

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

908 CIVIL APPLICATION NO.2480 OF 2018
IN SAST/42014/2017 WITH SAST/42014/2017

VITTHAL LAHANU BHUTKAR
VERSUS
BAPURAO BABURAO BHUTKAR AND OTHERS

...
Advocate for Applicant : Mr. Shaikh Shoyab
Advocate for Respondent No.1 : Mr. Jayabhar Dattatraya R.
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 08.09.2021

ORDER :-

. Present application has been filed for getting the delay of 1040 days condoned in filing second appeal. Present applicant is original defendant No.1. Present respondent No.1 is the original plaintiff, who had filed Regular Civil Suit No.10 of 2005 before learned Civil Judge Senior Division, Shrigonda, Dist. Ahmednagar for declaration and permanent injunction. The said suit came to be partly decreed. The relief of injunction was granted and defendant Nos.1, 3 and 4 were restrained from taking possession of the suit property from the possession of the plaintiff till due procedure of law is adopted. The relief of declaration of ownership claimed by plaintiff was rejected. The plaintiff was claiming ownership over the agricultural land Gut No.43 to

the extent of 5 Gunthas from northern side. The judgment and decree passed by the learned Trial Judge was challenged by the present appellant by filing Regular Civil Appeal No.272 of 2011 before the learned Adhoc District Judge-4, Ahmednagar and the said appeal came to be dismissed on 14.11.2014. The appellant – applicant wants to file second appeal, however, as aforesaid there is delay of 1040 days.

2. Heard learned Advocate Mr. Shaikh Shoyab for the applicant - appellant and learned Advocate Mr. D. R. Jaybhar for respondent No.1.

3. It has been submitted on behalf of the applicant that the applicant is old age person residing with his wife. He has only half Acre of land and no other source of income. Due to the old age of himself as well as his wife, he is required to incur huge medical expenses from time to time. He resides in remote rural area. He also contends that there was no telephonic communication between him and the learned Advocate who was representing him before the first Appellate Court. Learned Advocate representing him had given him understanding that his presence is not required on each and every date in the appeal and he would communicate regarding the same as and when need arises. There was no communication by his Advocate, but then he went to make inquiry about the progress in the appeal in the month of July, he came to

know that the matter has been decided long back. The delay is unintentional. His vital rights are involved and, therefore, he prays for the condonation of delay.

4. Though the learned Advocate appearing for respondent No.1 strongly opposed the application, yet taking liberal view, application stands allowed and disposed of.

5. With consent of both the parties, the Second Appeal is taken for admission immediately. Submissions on behalf of both sides have been heard.

6. It has been submitted on behalf of the appellant that the Courts below have not considered the evidence and the law points involved properly. Only on the basis of some decision by the revenue officers, the Courts below have come to the conclusion that the plaintiff was found possessing the suit land and, therefore, they have protected his possession. When the plaintiff could not have got any title to the property and he has not proved it as it has been so held by both the Courts below, it ought not to have been held by both the Courts below that the plaintiff is in possession. Learned Advocate appearing for the appellant has taken this Court through the judgment of both the Courts below and then submitted that since the substantial questions of law are

arising in this case, the second appeal deserves to be admitted. He submitted that some erroneous interpretation of the judgment and orders passed by the revenue authorities cannot give right in whatsoever manner in favour of the original plaintiff.

7. Per contra, the learned Advocate appearing for respondent No.1 supported the reasons given by both the Courts below and submitted that no substantial questions of law are arising in this case.

8. At the outset, it is to be noted that though the plaintiff was claiming to be the owner of the property, the learned Trial Judge has specifically held that plaintiff has not proved that he is the owner of the property. However, the said finding has been upheld by the learned first Appellate Court. Further, the learned Trial Judge has held on the basis of evidence adduced that the plaintiff has proved that he possesses 5 Gunthas land from the northern side of Gut No.43. Both the Courts below have held that the said possession of the plaintiff is unauthorized. It appears that both the Courts intended to say that the plaintiff is in settled possession of the suit property and, therefore, his said possession needs to be protected till due procedure is adopted. It appears that both the Courts below have taken help of the ratio laid down in ***Rame Gowda (D) By Lrs vs. M. Varadappa Naidu (D) By Lrs. & Anr, (2004) 1 SCC 769.***

As regards point of possession is concerned, it has been arrived at by both the Courts below after considering the oral as well as documentary evidence. Though there appears to be the revenue decisions and according to the appellant those decisions are in his favour, yet, it appears that in those decisions, it has been held by the revenue authorities that the plaintiff is in possession of the said property. At the cost of repetition, it can be said that whether the said possession is legal or illegal (unauthorized), yet when the Courts below come to the conclusion that it is settled possession as contemplated in the decision in ***Rame Gowda's case (Supra)***, then that needs to be protected and it cannot be said that the said finding regarding possession of the plaintiff over the suit land has been arrived at by both the Courts below due to the erroneous interpretation of the decisions given by the revenue authorities. If there was a scope for the present appellant to challenge the said revenue decisions, he ought to have taken that recourse.

9. As regards the finding regarding possession is concerned, it is a question of fact, which cannot be gone into by this Court wherein in view of Section 100 of Code of Civil Procedure only the substantial questions of law are required to be considered. In ***Ramathal Vs. Maruthathal and Ors., [(2018) 18 SCC 303]***, wherein the issue considered was as to whether the High Court was wrong in interfering

with the question of fact in the Second Appeal. The Hon'ble Supreme Court indicated in the said case that the restraint against interference is not an absolute rule but when there is perversity in findings of the Court which are not based on any material or when appreciation of evidence suffers from material irregularity, the High Court would be entitled to interfere on a question of fact as well. Further, in *P. Velayudhan and Ors. Vs. KurunGot Imbichia Moidu's son Ayammad and Ors.*, [(1990) Supp. SCC 9] and *Tapas Kumar Samanta Vs. Sarbani Sen and Anr.* [(2015) 12 SCC 523], it has been held that, "In a Second Appeal the High Court would not be justified in interfering with the finding of fact made by the first Appellate Court since such finding rendered would be based on evidence." This position has been reiterated by the Hon'ble Supreme Court in *Balasubramaniam vs. M. Arokiasamy (Dead) Thr. Lrs.*, Civil Appeal No.2066 of 2012 decided on 02.09.2021. Under such circumstance, taking into consideration the fact that both the Courts below have arrived at a finding of fact that the plaintiff has proved his possession over the suit land and it is also stated that the said possession is unauthorized, the protection, that is granted to the plaintiff is till the due procedure is adopted. No substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure arises in this case. Therefore, in view of *Kirpa Ram (deceased) through Lrs. and*

others Vs. Surendra Deo Gaur and others, [2021 (3) Mh.L.J. 250],

second appeal stands dismissed at the admission stage.

[SMT. VIBHA KANKANWADI, J.]

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