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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.208 OF 2023
WITH
INTERIM APPLICATION NO.2433 OF 2023**

Ibrahim Chittasaheb Mashal
deceased through legal heirs
Imtiyaz Ibrahim Mashal & Ors. ...Appellants
Versus
M. Ismail Chittasaheb Mashal & Ors. ...Respondents

Mr. A. B. Tajane, for the Appellants.

Mr. P. P. Kulkarni, for the Respondents.

CORAM : MADHAV J. JAMDAR, J.

DATED : 20th MARCH 2023

P.C. :

1. Heard Mr. A. B. Tajane, learned counsel appearing for the Appellants and Mr. P. P. Kulkarni, learned counsel appearing for the Respondents.

2. By this Second Appeal, the Appellants who are the original Defendants are challenging the legality and validity of the Judgment and Decree dated 31st January 2023 passed by the learned Principal District Judge, Solapur in Civil Appeal No. 70 of 2019 as well as the Judgment and Decree dated 2nd March 2019 passed by the learned 4th Joint Civil Judge Senior Division, Solapur in Regular Civil Suit No. 817 of 2006 granting

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partial relief and directing the Defendants to handover the possession of suit property 1B within a period of one month.

3. According to Mr. Tajane, following substantial questions of law arises in this Second Appeal:-

- i. Whether the report of Court Commissioner appointed by the Court can be relied on when admittedly no notice was given to the Appellants i.e. Defendants?
- ii. Whether the Court Commission report of Superintendent, City Survey Officer is valid when the Court has appointed City Survey Officer as the Commissioner?
- iii. Whether the concurrent finding recorded by both the Courts that Plaintiffs have proved the ownership of the property is in accordance with the evidence on record?
- iv. Whether the decree passed by the Trial Court as confirmed by the Appellate Court is beyond the prayers?
- v. Whether Will dated 29th May 1989 of deceased Jahirabi is proved in accordance with the provisions of law?

4. As far as first substantial question of law is concerned, it is the contention of Mr. Tajane that said Commissioner has not

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given any notice to the Appellants i.e. Defendants and therefore, said Commissioner's Report could not have been relied on by both the Courts. It is to be noted that the said Court Commissioner has admitted that he has not given notice to the Appellants, however, the factual position on record clearly shows that the Appellants were present at the time of Court commission work. The Appellants were aware about the order dated 23rd June 2015 by which Court Commissioner was appointed. Therefore, they were aware that Commissioner has been appointed. The panchnama which has been prepared clearly states that the Appellants were present and they refused to sign the commission report on the ground that their Advocate has informed them not to sign the commission report. The purpose of giving notice to the parties about the date and time of the commission work is that the parties to the litigation should be aware when the Court Commissioner would be conducting the work. In this case, Appellants were present when the commission work was performed and therefore, the Appellants have failed to point out any prejudice which has been caused to the Appellants by not giving notice to them.

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Therefore, there is no substance in the said substantial question of law raised by Mr. Tajane.

5. As far as the second substantial question of law, it is the submission of Mr. Tajane that by order dated 23rd June 2015 passed below Exhibit-1 in Regular Civil Suit No.817 of 2006, the learned 8th Joint Civil Judge, Junior Division, Solapur appointed the City Survey Officer, Solapur as Court Commissioner. He submitted that Court commission work was not carried out by the City Survey Officer but carried out by the Superintendent Surveyor, City Survey Office. It is submitted by Mr. Kulkarni, learned counsel appearing for the Respondents that Superintendent Surveyor is also City Survey Officer. Mr. Tajane has not controverted the said submission. Apart from that, assuming that the said officer is not the City Survey Officer, Mr. Tajane has not pointed out that any prejudice has been caused to the Appellants as the commission work was not conducted by the City Survey Officer but the Superintendent, City Survey Officer. It is not his submission that the factual position brought on record by the Superintendent, City Survey Officer is incorrect. In fact, on many occasions Advocates are

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also appointed by the Court to do the commission work for the purpose of ascertaining the factual position. Therefore, there is no substance in the said substantial question of law raised by Mr. Tajane.

6. Mr. Tajane also raised another substantial question of law that Respondents i.e. original Plaintiffs failed to prove their ownership and the concurrent finding recorded by both the Courts in that behalf is not in accordance with the evidence on record. It is important to note that both the learned Courts have concurrently held that the Respondents have proved their ownership of the suit property. For proving ownership, two documents are produced by the Plaintiffs. The first document is application dated 21st March 1974 at Exhibit-36 which is the application filed by the father of the Plaintiffs and Defendants by which he has stated that the said property is self acquired property purchased on 22nd July 1929 and the said property was allotted by him in favour of his wife-Jahirabi. He also executed Will dated 29th May 1989. Father of the Plaintiffs and Defendants had allotted the said property to his wife by Hiba i.e. oral Will and accordingly her name has been entered in the

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record of the said property in 1974. It has also come on record that said Jahirabi executed Will dated 29th May 1989 and by the said Will, the property has been allotted to the present Respondents i.e. Plaintiffs. It was the main contention of Mr. Tajane that the property belongs to Solapur Municipal Corporation. However, by appreciating evidence on record, both the learned Courts have concurrently come to the conclusion that the property belongs to the Plaintiffs and not to the Solapur Municipal Corporation. It is significant to note that it is not the contention of the Appellants that they are the owners of the property. It is only their contention that Solapur Municipal Corporation is the owner of the property. However, no documentary evidence is produced to substantiate the said contention. In fact, the Defendants have examined officials from Solapur Municipal who has produced resolution dated 5th November 2004 of Standing Committee of Solapur Municipal Corporation. The said resolution dated 5th November 2004 mentions that some open plot of city survey No.10380 belongs to Solapur Municipal Corporation and the Appellants have constructed a shop admeasuring 15X30 feet and staying in the

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said property for last 60 years. However, both the learned Courts have concurrently held that said resolution doesn't prove ownership of the property of the Solapur Municipal Corporation. In fact, both the Courts have concurrently recorded finding that the suit property belongs to the Respondents i.e. Plaintiffs. No documentary evidence is produced to show that Solapur Municipal Corporation is the owner of the said property. Therefore, both the Courts are right in observing that no concrete evidence is produced to substantiate the contention that suit property is belonging to the Solapur Municipal Corporation.

7. Mr. Tajane also raised substantial question of law that the learned Trial Court has granted decree as confirmed by the Appellate Court which is not even sought for in the plaint. A perusal of the decree passed by the learned Trial Court clearly shows that decree has been passed of eviction with respect to property which is mentioned in clause No.1B of the plaint. Clause No.1B of the plaint is with respect to one room admeasuring 10x15, one shop admeasuring 5x10 and construction of 5 feet. It is his submission that said

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construction is not mentioned in clause No.1A. However, what has been done in clause No.1A is entire property is described and in clause No.1B property which is in possession of Defendants is described. In any case, the decree of eviction has been specifically passed with respect to suit property mentioned in clause 1B. Therefore, there is no substance in the said substantial question of law raised by Mr. Tajane that the Courts have passed the decree which is not even prayed in the plaint.

8. Mr. Tajane has raised contention that Will is not proved. However, in fact, the Respondents have examined Khataalsaheb Yaqoobsaheb Shabhai as P.W.3 who was the attesting witness to the said Will. Mr. Tajane has failed to point out that Will has not been proved in accordance with the provisions of law. Therefore, there is no substance in the said substantial question of law raised by Mr. Tajane.

9. For the above reasons, there is no substance in the Second Appeal and the same is dismissed with no order as to costs.

10. In view of the dismissal of the Second Appeal, nothing

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survives in the Interim Application and the same is also dismissed.

11. At this stage, Mr. Tajane, learned counsel appearing for the Appellants seeks stay of the impugned decrees for reasonable period. Mr. Kulkarni strongly opposes the said request. However, in the interest of justice, the decrees shall not be executed till 31st August 2023.

[MADHAV J. JAMDAR, J.]