FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Notes, Office Memoranda of Coram, appearance, Court's orders or directions and Registrar's orders.	Court's or Judge's orders.

SECOND APPEAL NO. 240 OF 2013
WITH CA/4367/2013 IN SA/240/2013 WITH CA/10633/2015 IN SA/240/2013

BHAGCHAND JANARDHAN MULAY AND OTHERS
VERSUS
DHONDIBHAU NARAYAN MULAY
...

Advocate for Appellants : Mr. R. R. Mantri, Advocate h/f Mr. Garud N. C.
Advocate for Respondent Nos.1A and 1B: Mr. P. R. Katneshwarkar.

***

CORAM: T. V. NALAWADE, J.
DATED: 7th MARCH, 2016.

PER COURT:

1. The appeal is filed by original defendants of Regular Civil Suit No.22 of 1999 which was pending in the Court of Civil Judge, Junior Division, Parner. The suit filed by Respondent Dhondibhau for relief of declaration and permanent injunction is decided in his favour by trial Court and this decision is confirmed by the first Appellate Court. Both the sides are heard.

2. The suit was filed in respect of ½ portion of land Gat No.565 situated at Devibhoire, Tahsil Parner, District

Ahmednagar. It is the case of the plaintiff Dhondibhau Mulay that he is the owner of the suit portion and in his portion he has taken a well by using loan taken from Central Bank of India about 10 to 12 years prior to the date of suit. It is contended that he has been taking crops by using the water of this well and defendants have no concern whatsoever with this well, they have no right to take water from this well. It is contended that the defendant No.1 Bhagchand has executed a sale deed dated 14th December, 1998 in respect of some portion of Southern side of land Gat No.563 in favour of defendant Nos.2 and 3 and it is falsely shown in this sale deed that Bhagchand had right to take water from this well. It is contended that on the basis of the contents of the sale deed, the defendant Nos.2 and 3 are harassing the plaintiff and they are trying to forcibly take water from the well of the plaintiff. Relief of declaration was claimed, that Bhagchand had no right in the well or in the water of well and so the defendants have no such right and relief of injunction was prayed to prevent the defendants from taking the water of the suit well.

3. Defendant No.2 Shahaji filed written statement and contested the matter. He contended that land Gat

No.565 was initially owned by Narayan. It is contended that plaintiff Dhondibhau and one Janardhan were sons of Narayan and partition had taken place between Janardhan and Dhondibhau many years back. It is contended that the well situated in the Northern portion was there from prior to the date of partition and the well was kept common between Dhondibhau and Janardhan. Defendant No.1 Bhagchand is the son of said Janardhan.

4. It is the case of defendant No.2 that Bhagchand sold his share from land Gat No.565 to defendant Nos.2 and 3 and along with this share, the right of Bhgchand to take water from said well was also sold. It is contended that from the date of the sale deed the defendants are taking water from the said well and only to prevent them from taking the water, false suit is filed against them.

5. On the basis of aforesaid pleadings, issues were framed by the trial Court. The plaintiff gave evidence, which is as per aforesaid contentions. It is not disputed that in or about year 1980 partition had taken place between plaintiff and Janardhan and Northern portion had come to the share of plaintiff. In view of this circumstance, even if there was well in the northern portion, it was necessary for the defendants to show that

the well was kept common. In the appeal, along with civil application, some revenue record is produced to show that from prior to 1980 there was a well in land Gat No.565. In the revenue record, only one well is shown in this land and so the plaintiff examined one officer of bank Shri Subhash. In the evidence of Subhash, record of the bank is proved and it shows that bank had given loan to plaintiff for taking a well and for laying pipeline. This loan was given in the year 1986. Copy of account extract in respect of the loan is produced to show that this loan is repaid by plaintiff. Much was argued by learned counsel for Respondents that in the record produced by the bank officer the number of the property is not mentioned and so inference is not possible that the well which is in existence in Gat No.565 was taken by the plaintiff.

7. The defendant Nos.2 and 3 have examined defendant No.1 Bhagchand in support of their case that Janardhan had ½ share in the water of the well. His evidence in cross examination shows that he had not taken connection of electricity for installing motor on this well. He had not laid pipeline from the well up to his share which is on Southern side of the share of plaintiff.

His attention was drawn to some record, like copy of agreement at Exhibit-46. In this document, he had admitted that the suit well was taken by plaintiff after taking loan from bank and Bhagchand had no concern with this well. This document was executed on 17th November, 1994 much prior to the date of sale deed made in favour of other defendants. The attention of Bhagchand was drawn to application given by him to Tahsildar. It appears that at the instance of plaintiff order was made by the trial Court to send the relevant record for comparison of signatures of Bhagchand appearing on aforesaid record with his specimen signatures and the record was actually sent. No report was received and ultimately the matter came to be decided on the basis of evidence available.

8. Though there is some revenue record to show that from prior to 1980 there was one well in existence, the same was shown in the revenue record in crop cultivation column for few years but after that there was no entry and then the entry of the lone taken by plaintiff for taking the well from Central bank was made in the revenue record. One bank officer is also examined. The case needs to be decided on preponderance of

probability. It was necessary for Bhagchand to prove that in the partition which had taken place between plaintiff and Janardhan the well was kept common as the well is situated in the share of plaintiff. No such evidence is given. In absence of such evidence, it was not possible to draw inference that the well situated in the share of plaintiff was kept common. Further, there are aforesaid circumstances showing that loan was taken by plaintiff to take the well and there is only his motor and pipeline in the well and on the land. The findings are given by the trial Court on the basis of aforesaid evidence and other evidence and they are findings on questions of facts. This Court holds that it is not possible to interfere in the aforesaid findings and no substantial questions of law are involved in the matter.

9. In the result, the appeal stands dismissed.

10. In view of final disposal of the appeal itself nothing further survives in the Civil Application Nos.4367 of 2013 and Civil Application No.10633 of 2015 and the same stand disposed of accordingly.

(T. V. NALAWADE, J.)

Dt.07/03/2016.
ans/240