was further pleaded by way of amendment that inquiry is going on before learned

Collector, Beed about grant of permission to convert the land to non-agriculture. It has been revealed that the land is owned by Government. Since the Grampanchayat has not been made a party, suit deserves dismissal.

03. Taking into consideration 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 decreed the said suit on 10-10-2011. Defendants have been restrained from disturbing the possession of the plaintiff over the suit land till due process is adopted. Defendants had challenged the said judgment and decree, in Regular Civil Appeal No. 111 of 2011. 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 appellants that both the Courts below have not considered evidence and law involved in the matter properly. Plaintiff in this case had claimed ownership over the suit property on the basis of sale-deed dt. 22-11-1994, which was got executed by the defendant No. 2 in his favour. However, when the defendant No. 2 had no right to sale out the suit property to anybody, plaintiff can not

receive any right, title or interest in the property. He was not put in possession of the same. Governement was the owner of the property, which was leased out by Grampanchayat to defendant No. 2. Plaintiff had taken disadvantage of the need of defendant No. 2 and got the sale-deed executed under forced circumstance. Both the Courts erred in holding plaintiff as possessor of the suit land. 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 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 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 was claiming ownership as well as possession on the basis of sale-deed dt. 22-11-1994 executed by defendant No. 2 in his favour. Perusal of written statement would show that defendant No. 2 was blowing hot and cold at the same time. At one breath he contended that he is not the owner, but a lessee on the basis of resolution passed by Grampanchayat and at the another breath he was contending he is ready to get reconveyance of the suit land from plaintiff by paying amount of Rs.10,000/-. Unless there would have been ownership with him, he could not have claimed reconveyance. Further as per additional written statement filed by him, State Government is the owner of the suit land. If that is so, the concerned authority may take appropriate steps. Defendants can not obstruct plaintiff from enjoyment of the property. Defendant No. 2 can not

dispute his own act of executing sale-deed and then putting plaintiff in possession. 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. He has not led cogent evidence to prove that real nature of transaction was different. In fact, he could not overcome the bar under Section 91 and 92 of Indian Evidence Act.

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. Both the Courts have held that the plaintiff got the possession of the suit property on the date of sale-deed. The oral evidence supports the said fact.

Admissions are also given by defendants to that effect. The suit was only for injunction. The question of ownership was not gone into. The possession was made referable to sale-deed. Hence, it was held that plaintiff is in better position than defendants. Defendants were disturbing the possession of plaintiff and therefore, the discretion has been used judiciously to protect the possession of the plaintiff by both the Courts.

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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