

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO. 277 OF 2017
AND
CIVIL APPLICATION NO. 4377 OF 2017**

Sharad Nana Waghmare
Age : 61 years, Occu. : Pensioner
R/o. 499, Rasta Peth,
Uma-Shankar Co-op. Hsg. Society,
Flat No. 303, 3rd Floor, Pune

.. Appellant

Versus

Mohan Eknath Waghmare and others

.. Respondents

...
Mr. S.S. Wagh, Advocate for the appellant
Mr. V.S. Bedre, Advocate for the respondent no. 1
Respondent nos. 2A, 2B, 3 to 6 served – absent
Respondent no. 2/C served as per Court's order dated 15-09-2017
...

CORAM : MANGESH S. PATIL, J.

DATE : 29 MARCH 2022

ORDER :

Heard the learned advocates of both the sides on the point of admission of the second appeal.

2. This is an appeal by the original defendant no. 4 who is aggrieved and dis-satisfied by the judgments and orders of the courts below holding the respondent no. 1, who is the original plaintiff, to be entitled to protect his possession over the super-structure of the house property erected on the gram panchayat property no. 188 till he is dis-possessed by the due process of law.

3. The respondent no. 1 filed the suit against his own father and his paternal uncles, the appellant being one of them, seeking a

declaration that the plot on which the gram panchayat property no. 188 has been erected, is a joint family property. He has constructed the super-structure of the house with the consent of everybody including the appellant. Still, the appellant is obstructing his possession, hence he claimed declaration and perpetual injunction.

4. The trial court partly decreed the suit. It declared that the open space on which the super-structure has been erected is the joint family property but the respondent no. 1 was the owner of the super-structure. It also granted perpetual injunction restraining the appellant from causing any obstruction until he was dis-possessed by the due process of law.

5. Appellant preferred appeal against the judgment and decree passed by the trial court. It has been dismissed by the judgment and order under challenge. Hence this second appeal.

6. The learned advocate Mr. Wagh for the appellant would submit that there was ample evidence before the courts below to demonstrate that the appellant and his brothers were separate in all respects. There was evidence to show that the agricultural lands were partitioned and some of the brothers had sold their respective shares to him. He would further submit that there was also evidence to demonstrate that each one of these brothers was occupying separate house properties. Admittedly, the suit property was standing in the name of the appellant in all the government records. The respondent

no. 1 was laying a false claim. In-fact, the appellant himself had carried out the construction but taking advantage of the fact that he was staying in Pune due to his employment that the respondent no. 1 effected forcible entry into the house property in the year 2003 about which he lodged a police complaint.

7. Mr. Wagh would further submit that when the respondent no. 1 had approached the courts below seeking a relief, they had grossly erred in expecting the proof only from the appellant. Both the courts have erred in placing the burden on the appellant. The judgments and orders are perverse and arbitrary. Substantial questions of law arise for determination by this court and the second appeal be admitted.

8. The learned advocate Mr. Bedre for the respondent no. 1 would submit that there was no dispute about the fact that the plot on which the house property was erected by the respondent no. 1, is a joint family property. The appellant was coming with a case of a previous partition. He had failed to prove that it was allotted to his share. In view of his peculiar stand, the burden was obviously on him to substantiate his contention regarding previous partition. Both the courts below have meticulously considered the evidence and reached the concurrent findings about he having failed to prove such partition. The courts below are also unanimous that there was ample evidence to demonstrate that the super-structure was erected by the respondent no. 1. In any case, even the appellant himself admitted that the

respondent no.1 has entered into possession and is occupying it since 2003. The judgments and orders do not declare the respondent no. 1 to be the owner of the plot over which the super-structure is erected. Even if it is assumed that they have erroneously held that he has erected the super-structure, the only prohibition against the appellant is not to dis-possess the respondent no. 1 except by the due process of law. It is in view of such concurrent findings of facts, no substantial question of law arises for the determination by this court in the absence of which, the second appeal may not be admitted.

9. I have carefully considered the rival submissions and perused the record and the proceedings. The parameters for exercising the powers under section 100 of the Code of Civil Procedure have been elaborately discussed and laid down in the matter of **Narayanan Rajendran and Ors. Vs. Lekshmy Sarojini and Ors.; (2009) 5 SCC 264**. Suffice for the purpose, to reiterate the observations in paragraph no. 64 which read as under :-

“ 64. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used inherent in the amended section

specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question."

10. Bearing in mind these principles, at the outset, it is necessary to observe that there are concurrent findings of the two courts below on facts holding that the plot over which the super-structure has been erected is a joint family property. It was the case of the appellant that there was a partition in which it was allotted to his share. However, both the courts below have meticulously scanned the evidence while reaching a concurrent conclusion about he having failed to prove that there was any such partition of the house properties in which he was allotted the plot on which the disputed super-structure was erected.

11. Similarly, the courts below have also scanned the evidence to find out as to who must have spent for the erection of the super-structure. Keeping aside the controversy as to who has erected the

structure, one thing is quite clear that it has been erected on a plot which is concurrently held to be a joint family property. Even there is no dispute about the fact that the respondent no. 1 is presently exclusively occupying the super-structure, *albeit*, it is the stand of the appellant about he having effected a forcible entry into it in the year 2003.

12. Without indulging into a further scrutiny, it is suffice to observe that though it is a case of the appellant about the respondent no.1 having effected forcible entry into the disputed super-structure in the year 2003, he himself never seem to have taken recourse to any legal process soon thereafter. It is the respondent no. 1 who filed the present suit in the year 2006. In any case, the respondent no. 1 is, admittedly, in exclusive possession of the super-structure and on this premise the courts below have found him entitled to protect his possession until he is dis-possessed by the due process of law. There is no apparent perversity, arbitrariness or illegality much less giving rise to any substantial question of law.

13. The second appeal is dismissed with costs.

14. Pending civil application is disposed of.

[MANGESH S. PATIL]
JUDGE

arp/