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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL No. 112 OF 2014
WITH
CIVIL APPLICATION NO. 1628 OF 2014**

- (1) Vithal S/o Aba Kapse,
age 70 years occupation Agriculture
R/o Bhavthan Taluka Ambajogai District Beed.
- (2) Ankush S/o Mahadeo Yadav,
age 42 years occupation Agriculture
R/o Bori Savargaon Taluka Kaij District Beed.

..APPELLANTS

VERSUS

Kundlik S/o Vithal Kapse
age 55 years occupation Agriculture
R/o Bhavthana Taluka Ambejogai District Beed.

...RESPONDENT

Mr V.S. Bedre, Advocate for appellants.
Mr Shrikant Kulkarni, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 19th June, 2017

ORAL ORDER

The present appellants were original defendants in Regular
Civil Suit No. 235/2005 filed for permanent injunction, based on title,

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by the respondent/original plaintiff in the Court of Joint Civil Judge (J.D.), Ambejogai.

2. Appellant No.1 is father of respondent, whereas, appellant No.2 is step brother of respondent/original plaintiff.

3. Lands amongst other lands which are held by present appellant No.1, land Gat No. 56 at Bhavthana was partitioned between the appellants and the respondent, and it is not in dispute that land to the extent of 80R had fallen to the share of present respondent. It is also not in dispute that there is mutation entry about said 80R land being mutation entry No. 240 in favour of present respondent.

4. It is clear that said property has gone to the share of present respondent, by virtue of compromise decree passed in RCS No. 225/1990, wherein no description of the share of present respondent/original plaintiff is mentioned. In the aforesaid background, since the present appellant No.1 has disposed of part of the property of Gat No. 56 to two strangers, a dispute ensued, resulting into filing of RCS No. 235/2005 for permanent injunction.

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5. The suit came to be dismissed by the judgment and decree, dated September 29, 2007, passed by the III Joint Civil Judge (J.D.), Ambejogai, which decree was later-on reversed in Reg. Civil Appeal No. 101/2007, whereby the suit for permanent injunction, based on title of the respondent/original plaintiff, came to be decreed. As such, present Second Appeal.

6. Learned Counsel Shri Bedre by inviting my attention to compromise decree in RCS No. 225/1990, would urge that since the boundaries of land to the extent of 80R, which has un-disputedly gone to the share of original plaintiff/respondent herein, are not described, the Judgment of the lower Appellate Court in absence of identifying boundaries of disputed property is not sustainable. He would urge that the burden is on the respondent/plaintiff to demonstrate that the suit property was identified with specific boundaries in the compromise decree and respondent/plaintiff remained in possession of the same. He would urge that a substantial question of law needs to be framed.

7. Per contra, learned Counsel for the respondent would urge that both the parties have led oral evidence and it is in categorical terms in the evidence of P.W.2, P.W.3, and also the other documentary

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evidence, it has been established that the respondent/plaintiff is in possession of 80R land out of Gat No. 56 i.e. disputed property. According to him, the appeal lacks merit and be dismissed.

8. With the assistance, I have perused the pursis and judgment and decree passed in RCS No. 225/1990, which has resulted into compromise and admittedly, land to the extent of 80R out of Gat No. 56 had gone to the share of respondent/plaintiff.

9. The pursis, which was tendered in RCS No. 225/1990, signed by the appellants, though does not specify the boundaries, however, after dismissal of the suit, specifically mutation entry No. 240, 7/12 extract in pursuance to the same at Exh. 9, other mutation entry of Gat No. 56 at Exh. 32, mutation entry pursuant to the sale deed dated 27th July 2005 in favour of appellant No.2 were placed on record.

10. The evidence of D.W.5 i.e. present appellant No.1 in categorical terms, admits about allotment of land to the extent of 80R out of Gat No. 56 at Mouje Bhavthana to the share of respondent/plaintiff, by virtue of judgment and decree passed in RCS No. 225/1990, is not disputed position. Only dispute that is

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sought to be raised is as regards non-identification of boundaries of said 80R piece of land gone to the share of respondent/plaintiff.

11. The above referred documentary evidence viz. mutation entries, 7/12 extract, the mutation preceded to the sale deed in favour of appellant No.2 by appellant No.1 in categorical terms identifies property, which has gone to the share of respondent/plaintiff, which at earlier point, was not objected before any forum.

12. In support of the claim that he is in possession of disputed property, plaintiff/respondent Kundlik examined himself, who was supported by independent witnesses P.W.3 Hanumant, who is a neighbouring cultivator, and also P.W.4 Bhaurao, who was witness to the actual partition.

13. The cumulative effect of oral evidence of these witnesses in clear terms establishes the boundaries of the property to the extent of 80R land, which is disputed herein, and of which the respondent is in possession.

14. Though compromise decree in RCS No. 225/1990 does not

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speaking of the boundaries of the property, which had fallen to the share of respondent/plaintiff, however, in absence thereof in the present suit, boundaries are required to be ascertained from the documentary and oral evidence.

15. The plaintiff so as to establish his case has brought on record the documentary and oral evidence, which is appreciated by the Lower Appellate Court.

16. Once findings of fact are recorded by the Lower Appellate Court in favour of respondent, unless contrary is demonstrated by the appellants, it is difficult for this Court to interfere in the Second Appellate Jurisdiction, when same is to be exercised only at an issue of involvement of substantial question of law.

17. In the backdrop of above, in my opinion, the findings recorded by the lower Appellate Court are based on the evidence of P.W.1 to P.W.4, who are the witnesses, and the other detail documentary evidence brought on record.

18. The appeal in the aforesaid background, is devoid of merit and stands dismissed.

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19. In view of dismissal of Second Appeal, pending Civil Application does not survive and same stands disposed of.

(N.W. SAMBRE, J.)

pjm