

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

914 SECOND APPEAL NO.314 OF 2021

PRAKASH DATTATRAY KOTAMBE AND OTHERS
VERSUS
UTTAM RAMJI KOTAMBE(LAD) AND OTHERS

...
Advocate for Appellants : Mr. Dhananjay Deshpande

...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 11-08-2021.

ORDER :

1. Heard learned Advocate appearing for appellants.
2. The procedure that is required to be followed in the second appeal has been enumerated in *Ashok Rangnath Magar vs. Shrikant Govindrao Sangvikar*, reported in (2015) 16 SCC 763 as under;

"18. In the light of the provisions contained in section 100, Civil Procedure Code and the ratio decided by this Court, we come to following conclusion :

(i) On the day when the second appeal is listed for hearing on admission if the High Court is satisfied that no substantial question of law is involved, it shall dismiss the second appeal without even formulating the substantial question of law ;

(ii) In cases where the High Court after hearing the appeal is satisfied that the substantial question of law is involved, it shall formulate that question and then the appeal shall be heard on those substantial question of law, after giving notice and opportunity of hearing to the respondent ;

(iii) In no circumstances the High Court can reverse the judgment of the trial Court and the first Appellate Court without formulating the substantial question of law and complying with the mandatory requirements of section 100, Civil Procedure Code."

In view of the above, it is not necessary to hear the respondents at the time of admission of the second appeal. If this Court comes to the conclusion that substantial questions of law are raised as contemplated under Section 100 of the Code of Civil Procedure, the appeal can be admitted and then only the notice is required to be issued to the respondents.

3. The first and the foremost fact that is required to be considered is that the suit of the plaintiff was initially for possession and it is stated that alternatively, it was for partition and separate possession. The issues have been framed and the point has been considered by the learned First Appellate Court regarding the title to

the plaintiff and both have answered it in the negative. It appears that there were revenue entries since 1965 showing the name of the plaintiffs and their predecessor as possessors. There is no dispute between the parties that the suit property was allotted to Kishan who was the brother of the predecessor of the plaintiffs. Kishan had a wife by name Shobhabai and it is also not in dispute that around 1965 itself it is stated that she performed second marriage and went out of the family of the plaintiffs and defendants. According to the plaintiffs, the said property was allotted to their predecessor Dattatraya. Dattatraya expired in 2001. Plaintiffs are relying upon mutation entry in respect of inclusion of Dattatraya's name to the revenue record on the basis of information given by the other two brothers of Dattatraya who were the predecessor of defendants No.7 and 8 and the defendant No.1 himself. However, it appears that defendant No.1 has come with a case that he has become owner of the suit property by adverse possession in a hostility of title to Shobhabai. Admittedly Shobhabai is not a party to the proceeding and it also appears that defendant No.1 had not sought any declaration in respect of his alleged ownership by adverse possession. Whether he can set up that defence is a question but then the learned Trial Judge, as well as the First Appellate Court,

have given finding that defendant No.1 failed to prove that he became owner of the suit property by adverse possession, though both of them have held that he had dispossessed Shobhabai in the year 1965. Now it is tried to contend on behalf of the appellant that the suit of the plaintiffs was based on previous possession and since they have been dispossessed, they are entitled to get possession. This appears to be reconsidered in view of the mutation entries as well as the contentions of defendant No.1 in respect of alleged acts of defendant No.1 selling out certain property.

4. Under such circumstances, substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case requiring admission of the second appeal. Hence, the second appeal is **admitted**.

5. Following are the substantial questions of law : -

(A) Whether both the Courts erred in holding that defendant No.1 has proved that he had dispossessed Shobhabai from the suit property in the year 1965, in absence of Shobhabai, being party to the proceeding and contrary to the revenue record ?

(B) Whether both the Courts ought to have considered that the suit of the plaintiffs was based upon the

previous possession ?

(C) Whether the learned Trial Court was justified in proceeding with the matter before asking the plaintiff to elect the plea when they had taken alternative pleas ?

(D) If the predecessor of plaintiffs were put in possession around 1965 as per the contention of the plaintiff then what was the nature of their possession ?

(E) Whether the interference is required ?

6. Issue notice to the respondents, returnable on 05-10-2021.
7. Call for record and proceedings.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-