

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

SECOND APPEAL NO. 82 OF 2017

1. Shaikh Allahwala s/o Shaikh Papa
Died Through his legal representatives
- 1-A) Shaikh Mehemoood s/o Shaikh Allahwala
Age 51 Years, Occu: Business,
R/o Fakirwada, Khultabad,
District Aurangabad.
- 1-B) Shaikh Sheru s/o Shaikh Allahwala,
Age 76 years, Occu: Nil,
R/o Rajiv Gandhi Nagar, Khultabad,
District Aurangabad.
- 1-C) Mrs. Razia Begum s/o Nafiz Shaikh,
Age 56 years, Occu: Household,
R/o Baijipura, Sanjay Nagar, Aurangabad.
- 1-D) Nasima Begum w/o Moin Baig,
Age 61 years, Occu: Household,
R/o Rahamaniya Colony, Aurangabad

... APPELLANTS
(Orig. Plaintiffs)

VERSUS

1. Sayyad Nigah Ali s/o Sayyad Chirga Ali
Dead Through his legal representatives,
- 1-A) Sharifa Begum w/o Sayyad Nigah Ali,
Age 61 years, Occu : Household,
R/o Vijay Nagar, Baijipura, Aurangabad
- 1-B) Farzana Begum w/o Maqsood Ali,
Age 41 years, Occu: Household,
R/o Sanjay Nagar, Baijipura, Aurangabad.
- 1-C) Shabana Begum w/o Shaikh Yunus,
Age 38 years, Occu : Household,
R/o Sanjay Nagar, Baijipura, Aurangabad.

- 1-D) Chirag Ali s/o Nigah Ali,
Age 36 years, Occu : Nil,
R/o Sanjay Nagar, Baijipura, Aurangabad.
- 1-E) Sayyad Nizam Ali s/o Sayyad Nigah Ali,
Age 33 years, Occu : Nil,
R/o Sanjay Nagar, Baijipura, Aurangabad.
- 1-F) Sayyad Nishad Ali s/o Nigah Ali,
Age 30 years, Occu: Nil,
R/o Sanjay Nagar, Baijipura, Aurangabad.
- 1-G) Sayyad Shiraz Ali s/o Sayyad Nigah Ali,
Age 27 years, Occu: Nil,
R/o Sanjay Nagar, Baijipura, Aurangabad.
- 1-H) Rani Begum w/o Shaikh Nizam,
Age 25 years, Occu : Household,
R/o Sanjay Nagar, Baijipura, Aurangabad.
2. Khushiya Begum w/o Gulam Mohammad,
Age 29 years, Occu : Household,
R/o Fakirwada, Khultabad,
District Aurangabad.

... RESPONDENTS
(Orig. Defendants)

Mr. Babasaheb V. Dhage, Advocate for the appellants
Mr. A. A. Khan, Advocate for respondent No.2

CORAM : **R. M. JOSHI, J.**
RESERVED ON : **08/03/2023**
PRONOUNCED ON : **17/03/2023**

JUDGMENT :-

1. This second appeal filed under Section 100 of Code of Civil Procedure takes exception to the judgment and order passed by District Judge, Aurangabad dated 21/11/2014 in Regular Civil Appeal No. 304/2012 and judgment and order dated 26/03/2012 passed by Civil

Judge, (J.D.), Khultabad in Reg. Civil Suit No. 141/2009 whereby the suit of the plaintiff was dismissed and the said judgment of dismissal is upheld in the first appeal.

2. Appellants are legal heirs of original plaintiff Shaikh Allahwala Shaikh Papa who had filed R.C.S. No. 141/2009 against Sayyad Nigah Ali Sayyad Chirga Ali and Khushiya Begum gulam Mohammad (respondents/original defendants). The suit was for declaration that sale deed dated 04/05/2006 bearing registration No. 1682/2006 executed by defendant No.1 in favour of defendant No.2 is null and void. It is the contention of the plaintiff that he has inherited the suit house from his mother. It is alleged that defendant No.1 has no concern with the suit house and on the basis of forged and fabricated documents he got his name mutated in the municipal record to get the house divided being house No.41 (new). It is also alleged that on the basis of the said mutation he transferred the property in favour of defendant No.2.

3. Defendants filed written statement (Exhibit 11) wherein defendant No.1 claimed exclusive ownership and possession of the suit property. He states about purchase of suit house from plaintiff on 11/11/1974 under a sale deed. It is also claimed that on the basis of the said transaction his name was mutated in the record of right by the

Municipal Council. Defendant No.2 claimed purchase of the suit house from defendant No.1 on the basis of registered sale deed dated 04/05/2006. Both claimed possession over the suit house one after another with effect from 11/11/1974 onwards.

4. Learned Trial Court dismissed the suit after recording evidence. The said judgment was carried in the First Appeal before learned District Judge in R.C.A. No. 304/2012 which also was dismissed. Against dismissal of the suit and first appeal, present appeal is preferred.

5. It is the contention of the appellants that the findings recorded by the Trial Court are not based on legal evidence. It is alleged that the Trial Court exhibited photo copy of sale deed and which amounts to illegality. Similarly, it is claimed that without framing issue of adverse possession and without giving opportunity for evidence to the appellants the said issue was decided by recording finding in that regard. Exception is also taken to the judgment of the first appellate Court about the reading the contents of the unregistered sale deed which is not admissible in evidence.

6. Learned counsel for the appellants state that exhibition of photo copy by learned Trial Court is contrary to the settled law and

which amounts to perversity in the judgment. It is further argued that learned Trial Court as well as First Appellate Court committed serious error by recording the finding about adverse possession of defendant No.1 over the suit house in absence of any plea being raised by the said defendant and framing issue in this regard. In support of his contention reliance is placed on ***S. M. Karim V. Mst. Bibi Sakina, AIR 1964 SCC 1254.***

7. Learned counsel for respondent No.2 opposed the said contentions by referring to the pleadings of the parties and evidence led before the Trial Court. According to him there is no objection raised by plaintiff while exhibiting the documents and hence now the said issue is not open for challenge in this appeal.

8. In view of Section 100 and 103 of CPC, the second appeal would lie only when substantial question of law is involved therein. Such appeal will lie on the ground that the decisions are contrary to law, failure on the part of the Court to determine material issue of law or substantial error or effect in procedure which have affected the decision of the case on merit. In catena of judgments the substantial question of law has been defined and the scope of interference in the impugned judgment is clarified. In this regard reference can be made to judgment of Apex Court in case of ***Ramathal V. Maruthathal, AIR 2018 SC***

340, wherein it is observed that,

"15. A clear reading of sections 100 and 103 of the CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the High Court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a Second appeal is a substantial question of law involved in the case which has to be adjudicated by the High Court. It is the intention of the Legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact finding court. However it is not an absolute rule that High Court cannot interfere in a second appeal on a question of fact, Section 103 of the CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible, in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact."

9. Similarly, when finding of fact is perverse, it can be interfered in second appeal in case of **S. R. Tewari Vs. Union of India and Anr. (2013) 6 SCC 602**, wherein the Apex Court has held thus:

"30. The finding of fact recorded by a court can be held to be perverse if or by taking into consideration

irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn.; Kuldeep Sing v. Commr. Of Police; Gamini Bala Koteswara Rao v. Stat of A. P.; and Babu v. State of Kerala)"

10. In the instant case perusal of the pleadings of the parties indicate that plaintiff has filed suit with averment that defendant No.1 has no concern with the suit house and on the basis of forged documents he got his name mutated in the municipal record. On this ground alone the subsequent sale deed executed by defendant No.1 in favour of defendant No.2 is sought to be challenged. On the other hand defendants in their written statement have specifically pleaded as to how plaintiff executed sale deed dated 11/11/1974 whereby the suit house was sold and given in the possession of defendant No.1. They have specifically stated that on the basis of said sale deed and with no objection of plaintiff the record of right in respect of suit house was mutated in favour of defendant No.1 in the year 1975. Defendant No.1 has claimed possession of the suit house since 11/11/1974 and after the execution of sale deed under challenge defendant No.2 has continued

her possession over the said house.

11. In the light of aforesaid pleadings evidence of the plaintiff indicates that there is no challenge raised to the mutation recorded in favour of defendant No.1 by the Municipal Council in respect of suit house. Similarly, plaintiff has given admissions indicating that he has no concern with house No. 42 and that in the same was in possession of defendant No.1.

12. Plaintiff's witness Shaikh Mehemoood, son of original plaintiff Shaikh Allahwala s/o Shaikh Papa has shown his ignorance in the cross-examination about his father having sold the house to defendant No.1 on 11/11/1974. He also claims ignorance about the fact that his father gave no objection for mutating name of defendant No.1 in the record of Municipal council in respect of suit house. Pertinently, on both important aspects there is no specific denial. He further admitted that defendant No.1's name appears as the owner in respect of house No.42 and that no objection was raised by his father i.e. original plaintiff to the same. He further admitted that except for filing the suit in question no complaint was made by the witness also in that regard. His cross-examination further reveals that plaintiff was residing in house No. 41 and as of today he along with his family in residing in the same house. It is further admitted that on the basis of the sale deed name of

defendant No.2 is recorded as owner in the record of the Municipal council and she was given permission for construction of the house. He also stated candidly that he has no concerned with house No. 42.

13. Perusal of the judgment of Trial Court indicates that photo copy of sale deed dated 11/11/1974 is marked as Exhibit 79. However, evidence of defendant No.2 shows that in the said document was given Exhibit number only for the reason that the document was referred to defendant No.2 during her cross-examination conducted by counsel for plaintiffs. Mere exhibition of the document does not amount to proof thereof nor the document is relied upon. The said aspect has been aptly dealt with by the First Appellate Court in its judgment. Perusal of the judgment of the First Appellate Court shows that the learned Trial Court never exhibited the document to have been proved through defendant No.2 though it was a photo copy of the document. It is only when the said document was referred to the witness learned Trial Court was fully justified in marking it as exhibit at least for the purpose of identification. No error is committed by the learned Trial Court in marking exhibit to the said document.

14. There is no substance in the contention of the appellant that without pleading and without framing issues findings are recorded by both Courts on adverse possession. It is pertinent to note that the

defendants in their written statement have specifically stated about defendant No.1 in possession of suit house on the basis of document dated 11/11/1974. Said possession is also said to be continued till the date of filing of the suit firstly by defendant No.1 and thereafter defendant No.2. The question arises as to whether the plaintiff is taken by surprise with the recording of the findings by the Courts below. The answer to the same has to be emphatic No. Perusal of evidence and in particular the cross-examination of defendant No.2 conducted on behalf of the plaintiff clearly indicates that the plaintiff was fully conversant with the said issue involved in the suit and hence defendant No.2 was sufficiently cross-examined on this aspect. No prejudice been caused to the plaintiff by non framing of the said issues formally.

15. Learned Trial Court has recorded finding that on the basis of unregistered sale deed, name of defendant No.1 was recorded as owner and possession of house is taken in the year 1974 itself. In this backdrop further findings are recorded about possession adverse to original owner on the basis of invalid title, relying upon judgment of Hon'ble Apex Court in case of ***State of W.B. Vs. The Dalhousie Institute Society, AIR 1970 SC 1778***. In the facts of the case no perversity is found in the said findings recorded by Trial Court.

16. Merely because photo copy of a document is exhibited when it was referred to witness in cross-examination, it would not become a substantial question of law. Such objection cannot be entertained also for the reason that plaintiffs raised no objection to exhibit said document before trial Court. Both Trial Court as well as First Appellate Court have concurrently recorded the finding about possession of defendant No.1 who was the suit property since year 1975 and his name being shown as the owner of the suit house in the records of the Municipal council. In order to maintain second appeal it is not sufficient for the appellants even to show that there is any error in the findings recorded by the Courts below but the such finding must be shown to be perverse. Here in this case the findings on record are in consonance with to the evidence laid before the Trial Court and law applicable to case.

17. Having considered pleadings and evidence led by parties, this Court is unable to find out any substantial question of law being involved in this appeal. Resultantly, present second appeal stands dismissed with costs.

(R. M. JOSHI, J.)

ssp