

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.315 OF 2022**

Nitin Baburao Patil (Dhote)

Age: 45 years, Occu.: Medical Practitioner,

R/o: Rokda Sawargaon, Tq. Ahemadpur, Dist. Latur

and at present

Siddhivinayak Accident Hospital, Jadhavwadi Signal,

Jalgaon Road, Aurangabad.

..Appellant

(Orig. Defendant No.1)

Versus

1. M/s. V. S. Kale and Co.

A Partnership firm registered under Indian Partnership Act having its Head Office at Vizori, Tq. Malshiras, Dist. Solapur.

2. Mangal W/o Tukaram Kale,

Age: 55 years, Occu.: Business and Household,

R/o: Dhaval height, Tejas Society, Kothrud, Pune.

3. Vithal Sitaram Kale,

Age: 63 years, Occu.: Business and Agriculture,

R/o: Vizori, Tq. Malshiras, Dist. Solapur.

4. Dnyandeo Sitaram Kale,

Age: 68 years, Occu.: Business and Agriculture,

R/o: Vizori, Tq. Malshiras, Dist. Solapur.

5. Abhijeet Tukaram Kale,

Age: 63 years, Occu.: Business and Agriculture,

R/o: Vizori, Tq. Malshiras, Dist. Solapur.

..Respondent

(Orig. Plaintiff Nos.1 to 5)

6. Baburao Shankarrao Dhote (Patil)

Age: 75 years, Occu.: Agri,

R/o: Rokda Sawargaon, Tq. Ahemadpur, Dist. Latur.

..Proforma Respondent

(Orig. Defendant No.2.)

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Mr. A. R. Vaidya, Advocate for the Appellant.

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CORAM : S. G. CHAPALGAONKAR, J.

RESERVED ON : 10th JULY, 2023.
PRONOUNCED ON : 18th AUGUST, 2023.

JUDGMENT:-

1. The present second appeal is filed impugning the judgment and decree passed by learned District Judge-1, Ahemdpur, Dist. Latur in Regular Civil Appeal No.15/2016 by which the judgment and decree passed by Civil Judge, Senior Division, Ahemdpur, Dist. Latur in Special Civil Suit No.45/2010, has been confirmed by which the suit of the respondents/defendants has been decreed for recovery of Rs.10,00,000/- from the appellant. (Hereinafter Parties are referred by their original status for purpose of brevity)

2. The appellant is original defendant no.1 in Regular Civil Suit No.45/2010 instituted by the respondents seeking the decree for recovery of the amount of Rs.10,00,000/-. The contention of the plaintiffs is that defendant no.1 is a medical practitioner. He married to Sucheta daughter of Baliram Palapure, who was in service under State of Maharashtra in the Water Conservation Department at Pune. Tukaram Kale, husband of plaintiff No. 2 also works at said office. They have friendly relations with each other. The defendant no.1 was in the need of money for construction of his hospital. He requested his father-in-law i.e. Baliram Palapure to provide financial assistance but due to paucity of funds, he requested his close friend Tukaram Kale i.e. husband of plaintiff no.2 to extend financial support to his son in law. On such request, looking to cordial relations of families, plaintiff no.2 transferred the amount of Rs.10,00,000/- through Bank to defendant no.1, who had assured repayment within a year. The defendant No.1 withdrawn and utilized amount for his construction. It is further contended that although defendant no.1 had assured repayment of the amount within the period of one year, he failed to keep his promise. Hence present suit has been in-

stituted for recovery of the amount. The prayer is also made for creating charge on the agriculture lands owned by defendants, situated at Rokada Savargaon, Tq. Ahemdpur, Dist. Latur.

3. The defendant no.1 filed his written statement and denied the averments in the plaint. It is contended that the plaintiffs are unconcern with him. According to the defendant, the sum of Rs.10,00,000/- was transferred to his account towards share of Suhas Palapure, who had jointly purchased a plot with him. He contends that the amount transferred in his account has nothing to do with the alleged transaction pleaded by the plaintiffs.

4. The parties recorded their evidence in pursuance of the issues framed. The plaintiffs relied upon the evidence of PW-1 Tukaram Kale, who is general Power of Attorney on behalf of the plaintiffs, PW-2 Anil and PW-3 Arun Kumar, who are Bank officers to prove bank transactions and transfer of funds. The audit report of the plaintiff partnership firm is placed at Exhibit-89 to show the entry regarding the payment made to defendant no.1. The defendant relied upon his own evidence and relied upon evidence of DW-2 Shamrao and DW-3 Babasaheb to prove that at the time of alleged cause of action, he was in the jail and there is no entry regarding jail visit of the plaintiffs, which falsifies the cause of action.

5. The Trial Court after considering the evidence on record, concluded that the plaintiffs have proved payment of Rs.10,00,000/- to defendant no.1, which he failed to repay. Accordingly, decreed the suit of the plaintiffs for recovery of the amount alongwith interest at the rate of 9% per annum from the date of the judgment. The charge of the dec-

retal amount has been created on the lands owned by defendant no.1. The suit came to be dismissed against defendant no.1.

6. The aggrieved defendant preferred Regular Civil Appeal No.15/2016 before District Judge at Ahemdpur. The plaintiffs filed cross objection to extent of the non-grant of interest from date of petition and claimed interest from the date of institution of the suit. The appeal and cross objection were heard together. The Appellate Court after considering the submissions of the parties, dismissed the appeal and allowed cross objection, thereby directing the payment of interest on decretal amount at the rate of 6% per annum from the date of institution of the suit i.e. from 28.09.2010.

7. The defendant no.1-appellant approached this Court invoking the jurisdiction under Section 100 of the Code of Civil Procedure.

8. Mr. Vaidya, learned Advocate appearing for the appellant would submit that the objection regarding territorial jurisdiction of the Civil Court at Ahemdpur was specifically raised in the written statement, however, the Trial Court failed to frame the issue so also record its finding. He would further urge that the Appellate Court also failed to consider vital objection as to territorial jurisdiction. He would submit that the looking to the pleadings in the plaint there is nothing to indicate that part of cause of action arose within the territorial jurisdiction of Court at Ahemdpur. He would submit courts have committed serious error in entertaining suit without cause of action. He would further submit that only because of the prayer in made to create the charge over the property situated within jurisdiction on the Civil Court at Ahemdpur, suit cannot be entertained. He would further submit that the finding of facts recorded by the Court below are perverse. According to him plaintiff partnership firm is unconcern with defendant no.1. He would

further submit that transaction can be said to be between Palapure and the defendant. In absence Palapure being party, suit ought to have been dismissed. He would further submit that the Trial Court failed to frame the necessary issues emerging from pleading of the parties so also the Appellate Court failed to frame the requisite points for consideration and render the findings on all the material aspect. There is serious jurisdictional error on account of non-adherence to procedure contemplated under Order 41 Rule 33 of Code of Civil Procedure on part of appellate Court. Accordingly, he urges to admit the Second Appeal on the basis of the substantial questions of law proposed in the memo of Second Appeal.

9. I have considered the submissions advanced by the learned Advocate appearing for the appellant. The crux of his argument is that the Civil Court at Ahemdpur entertained the suit, although no cause of action arose within the jurisdiction of that Court. Perusal of the plaint in Special Civil Suit No.45/2010 would show that the suit has been instituted against the defendants whose residential address is at Rokada Savargaon, Tq. Ahemdpur. There is no contest on the point of the residential address of defendant, which is the within the territorial jurisdiction of the Civil Court at Ahemdpur. Secondly, the suit is filed with a composite prayer. The third prayer in the suit is to create charge of the decretal amount on the lands bearing Gut Nos.41 and 43 situated at village Rokada Savargaon, Tq. Ahemdpur, Dist. Latur.

10. Section 20 of the Code of Civil Procedure provides that the suit can be instituted where defendant resides or cause of action arises. In present case, the plaintiffs have specifically pleaded the residence of defendant within territorial jurisdiction of the Court at Ahemdpur. Further the land owned by the defendants situates within the territorial ju-

jurisdiction of the Court at Ahemdpur. In that view of the matter, bare perusal of the averments in the plaint depicts that Civil Court at Ahemdpur would have jurisdiction to try and entertain the suit. It appears that, the defendant on his appearance has cursorily raised the objection regarding jurisdiction of the Civil Court at Ahemdpur without giving particulars in support of his objection. The appeal memo before the District Judge also cursorily refers to the objection regarding territorial jurisdiction without the particulars and details on the basis of which such objection is raised. Independently appellant has not filed any application for return of plaint raising the objection of territorial jurisdiction. Even, application for framing of specific issue on the point of jurisdiction is not filed. It is true that, if the objection as regards to the jurisdiction is raised, it would be necessary to frame the issue in that regard. However, even it is assumed that objection of territorial jurisdiction was raised in written statement, if objection sans necessary particulars, the Trial Court cannot be blamed for not framing the issue. Since the material on record clearly demonstrate that Court is having territorial jurisdiction, no prejudice is caused to defendant. The reading of the impugned judgment shows that the appellant has never pressed such objection before the both the Courts. Therefore, the insistence of the appellant to consider such objection as substantial question of law cannot be entertained.

11. Pertinently, the suit has been contested by the defendant before the Trial Court by filing written statement and recording evidence of as many as three witnesses. The Trial Court as well as Appellate Court have recorded concurrent finding of facts based on the evidence tendered into service. It is not pointed out as to what prejudice is caused to the appellant. In that view of the matter, there is no force in contention of the appellant that the issue of territorial jurisdiction has

not been given due consideration by the Courts below. In absence of any prejudice or the *prima facie* material to demonstrate that the Civil Court at Ahemdpur was lacking a territorial jurisdiction, such objection cannot be entertained at this stage.

12. The next contention raised on behalf of the appellant is that the Trial Court or the Appellate Court have failed in their duty to frame requisite issues and points for consideration. The pleadings of the parties show that the suit is instituted for recovery of the amount. The burden to show that such amount is due and recoverable is upon the plaintiffs. The Trial Court has rightly framed the issues to that effect and the decision is rendered after recording the findings on that issue. Therefore, no question of law in that regard arises for consideration. The Appellate Courts judgment also shows that appropriate points for consideration were framed based on grounds of appeal as well as the cross objection. After due deliberation, appellate Court has confirmed the finding of the facts. It is duly established that sum of Rs. 10.00000/- was transferred by plaintiffs in account of defendant who has withdrawn amount and used for own benefit. The theory pleaded by defendant about joint purchase of plot and amount transferred in his account was towards payment of share of his brother in law could not be established. Therefore, no substantial questions of law arise for consideration in the present appeal. Hence, Second Appeal is dismissed.

(S. G. CHAPALGAONKAR)
JUDGE