

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

**SECOND APPEAL NO.374 OF 2015
WITH
CIVIL APPLICATION NO.835 OF 2015
IN
SECOND APPEAL NO.374 OF 2015
WITH
SECOND APPEAL NO.225 OF 2015
WITH
CIVIL APPLICATION NO.465 OF 2015
WITH
CIVIL APPLICATION NO.466 OF 2015
IN
SECOND APPEAL NO.225 OF 2015**

Shri Appasaheb Dhondiram Miraje

And Others

... Appellants/Applicants

Versus

Shri Shankar Babu Bodhgire And Others

... Respondents

.....

Mr. S.G. Deshmukh i/b Pramod G. Kathane for the Appellants/Applicants.

Mr. N.J. Patil i/b Manoj A. Patil for Respondent Nos.1 And 2.

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CORAM : S.C. GUPTE, J.

DATE : 20 MARCH 2017

P.C. :

. Heard learned Counsel for the parties.

2 These two Second Appeals challenge a judgment and order passed by the District Judge at Sangli in two Civil Appeals, namely, Regular Civil Appeal No.137 of 2007 and Regular Civil Appeal No.138 of 2007. By the

impugned common judgment and order, the learned District Judge dismissed the civil appeals filed by the Appellants herein and confirmed the common judgment and decree passed by the Trial Court in two Civil Suits, namely, Regular Civil Suit No.93 of 2002 filed by the Appellants herein and Regular Civil Suit No.76 of 2003 filed by the Respondents herein. By this common judgment and decree, the Trial Court had decreed the Respondents' suit for recovery of possession of the suit land from the Appellants and dismissed the Appellants' suit for perpetual injunction against the Respondents in respect of the Appellants' purported possession of the suit land.

3 The Appellants (original Plaintiffs) filed Regular Civil Suit No.93 of 2002 for a perpetual injunction against the Respondents (original Defendants), claiming that the suit property, bearing Gut No.355 (original Survey No.254/2) admeasuring 80 AREs and situated at Village Shindewadi (H), Taluka Kavathe Mahankal, District Sangli, was owned and exclusively possessed by the Plaintiffs. It was the Plaintiffs' case that the Defendants had their adjacent property bearing Gat No.356 surveyed by the Land Records Office and got fixed new boundary stones including within it a part of the suit property. The Plaintiffs were objecting to this. Their suit was on an apprehension that the Defendants would grab this portion (which they called 'encroached portion') by taking recourse to unfair means and accordingly prayed for perpetual injunction. The Defendants appeared in the suit and resisted the suit claim by filing a written statement. According to the Defendants, the land bearing No.356 owned and possessed by them was adjacent to the land bearing Gat No.355 owned by the Plaintiffs. It was their case that the Plaintiffs, by encroaching

upon Gat No.356, had planted a grape garden. After the Defendants objected to the same, the Plaintiffs agreed to remove the encroachment after carrying out joint measurements. Since the Plaintiffs delayed carrying out joint measurements of Gat Nos.355 and 356, the Defendants unilaterally applied for measurement of their land, namely, Gat No.356. It was their case that after such measurement, they realized that there was an encroachment on the part of the Plaintiffs on an area of about 22 AREs in Gat No.356. The Defendants filed their own suit, being Regular Civil Suit No.76 of 2003, for removal of this encroachment and recovery of possession of 22 AREs from the Plaintiffs. Both suits were heard together by the Trial Court. On the basis of the pleadings of the parties and evidence before it and after hearing submissions of both sides, the Trial Court dismissed the Plaintiffs' suit and decreed the Defendants' suit. Being aggrieved by the common judgment and decree, original Plaintiffs in Regular Suit No.93 of 2002 (who were original Defendant Nos. 1 to 3 in Regular Civil Suit No.76 of 2003) preferred two civil appeals before the District Court, namely, Regular Civil Appeal No.137 of 2007 in their own suit and Regular Civil Appeal No.138 of 2007 in the Defendants' suit. The District Court held that the Plaintiffs had not described their property, namely, Gat No.355, correctly and that they were not owners of the disputed portion of the suit land and in the premises, they were not entitled to any injunction. As for the Defendants' suit, the District Court held that the Defendants had described their land correctly and had proved their ownership of the same and also that the Plaintiffs had encroached upon 22 AREs from Gat No.356, thus, entitling them to a decree of possession.

4 In the first place, whether the description of the Plaintiffs of their land, namely, Gat No.355, was correct or whether the description of Gat No.356 by the Defendants was correct, is a pure question of fact. Both Courts below have come to a concurrent finding that the description of Gat No.356 given by the Defendants was correct and that the description of Gat No.355 given by the Plaintiffs was not correct. Ordinarily, no substantial question of law can arise from these findings, unless the same can be said to be perverse or contrary to evidence.

5 Learned Counsel for the Appellants/Plaintiffs presses his application (Civil Application No.465 of 2016) under Order 41 Rule 27 of the Code of Civil Procedure (“Code”) for production of additional evidence before this Court. It is submitted that both Courts below have come to their concurrent finding of fact against the Plaintiffs on the ground that the Plaintiffs had not proved their ownership of land admeasuring 80 AREs (Gat No.355). It is submitted that during the pendency of the suits as well as the First Appeals, inspite of their best efforts, the registered sale deed dated 16 September 1935, by which their predecessor-in-title had purchased agricultural land bearing Survey No.254/2, from out of which Gat No.355 is formed, was not available. It is submitted that after the disposal of the First Appeals and during the pendency of the Second Appeals, they could trace this sale deed in the Office of Sub-Registrar, Tasgaon and received the same on 28 May 2014. The Appellants/Plaintiffs apply for production of this sale deed as additional evidence for the purpose of complete and effective adjudication of the case. A party, no doubt, can produce additional evidence before the Appeal Court, provided any of the conditions mentioned in clause (a), (aa) or (b) of sub-rule (1) of

Rule 27 of Order 41 of the Code, is satisfied. It must be shown either that (a) the Court, from whose decree the appeal is preferred, has refused to admit evidence which ought to have been admitted, or (aa) the party seeking to produce additional evidence establishes that notwithstanding exercise of due diligence, such evidence was not within his knowledge or could not, despite exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. None of these conditions can be said to obtain in the present case. The Appellants/Plaintiffs have not established that they either exercised due diligence or in spite of such exercise, the evidence sought to be produced before this Court was not available to them. The only submission, in support of their case under Order 41 Rule 27, is contained in paragraph 15 of the civil application. It is stated in paragraph-15 that “during the pendency of the suits and appeals, in spite of their best efforts they could not produce the registered Sale Deed dated 16 September 1935 and that they lastly traced the same in the Office of Sub-Registrar, Tasgaon and received the same on 28 May 2014.” This is nothing but just a slogan. It is, first of all, inconceivable that the so called best efforts of the Plaintiff did not include an obvious inquiry at the Sub-Registrar's Office, where the document was certainly to be found. There is no reason why the Appellants/Plaintiffs could not have found the document in the Office of Sub-Registrar, Tasgaon at the relevant time and produced the same before the Trial Court or the First Appellate Court.

6 Be that as it may, even otherwise, evidence in the form of the sale

deed, which is sought to be produced by the Appellants/Plaintiffs, cannot be termed as clinching evidence which could tilt the scales in favour of the Appellants/Plaintiffs in the matter of decision of their suit. The Courts below have come to their concurrent finding of fact that Gat No.355, owned by the Plaintiffs, admeasures 65 AREs, on the basis of pleadings and evidence before them. In the first place, it was the Plaintiffs' own case initially that they were owners of land bearing Gat No.355 which admeasured 65 AREs. It was only subsequently that they got their plaint amended and contended that Gat No.355 (originally forming part of Survey 254/2) admeasured 80 AREs. It is not disputed that as per revenue records maintained by the Land Records Office, Gat No.355 admeasures 65 AREs. The 7/12 extract of Gat No.355 was before the Courts below. It revealed the area of the land as 65 AREs. Besides, in his oral evidence, P.W. 1 himself admitted that Gat No.355 was formed from Survey No.254/2-A and as per revenue records, the area of the suit land was 65 AREs only. He also admitted that Gat No.354 was from Survey No.254/2-B which admeasured 96 AREs and land Survey No.254/2-C admeasured 1 ARE (now Gat No.353). All three Gat Nos. together admeasured 4 acres and 1 guntha. The Plaintiffs also admitted that since implementation of a consolidation scheme in the village, the area of the land bearing Gat No.355 was shown in the revenue record as 65 AREs. Considering the evidence of P.W. 1, Appasaheb Dhondiram Miraje, coupled with the documentary evidence on record, the Courts came to a conclusion that the Plaintiffs had not described the suit land correctly and had failed to prove that they were owners of 80 AREs of land as contended by them. The sale deed now sought to be produced by the Plaintiffs is executed in favour of the Plaintiffs' predecessors, one Kedari and one Dnyanu, by the original

owner of Survey No.254/2. This document describes the area of Survey No.254/2 purportedly as 4 Acres and 30 Gunthas. (There is some controversy between the parties as to the number “0” appearing after the figure “3” in the particulars.) Be that as it may, this still does not imply that Gat No.355 or Survey No.254/2-A from which it is formed admeasures 80 AREs and not 65 AREs. That Kedari and Dnyanu together got land admeasuring 4 Acres and 30 Gunthas corresponding to about 2 H 15 AREs, and therefore the purported one half share of the land, which came to the share of Kedari, the predecessor in title of the Plaintiffs, represented by Survey No.254/2-A, admeasured 80 AREs, is merely a matter of speculation. One half share of 2 H and 15 AREs anyway would work out to much more than 80 AREs. On the other hand, as I have noted above, there is ample evidence before the Courts below, including consolidation record, which puts the area of Gat No.355 corresponding to old Survey No.254/2-A at 65 AREs.

7 In the premises, there is no case made out by the Plaintiffs under Order 41 Rule 27 of the Code for production of additional evidence but, as I have noted above, even if the Appellants/Plaintiffs were allowed to lead such additional evidence, it does not go to show that the Appellants/Plaintiffs, who are owners of Gat No.355, own land admeasuring 80 AREs.

8 The Second Appeals, in the premises, do not give rise to any substantial question of law for the determination of this Court. The assessment of evidence and findings of the fact arrived at on the basis thereof by the Courts below, cannot be termed as perverse. These are

findings based on evidence. No relevant or germane material is disregarded by the Courts below and no irrelevant or non-germane material is considered for arriving at these findings. And, as I have noted above, even the additional evidence sought to be produced by the Appellants/Plaintiffs does not take their case much further.

9 In the premises, there is no merit in the Second Appeals. The Second Appeals along with Civil Application No.465 of 2015 are dismissed.

10 In view of the dismissal of the Second Appeals, Civil Application No.466 of 2015 and Civil Application No.835 of 2015 do not survive and the same are also disposed of.

(S.C. GUPTE, J.)