

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

**SECOND APPEAL NO.892 OF 2015
WITH
CIVIL APPLICATION NO.1951 OF 2015**

Shri Dhondi Dattu Bhutal And Others ... Appellants/Applicants
Versus
Shri Jawaharlala Annaso Rote And Others ... Respondents

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Mr. G.S. Godbole i/b S.A. Rjeshirke for the Appellants/Applicants.
Mr. Amit Borkar for Respondent No.5.

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CORAM : S.C. GUPTE, J.

DATE : 28 FEBRUARY 2017

P.C. :

. Heard learned Counsel for the parties.

2 This second appeal challenges a judgment and order passed by the District Court at Kolhapur. By the impugned judgment and order, the learned District Judge confirmed the judgment and decree passed by the Joint Civil Judge, Junior Division, Kolhapur in Regular Civil Suit No.204 of 2003 rejecting the Appellants' suit.

3 The Appellants are original Plaintiffs in Regular Civil Suit No.204 of 2003, claiming perpetual injunction in respect of the suit property described as agricultural land bearing Survey No.77, now part of Gut No.120, situated at Village Bhutalwadi, Post. Saitawade, District Kolhapur. The Respondents are original Defendants to that suit. It is the case of the

Plaintiffs that the predecessor of the Defendants, one Shantappa Raghoba Rote (“Shantappa”), was a landlord having thousands of acres of land in various villages, who executed several deeds and transferred several parcels of land to various transferees. It is the case of the Plaintiffs that Shantappa, by a sale deed dated 27 October 1945, sold the suit plot of land to the predecessor-in-title of the Plaintiffs. The suit plot of land was described in the sale deed as Survey No.91, the local description of the property being “आंब्याचा माळ”. The land was said to be admeasuring 13 acres 7 gunthas. It is the case of the Plaintiffs that the description of the property in the sale deed, namely, Survey No.91, was a mistake; the correct survey number of the plot of land, covered under the sale deed, was Survey No.77. It is submitted that this mistake was corrected by a mutation entry, which is described as Diary No.110. By this mutation entry, the description of the suit plot of land was corrected as Survey No.77 in place of Survey No.91. The Defendants, on the other hand, claim to be the owners of the suit property, through their predecessor, Shantappa. It is their case that the suit plot of land, namely, Survey No.77, was not sold by Shantappa by the sale deed of 27 October 1945; it remained in the family and came to be allotted in a partition to Defendant No.5, who subsequently sold the same to Defendant No.6 by a sale deed dated 22 January 2003.

4 The main question involved in the suit concerns the identity of the suit property – whether it was Survey No.91, admeasuring 13 acres and 7 gunthas, as described in the sale deed, or whether it was Survey No.77 described wrongly as Survey No.91, as claimed by the Plaintiffs. The identity of the property sold under the sale deed of 27 October 1945, is a pure question of fact. Both the Courts below have come to a concurrent

finding that what was sold by Shantappa by the sale deed of 27 October 1945 was Survey No.91 and not Survey No.77 as claimed by the Plaintiffs. The only document, which purportedly connects Survey No.91 described in the sale deed dated 27 October 1945 to Survey No.77, is the alleged mutual entry represented by Diary No.110. Both the Courts below have noted that before sanctioning this mutual entry, there was no notice issued to the Defendants or their predecessor-in-title; that there was no document executed between the parties for correction of the description of the property from Survey No.91 to Survey No.77; and that the Revenue Authorities appeared to have changed the description of the property from Survey No.91 to Survey No.77, simply upon local inquiries. Similarly, the Courts have also noted that the area of Survey No.77 did not tally with the area mentioned in the sale deed. The area of Survey No.91 described in the sale deed was 13 acres 7 gunthas, whereas the area of Survey No.77 was 12 acres 5 gunthas. There was no other evidence, beside Diary No.110, produced by the Plaintiffs in support of their case that they either had title to or possession of Survey No.77. On these facts, both the Courts below have come to a concurrent finding that the property sold to the predecessor-in-title of the Plaintiffs by Shantappa was Survey No.91, which existed separately from Survey No.77, and that the Plaintiffs had not shown their title or possession of Survey No.77, which, according to the records produced in evidence by the Defendants, was owned initially by Shantappa and later on under a decree of partition, allotted to Defendant No.5 and finally sold by him to Defendant No.6. These concurrent findings of fact, which are based on evidence, cannot be assailed in the second appeal on any substantial question of law. This is not a case, where concurrent findings of fact rendered by the Courts below, can be said to be

based on no evidence. It also cannot be said that the findings have been arrived at either by disregarding any material or germane fact or evidence, or by taking into account any irrelevant or non-germane fact or evidence.

5 Learned Counsel for the Appellants contends that it is an established position that if there is a conflict between area and boundary of the land conveyed, the boundary prevails. Learned Counsel relies on the judgment of our Court in the case of **Temple of Maruti by its attorney Vs. Balkrishna Suryaji S. Kakodkar**¹ in support of his contention. As noted by the Trial Court, the boundaries of Survey No.77 mentioned in the plaint and the affidavit of evidence of Plaintiff No.3 do not match. The sale deed of 27 October 1945 does not contain any description of the boundaries. On the other hand, the description of the place, area etc. in the said deed applies correctly to Survey No.91. There is no way that the identity of the suit property can be established with reference to the description of boundaries. The judgment in **Temple of Maruti** case, thus, has no application to the facts of the present case.

6 Learned Counsel for the Appellants submits that there is one more important index in the sale deed, which has a material bearing on the identity of the suit property, namely, the purported local description of the suit property as “आंब्याचा माळ” in the sale deed. Learned Counsel submits that whereas the Trial Court has, in terms, considered this aspect of the description of the suit property, though unfavourably to the Appellants, the First Appellate Court has not adverted to this aspect at all. It is submitted that as the last fact finding Court, it was incumbent on the Lower Appellate

1 1998(3) Bom.C.R 540

Court to have considered this aspect, which was anyway a matter of contest between the parties. It is submitted that this itself amounts to a substantial question of law, for which the second appeal deserves to be admitted.

7 The records before the Courts below indicate that both properties, namely, Survey No.91 and Survey No.77, were locally known as “आंब्याचा माळ”. There are revenue records in the form of 7/12 extracts of both the properties, which describe the local name of both properties as “आंब्याचा माळ”. Thus, the description of the property as “आंब्याचा माळ” cannot be said to be a clinching matter. Both properties go by this description and the description is not determinative in itself to establish the identity of the suit property. No doubt, the Lower Appellate Court has not particularly adverted to this aspect of the matter. It has, however, taken into account various other important aspects, which have a crucial bearing on the identity of the suit property, and has found the conclusion of the Trial Court to be in order and not warranting any interference. It cannot be said that merely because this particular aspect of the description of the suit property was not specifically adverted to by the Lower Appellate Court, there is a substantial infirmity of law, which goes to the root of the matter and which calls for admission of the present second appeal. As I have noted above, this aspect, reflecting on the identity of the suit property is, by no means, determinative of the matter, namely, the identity of the suit property as between Survey No.91 and 77.

8 No other contention was advanced by learned Counsel for the Appellants in support of the appeal.

9 There is, accordingly, no merit in the second appeal. The second appeal is dismissed. No order as to costs.

10 In view of the dismissal of the second appeal, the civil application does not survive and the same is also disposed of.

(S.C. GUPTE, J.)