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**(2018) 07 MP CK 0185**  
**In the Madhya Pradesh High Court**  
**Case No : Second Appeal No.576 OF 2016**

ShiVshankar

APPELLANT

Vs

Inderlal & Others

RESPONDENT

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**Date of Decision :** 20-07-2018

**Acts Referred:**

Code of Civil Procedure, 1908 — Order 41 Rule 27

**Citation :** (2018) 07 MP CK 0185

**Hon'ble Judges :** Vivek Rusia, J

**Bench :** Single Bench

**Advocate :** M.M. Bohra

**Final Decision :** Dismissed

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## Judgement

The appellant/plaintiff has filed the present second appeal being aggrieved by the judgment dated 30.6.2011 passed by Civil Judge, Class-II, Sanawad,

District Khargone in Civil Suit No.33-A/2008 by which the suit has been dismissed and the judgment dated 7.9.2016 passed by Additional District

Judge, Barwaha, District Khargone by which the appeal has also been dismissed and the judgment of learned trial Court has been affirmed.

2. According to the plaintiff, he is owner and in possession of the land bearing survey No. 166/5 area 0.393 Hect. situated at Village Dasgaon, Tehsil

Barwaha, District Khargone. There is a Well in the land, in which the defendants were drawing water during the life time of father of the plaintiff.

The defendants No.1 and 2 are real brothers and they are owners of land bearing Survey No.166/5 which is adjacent to the land of the plaintiff. On

the basis of oral agreement between father of the plaintiff and defendants, the defendants were drawing water from the Well since 4-5 years.

According to the plaintiff, in the month of June, 2008, the defendants came there

and tried to stop him drawing water from the Well, which gave him cause of action to give legal notice and to file the suit for permanent injunction.

3. After notice, the defendants filed their written statement. The defendants admitted the ownership of the plaintiff over the land where the Well is situated. According to the defendants, an agreement to sale dated 13.2.1981 (Ex. D/6) was executed between father of the plaintiff and defendant

No.1 to draw water from the Well @ 50 Paise and since then, they are drawing water from the Well.

4. On the basis of pleadings made in the plaint as well as in the written statement, learned trial Court framed five issues for adjudication. The plaintiff himself and 3 other witnesses viz. Balakram, Tularam and Sevakram. The learned trial Court after appreciating the evidence on record came to the

conclusion that the defendants by virtue of agreement dated 13.2.1981 (Ex. D/6) are drawing water from the Well and the plaintiff did not challenge

the said agreement, therefore, no case for permanent injunction is made out and accordingly dismissed the suit. Being aggrieved, the plaintiff preferred

the appeal before the learned Additional District Judge who dismissed the appeal and affirmed the judgment of the learned trial Court. Hence, the

present second appeal before this Court.

5. In this second appeal, the appellant has proposed the following substantial questions of law :

â??A. Whether the learned lower appellate Court has erred in affirming the judgment and decree passed by the learned trial Court ?

B. Whether the impugned order is perverse to law and facts on record?

C. Whether the learned lower appellate court has erred in rejecting the application u/O. 41 R. 27 CPC?

D. Whether the lower appellate Court has erred while relying upon D-6 dated 13.2.1981 by which the rights to use water from well was conveyed to

the defendants?

E. Whether the lower appellate Court has erred while not considering that the plaintiff had right, title and interest over agricultural land bearing survey

No.166/5 situated at Dasgaon Tehsil Badwah, District Khargone and the well is undisputedly situated over this land and therefore the right to use well

exclusively remains with plaintiff?

F. Whether both the courts below have misread the evidence brought on record?  
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6. Shri M.M. Bohra, learned counsel appearing for the appellant, submits that the learned trial Court has dismissed the suit only on the ground that the plaintiff has filed the electricity bill only for one month, whereas the at the stage of first appeal, he has filed electricity bills of several months along with the application under Order 41 Rule 27 of the C.P.C. The learned appellate Court has erred in rejecting the application which gives rise to substantial question of law in this appeal.

7. I have heard the learned counsel appearing for the appellant at length and perused the record of Courts below. 8. Admittedly, agreement (Ex. D/6)

was executed between the father of the plaintiff and the defendants and by virtue of the said agreement, the defendants were drawing water from the

Well since 1981. Despite said agreement, the plaintiff did not sought any relief regarding cancellation of the same or that the said agreement is not

binding on him. Since the plaintiff got the land in succession, therefore, the said agreement is binding on the plaintiff. Both the Courts below have

concurrently recorded the finding against the appellant. I do not find any question of law that too substantial question of law is involved in this appeal.

Â 9. Even otherwise, the apex Court in the case of Kondiba Dagadu Kadam v. Savitribai Sopan Gujar :(1999) 3 SCC 722,Â has held as under:

5. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first

appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but

even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the

appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn

by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot

substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were

erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court,

or was based upon inadmissible evidence or arrived at without evidence.

6. If the question of law termed as a substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy

Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial

question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant

should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary

evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found

that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a

substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an

error either of law or of procedure requiring interference in second appeal. This Court in *Reserve Bank of India v. Ramkrishna Govind Morey* [AIR

1976 SC 830] held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference.

Â 10. In case ofÂ *Laxmidevamma v. Ranganath* : (2015) 4 SCC 264, again the apex court has held as under:

16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plain-tiffs have established

their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was

no substantial ground for reappraisal of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A

schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffsâ??

right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the

findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by

the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained.

11. Recently, the Apex Court in case of Adivappa & Others Vs. Bhimappa & Others : (2017) 9 SCC 586 has held as under:

17. Here is a case where two Courts below, on appreciating the entire evidence, have come to a conclusion that the Plaintiffs failed to prove their

case in relation to both the suit properties. The concurrent findings of facts recorded by the two Courts, which do not involve any question of law

much less substantial question of law, are binding on this Court.

18. It is more so when these findings are neither against the pleadings nor against the evidence and nor contrary to any provision of law. They are also

not perverse to the extent that no such findings could ever be recorded by any judicial person. In other words, unless the findings of facts, though

concurrent, are found to be extremely perverse so as to affect the judicial conscious of a judge, they would be binding on the Appellate Court.

12. In view of the above, this appeal does not involve any question of law much less substantial question of law and the same is hereby dismissed.

No order as to costs.