

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

SECOND APPEAL NO.51 OF 2017

Ashok Vishwanath Dange,
Age 55 yrs., Occ. Agri.,
R/o Ardhapur, Tq. Ardhapur,
Dist. Nanded.

... **Appellant.**

... **Versus** ...

- 1 Govind Vishwanath Dange,
 Age 57 yrs., Occ. Agri.,
 R/o Ardhapur, Tq. Ardhapur,
 Dist. Nanded.
 At present Shardanagar, Nanded,
 Tq. & Dist. Nanded.
- 2 Chandrakant Vishwanath Dange,
 Age 64 yrs., Occ. Agri.,
 R/o Ardhapur, Tq. Ardhapur,
 Dist. Nanded.

... **Respondents.**

...

Mr. S.S. Deshmukh (Patnurkar), Advocate for the appellant
Mr. D.Y. Nandedkar, Advocate for the respondent Nos.1 and 2

...

CORAM : SMT. VIBHA KANKANWADI,J.

DATE : 28th FEBRUARY, 2019

JUDGMENT :

1 Present appeal has been filed by the original defendant challenging the Judgment and Decree passed in Regular Civil Appeal No.66/2013 by learned District Judge-5, Nanded dated 17.10.2016, whereby his appeal came to be dismissed. In the said appeal he has challenged the Judgment and Decree passed by the learned Civil Judge Junior Division, Ardhapur, Dist. Nanded in R.C.S. No.12/2010 dated 25.03.2013. The said suit was filed by present respondents-original plaintiffs for perpetual injunction. The said suit was decreed by the learned Trial Court.

2 The admitted facts from the pleadings of the parties were that father of plaintiffs and defendant Vishwanath Dange was the original owner of agricultural land Block Nos.35 and 37. He had five sons viz. Govind, Chandrakant, Ashok, Shivaji and Gopinath. After death of father, the sons mutually partitioned the agricultural land on Gudi Padwa of 2002. Portion of 00 Hectare 60 Ares and 01 Hectare from Block No.37 was allotted to plaintiff Nos.1 and 2 respectively. Gopinath was given 01 Hectare 04 Ares land from Block No.37. Shivaji and defendant got 70 Ares land each from Block No.35. All of them are cultivating their respective shares since then.

3 The original plaintiffs had come with the case that there is an ancestral well in land Block No.35. It was mutually agreed between the

brothers at the time of partition that it would be used commonly. Further, they also agreed to use the electric motor, motor pump and pipeline installed by their father commonly to the said well. However, plaintiffs contend that defendant is obstructing them from using electric motor, pump sets and pipeline as well as water from the well. Said threat was given on 21.02.2010 and therefore the suit was filed, simplicitor for perpetual injunction.

4 The defendant contested the claim of the plaintiffs by denying the fact that the well in Block No.35 is common. It is stated that there were in all two wells. One was in Block No.35 and another was in Block No.37. The brothers who got share in land Block No.35 were allowed to take water from the well situated in Block No.35 and the brothers who were allotted share in Block No.37 were allowed to take water from the well situated in Block No.37. It is stated that the plaintiffs have no share, right, title or interest in the well situated in Block No.35.

5 Taking into consideration rival contentions, issues came to be framed, parties led oral as well as documentary evidence. Taking into consideration evidence on record, the learned Trial Court has decreed the suit as aforesaid. The defendant preferred the appeal before the learned First Appellate Court and after hearing both sides the learned First Appellate Court

has dismissed the appeal. Hence, the original defendant has filed this Second Appeal.

6 Heard learned Advocate Mr. S.S. Deshmukh for appellant and learned Advocate Mr. D.Y. Nandedkar for respondent Nos.1 and 2. By order dated 05.12.2018 it was thought fit by this Court, taking into consideration the substantial question of law involved, that the matter can be decided finally at the admission stage and therefore by giving requisite intimation to both the sides and taking paper book from the appellant the matter has been heard finally at the stage of admission itself.

7 The learned Advocate appearing for the appellant submitted that both the Courts below have not considered the evidence as well as law points involved in the matter properly. When the plaintiffs themselves had come with the case that there was a partition as regards agricultural lands then there ought to have been some cogent evidence to show that the well in one of the Block numbers was kept in common. Further, the First Appellate Court failed to consider that during the pendency of the appeal, Court Commissioner was appointed and he had submitted the report. In fact, the said report was considered at the time of hearing. The application for stay and reference of the same was made in order below Exh.4 dated 10.12.2013

in R.C.A. No.66/2013. Thereafter, the appeal was finally decided on 17.10.2016, but there is absolutely no mention about the said report. The said report clearly showed that another well existed in block No.37. Under such circumstance, when the existence of well in Block No.37 was suppressed by the plaintiff, they were not entitled to get equitable relief. They had not pleaded as to why only the well from Gat No.35 was kept in common. Plaintiffs had not come with the case that thereafter, that means after the partition effected in 2002, they had dug well in Block No.37. That means, if it was in existence prior to the partition, all of them had equal right over the same. There ought to have been pleadings by the plaintiffs in respect of the rights and whether the said well is in use or not. When there was suppression of material fact, the prayer of injunction ought not to have been granted by both the Courts below. The discretion has not been used judiciously. The learned Advocate appearing for the appellant has also pointed out, that when the matter carried to this Court under the orders passed by this Court in Civil Application No.8847 of 2017, learned Civil Judge Junior Division, Ardhapur was directed to record the evidence of Court Commissioner and accordingly his evidence was recorded. The evidence of Court Commissioner Advocate Mr. Vikram Kasralikar would show that there were two wells each in Gat No.35 and 37. In the cross examination,

thereafter, it appears that a story has been developed that the well in Gat No.37 is not in use. But this fact was never pleaded by plaintiffs and therefore substantial question of law was involved in this case, though there is concurrent findings in this appeal, the Second Appeal deserves to be allowed on the above said grounds.

8 Per contra, the learned Advocate appearing for the respondent submitted that Court Commissioner cannot be appointed to collect the evidence and therefore reliance cannot be placed on the evidence of the Court Commissioner. Even if for the sake of argument if it is accepted that his evidence is required to be considered, then he has clearly stated that the pipeline goes from Gat No.35 to Gat No.37. There is no motor affixed on the well in Gat No.37. There is no electricity and pipeline attached to the said well. It is surrounded by thorns and it is not in use. Under such circumstance, if it is not in use, then there is substance in the say of plaintiff that he is using the water from Gat No.35. In the said partition, the said well was kept common. The cross examination of defendant would show that in Exh.43, which was a document got written by him, from his brothers, he contended that the well is common and he is purchasing it. The 7/12 extract of Gat No.35 would show that it is not noted in the said 7/12 extract that the well belongs to him independently. Therefore, his own conduct would show

that it is a common well and therefore, both the Courts below have given concurrent findings. When there is concurrent findings, it cannot be stated that there is substantial question of law. Whatever has been raised by the appellant, is only the question of law and question of fact, and therefore, Second Appeal cannot be allowed.

9 Here, in this case, both the Courts below have concurrently held that the well from Gat No.35 is common well or it is the ancestral and Joint Family property. It was also held that the defendant is causing obstruction or interference to the plaintiffs over the use and enjoyment of water from the well, motor pump and pipeline. Therefore, the question is, as to whether any substantial question of law is arising or not.

10 At the outset, it is required to be seen, as to whether any substantial question of law has been pointed out by the original plaintiffs, 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.

A 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 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.

11 Taking into consideration the above legal position, it is required to be seen, whether the appellant has made out a case of substantial question of law. Plaintiffs have come with the specific case that there is partition of the ancestral property between the five brothers. Plaintiffs and another brother Gopinath got portions of land from Block No.37, whereas Shivaji and defendant got portion of land from Block No.35. Plaintiffs had painted a picture that there was only one well in Block No.35 as if there was no well in

Gat No.37. Defendant had specifically contended that there is well in Block No.37 also. In spite of this fact coming on record by way of pleadings, plaintiffs did not amend the plaint and continued to pretend that there is no well in Gat No.37. There was no mention about whether the well in Block No.37 was kept in common or it was given to those brothers to whom the portions of land from Block No.37 was given, was not clarified. In other words, there was total suppression of existence of well from Block No.37 by the plaintiffs. They had not come with the case that after the partition was effected they had dug the well in Block No.37 and therefore, it is their exclusive property. But since the well from Block No.35 is also their ancestral land, they have right in the same. It can also be stated in other words, that no reason was assigned by the plaintiffs, as to why there was no partition in respect of share in the well from Gat No.35. In cross examination PW 1 Govind has admitted that Gopinath, who got 01 Hectare 04 Ares from Block No.37, has sold out his share. So also Shivaji, who had share in Gat No.35 has sold out his share. In the sale deeds executed by both of them, there is absolutely no mention about well situated in Block No.35. These admissions show that if at all, there was such right in favour of Gopinath, then he would have definitely mentioned it, that he is selling his entire share from the land as well as the well. Plaintiffs have not examined Gopinath to support their

contention. Further, PW 1 Govind has stated that since he has not paid the electricity bill of the motor installed on well, he has not produced the same. Point to be noted is that the partition has taken place on the day of Gudi Padwa of 2002, the suit was filed on 03.03.2010. If at all, he was using the motor installed on the well situated in Block No.35, then he ought to have contributed to the electricity charges. He has not given explanation as to why he was not contributing to the same. These are the acts of ownership, which plaintiffs are not performed.

12 As regards appointment of Court Commissioner is concerned, definitely, the legal proposition cannot be denied that there cannot be a Court Commissioner to collect evidence. However, it is to be noted that the Court Commissioner was appointed by consent of both parties. If the plaintiffs had given consent, then now, they cannot come with the case that the report of the Court Commissioner and evidence cannot be looked into. The learned First Appellate Court, though the report was on record, did not consider that report nor an endeavour was made to examine the Court Commissioner. That exercise has been done by this Court by order dated 31.07.2017. The evidence of Court Commissioner was recorded through Civil Judge Junior Division, Ardhapur and therefore the said evidence is required to be considered. The Court Commissioner had examined the property i.e. Block

No.35 as well as 37 after giving notice to both the parties and in presence of them as well as their Advocates. He has categorically stated that there is well in Block No.35 as well as in Gat No.37. He has given the description of both wells. In the cross examination, for the first time, the plaintiff has come with the case that the well in Gat No.37 is not in use. That means, there is total suppression of facts by the plaintiffs regarding the existence of the well in Block No.37 and as to right over the said well. When they have not come with the case, as to when they had constructed it or it was in existence since beginning i.e. prior to partition, then what was done with that well in Block No.37 at the time of partition, ought to have been disclosed by them. Merely because the well in Block No.37 is not in use, plaintiffs cannot be allowed to exercise their alleged right on the well in Block No.35. On the preponderance of probabilities, taking into consideration the fact that there were two separate wells in two separate Blocks and the portion from those Blocks went to five brothers, the probability is that the well from Block No.37 was given to three brothers who received separate portions from the said land and then well from Block No.35 came to the share of two brothers, including the defendant. Under such circumstance, when all these facts were suppressed, it will have to be held that both the Courts below failed to take into consideration all these facts and come to a wrong conclusion about the

right of the plaintiffs. When the evidence has not been considered properly and the findings based upon such wrong appreciation of evidence is perverse, definitely, the Second Appeal is maintainable in view of Section 100 of the Code of Civil Procedure. The substantial questions of law involved in this case were :

- 1 Whether suppression of facts would entitle the plaintiffs to get equitable reliefs ?
- 2 Whether the well, motor pump and pipelines in Block No.35 is ancestral property of the plaintiffs and defendant ?
- 3 Whether plaintiffs were entitle to get relief of injunction as prayed ?
- 4 Whether the Courts below erred in relying upon the provisions of Order VIII Rule 5 of the Code of Civil Procedure ?

13 For the aforesaid reasons, when these substantial questions of law are arising, the findings would be given at a later stage, but as regards point of unnecessary relying on Order VIII Rule 5 of CPC is concerned, it appears that the Courts below have used the method of pick and choose, the pleadings are required to be read as a whole. Merely because it is stated that

contents of para No.3 is not seriously disputed, that does not amount to admission of the claim. When further explanations are given and thereby "not seriously disputed" is explained, then reliance on Order VIII Rule 5 of Code of Civil Procedure was uncalled for. Further, as regards document Exh.43 is concerned, it appears that it was halfheartedly relied. The document was exhibited when it was shown to defendant in cross and then it has been discarded, on the grounds, that it is not registered document, as contemplated in Section 49 of the Indian Registration Act. Before putting that document in evidence, all the legal points ought to have been considered and if it is exhibited, then it ought to have also be seen, as to whether it can be put to collateral purpose. If the cross examination of the defendant based on Exh.43 is seen, then it is to be seen that it is styled as "Kararnama" and then not only it was mentioned in that document that well is common but it was also mentioned that he is purchasing it. It was signed by both the plaintiffs as well as Gopinath. If that document is relied by the plaintiffs by showing it in cross, then apart from whether title has derived to the defendant or not, it presupposes that plaintiffs had executed that document and then plaintiff had executed it with intent to sell. Consequently, the defendant would be exclusive owner of the said well. Therefore, both the Courts below have not properly considered Exh.43. It ought to have been

either relied by the plaintiff in entirety or ought to have been discarded completely.

14 Taking into consideration above said reasons, the findings are given as follows.

1 In negative.

2 No.

3 No.

4 Yes.

Therefore, I proceed to pass following order.

ORDER

1 Second Appeal is allowed.

2 The Judgment and Decree passed in Regular Civil Appeal No.66/2013 by learned District Judge-5, Nanded dated 17.10.2016 and the Judgment and Decree passed in Regular Civil Suit No.12/2010 by Civil Judge Junior Division, Ardhapur, Dist. Nanded dated 25.03.2013 are hereby set aside.

3 The suit stands dismissed.

- 4 Decree be drawn accordingly.
- 5 Parties to bear their own costs.

(Smt. Vibha Kankanwadi, J.)

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