

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

rpa

SECOND APPEAL NO.252 OF 2013

Sureesh D. Nishandar & Anr.	.. Appellants
Vs.	
Prakash Sagar Latthe	.. Respondent

....
Mr.B.A. Lawate, Advocate for the Appellants.
Mr.Surel Shah, Advocate for the Respondent.
....

CORAM : RAVI K. DESHPANDE, J.

DATED : JUNE 8, 2015.

P.C. :

The trial Court dismissed Regular Civil Suit No.44 of 2003 for grant of permanent injunction, but the Appellate Court allowed the Regular Appeal No.9 of 2010 by its Judgment and order dated 2nd August, 2012. Hence, the original defendants are before this Court in the Second Appeal.

2 With the assistance of the learned counsel appearing for the parties, I have gone through the judgment and order passed by the Courts below. No doubt that the defendant has not entered the witness box but the Appellate Court was bound to take into consideration the evidence laid by the plaintiff to find out as to whether the plaintiff has substantiated his case.

The Appellate Court has allowed the Appeal on the sole ground that the Appellant has not entered the witness box. Hence, the following substantial question of law arises for the consideration by this Court:

(i) Whether the Appellate Court has failed to discharge its duty conferred under order 41 Rule 31 of the Code of Civil Procedure in not considering the finding recorded by the trial Court and the evidence brought on record?

3 Admit.

4 The learned counsel appearing for the respondent waives service.

5 Heard finally by consent.

6 The factual position as aforestated has not been disclosed but only ground which the Appellate Court reversed the decree passed by the trial Court is that the defendant has not entered into the witness box. The Appellate Court has failed to prove whether the plaintiff has discharged the burden. The judgment and order passed by the Appellate Court suffers from non-application of mind to the pleas and evidence brought on

record and also to the real controversy involved. The judgment and order passed by the Appellate Court, will have to be set aside with an order of remand.

7 In the result, the Second Appeal is allowed. The judgment and order dated 2nd August, 2012, passed by the Appellate Court is hereby quashed and set aside.

8 The Appeal is remanded back to the Appellate Court to decide the matter after giving an opportunity to all the parties. The parties to appear before the Appellate Court on 6th July, 2015.

9 R & P if received sent back to the trial Court.

10 The Appellate Court to decide the Appeal within a period of eight months from the date of receipt of the order.

(RAVI K. DESHPANDE, J.)