

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

SECOND APPEAL NO. 592 OF 2019

Razyabee w/o. Kayamoddin and Anr. .. Appellants
[original
defendants]

Versus

Sk. Hasan s/o. Roshan .. Respondent
[original
plaintiff]

Mrs.Minakshi L. Sangit, Advocate for the appellants.

CORAM : S.M.GAVHANE, J.
RESERVED ON : 13.01.2020
PRONOUNCED ON : 21.01.2020

ORDER :-

. The appellants-original defendants, who are respectively daughter and son-in-law of the respondent-original plaintiff have filed this Second Appeal, aggrieved by judgment and decree dated 09.07.2019, passed by the learned District Judge-1, Nanded in Regular Civil Appeal No.108 of 2017 dismissing said appeal, thereby confirming the judgment and decree for perpetual injunction dated 10.11.2017, passed by the Civil Judge, Junior Division, Hadgaon in Regular Civil Suit No.239 of 2016, filed against them by the respondents.

2. Mrs.Sangit, learned counsel appearing for the appellants submitted that the respondent filed aforesaid suit against them simplicitor for perpetual injunction on 11.07.2016 in respect of House No.23/6 (CEN No.635) Ward No.6 (New Ward No.1) (hereinafter referred to as the "suit house"), contending that he is in possession and enjoyment of the suit house, since 1975. In 2012, as his wife was not keeping well, the appellants - his daughter and son-in-law had come to meet his wife and as he had no money for his wife's treatment, they had obtained his signature on blank stamp paper, saying that the amount would be sanctioned to him for treatment of his wife, if bond is given in Tahsil office and Government hospital. It is contended by the respondent that the appellants had kept said bond paper with them. It is submitted that as per case of the respondent, his wife died on 25.09.2014 and that he has been residing alone in the suit house and the appellants threatened to dispossess him from the suit house contending that they are having *Hibanama* of the

suit house and attempt of dispossessing him was made by the appellants on 30.05.2016.

3. Mrs. Sangit, learned counsel appearing for the appellants further submitted that the suit proceeded *ex-parte* against the appellants and the Trial Court after framing necessary issues i.e. regarding respondent's possession over the suit house, regarding obstruction made by the appellants in the respondent's possession over the suit house and on answering said issues in the affirmative, decreed the suit for perpetual injunction and perpetually restrained the appellants and anybody else on their behalf from obstructing the respondent's enjoyment of the suit house by the judgment and decree dated 10.11.2017. It is submitted that said decree was challenged in Regular Civil Appeal No.108 of 2007 by the appellants on several grounds mentioned in the memorandum of appeal including the ground that on 14.03.2014, the respondent executed gift-deed (*Hibanama*) in favour of appellant No.1 – his daughter, of the suit house and

delivered possession of the suit house to the appellants and therefore the findings of the Trial Court regarding respondent's possession over the suit house and the alleged obstruction made by the appellants in his possession are incorrect. It is submitted that the Appellate Court, however, dismissed the appeal with costs and therefore the appellants are before this Court.

4. Mrs. Sangit, learned counsel appearing for the appellants submitted that the appellants had made request before the First Appellate Court that as the appellants are in possession of the suit house on the basis of *Hibanama* in favour of appellant No.1 and as the suit proceeded *ex-parte* against the appellants, decree passed by the Trial Court may be set aside and the suit may be remanded to the Trial Court for fresh hearing but the Appellate Court did not consider said request of the appellants. Learned Counsel submitted that as per judgment of the Trial Court, suit proceeded *ex-parte* against the appellants as per order dated 18.11.2016

passed below Exh.1 in the suit and at that time appellant No.2 was admitted in the hospital as he was assaulted on 23.10.2016 in the afternoon by Shaikh Hanif and others – brothers in law of appellant No.2 i.e. brothers of appellant No.1 and said fact is clear from the MLC record and Medico-legal certificate referred by the learned counsel in the course of arguments before this Court. Therefore, according to learned counsel, as the appellants were prevented from appearing before the Trial Court on 18.11.2016, as appellant No.2 was admitted in the hospital from 23.10.2016 till 25.11.2016, the Appellate Court was required to consider the request of appellants to remand the matter to the Trial Court for hearing the suit on merits. Thus, according to learned counsel for the appellants, learned Appellate Court failed to consider *Hibanama* executed by the respondents, in favour of appellant No.1 in respect of suit house along with provisions of the *Mohammedan Law* in right perspective and further failed to consider that the possession of the suit house was handed over to the

appellants by the respondent on the basis of *Hibanama* and therefore ground Nos.VI and VII of the appeal involve substantial questions of law for consideration of this Court and hence appeal may be admitted.

5. I have carefully considered the submissions made by the learned Counsel appearing for the appellants and perused the judgments of both the Courts below and copy of memorandum of appeal before the First Appellate Court. Learned Counsel for the appellants also invited my attention to the copy of *Hibanama* and Medico-Legal Certificate of appellant No.2.

6. On perusal of judgments of both the Courts below it is clear that both the Courts have recorded concurrent findings of fact that respondent-plaintiff has proved his possession over the suit house. He has proved that the appellants-defendants have illegally caused obstruction in his peaceful possession over the suit house and thus the respondent is entitled to permanent injunction

against the appellants. There is nothing on record to show that while recording aforementioned concurrent findings of fact by both the Courts below, they have not considered the material or relevant evidence or that they have taken into consideration inadmissible evidence so as to say that substantial question of law in this respect is arising in this appeal for consideration of this Court.

7. Admittedly, the respondent had filed suit on 11.07.2016 and the appellants who were defendants were served with suit summons and as they did not appear before the Trial Court despite service of summons, suit proceeded ex-parte against them as per order dated 18.11.2016 passed below Exh.1 in the suit. As referred earlier, learned counsel appearing for the appellants submitted that appellant No.2 – husband of the appellant No.1 was assaulted by his brothers-in-law i.e. sons of the respondent-plaintiff, on 23.10.2016 and he was admitted in the hospital from 23.10.2016 to 25.11.2016

and his statement in this respect was also recorded by the police on 11.11.2016 and therefore both the appellants could not appear in the suit and contest the suit. It appears that the suit was decreed on 10.11.2017. Thus, it is clear that the suit was decreed nearly after one year of discharge of appellant No.2 from hospital on 25.11.2016. Therefore, during this one year's period, it was possible for the appellants to appear in the suit and to contest the same, but they preferred not to contest and allowed the suit to proceed *ex-parte* against them. The ground regarding assault on appellant No.2 by sons of the respondent was not taken before the First Appellate Court in the appeal and therefore for the first time said ground cannot be considered in this appeal. Therefore, submission made on behalf of the appellants that in the above circumstances, the Appellate Court should have remanded the matter to the Trial Court, is not acceptable.

8. As referred earlier, it is the submission of

learned counsel appearing for the appellants that the respondent executed *Hibanama* in favour of his daughter – appellant No.1 on 14.03.2014 of the suit house and since then the appellants – husband and wife are in possession of the suit house and therefore the concurrent findings of facts regarding respondent's possession over the suit house of both the Courts below are incorrect and unsustainable. It appears that the ground in respect of *Hibanama* was taken in appeal before the First Appellate Court. As observed earlier, even after discharge of appellant No.2 from hospital on 25.11.2016, there was one year's period till the date of decree in suit on 10.11.2017, but the appellants allowed to proceed the suit *ex-parte* against them and did not file written statement after appearing in the suit, requesting the Court to set aside *ex-parte* order passed against them. Therefore, when both the Courts below have accepted case of the respondent that the appellants had taken his signature on blank stamp paper and they had tried to disturb his possession over the suit house under the

pretext of *Hibanama*, argument advanced by the learned Counsel that concurrent findings of facts of both the Courts are not sustainable, is not acceptable.

9. There is no dispute that the respondent had filed suit simplicitor for perpetual injunction against the appellants claiming that he is in possession of the suit house since 1975. It is settled law that in case of suit simplicitor for perpetual injunction, the party claiming said relief is required to prove its possession over the property on the date of institution of suit and obstruction in its possession at the hands of the defendants against whom perpetual injunction is claimed. In the present case on the basis of unchallenged evidence of the respondent/plaintiff the Trial Court found respondent in exclusive possession and enjoyment of the suit house and that only respondent's name is recorded in tax assessment index (Exh.19) as owner. Therefore, it can be said that the respondent has proved his possession over the suit house and his possession is referable to

title. The Appellate Court being second fact finding court also on re-appreciation of evidence adduced by the respondent and after referring the submissions made by the learned Counsel appearing for the appellants concluded that the respondent has proved his possession over the suit house. The Appellate Court observed that the possession of the respondent over the suit house was protected by the Trial Court by interim order dated 07.02.2017 and in main suit perpetual injunction has been granted and further observed that this shows plaintiff's possession over the suit property. It is also observed by the Appellate Court that the appellants – defendants did not explain as to why they were prevented from appearing before the Trial Court. Moreover, the Appellate Court observed that the appellants/defendants have remedy to seek possession on the basis of document and that they may file suit for possession and also for other ancillary relief on the basis of *Hibanama* and in such circumstances the Appellate Court found that there is no substance in remanding the matter to the Trial Court, considering the

nature of simplicitor suit for injunction.

10. Here I would like to refer to the decision of the Hon'ble Apex Court dated 19.11.2019 in Civil Appeal No.8859 of 2019 (Naresh and Ors. Vs. Hemant and Ors.), wherein in paragraph Nos.11 and 12, it was observed as under :-

"11. The High Court invoked the presumption without proper consideration and appreciation of the facts considered and dealt with by two courts holding by reasoned conclusions why the presumption stood rebutted on the facts. The High Court also committed an error of record by holding that there was no evidence that Trimbakrao Ingole alone had constructed the house, a finding patently contrary to the admission of PW-1 in his evidence. The fact that mutation also was done in the name of Trimbakrao Ingole alone which remain unchallenged at any time was also not noticed. The conclusion of the High Court that improper appreciation of evidence amounted to perversity is completely unsustainable. No finding has been arrived at that any evidence had been admitted contrary to the law or that a finding was based on no evidence only in which circumstance the High Court could have interfered in the second appeal.

12. The High Court therefore manifestly erred by interfering with the concurrent findings on facts by two courts below in exercise of powers under Section 100, Civil Procedure Code, a jurisdiction confined to substantial questions of law only. Merely because the High Court may have been of the opinion that the inferences and conclusions on the evidence were erroneous, and that another conclusion to its satisfaction could be drawn, cannot be justification for the High Court to have interfered."

11. For the reasons aforesaid, I hold that no substantial question of law is involved in the present appeal to warrant interference in the concurrent findings of facts of two Courts below regarding respondent's possession over the suit house and obstruction in his possession over the suit house at the hands of the appellants in exercise of powers under section 100 of the Civil Procedure Code in this appeal by this Court. Therefore, the appeal is liable to be dismissed in *limine*. Accordingly, the appeal is dismissed.

[S.M.GAVHANE, J.]