

HIGH COURT OF MADHYA PRADESH

Bench: JUSTICE ACHAL KUMAR PALIWAL

Date of Decision: 01.11.2023

SECOND APPEAL No. 258 of 2017

1. Aslam beg s/o bapu beg, aged about 61 years, gram mudlay, krashak gram inchiwada, teh.gulana, district-Shajapur (madhya pradesh)
(dead)
2. Sardar beg s/o chhitu beg, aged about 65 years, gram mudlai, krashak gram inchiwara tehsil gulana distt shajapur (madhya pradesh)
3. Bunde Khan s/o roshan beg, aged about 65 years, gram mudlai, krashak gram inchiwara tehsil gulana distt shajapur (madhya pradesh)
4. Munim beg s/o babu beg, aged about 45 years, gram mudlai, krashak gram inchiwara tehsil gulana distt Shajapur (madhya pradesh)
(dead)
5. Rafik s/o late munim beg, aged about 44 years, gulana, district-shajapur (madhya pradesh)
6. Imran s/o late munim, aged about 40 years, occupation: no, gulana, district-shajapur (madhya pradesh)
7. Jugnu s/o late munim, aged about 38 years, occupation: no gulana, district-shajapur (madhya pradesh)
8. Rubina bee d/o late munim, aged about 38 years, occupation: no, gulana (madhya pradesh)
9.
Nizam s/o aslam beg, aged about 45 years, occupation: no gulana, district-shajapur (madhya pradesh)
10. Akram s/o aslam beg, aged about 48 years, occupation: no gulana, district-shajapur (madhya pradesh)
11. Shiraz bai w/o aslam beg, aged about 68 years, occupation: no, gulana, shajapur (madhya pradesh)
12. Kherun d/o jalil beg, aged about 30 years, occupation: no sarangpur (madhya pradesh)
13. Amina d/o sabir, aged about 25 years, occupation: no badodiya (madhya pradesh)

.....appellants

Versus

1. Sheikh alim s/o sheikh naamdar kha, aged about 60 years, gram chatarukhedi, teh.sarangpur (madhya pradesh)
2. Sheikh sonu s/o sheikh namdar khan, aged about 48 years, gram chatrukhedhi, teh sarangpur distt rajgarh (madhya pradesh)
3. Bisiya bi s/o sheikh namdar khan, aged about 42 years, gram chatrukhedhi, teh sarangpur distt rajgarh (madhya pradesh)
4. Sabina bi s/o sheikh namdar khan, aged about 40 years, gram chatrukhedhi, teh sarangpur distt rajgarh (madhya pradesh)
5. Collector shajapur the state of madhya pradesh shajapur (madhya pradesh)
6. Rubina d/o late munim beg, aged about 38 years,
Occupation: no shajapur (madhya pradesh)

.....respondents

Sections, Acts, Rules, and Articles:

Section 100 of the CPC

Subject: Civil Appeal – Property Dispute – Validity of 'Hiba' (gift) – Plaintiffs claimed ownership based on oral 'Hiba' by Sugrabai – Mutation proceedings did not mention the oral 'Hiba' – Courts below found plaintiffs' claim to be an afterthought – Concurrent findings of facts by lower courts – No substantial question of law for adjudication – Second appeal dismissed.

Headnotes:

Second Appeal – Civil Property Dispute – Hiba (Gift) - Appellants challenge the decision of the 2nd Additional District Judge, Shajapur, in RCA No.20A/2014 which upheld the lower court's judgment in RCS No.32A/2013. The suit was initiated for a declaration of title and permanent injunction concerning a property purportedly gifted ('Hiba') by Sugrabai to the plaintiffs. [Para 1-3]

Validity of 'Hiba' – Oral Gift – Plaintiffs' Witnesses - Appellants claim that Sugrabai's oral 'Hiba' to them fulfills all legal requisites. Citing testimonies of witnesses PW-4 and PW-5 and Apex Court precedent in Hafeeza Bibi and others Vs. Shaikh Farid, they contend that the courts below failed to properly assess evidence supporting the 'Hiba'. [Para 4]

Respondents' Counterclaim – No Prior Claim on 'Hiba' - Respondents argue that the appellants never claimed the property based on the 'Hiba' in any prior proceedings. Contend that the 'Hiba' claim is an afterthought and thus both lower courts rightly dismissed the appellants' suit and appeal. [Para 6]

High Court's Scope of Interference – Concurrent Findings of Facts - High Court questions when it may interfere with concurrent findings of facts by the lower courts. Cites Apex Court decisions detailing circumstances under which High Court may overturn lower courts' findings. [Para 9]

Jurisdictional Limitations – Second Appeal Under Section 100 CPC - Apex Court's clarification that a second appeal under Section 100 of the CPC is permissible only when it involves a 'substantial question of law'. Draws attention to the High Court's limited jurisdiction in re-examining facts under this section. Appeal Dismissed. [Para 10]

Referred Cases:

- Hafeeza Bibi and others Vs. Shaikh Farid (dead) by LRs and others, 2011 (5) SCC 654
- Chandrabhan (Deceased) through LRs. And Others vs. Saraswati and Others, AIR 2022 SC 4601
- Mehrunissa vs. Visham Kumari, 1998 (2) SCC 295
- Sri Chand Gupta vs. Gulzar Singh, 1992 (1) SCC 143
- Ishwar Dass Jain (Dead) through LRs vs. Sohan Lal (Dead) through LRs, (2000) 1 Supreme Court Cases 434

Representing Advocates:

Shri Manish Kumar Vijaywargiya, Learned Counsel for the Appellants

Shri Ahsan Ujjaman Siddique, Learned Counsel for the Respondent [R-2]

This appeal having been heard and reserved for orders, coming on for pronouncement this day, the Court pronounced the following:

ORDER

This second appeal has been filed by the appellants/plaintiffs being aggrieved by judgment and decree dated 31.03.2017 passed by 2nd Additional District Judge, Shajapur in RCA No.20A/2014 whereby the first appellate court has upheld the decree and judgment dated 29.03.2014 passed by First Additional Civil Judge, Class-I, Shajapur in RCS No.32A/2013.

02. Brief facts of the case are that one Sugrabai was owner of suit property and Sugrabai before her death i.e. in January, 2008 gave her share of suit property to the plaintiffs by way of '*Hiba*' and also gave possession of suit property to the plaintiffs and since then, plaintiffs are in possession of suit property and they are cultivating the same. But after Sugrabai's death, defendants got mutated their names over suit property and plaintiffs were not informed about the same and on above grounds, plaintiffs filed suit for declaration, title and permanent injunction.

03. Learned trial court vide judgment dated 29.03.2014 dismissed the suit filed of plaintiffs and appeal filed by plaintiffs against the judgment was also dismissed by Second Additional District Judge, Shajapur vide judgment dated 31.03.2017 passed in RCA No.20A/2014. Against this judgment, plaintiffs have filed this present appeal.

04. Learned counsel for the appellants/plaintiffs have submitted that the basis of appellants/plaintiffs' title is oral '*Hiba*' made by Sugrabai in favour of appellants/plaintiffs. Learned counsel after referring to testimonies of plaintiffs' witnesses, especially PW-4 and PW-5 and relying upon judgment delivered by the Apex Court in the case of **Hafeeza Bibi and others Vs. Shaikh Farid (dead) by LRs and others, 2011 (5) SCC 654** submitted that in the instant case, all the three essential conditions required for a valid gift are fulfilled. Cross-examination by plaintiffs' witnesses reveal that there is no specific suggestion with respect to '*Hiba*' has been given to plaintiffs' witnesses. Hence, testimony of plaintiffs' witnesses on '*Hiba*' has substantially remained unchallenged in the cross-examination.

05. It is also urged that respondent/defendant did not file any suit/counter claim for declaration of title or recovery of possession. Ex.P-1 is of 2012 whereas, suit property was given in *Hiba* in the year 2008, therefore, Ex.P-1 does not affect *Hiba* made in the year 2008. On above grounds, it is urged that learned courts below have not examined/assessed the evidence and pleadings in proper perspective. Therefore, findings recorded by the courts below are perverse. Hence, substantial questions of law mentioned in the appeal memo arise in the instant case.

06. Learned counsel for the respondent submits that both the courts below have categorically held that initially/at the earliest, appellants/plaintiffs did not make any claim anywhere on oral *Hiba* made by Sugrabai in their favour of suit property. Further, in revenue court also appellants/plaintiffs did not state that Sugrabai had given suit property to plaintiffs/plaintiffs vide oral '*Hiba*'. Therefore, courts below have rightly held that ground of '*Hiba*' taken by appellants/plaintiffs is an after thought. Hence, courts below have rightly dismissed the suit as well as the appeal filed by appellants/plaintiffs.

07. I have heard learned counsel for the appellants/plaintiffs and perused the records of Courts below.

08. It is apparent from records of Courts below that it is a case of concurrent findings of facts i.e. both the Courts below have dismissed the suit/appeal filed by the appellant/plaintiff.

09. Therefore, question arises as to when this Court can interfere with the findings of facts arrived at by the Courts below. In this connection, I would like to refer to the law laid down by the Hon'ble Apex Court in the case of **Chandrabhan (Deceased) through Lrs. And Others vs. Saraswati and Others reported in AIR 2022 SC 4601**, wherein Hon'ble Apex Court in para 33(iii) has held as under:-

“33 (iii) The general rule is that the High Court will not interfere with findings of facts arrived at by the courts below. But it is not an absolute rule. Some of the well - recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision” based on no evidence”, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding”.

10. Similarly in the case of **Gurnam Singh (Dead) by legal representatives and Others vs. Lehna Singh (Dead) by legal representatives**, Hon'ble Apex Court has held as under:-

“13.1.....However, in Second Appeal under Section 100 of the CPC, the High Court, by impugned judgment and order has interfered with the Judgment and Decree passed by the First Appellate Court. While interfering with the judgment and order passed by the first Appellate Court, it appears that while upsetting the judgment and decree passed by the First Appellate Court, the High Court has again appreciated the entire evidence on record, which in exercise of powers under Section 100 CPC is not permissible. While passing the impugned judgment and order, it appears that High Court has not at all appreciated the fact that the High Court was deciding the Second Appeal under Section 100 of the CPC and not first appeal under Section 96 of the CPC. As per the law laid down by this Court in a catena of decisions, the jurisdiction of High Court to entertain second appeal under Section 100 CPC after the 1976 Amendment, is confined only when the second appeal involves 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. As observed and held by this Court in the case of Kondiba Dagadu Kadam (Supra), in a 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”.

11. In this connection, **Ishwar Dass Jain (Dead) through LRs vs. Sohan Lal (Dead) by LRs** reported in (2000) 1 Supreme Court Cases 434 may also be referred to. Paras 11 and 12 of the said judgment is relevant and is under:-

“11. 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. This principle has been laid down in a series of judgments of this Court in relation to section 100 CPC after the 1976 amendment. [In Dilbagrai Punjabi vs. Sharad Chandra](#) [1988 Supple. SCC 710], while dealing with a Second Appeal of 1978 decided by the Madhya Pradesh High Court on 20.8.81, L.M.Sharma, J. (as he then was) observed that "The Court (the first appellate Court) is under a duty to examine the entire relevant evidence on record and if it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises as of a magnitude that it gives birth to a substantial question

of law, the High Court is fully authorised to set aside the finding. This is the situation in the present case."

In that case, an admission by the defendant-tenant in the reply notice in regard to the plaintiff's title and the description of the plaintiff as 'owner' of the property signed by the defendant were not considered by the first appellate Court while holding that the plaintiff had not proved his title. The High Court interfered with the finding on the ground of nonconsideration of vital evidence and this Court affirmed the said decision. That was upheld. [In Jagdish Singh vs. Nathu Singh](#) [1992 (1) SCC 647], with reference to a Second Appeal of 1978 disposed of on 5.4.1991. Venkatachaliah, J.

(as he then was) held:

"where the findings by the Court of facts is vitiated by nonconsideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings."

Again in [Sundra Naicka Vadiyar vs. Ramaswami Ayyar](#) [1995 Suppl. (4) SCC 534], it was held that where certain vital documents for deciding the question of possession were ignored - such as a compromise, an order of the revenue Court - reliance on oral evidence was unjustified. In yet another case in *Mehrunissa vs. Visham Kumari* [1998 (2) SCC 295] arising out of Second appeal of 1988 decided on 15.1.1996, it was held by Venkataswami, J. that a finding arrived at by ignoring the second notice issued by the landlady and without noticing that the suit was not based on earlier notices, was vitiated and the High Court could interfere with such a finding. This was in Second Appeal of 1988 decided on 15.1.1996.

12. 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 Sri Chand Gupta vs. Gulzar Singh](#) [1992 (1) SCC 143], it was held that the High Court was right in interfering in Second Appeal where the lower appellate Court relied upon an admission of a third party treating it as binding on the defendant. The admission was inadmissible as against the defendant. This was also a Second Appeal of 1981 disposed of on 24.9.1985".

12. I have gone through the evidence adduced by parties, especially by appellants/plaintiffs and Ex.P-4 and Ex.P-5, in which there is no mention about oral '*Hiba*'. Ex.P-1's documents is dated 02.04.2012 whereas Ex.P-4 and Ex.P-5's documents relate to period between 26.11.2012 to 06.12.2012. Thus, it is clear that during mutation proceedings, appellants/plaintiffs did not take stand that Sugrabai had given suit property to them vide oral *Hiba*. Therefore, in this Court's opinion, learned courts below have rightly concluded that stand taken by appellants/plaintiffs by oral *Hiba* is an after thought. Therefore, in the facts and circumstances of the case, principles laid down in **Hafeeza Bibi and others (supra)** do not help appellants/plaintiffs in any way.

13. If pleadings of the parties and evidence adduced by the parties and the impugned judgments passed by the Courts below are considered in light of the above legal principles/legal provisions reiterated in aforesaid judgments, then, in this Court's considered opinion, the findings of facts concurrently recorded by the Courts below are not liable to be interfered with in the instant case and it cannot be said that Courts below have ignored any material evidence or has acted on no evidence or Courts have drawn wrong inferences from the proved facts etc. Further, it cannot be said that evidence taken as a whole, is not reasonably capable of supporting the findings. It can also be not said that the findings of Courts below are based on inadmissible evidence.

14. A perusal of the impugned judgments and decree passed by the Courts below reveal that they are well reasoned and have been passed after due consideration of oral as well as documentary evidence on record. Learned counsel for the appellant/plaintiff has failed to show that how the findings of facts recorded by the Courts below are illegal, perverse and based on no evidence etc. The learned Courts below have legally and rightly dealt with the issues involved in the matter and have recorded correct findings of facts.

15. For the reasons aforesaid, I find no merit in the instant second appeal. Concurrent findings recorded by the Courts below in favour of defendant are fully justified by the evidence on record. Concurrent findings recorded by the Courts below are not based on misreading or misappreciation of evidence nor it is shown to be illegal or perverse in any manner so as to call for interference in second appeal. No question of law, much less substantial question of law, arises for adjudication in the instant second appeal. Accordingly, the appeal is dismissed *in limine*.

16. A copy of this order along with record be sent back to the courts below for information and its compliance.

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