HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Civil Second Appeal No. 177/2025

Ritesh Khatri S/o Shyam Sundar Khatri, R/o Bajariya, Sawai Madhopur.

----Appellant

Versus

Shyam Sundar Khatri S/o Balmukund Khatri, R/o Bajariya, Sawai Madhopur.

----Respondent

For Appellant(s)	:	Mr. R.K. Agarwal, Senior Advocate, assisted by Mr. Mamoon Khalid, Mr. Dharmesh Jain, Mr. Adhiraj Modi – for appellant.
For Respondent(s)	:	Mr. Ajeet Bhandari, Senior Advocate, assisted by Mr. Atul Bhandari – for respondent.

HON'BLE MR. JUSTICE SUDESH BANSAL

Judgment

Reserved On :: 08th October 2025
Pronounced On :: 28th October 2025

Reportable

Instant Civil Second Appeal u/s. 100 of Code of Civil Procedure is directed against the judgment dated 21.02.2025 passed in Civil First Appeal No.64/2024, by the Additional District Judge, Sawai Madhopur, dismissing the appellant-defendant's First Appeal and affirming the judgment and decree dated 19.10.2024 passed in Civil Suit No.8/2019 by the Additional Civil Judge No.2, Sawai Madhopur, whereby and whereunder, while decreeing the Civil Suit for mandatory and permanent injunction filed by the respondent-plaintiff, appellant-defendant has been directed to vacate and handover actual possession of suit property to

respondent-plaintiff. The prayer of the plaintiff to award mesne profit against defendant has been disallowed. The counter-claim submitted by the appellant-defendant seeking to restrain respondent-plaintiff by way of permanent injunction has also been disallowed.

2. This is an unfortunate litigation, in respect of immovable property between father and son, continuing since half decade, which shows a notable decadence of ethics and moral values in the society. Appellant-defendant is son and respondent-plaintiff is his father.

3. The relevant facts, in nutshell, as culled out from the record can be recapitulated as under and parties shall be referred as were called before trial Court:-

3.1 A plot measuring 90x112 square feet bearing Plot No.1, situated at Indra Colony, in Sawai Madhopur District, was stated to be jointly purchased by plaintiff and his brother Radheshyam in an auction, conducted by Nagar Palika, Mantown, Sawai Madhopur on 21.08.1974 and the sale deed of plot in question was registered before the Sub Registrar, Sawai Madhopur, in their joint name on 19.09.2003.

3.2 It has been pleaded by the plaintiff in the plaint that plot in question was divided between both brothers with mutual consent and west side portion of the plot measuring 45x112 square feet came in the share of plaintiff and a written document, in conformity with the mutual division of plot came to be executed on 25.08.2003. It was also pleaded therein that plaintiff raised construction of his residential house over his portion of plot and he is sole owner and possession holder of his house.

3.3 It has further been pleaded in the plaint that defendant is son of plaintiff and after his marriage, he was permitted to use two bedrooms, two storerooms, kitchen & let-bath in the house, situated towards southern side, for living along with his wife. It was averred that defendant is residing in the portion of the plaintiff house with his permission and as a licensee.

3.4 It has further been pleaded that defendant's behaviour has become quite bad with the plaintiff, due to which, plaintiff is continuously facing mental distress. Plaintiff asked his son – defendant, to vacate the portion of his house, but defendant, deliberately evaded his request and has been mistreating the plaintiff, hence, plaintiff has to send a legal notice dated 26.11.2018 to the defendant through Registered Post, revoking permission and license of appellant to live in the house in question and demanded to vacate and handover possession of the portion of his house to the plaintiff. Plaintiff also claimed from defendant to pay Rs.15,000/- per month as mesne profit for use and occupation of the portion in his house until delivery of actual possession of same to the plaintiff.

3.5 It has been pleaded in the plaint that legal notice dated 26.11.2018, sent by the plaintiff, was served upon defendant, who sent a reply notice dated 03.12.2018 through his Advocate narrating untrue and wrong facts. Defendant in reply notice asserted his possession over the portion of house as owner and not as licensee.

3.6 Thereafter, the plaintiff led present Civil Suit on 16.01.2019, for issuance of a mandatory injunction against defendant, directing him to handover actual and vacate possession of the

portion of house of plaintiff to him. Plaintiff also prayed to award mesne profit @ Rs.15,000/- from the date of suit and to issue decree of permanent injunction against defendant.

3.7 The defendant, instead of honoring wish and command of his father, stood against him before the Court and contested the Civil Suit and filed written statement on 14.05.2019. In the written statement, in order to resist the plaintiff's suit, defendant took a defence/plea that plot No.1 was purchased in auction by plaintiff and his brother, out of income generated from a Firm of HUF, namely, M/s. Panna Lal Prem Raj Khatri and indeed plot was purchased by his grand-father - Shri Bal Mukand Ji Khatri and his grandfather got constructed two residential portions on such plot for his two sons viz. plaintiff-Shyam Sundar and plaintiff's brother – Radheshyam.

3.8 The defendant categorically claimed in the written statement that the property is of HUF and he is coparcener therein.

3.9 Defendant further asserted in his written statement that his marriage was solemnized in the year 2004 and thereafter, out of the plot with construction measuring 45x112 feet, which had come in share of father, same was orally divided, wherein southern portion of constructed house measuring 55x45 square feet was given to defendant and northern portion of house was given to defendant's younger brother. Defendant asserted that since then the defendant is owner of his portion, in the house in question and residing therein as owner.

3.10 Defendant categorically denied himself to be a licensee of plaintiff in the house in question and also denied to live therein with permission of plaintiff, rather submitted a counter-claim in his

written statement, against his father, seeking to restrain him by way of permanent injunction not to obstruct the defendant in raising construction over the first floor of his portion.

3.11 Plaintiff filed rejoinder stating *inter-alia* that firm Panna Lal Prem Raj Khatri is not firm of HUF but is a partnership firm and that house is not of HUF but of his own ownership and possession where defendant does not have as right, title and interest. Plaintiff specifically denied factum of oral division of his constructed plot, between his two sons. Plaintiff clearly denied the counter-claim put forth by defendant in written statement projecting himself to be a coparcener/owner in the house in question and prayed to reject his counter-claim.

4. Issues were framed and evidence by both the parties, oral as well as documentary, was adduced.

5.1 The trial Court, vide judgment dated 19.10.2024, held that the defendant admitted in his cross-examination that the registry of the disputed plot was made in the joint names of his father and uncle, and later on, the plot was partitioned between both of them and both are residing in their respective shares of the plot. The defendant also admitted that the permission for construction over the plot in question, was granted in the names of his father and uncle. The documents of the registered sale deed (Exhibit-1), permission for construction (Exhibit-2), and memorandum of partition (Exhibit-7), are available on record.

5.2 The trial Court noted that the defendant also admitted in his evidence that the firm- Panna Lal Prem Raj Khatri is a partnership firm, wherein his father became a partner in the year 1971, and he himself was also inducted as a partner having a 12.5% share.

The defendant admitted that the income generated out of the partnership business of the firm was that of personal income of the partners, and they never submitted income tax returns of the firm in the Income Tax Department as an HUF firm. The defendant's witnesses, DW-2 & DW-3, also admitted that the firm was a partnership firm. It was further noted that although the partnership deed was not placed on record, but the register of the Registrar of Firms is available on record as Exhibit-7, wherein the entry of the firm is recorded as a partnership firm.

5.3 The trial Court noted that the plaintiff adduced evidence to the effect that the firm Panna Lal Prem Raj Khatri is a factory, engaged in the manufacturing and sale of *bidis* and matches, which was established in the year 1953. At that point of time, the plaintiff's father- Balmukund Khatri, and Janaki Lal were partners. Later on, after 1959, the plaintiff's elder brother, Radheshyam , entered into the partnership, and thereafter, the plaintiff also became a partner. The defendant became a partner in the said firm with a 12.5% share in profit and loss in the year 2003. The firm is a registered partnership firm. According to the plaintiff, he started handling the business of the partnership firm in the factory since 1968–69.

5.4 The learned trial Court, after appreciation of the evidence of both parties, recorded fact findings to the effect that the plot was purchased by the plaintiff and his brother Radheshyam, in the year 1974 from Nagar Palika, Sawai Madhopur, out of their own earned money, and thereafter, construction over the plot was also raised by them. The trial court found that the defendant had not produced a single document or piece of evidence to establish that

the plot in question was property of the HUF and defendant could not establish his possession over any portion of the plot in question either as a co-parcener or as an owner. The trial Court clearly held that the defendant miserably failed to prove his counter-claim, whereas the plaintiff successfully established that the disputed plot is his personally owned property, wherein his son is residing only under his permission. The plaintiff, therefore, has a vested right to get the property vacated from his son.

5.5 The trial Court, on the issue of the claim for mesne profits, also held and observed that the defendant was born in the disputed house in the year 1979 in the family of the plaintiff and, since then, has been residing therein as a family member of the plaintiff. Hence, the defendant cannot be treated as a paid licensee of the plaintiff in the legal sense. Therefore, the plaintiff is not entitled to obtain mesne profits from the defendant.

5.6 Finally, the trial Court decreed the plaintiff's suit partly and directed the defendant to vacate and hand over possession of the portion of the house to the plaintiff. The plaintiff's claim for mesne profits was denied, and the counter-claim of the defendant was dismissed. Defendant was further restrained from obstructing the plaintiff for peaceful use and occupation of his property.

6. The judgment and decree of the trial Court was assailed by the defendant, by way of filing a Civil First Appeal. The appellate Court, after re-appreciating the entire evidence of both parties, affirmed the fact findings of the trial court, holding that it is established from the record that the firm Panna Lal Prem Raj Khatri is a registered partnership firm, wherein plaintiff- father and defendant- son, both are partners of their respective shares,

however, merely on that basis, the disputed property cannot be presumed to be a property of the HUF.

The appellate Court reaffirmed the findings that the defendant could not establish his plea of HUF. The appellate Court, in Paragraphs No.20 & 21 of its judgment, affirmed the fact findings of the trial Court that the defendant is residing in the disputed property in the capacity of being son of the plaintiff and not as his licensee, but only under the permission of the plaintiff. It was observed that since the suit property is the personally owned property of the plaintiff, the defendant, being his son, can reside therein with the plaintiff's permission only and the plaintiff has an absolute legal right to evict the defendant therefrom. Finally, the first appeal was dismissed on merits vide judgment dated 21.02.2025, affirming the judgment and decree of the trial Court dated 19.10.2024. Hence, the present second appeal has been filed by the defendant thereagainst.

7. At the time of admission of the present second appeal, the following substantial questions of law were proposed and framed for consideration:-

"(I) Whether in absence of finding of relationship of licensor and licensee between plaintiff and defendant, a decree of eviction can be passed by the trial court in a suit for mandatory injunction?
(II) Whether the appellate court was competent to overlook and reverse the findings of the trial court about non-existence of relationship as licensee and still maintain the decree of trial court?
(III) Whether the trial court and the appellate court have misread and misconstrued the evidence on record while passing decree in favour of plaintiff and affirming decree in appeal?
(IV) Whether in absense of establishment of facts and in absence of proof of averments made in the plaint, still a decree can be passed in favour of plaintiff?"

Substantial Questions of Law No. (I) & (II):-

8. Both the questions of law pertain to the existence or non-existence of the relationship of licensor and licensee between the plaintiff and the defendant, who are father and son. The trial Court as well as the first appellate Court have concurrently held that the defendant, being the son of the plaintiff, is residing in the house in question under the permission of the plaintiff and not as a licensee. Since the plaintiff has cancelled/ revoked his permission, the defendant can be directed to vacate and leave the portion in his possession, of the property in question and to hand over the same to his father, as the property is the personally owned property of the father.

9. Learned Senior Counsel appearing on behalf of the appellant-defendant, during the course of his arguments before this Court, sought to make out a case that the plaintiff, in the plaint, came up with a pleading that the defendant is his licensee. He contended that once both courts have held that the defendant is not a licensee of the plaintiff, the plaintiff's suit must have been failed. His submission is that the defendant, being the natural son of the plaintiff and born in the house in question, cannot be a licensee of his father, and in the absence of the relationship of licensor-licensee, the suit for mandatory injunction cannot be decreed.

10. The arguments of learned Senior Counsel for appellant-defendant, at first blush, appear to be attractive, however, on a closer and meaningful reading of the plaint as a whole, it transpires that, though in Paragraphs 4, 6 & 8 of the plaint, the word "licensee" has been used by the plaintiff in relation to the

defendant, but the true intention and meaning of using this word is that the defendant has been residing in the house of the plaintiff under his permission/ license and once the plaintiff has cancelled/ revoked his permission/ license, the defendant has no right to retain possession of the portion of the house in question. At this juncture, it is noteworthy that the fact findings of the two courts below, based on appreciation of oral and documentary evidence, that the property in question is not of HUF, but is the personally owned property of the plaintiff, are not in question. There is no appeal by the defendant against the dismissal of his counter-claim, as has been admitted by the learned Senior Counsel for the appellant-defendant as well.

11. The Delhi High Court, in case of **Ramesh Kumar Handoo Vs. Shri Binay Kumar Basu [MANU/DE/8953/2007]**, dealt with a similar issue in a second appeal. In that case, father had filed a civil suit seeking a mandatory injunction against his married daughter and son-in-law, directing them to vacate the suit property and hand over possession. The Court held and observed that the status of a married daughter is no different from that of a married son, and since the father is the perpetual licensee of the suit property, on which a building was constructed and the daughter was permitted to reside with her husband, once the father revoked his permission, the defendants have to vacate the house, and the suit for mandatory injunction would be maintainable. In Paragraph 19, the High Court of Delhi clearly observed as under:-

> *"19. I may note a fact, not considered by the courts below, concept of permissive possession is different from the concept of a license. A child lives with his parents in the house of the parents under a permissive possession and not strictly as a licensee. No rights akin to the rights of a licensee are available to the child. In the instant case as stated in the plaint the daughter and her husband were residing jointly in the house of the father. All were sharing the entire accommodation."*

The High Court of Delhi relied upon the decision of the Hon'ble Supreme Court delivered in the case of **Joseph Severance Vs. Benny Mathew [(2005) 7 SCC 667]**.

12. The term "license" as defined under Section 52 of the Indian Easements Act, 1882 was analysed and discussed by the Hon'ble Supreme Court in case of **Prabhudas Damodar Kotecha Vs. Manhabalal Jeram Damodar [(2013) 15 SCC 358]**. The Hon'ble Supreme Court, in Para No. 53 of its judgment, held and observed that the word licence is not popularly understood to mean that it should be on payment of licence fee, it can also cover a gratuitous licensee as well. The Apex Court clarified that in other words, a licensor can permit a person to enter into another's property without any consideration, it can be gratuitous as well. For ready reference, relevant portion of judgment i.e. Para Nos.47 to 53 are being reproduced hereunder:-

> *"47. Let us now examine the definition of "licence" under Section 52 of the Indian Easement Act which provides that:*
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> > *52. '**Licence**' defined- where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right be unlawful and such right does not amount to easement or an interest in the property, the right is called a licence.*
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> *This Court in State of Punjab V. Brig. Sukhjit Singh [(1993) 3 SCC 459] has observed that payment of licence fee is not an essential attribute for subsistence of licence. Section 52, therefore, does not require any consideration, material or non material to be an element, under the definition of licence nor does it require the right under the licence must arise by way of contract or as a result of a mutual promise.*
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> *48. We have already referred to Section 52 of the Indian Easement Act and explained as to how the legislature intended that expression to be understood. The expressions "licensor" and "licensee" are not only*

used in various statutes but are also understood and applied in various fact situations. The meaning of that expression "licence" has come up for consideration in several judgments. Reference may be made to the judgment of this Courti in C.M. Beena v. P.N. Ramachandra Rao [(2004) 3 SCC 595], Sohan Lal Naraindas v. Laxmidas Raghunath Gadit [(1971) 1 SCC 276], Union of India (UOI) v. Prem Kumar Jain and Ors. [(1976) 3 SCC 743], Chandy Varghese and Ors. v. K. Abdul Khader and Ors. [(2003) 11 SCC 328].

49. The expression "licensee" has also been explained by this Court in Surendra Kumar Jain v. Royce Pereira [(1997) 8 SCC 759].

50. In P.R. Aiyar's the Law Lexicon, 2nd Edition 1997, License has been explained as

"A license in respect to real estate is defined to be an authority to do a particular act or series of acts on another's land without possessing any estate therein".

51. The word "licensee" has been explained in Black's Law Dictionary, 6th Edition to mean:

Licensee.- A person who has a privilege to enter upon land arising from the permission or consent, express, or implied, of the possessor of land but who goes on the land for his own purpose rather than for any purpose or interest of the possessor.

52. Stroud's Judicial Dictionary of Words and Phrases, 6th Edition, Vol. 2 provides the meaning of word "licensee" to mean a licensee is a person who has permission to do an act which without such permission would be unlawful.

53. We have referred to the meaning of the expressions "licence" and "licensee" in various situations rather than one that appears in Section 52 of the Indian Easement Act only to indicate that the word licence is not popularly understood to mean that it should be on payment of licence fee, it can also cover a gratuitous licensee as well. In other words, a licensor can permit a person to enter into another's property without any consideration, it can be gratuitous as well."

13. In view of the fact findings of the two courts below and the case law discussed & referred hereinabove, both the above-mentioned questions of law do not arise at all in the present second appeal.

Substantial Questions of Law No. (III) & (IV):-

14. These questions of law are common and general in nature. The only defence/ plea raised by the defendant was that his possession of the portion of the property in question was not as a licensee, but as a co-parcener or owner. The defendant alleged the property in question to be of HUF. Such defence and his counterclaim to this effect, have not been found proved. Both the

Courts, after appreciation of the evidence of both parties, observed that the defendant did not produce a single document or piece of evidence to establish that the property in question belonged to HUF and the defendant could not prove his status in the suit property as a co-parcener or owner. It is noteworthy that such fact findings are based on proper appreciation of evidence and cannot be said to be perverse. Furthermore, no appeal against the dismissal of the defendant's counterclaim has been filed by the defendant.

In this manner, the defendant miserably failed to establish his right, title, interest in the suit property except to show that he is in permissive possession. The property in question is in the absolute ownership of the plaintiff, which has also been proved by the plaintiff by producing oral and documentary evidence. These fact findings are not in dispute in the present second appeal, as has been admitted by the learned Senior Counsel for the appellant-defendant as well, during the course of arguments.

15. As far as the possession of the defendant over the portion of the property in question, being the son of the plaintiff, is concerned, it is suffice to observe that a child continues to reside in the property of his father during the course of his childhood by virtue of love and affection and because of the parental duty of the father. Subsequently, in adulthood, after attaining the age of majority and entering into marriage, if the father allows his son or daughter to continue in possession of his house or property or its portion, the same does not, by itself, create any legal right in

favour of the child to claim that property as his own, unless the property is ancestral or of HUF.

This Court finds corroboration of its view with the judgment delivered by the High Court of Punjab and Haryana in the case of **Jai Raj V. Shyam Lal: RSA No.1270/2016 decided on 19.09.2016**. The relevant portion of the judgment is being reproduced hereunder:-

> *"12. Having considered the aforesaid, I find no merit in the appeal, in view of the fact that simply because a child continues to reside in the property of his father, during his childhood by virtue of the love and affection and parental duty of the father, and subsequently, in adulthood the father allows him to continue to reside in it, that does not create a right in the child to claim the property to be his own, unless, of course, it devolved upon the father also as ancestral property.*
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> *In the present case, the respondent-plaintiff having been proved to have acquired the property by virtue of a sale deed (Ex.P6), in the year 1959, obviously it was not ancestral property and nor could the appellants-defendants lead any evidence to prove it to be so.*
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> *Hence, with the father not being happy with the conduct of his son and daughter-in-law, and he no longer wishing that they should continue to reside in his property, in the opinion of this Court, the continued occupation of the appellants, was by permission of the respondent, till such time as he allowed them to reside in his house.*
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> *16. Even otherwise, hypothetically, if for any reason the appellants were not to be treated as licensees, their possession continued to be permissive possession till such time as they were allowed to continue to reside in the house by the respondent-plaintiff, and thereafter, there in any case being not even a plea of adverse possession raised, which would be difficult for a son to raise otherwise also, the appellants were bound to vacate the suit property, they having no right in it, once the notice period was over, (upon service of the notice dated 16.5.2013, Ex.P2, upon them).*
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> *Hence, for the reasons aforesaid, I find absolutely no merit in the appeal."*

16. This Court finds further support of its view by the judgment of the Delhi High Court delivered in the case of **Sachin & Anr. V. Jhabbulal [AIR 2017 (Delhi) 1]**. In that case, elderly parents were constrained to file a civil suit against their two married sons to evict them from the first and second floors and to recover possession of their house. By filing the civil suit, the parents prayed for a decree of mandatory injunction directing their sons to

vacate the floors in their possession and also to restrain them from creating any third-party interest in the suit property. The trial court decreed the suit for mandatory and permanent injunction. The first appeal filed by both sons was dismissed. In the second appeal, the High Court held and observed as under:-

> *"15. Where the house is self acquired house of the parents, son whether married or unmarried, has no legal right to live in that house and he can live in that house only at the mercy of his parents upto the time the parents allow. Merely because the parents have allowed him to live in the house so long as his relations with the parents were cordial, does not mean that the parents have to bear his burden throughout his life.*
> *16. In my opinion in a case such as the present one where the appellants/defendant Nos.3 & 4 have led no evidence to prove that it waived self acquired or co-ownership in the suit property whereas respondents/plaintiffs No.1 & 2 have proved their case on the basis of documentary evidence i.e. copies of General Power of Attorney, Agreement to Sell, Receipt possession letter Affidavit etc., the learned trial Court was justified in decreeing the suit which was upheld by the First Appellate Court."*

17. That apart, the scope of the High Court to grant indulgence in concurrent fact findings recorded by the two courts below, is extremely limited and confined to the existence of a substantial question of law, while exercising its power and jurisdiction under Section 100 of the CPC. In a series of decisions rendered by the Hon'ble Supreme Court, it has been categorically held as an established principle of law that the High Court is not required to re-appreciate the entire evidence on record or to come to its own conclusion. The High Court cannot set aside the findings of fact recorded by the two courts below, when such findings are based on proper appreciation of evidence. In this regard, reference may be made to a judgment of the Hon'ble Supreme Court delivered in the case of **S. Subramanian Vs. S. Ramasamy [(2019) 6 SCC**

46]. The relevant portions of the judgment i.e. Paragraphs 7.4, 7.5, and 7.6, are being reproduced hereunder:-

> *"7.4 Even otherwise, it is required to be noted that as per a catena of the decisions of this Court and even as provided under Section 100 CPC, the second appeal would be maintainable only on substantial question of law. The second appeal does not lie on question of facts or of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC. As observed and held by this Court in Kondiba Dagadu Kadam' , in a second appeal under Section 100 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:*
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> *(i) Contrary to the mandatory provisions of the applicable law;*
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> *OR*
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> *(ii) Contrary to the law as pronounced by the Apex Court;*
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> *OR*
>
> *(iii) Based on inadmissible evidence or no evidence.*
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> *It is further observed by this Court in the aforesaid decision that if the 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.*
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> *7.5. When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in Ishwar Dass Jain v. Sohan Lal [(2000) 1 SCC 434]. In the aforesaid decision, this Court has specifically observed and held:*
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> > *"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."*
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> *7.6. Applying the law laid down by this Court in the aforesaid decisions and the substantial questions of law formulated/framed and answered by the High Court, reproduced hereinabove, it cannot be said that the said questions of law can be said to be substantial questions of law. All can be said to be questions of law or questions of fact and cannot be said to be substantial questions of law."*

18. For the reasons noted hereinabove, and in view of the judgments referred above, in the considered opinion of this Court, both the questions of law too do not arise in the present second appeal.

19. Apart from pressing the above substantial questions of law, which have already been discussed and answered in the negative against the appellant-defendant, the learned Senior Counsel for the appellant-defendant additionally argued that since the defendant was admittedly in possession of the suit property, the plaintiff ought to have filed a suit for possession and not a suit for mandatory injunction to recover possession from the defendant.

In this context, at the cost of repetition, it is hereby observed that the defendant's plea for protection of his possession is not backed by his absolute legal right, vested in him, and his possession over the property of his father since childhood is because of love and affection. The moment father is dissatisfied with the behaviour and conduct of his son and no longer wishes that his son or his family should continue to reside in his property, the defendant's possession, being the son, is not liable to be protected. The defendant, falling within the relationship with the plaintiff as his natural son and being in permissive possession, as a family member and gratuitous licensee in the property of his father, cannot claim that the plaintiff ought to have filed a suit for possession only. It has already been held and proved that the possession of the defendant in the portion of the property in question, belonging to the father, is purely on a gratuitous basis and under the permission of the father, and the defendant could not set up his any independent legal right in the suit property. The permission granted by the father has been revoked/ withdrawn, which has been concurrently held by both courts below. Hence, in such backdrop of factual matrix, and considering the relationship

between the plaintiff and the defendant, being father and son, the suit for mandatory injunction is maintainable and has rightly been decreed. It is further noteworthy that such plea or objection was not raised by the defendant before the trial court or the first appellate court.

20. The Hon'ble Supreme Court, in the celebrated and oft-quoted judgment delivered in the case of **Maria Margadia Sequeria Fernandes v. Erasmo Jack De Sequeria [AIR (2012) SC 1727]** held that a title holder in order to recover possession of his property may file a civil suit which can be a suit for recovery of possession or it can be one for ejectment of an ex-lessee or for mandatory injunction requiring a person to remove himself or it can be a suit u/s 6 of the Specific Relief Act. After detailed discussions, the Hon'ble Supreme Court crystallised following principles of law:-

> "101.
> (1) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.
> (3) The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant."
>
> (Emphasis Supplied)

21. Following the dictum of the Hon'ble Supreme Court as expounded in the case of **Maria Margadia Sequeria Fernandes** (Supra), the High Court of Judicature at Madras in case of **Munusamy V. Duraibabu Mudailar: S.A. No. 133/2016 decided on 10.01.2019**, affirmed the decree passed in the civil suit for mandatory injunction, directing the defendant to vacate/ surrender possession of the house in the scheduled mentioned property. It was a litigation between two brothers. The elder

brother, out of love and affection, allowed the younger brother to reside in his house. However, later on, when the younger brother claimed a right and title in the property, a civil suit for mandatory injunction was filed, which was decreed, and the decree was affirmed by the High Court. The relevant Paragraph No. 15 of the judgment reads as under:

> *"15. Considering the relationship it would be a natural presumption that the defendant was put in permissive occupation by his brother. Once the defendant has misused the permission and tried to set up an independent right, title and interest to the property by attempting to put up construction the plaintiff is entitled to seek for recovery of possession. The Judgement of the Honourable Supreme Court in Maria Margadia Sequeria Fernandes and others Vs. Erasmo Jack De Sequeria (D) Tr.Lrs. and Others reported in 2012-3-L.W.111 lays down the principle that the Courts are not justified in protecting the possession of caretaker, servant or any person who wa allowed to live in the premises for sometime either as a friend, relative, caretaker or as servant. The defendant is under the category of a relative.*
> *Considering the fact that he was only permitted to occupy the property the assertion of an independent right by the plaintiff itself disentitles him to be in possession of the property. Consequently the second substantial Question of law is also answered against the appellant/defendant. In the result, the Second Appeal stands dismissed however there shall be no order as to cost. Consequently, connected Civil Miscellaneous Petition is also closed."*

22. This Court further finds it appropriate to refer here and reproduce a judgment of the High Court of Bombay, which is relevant to answer the point under consideration. The judgment was delivered in the case of **Conrad Dias of Bombay v. Joseph Dias of Bombay reported in [AIR 1995 BOM 210]**. The facts and circumstances of that case were substantially similar to the case in hand. The dispute was between a father and his son. The father filed a suit seeking issuance of a mandatory injunction against the son, directing him to vacate and remove himself from the property. The High Court held that a person who is residing with the parents in the house cannot claim any legal character much less, the character of a licensee as defined in Section 52 of

the Easements Act, but he is residing simpliciter as a member of the family and nothing more and nothing less. On the issue of filing a suit for mandatory injunction, instead of suit for possession, the High Court also held and observed as under:-

> *"19. It was argued that the plaintiff should have filed a suit for possession and not for injunction. It is true that normally a person who is not in possession of the property should file a suit for possession. But in the present case the plaintiff nowhere says that he is not in possession of the suit premises. His case is that he and his son are in joint possession of the suit premises. I have already shown that even when he was a boy the appellant-son was residing with the father and continued to stay in the suit premises even after the plaintiff was transferred to Bangalore. It is also in evidence that plaintiff has been visiting Bombay and residing in the suit house every year. Since the relationship between the parties is one of father and son and they are residing together, it is a case of joint possession even though plaintiff has been subsequently transferred to Bangalore. The plaintiff has nowhere admitted that he has been dispossessed or that he has lost possession. Hence in the circumstances since the plaintiff is held to be in joint possession along with the defendant and he has never lost possession, he cannot file a suit for possession. Therefore, the present frame of suit asking for an injunction against the defendant cannot be said to be bad. Since defendant has no legal right to continue to stay in the premises, plaintiff has advisedly asked the relief of injunction which is perfectly and legally permissible. Hence, I find no merit in the contention that the suit is not maintainable."*
>
> (underline is mine)

23. In view of the above discussions, the Trial Court has not erred in issuing a decree for mandatory injunction, directing the defendant to vacate and hand over possession of the suit property to the plaintiff. The objection raised by the learned Senior Counsel for appellant, at the stage of the second appeal, is hereby rejected. No other substantial question of law has been raised, nor does arise in this second appeal. In the opinion of this Court, the present second appeal is devoid of substance and has no merit.

24. Before parting with, it is hereby observed that this is not an ordinary litigation. The appellant, who is the natural son of the respondent, is an educated person and is well aware that the property in question was purchased by his father in his own name,

along with his father's brother, and that he himself is residing in his father's property, being a member of his family. Yet, the appellant took a plea that he is owner & co-parcener and despite having failed to prove his plea that the property was part of a HUF or co-parcenery before the Trial Court as well as the First Appellate Court, chose to continue the litigation against his father up to the High Court. This is nothing but sheer harassment of the father by his son. In order to demote such kind of litigation, which leaves a black scar on society and undermines the pious and trustful relationship of father and son, this Court finds it appropriate and fit that the appellant deserves to be saddled with costs. Though imposition of cost may not be sufficient to compensate the agony, distress, and harassment, faced by the father in contesting this litigation, yet it would set an example for future not to stretch such kind of litigation maliciously. The cost is quantified to the tune of Rs.1,00,000/- (Rupees One Lakh), which shall include litigation expenses as well, and shall be payable to the respondent.

25. As a final result, the present second appeal is dismissed with exemplary costs of Rs.1,00,000/- (Rupees One Lakh) to be paid by the appellant to the respondent.

26. Pending application(s), if any, stand(s) disposed of.

(SUDESH BANSAL),J

SUNIL SOLANKI /Sachin Sharma