

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

Second Appeal No. 0152 of 2019

District : Aurangabad

1. Yuvraj s/o. Sampat Salunke,
Age : 56 years,
Occupation : Agriculture,
R/o. Dawala Road, Vaijapur,
Taluka Vaijapur,
Dist. Aurangabad.
2. Sampat s/o. Aabaji Patil
Salunke,
deceased through L.Rs.,
 - 2A. Sharad s/o. Sampat Salunke,
Age : 60 years,
Occupation : Agriculture,
R/o. Dawala Road, Vaijapur,
Taluka Vaijapur,
Dist. Aurangabad.
 - 2B. Alka w/o. Vinayak Deshmukh,
Age : 56 years,
Occupation : Household,
 - 2C. Kiran w/o. Dattatraya Gaikwad,
Age : 62 years,
Occupation : Household.

Appellant No. 2B and 2C
Through G.P.A.,
Yuvraj s/o. Sampat Salunke,
Age : 56 years,
Occupation : Agriculture,
R/o. Dawala Road, Vaijapur,
Taluka Vaijapur,
Dist. Aurangabad.

.. Appellants

versus

Laxman s/o. Eknath Salunke,
Age : 75 years,
Occupation : Agriculture &
Labour,
R/o. Salunke Galli, Vaijapur,
Dist. Aurangabad.

.. Respondent.

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*Mr. Mobin Shaikh, Advocate, holding for
Mr. V.R. Dhorde, Advocate, for the appellants.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 06TH MARCH 2019

ORDER :

01. Present appeal has been filed by the original defendants challenging the judgment and decree passed in Regular Civil Appeal No. 193 of 2012 by District Judge-1, Vaijapur, District Aurangabad, dated 27-09-2018 whereby their appeal came to be dismissed. In the said appeal, they had challenged the judgment and decree passed by Joint Civil Judge (Junior Division), Vaijapur, in Regular Civil Suit No. 418 of 2001, dated 23-04-2008. The said suit was filed by present respondent for perpetual injunction. The said suit was decreed by the learned trial Court and the present appellants were restrained perpetually from obstructing and interfering with the peaceful possession and enjoyment of plaintiff over suit property of plaintiff i.e. southern side 03 acre and 31 gunthas land from Survey No. 229/1 situated at Vaijapur.

02. Heard learned Advocate Mr. Mobin Shaikh, holding for learned Advocate Mr. V.R. Dhorde, for the appellants. He has vehemently submitted that both the Courts below, though concurrently gave finding, have not appreciated the evidence as well as law properly. The original plaintiff had come with a case that he is the tenant of the said suit property by virtue of *Thokepatra* given by one Laxmibai, who is the predecessor of the defendants, on 22-07-1971. However, without framing issue in respect of tenancy, both the Courts below have held that the plaintiff is in possession. Further, the point as regards *res judicata* was not at all considered in proper perspective by the Courts below. Plaintiff had filed Regular Civil Suit No. 249 of 1974 and then it was withdrawn by the plaintiff unconditionally. The unconditional withdrawal had barred the plaintiff to file a second suit under Order XXIII Rule 01 of the Code of Civil Procedure, 1908 and, therefore, substantial questions of law are arising in this matter. It was also stated that the revenue entries are standing in the name of appellants since last more than 30 years and, therefore, it ought to have been held by both the Courts below that the appellants possess the suit property and, therefore, they ought not to have been injuncted.

03. Taking into consideration the judgments and

decree passed by both the Courts below, it is not even necessary to issue notice to the respondent. Unless the appellants show substantial question of law, the second appeal cannot be admitted and when no such background has been led, it is not necessary to issue notice to the respondent. In *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar* [(1999) 3 SCC 722], 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 inadmissible evidence or no evidence."

Further, it has been observed 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." Therefore, it is now required to be considered as to whether any substantial question of law has been pointed out by the appellants in this case, even *prima facie*.

04. As regards non-framing of issue is concerned, it is to be noted that the defendants never, after the issues were framed, applied for recast of the issues. If at all they were interested to have the said issue decided, there was an opportunity available to the defendants to get that issue framed by showing appropriate provisions to the first appellate Court and get a finding on the issue in respect of tenancy. When that exercise has not been done by the appellants before the first appellate Court, then such exercise cannot be allowed to be done in second appeal.

05. The plaintiff had come with a specific case that he possess the suit property as tenant and in Tenancy Case No. 12 of 1984, it has been held that the plaintiff is a tenant by judgment dated 19-11-1987 by Additional Tahsildar. This fact has not been negatived by the defendants in their written statement nor evidence was produced to prove that either they or their predecessor had ever challenged the said decision by learned Additional Tahsildar. When the suit was filed for possession, referable to lawful title, the plaintiff had given the background and produced necessary documents to prove that his possession over the suit property is referable to lawful title. Therefore, in a suit for injunction, it is not always necessary to refer the tenancy issue

to the concerned Tribunal. It depends upon the facts pleaded, supporting documents. In the present case, necessary documents were produced and in view of no denial to that effect in the written statement, there was no necessity to frame the said issue and refer it for the decision by the Agricultural Lands Tribunal.

06. As regards fact of possession is concerned, both the Courts have given concurrent finding that plaintiff has proved his possession over the suit property. The said fact is based upon factual aspects which have been properly considered; it cannot take shape of 'substantial question of law'. The point that has been raised is in respect of *res judicata* under Section 11 of the Code of Civil Procedure. It has been rightly observed by the first appellate Court, that mere withdrawal of the earlier suit will not be a bar for the second suit, as contemplated under Section 11 of C.P.C. In order to prove that the suit is barred under Section 11 of C.P.C., it ought to have been shown that the earlier suit was between the same parties or same parties litigating under same title, same subject matter and same cause of action. As regards present suit is concerned, it is stated that the possession of the plaintiff was disturbed or obstructed by the defendants on 05-07-2001 which he has proved by leading factual evidence which could not have been available when Regular Civil Suit No. 249 of 1974 was

filed. Therefore, the cause of action was different. Hence, present suit cannot be said to have been barred under Section 11 of C.P.C. Same is the case as regards Order XXIII Rule 01 of C.P.C. Same cause of action was not canvassed in the present suit.

07. As regards the alleged longstanding entries in the name of defendants are concerned, it is to be noted that mere longstanding entries would not create any title in favour of defendants nor it can be said that they have proved their possession. In fact, by virtue of the mutation entry no. 1413, name of the plaintiff was entered on the basis of *Thokepatra*. Subsequent change in the mutation entries cannot be said to be binding on the plaintiff. Furthermore, he has been declared as tenant by virtue of the order passed by the learned Additional Tahsildar. Defendants are claiming ownership on the basis of sale deed executed by Dagubai, who is stated to be the daughter of Laxmibai.

08. Further, it appears that two registered will alleged to be executed by Laxmibai were produced on record. By will dated 05-07-1971 had bequeathed Survey No. 229/1 to her daughter and the title area has been shown as 15 acres 84 gunthas. But will was executed in respect of 11 acres 13 gunthas only and it has been specifically mentioned that plaintiff, who is the nephew of Laxmibai, passess the remaining

southern side area. This will supports the contention of the plaintiff. The other will which was brought on record was dated 13-09-1971 but in the said will, name of Laxmibai has been stated as Laxmibai Raghunath Wadikar when in fact, deceased was Laxmibai Salunke and therefore, that will was not believed by both the Courts below. If that will has not given any right to Dagubai, she could not have sold it to defendants and, therefore, the findings arrived at, by both the Courts were the correct findings based on preponderance of probabilities.

09. In the light of above, no substantial question of law has been shown. Hence, the appeal is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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