

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

**920 SECOND APPEAL NO.229 OF 2019
WITH CA/4992/2019 IN SA/229/2019**

Ananda Gunda Madane

... Versus ...

Navnath Shyamrao Madane (Died)
Through L.Rs. Shyamrao and others

...

Mr. S.B. Choudhari, Advocate for the appellant

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 12th APRIL, 2019

PER COURT :

1 Present appeal has been filed by the original defendant challenging the concurrent findings in R.C.S. No.26/2009 by Civil Judge Junior Division, Lohara, Dist. Osmanabad dated 02.03.2015 and R.C.A. No.23/2015 by learned Adhoc District Judge-1, Omerga, Dist. Osmanabad dated 16.10.2018. Present respondents had filed R.C.S. No.26/2009 for perpetual injunction in respect of agricultural land Gat No.113 admeasuring 00 Hectare 42 Ares situated at village Dastapur, Tq. Lohara, Dist. Osmanabad. Original plaintiff had come with the case that he purchased

property by registered sale deed No.2899/1997 dated 28.10.1997 from one Vijayabai Ankush Somwanshi. Said Vijayabai had purchased the suit property from Shivaji Balbhim Madne. As per the sale deed, Mutation Entry No.358 was sanctioned on 14.09.2008. According to the plaintiff, defendant has no right, title or interest over the suit property. Still he challenged the mutation entry before Sub Divisional Officer, Osmanabad. It is also stated that with the help of a bogus sale deed defendant got his name mutated vide Mutation Entry No.256 to the revenue record and shown himself to be in possession of the suit property. Thereafter he started obstruction to the possession of the plaintiff over the suit land since 28.01.2009. Hence, the suit for perpetual injunction was filed.

2 The defendant resisted the claim of the plaintiff by filing written statement. According to the defendant, the original owner of the suit land Shivaji Madne had handed over the possession of the suit land to defendant by way of Bataipatra dated 17.06.1996. He was in possession of suit property on the basis of said Bataipatra till 17.03.1999. Thereafter, Shivaji decided to sell the suit property to defendant and then entered into an agreement to sell with the defendant on 08.04.1997. At that time the defendant had paid amount of Rs.10,000/- as earnest amount out of total consideration of Rs.40,000/- to Shivaji. As Shivaji had not executed the sale

deed, but then Shivaji went on to execute the sale deed in favour of Vijaya and therefore the mutation entry which was taken on the basis of said sale deed bearing M.E. No.111 was challenged by the defendant. It is held by the revenue authorities that the said mutation entry is void and therefore, it was cancelled. Thereafter, Vijaya had sold the said property to plaintiff. However, according to the defendant, it is without possession. Shivaji expired on 25.04.2000 and thereafter his legal heirs through his father sold the suit property to defendant on 02.01.2004. Defendant says that he is in possession of the suit land since 1996 and therefore, on these grounds he prayed for dismissal of suit.

3 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 the evidence and after hearing both sides the learned Trial Court has decreed the suit. The defendant has been perpetually restrained from obstructing defendant over the suit land.

4 The defendant challenged the said Judgment and Decree in R.C.A. No.23/2015. The appeal was heard by learned Adhoc District Judge-1, Omerga and it came to be dismissed on 16.10.2018. Hence, the defendant has filed the present Second Appeal.

5 Heard learned Advocate Mr. S.B. Choudhari appearing for the appellant. Perused the Judgments delivered by both the learned Courts below. Taking into consideration the argument as well as the reasons given by both the Courts below, it is absolutely not necessary even to issue notice to the respondent.

6 The cardinal principle to entertain a Second Appeal under Section 100 of the Code of Civil Procedure is that the appellant should make out the case for framing substantial question of law. The ratio laid down in **Gurnam Singh (D) by LRs. & Ors. vs. Lehna Singh (D) by LRs. in Civil Appeal No.6567 of 2014** decided by the Apex Court on 13.03.2019 is required to be considered, wherein it has been reported that the existence of 'a substantial question of law' is a sine qua non for the exercise of the jurisdiction under Section 100 of CPC. Reliance was placed on **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar** reported in **(1999) 3 SCC 722**, 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.

7 Here, both the Courts are concurrent in giving findings that the plaintiff possessing the suit property which is referable to lawful title. There is concurrent finding in respect of finding that the defendant is obstructing the plaintiff's possession over the suit land. Therefore, on the basis of these two findings both the Courts below have exercised their discretion in a judicious way to grant perpetual injunction against the defendant. Therefore, this Court would be slow in interfering with the findings given by both the Courts below and as aforesaid unless it is shown that the findings of both the Courts below were perverse the Second Appeal cannot be entertained.

8 Here, the plaintiff was claiming possession on the basis of registered sale deed. That sale deed was produced on record and therefore, initially burden was discharged by the plaintiff. The onus was then shifted on defendant to prove that he was put in possession since 1996 by Shivaji. According to the defendant, Shivaji had executed Bataipatra on 17.06.1996 and it was for two years. It is to be noted that, that Bataipatra was never

produced before the Trial Court. Thereafter, the defendant contends that Shivaji had agreed to sell the suit land by executing agreement dated 08.04.1997. That means, he intended to say that from 08.04.1997 his possession over the suit land was by virtue of the agreement to sell, however, it is to be noted that the said agreement is not a registered document, if the possession was handed over to defendant on that day by change in the character, in other words, not as a Bataidar but as a prospective purchaser, then when the agreement was coupled with the possession it ought to have been registered. Further, the fact, that is admitted is that Shivaji executed sale deed in favour of Vijaya on 26.05.1997. That means, within one and half months from the alleged agreement to sell between him and defendant. Defendant has also come with the case that prior to the said sale deed between Shivaji and Vijaya he had given a paper publication in respect of the agreement to sell, which was in his favour. But inspite of this, it appears that after the sale deed the defendant did not take any immediate action to challenge the action of Shivaji to sell the suit land to Vijayabai. Thereafter, further it is an admitted position that Vijayabai had sold the said land to Shivaji on 28.10.1997. It has also been pleaded by the defendant that he was challenging the mutation entry, however, under such circumstance, here challenge to the mutation entry will not be sufficient, if he had any kind of

right to get the sale deed executed in his favour. He never filed any suit for specific performance of contract against Shivaji. The defendant is also claiming his ownership over the suit land by virtue of sale deed dated 02.01.2004 stated to have been executed by the father of Shivaji. The question is, when Shivaji had already parted with the ownership over the suit land in favour of Vijayabai and then Vijayabai parted with the ownership over the suit land with plaintiff, whether there was any right, title or interest in favour of father of Shivaji as heir of Shivaji to sale out the land. The alleged possession of the defendant over the suit land cannot be said to be referable to lawful title, for the simple reason that he has not produced the Bataipatra and then at the costs of repetition it can be said that the agreement to sell dated 08.04.1997 is not a registered document, as well as in the sale deed dated 02.01.2004 he cannot be said to have received any title. Under such circumstances, the view taken by both the Courts below is perfectly correct and on the basis of preponderance of probabilities it was the only view.

9 Submission has been made that the three witnesses, who have been examined in this case, have stated that possession was not handed over by Shivaji to Vijayabai and then by Vijayabai to plaintiff. If we see the chronology of the legal documents then definitely, the documentary evidence

will prevail over the oral evidence and therefore, both the Courts below have rightly discarded the oral evidence.

10 For the aforesaid reasons no substantial question of law has been pointed out. Hence, the Second Appeal is disposed of as “**Not admitted**”. Civil Application is also disposed of.

(Smt. Vibha Kankanwadi, J.)

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