

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

**SECOND APPEAL NO. 44 OF 2020
WITH CIVIL APPLICATION NO. 1116 OF 2020**

1. Apparao s/o Ramchandra Patil,
(Since deceased through his L.Rs.)
- 1.A. Sunita W/o Shankarrao Patil,
Age 46 years, Occ. Agri., & Household,
R/o Ravi, Tal. Mukhed,
District Nanded.
- 1.B Chandrakalabi w/o Shivaji Naik,
(deceased through L.Rs.)
- 1B(1) Shivaji s/o Malharrao Naik,
Age 62 years, Occ. Agri.,
R/o Risangaon, Tal. Loha,
District Nanded.
- 1B(2) Nandkumar s/o Shivaji Naik,
Age 49 years, Occ. Agri.,
R/o As above.
- 1B(3) Govind s/o Shivaji Naik,
Age 45 years, Occ. Agri.,
R/o As above.
- 1B(4) Padminibai D/o Shivaji Naik,
Age 45 years, Occ. Household,
R/o As above.
- 1B(5) Raman D/o Subhash Naik,
Age 40 years, Occ. Household,
R/o Bawalgaon, Tal. Aurad (Bazar),
Dist. Bidar, (State of Karnataka).
- 1B(6) Uman D/o Vitthal Devkatte,
Age 35 years, Occ. Household,
R/o Saundana (Amba), Tal. Kalam,
District Osmanabad.
- 1C. Prabhavatibai w/o Ganpatrao Patil,
Age 61 years, Occ. Household & Agri.,
R/o As above.
2. Kaushalyabai w/o Apparao Patil,
Age 66 years, Occ. Agri.,
R/o Ravi, Tal. Mukhed,

District Nanded.

... APPELLANTS
(Org. Defendants)

VERSUS

Sau. Shantabai w/o Namdeorao Doifode,
Age 49 years, Occ. Agri.,
R/o Shilvani, Tal. Degloor,
District Nanded.

... RESPONDENT
(Orig. Plaintiff)

Mr. P. R. Katneshwarkar, Advocate for the appellants
Mr. A. N. Nagargoje, Advocate for respondent

CORAM : R. M. JOSHI, J.
RESERVED ON : 21/03/2023
PRONOUNCED ON : 31/03/2023

JUDGMENT :-

1. Appellants, original defendants being aggrieved by the judgment and decree passed in Reg. Civil Appeal No. 07/2003 dated 14/08/2019 confirming the judgment and decree passed in Reg. Civil Suit No. 113/1986 dated 26/04/1996, granting specific performance of the contract and possession of the suit property to the plaintiff, have preferred this appeal under Section 100 of the Code of Civil Procedure.

2. In short case of the plaintiff and defendants can be narrated as follows:

. It is the case of the plaintiff that Kalawatibai, wife of defendant No.1 was owner of gut bearing No.90 ad-measuring 6 H 24 Are

situated at village Ravi, Tq. Mukhed. Out of it 1 H 45 *Are* area is the suit property. It is further case of the plaintiff that Kalawatibai died on 18/10/1983 issueless and her husband- defendant No.1 Apparao was her only legal heir. The said land was in possession of Kalawatibai and her name was recorded in 7x12 extract. According to the plaintiff Apparao for legal necessity agreed to sell suit property ad-measuring 1 H 45 *Are* land from gut No. 90 for the total consideration of Rs.15,000/- and at the time of execution of agreement to sale on 08/11/1983 he received earnest amount of Rs.5,000/-. It is further claimed that at that time possession of suit land was handed over to the plaintiff. It was agreed between the parties that the remaining amount of consideration would be paid within three years i.e. at the time of execution of the sale deed. Plaintiff has pleaded that all through out she was ready and willing to pay balance consideration. However, she came to know that defendant No.1 has transferred the suit land in favour of his son begotten from first wife as per decree in R.C.S. No. 139 of 1983 dated 29/11/1983. Plaintiff also claimed her forcible dispossession from suit property and hence suit came to be filed.

3. Defendant No.1 filed his written statement contending that Kalawatibai was neither owner nor in possession of the suit land. According to him the suit land was his ancestral land and his son had

share into the same. It is denied that the agreement to sale was executed by him or any earnest amount is received from the plaintiff. It is however not in dispute that Kalawatibai died issuess and defendant No.1 being husband is her only legal heir.

4. Defendant No.2 filed written statement contending that after passing of decree in R.C.S. No. 139/1983 defendant No.1 was not owner nor in occupation of the suit land, but defendant No.2 has become owner and occupier thereof. It is also alleged that in the year 1983 the market value of the suit land was Rs.25,000/-, however the consideration allegedly shown as 15,000/- is not proper.

5. Plaintiff entered in the witness box and examined herself to depose in respect of the transaction between herself and defendant No.1 for the purchase of the suit land. She also claimed that the stamp paper for preparing agreement to sale (Exhibit 95) was purchased by defendant No.1 Apparao. She further claimed that the scribe of the document has written the same as per the instructions of Apparao and that she paid Rs.5,000/- towards earnest amount on the date of execution of the said agreement. In support of her contention about ownership of suit land by Kalawatibai, she placed reliance on 7x12 extract (Exhibit 5) showing name of Kalawatibai as the owner thereof. She also examined Havgirao Malge

(Exhibit 94) in whose presence the agreement to sale (Exhibit 95) was executed by defendant No.1 and the amount of earnest amount was received. Gyanoba Yelge was also examined (Exhibit 96) in order to show plaintiff's possession over the suit land from 1983 to 1986.

6. On the other hand, defendant No.1 examined himself and claimed that Kalawatibai was not owner of the suit land and that as per the decree passed in R.C.S. No. 139/1983 his son i.e. defendant No. 2 has become owner. In the cross-examination he admitted that Kalawatibai died issueless. He further admitted that her name was entered in to the revenue record in respect of the said land as owner and that the said entry is never challenged by him. In the cross-examination this witness has denied his own signature on affidavit (Exhibit 44) and Vakalatnama (Exhibit 42).

7. Defendant No.2 Kaushalyabai mother of Gyanoba claimed that defendant No.1 was the original owner of the suit land and he has transferred the same in the name of his son by virtue of the decree.

8. Learned counsel for the appellant states that learned Trial Court as well as the First Appellate Court have committed error in not framing the issue about the ownership and title of the defendant No.1 over the suit land. He also contended that in view of the specific

contention of the defendant in the written statement about the transfer of the ownership in favour of defendant No.2 by virtue of decree passed in R.C.S. No. 139/1983 it was incumbent in the part of the both Courts below to frame the issue for determination and also to record finding against the same. Thus, according to him on this ground alone the impugned judgment and decree deserves to be set aside and the matter needs to be relegated back to the Trial Court for hearing afresh. He further submitted that defendant No.1 was not owner of the suit property and that the decree passed in R.C.S. No. 139/1983 holds the field being not set aside by the competent court of law. He also drew attention of the Court to evidence on record in order to contend that the plaintiff has failed to substantiate her case about the execution of sale deed as well as possession of the suit land by defendant No.1 in her favour. He also contended that there is no evidence to show that plaintiff was forcibly dispossessed from the suit land as claimed by her.

9. Learned counsel for the plaintiff/respondent strongly opposed the said contention pointing out relevant dates and events occurred in the present case. According to him the agreement to sale was executed on 08/11/1983 whereas the collusive suit bearing R.C.S. No. 139/1983 was filed thereafter. It is stated that on the basis of the pleadings of in the said suit, the Court could not

have passed the decree even in terms of compromise. It is stated that the said decree is a collusive as obtained in order to frustrate the claim of the plaintiff and therefore the same is not binding on her. He referred to the evidence recorded before the Trial Court in order to submit that the plaintiff has not only proved the execution of the agreement to sale in question by the defendant No.1 but has also proved payment of earnest money and handing over of the possession to her him. It is stated that from the evidence of Gyanoba (Exhibit 96) it is established that plaintiff was having possession of the suit land for the period from 1983 to 1986 and thereafter she was dispossessed therefrom.

10. Before dealing with the question raised in the appeal, it will be appropriate to consider the scope of Section 100 and 103 of CPC which reads thus:

"100. Second appeal.-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it

shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

Section 103- Power of High Court to determine issues of fact – In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,-

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts reason of a decision on such question of law as is referred in section 100.

11. While considering the scope of these two provisions, the Apex Court in ***Ramathal V. Maruthathal, AIR 2018 SC 340*** has observed thus:-

"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."

12. In **Tulsidhara & Anr. vs. Narayanappa & Ors. (2019)**

6 SCC 409 the Apex Court has reiterated that :-

"7.1. ... It cannot be disputed and even as per the law laid down by this Court in the catena of decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of the CPC after the 1976 amendment, is confined only with the Second Appeal involving a substantial question of law. The existence of 'a substantial question of law' is a sine qua non for the exercise of the jurisdiction under Section 100 of the CPC.

7.2 As observed and held by this Court in the case of Kondiba Dagadu Kadam v. Savirtibai Sopan Gujar, (1999) 3 SCC 722, in the Second Appeal under Section 100 of the CPC, the High Court cannot substitute its own opinion for that of the First

Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :
(i) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court; OR

(iii) Based on inadmissible evidence or no evidence. It is further observed by this Court in the aforesaid decision that if First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal. It is further observed that the Trial Court could have decided differently is not a question of law justifying interference in Second Appeal.

7.3 When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in the case of Ishwar Dass Jain vs. Sohan Lal (2000) 1 SCC 434. In the aforesaid decision, this Court has specifically observed and held:

"Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

7.4 Considering the law laid down by this Court in

the aforesaid decisions and even considering Section 100 of the CPC, the substantial question of law framed by the High Court in the present case, as such, cannot be said to be a substantial question of law at all.

13. In **Damodar Lal vs. Sohan Das & Ors. (2016) 3 SCC**

78, the Apex Court has held thus:

"8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of the Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam, it has been held at para 11 that : (SCC pp.192-93)

11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the finding of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."

14. When a finding of fact can be said to be perverse, has

been explained in **S.R.Tewari vs. Union of India & 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 Singh v. Commr. Of Police; Gamini Bala Koteswara Rao v. State of A.P; and Babu v. State of Kerala)”

15. It is thus well settled that in second appeal under Section 100 of the Civil Procedure Code, the court has no jurisdiction to interfere with finding of fact on the ground that the finding is erroneous. Interference is possible only if there is any perversity or illegality in the judgments of the Courts below or total absence in considering the evidence available on record or misreading of evidence on the part of the Courts below. The questions arised in this appeal need to be answered keeping in mind the aforesaid dictum.

16. Plaintiff has come out with a specific case that Kalawatibai was owner of gut No. 90 and that the revenue record indicated her as owner and occupier of the said land. There is no dispute about the fact that Kalawatibai died issueless and hence her husband Apparao i.e. defendant No.1 was only class-I heir of Kalawatibai, being Hindu female. Defendant No.1 in the cross-examination has candidly admitted about the 7x12 extract showing name of Kalawatibai as owner and occupier of the said land. He

further accepted that he never challenged the said revenue entry. Plaintiff has also laid evidence to prove that agreement to sale (Exhibit 95) was executed by defendant No.1 and he had also received earnest amount. Testimony of plaintiff and Havgirao PW-2 (Exhibit 94) is more than sufficient to prove the said fact. In this regard it is material to note that the defendant No.1 Apparao though has claimed that at relevant time he was mourning the death of his wife. However, immediately after execution of agreement to sale he appeared before the Court and obtained decree by way of compromise. This indicates that the stand of this defendant is not genuine. Apart from this it is pertinent to note that this defendant in order to deny execution of agreement to sale even went to the extent of denying his own signature on his affidavit (Exhibit 44) and Vakalatnama (Exhibit 42). This indicates that defendant No.1 has no regard for the truth and he can state falsehood in order to protect his vested interest.

17. Plaintiff has pleaded and proved her readiness and willingness to perform her part of the contract and the mandatory requirement of section 20 of the Specific Relief Act as it stood prior to the amendment of 2018 has been duly fulfilled by the plaintiff.

18. As far as the contention of the appellant that issue of the

ownership /title of the suit property was not framed by the Trial Court is concerned, it would be relevant to refer to the judgment of Hon'ble Apex Court in case of **Nedunuri Kameswaramma vs Sampati Subba Rao, AIR 1963 SC SSC**, wherein it is held that,

"No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of the opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion."

19. Perusal of the pleadings of the parties and evidence led on record in the case in hand, clearly establishes that both sides were fully conscious of the fact that their required to be with the issue of the ownership of defendant No.1 over the suit land. More particularly written statement of the defendant No.1 and evidence led by him indicates that only after being fully conscious of the said issue evidence was led to the effect that is son Gyanoba has become owner of the suit land, pursuant to decree passed in R.C.S. No. 139/1983. Similarly defendant No.2 also led evidence in order to claim that after passing of the decree in R.C.S. No. 139 of 1983, Gyanoba has become owner and occupier of the suit land. It is

settled position of law that merely because a specific issue is not framed by the Court but where the parties are conscious of fact about the issue required to be made by them in the Trial, non framing of specific issue is not sufficient to set aside judgment. Defendants have failed to show any prejudice being caused to them for want of framing of specific issues. Pertinently, learned Trial Court has framed issue No.8 to the effect as to whether the plaintiff is entitled to the declaration that the decree in R.C.S. No.139/1983 is ineffective. The said and other issues squarely cover the points for consideration now sought to be argued on behalf of the appellant. Thus, in view of this Court suit cannot be dismissed on this ground nor it is a fit case for remand, as there is ample evidence on record for its decision.

20. With regard to the decree passed in R.C.S. No. 139/1983 it is seen from the decree that the case of the defendant No.2 herein was that the suit land was gifted by defendant to Kalawatibai and that after her death there is no other heir except defendant Nos. 1 and 2. Defendant No.1, in the instant case does not take any such stand in this written statement. In this regard it is also material to take note of the written statement of Kausalyabai, i.e. legal heir defendant No.2 in the present suit. In the written statement there is specific admission of this defendant that before passing of compromise decree defendant No.1 was the owner and in occupation

of the suit land. It is specifically claimed that only after passing of the decree he became owner and came in to the possession of the suit land. These pleadings of the defendant No.2 falsifies the defence raised by the defendant No.1 about the suit land being his ancestral property and the same not being own by Kalawatibai. The facts and circumstances on record clearly indicate that the compromise decree was obtained by the defendant No.1 in collusion with his son Gyanoba only with a view to frustrate and defeat the claim of plaintiff. Thus, the said decree being collusive and obtained by misrepresentation of facts is not binding on the plaintiff.

21. Both learned Trial Court as well as First Appellate Court have rightly considered the material on record and arrived at the findings about the suit land being own by Kalawatibai and after her death defendant No.1 being only legal heir of Kalawatibai. Further findings about the execution of agreement to sale and handing over of the possession of the suit land to the plaintiff after accepting part consideration are also duly supported by the material oral and documentary evidence on record. The conclusion drawn by both Courts below that the defendant has proved her readiness and willingness to perform her part of the contract cannot be disturbed in this appeal for want of any perversity therein. In considered view of this Court this is not the case wherein any substantial question of law

is involved in order to entertain the appeal under Section 100 of CPC.

22. Before parting with the judgment, it needs to be recorded that this is a classic case to show as to how unscrupulous litigant can abuse in the process of law and deny relief to other side for decades. Having considered entire facts and circumstances appearing on record and particularly statements of defendant No.1 in his cross-examination, this Court cannot resist to observe that this defendant took false defense and had obtained collusive decree just to deny rights of plaintiff and has abused process of law. Having regard to the provision of Section 35A of CPC, the appeal is dismissed with costs of Rs.3,000/-.

23. Pending civil application, if any, stands disposed of.

(R. M. JOSHI, J.)

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