

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Second Appeal No. 92 of 2016
[Haribhau Dhondsa Kakpure [dead] through legal heirs Vs. Anil Marotrao Kalode]

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

Court's or Judge's orders

Mr. S. S. Sharma, Adv., for appellant.
Mr. N. R. Saboo, Adv., for respondent sole.

CORAM : A. S. CHANDURKAR, J.

DATE : 03rd July, 2017

The learned counsel for the parties have been heard on the following substantial question of law:-

“Whether the decree passed by the appellate Court is in consonance with the measurement at Exh.63?”

The appellant is the original defendant in a suit filed by the respondent for possession after removal of encroachment. According to the plaintiff, he is owner of Plot No. 17/1 having purchased area admeasuring 2,400 sq. ft., on 25th April, 2008. According to the plaintiff, about seven plots were sold in favour of the Society in the year 1973 and thereafter said Society allotted plots to its members. According to the plaintiff, the erstwhile owner executed a Gift-Deed in favour of defendant's

father with regard to portion of Plot No. 17. It is the case of the plaintiff that the defendant made an encroachment to the extent of seventy-five sq. ft. and hence, aforesaid suit came to be filed.

In the Written Statement, the defendant took the stand that he had not committed any encroachment and that the Gift-Deed in his favour was valid.

Before the trial Court, the defendant filed an application below Exh.44 for appointment of the taluka Inspector of Land Records to measure the lands in question. Accordingly, after such measurement, map at Exh.63 was placed on record. The trial Court held that the plaintiff had not proved his ownership and, therefore, dismissed the suit. The appellate Court reversed said finding and decreed the suit.

Shri Sharma, learned counsel for the appellant, submitted that in absence of title of the plaintiff being proved, the claim of the plaintiff could not have been allowed. He submitted that even according to the plaintiff, the encroachment was committed prior to purchasing the suit property. He urged that from the deposition of PW 4, it could not be said that the plaintiff had proved his encroachment. The trial Court rightly discarded the evidence of PW 4 and hence decree passed by the appellate Court was liable to be set aside. He submitted that the proceedings filed by the

defendant seeking compensation from the present plaintiff had not attained finality.

Shri N.R. Saboo, learned counsel for the respondent, supported the impugned judgment. He urged that title of the plaintiff was not seriously challenged by the defendant. Even the earlier notice issued at Exh.21 was not contested by the defendant in so far as ownership is concerned. He then submitted that map at Exh.63 clearly indicated encroachment to the extent of 38.50 square meters; but the claim was restricted to 75 square feet only.

I have heard the learned counsel for the parties at length and perused the material placed on record.

In so far as ownership of the plaintiff is concerned, the learned Judge of the appellate Court in paras 16 to 19 has after considering the entire material found that the plaintiff had proved his title with regard to Plot No. 17/1 to the extent of 2,400 sq.ft. Reference was made to exchange of notices as well as the 7/12 extracts at Exhs.22 and 20. The finding in that regard being based on evidence on record, the same does not call for any interference.

In so far as encroachment is concerned, PW 4 measured both the plots pursuant to an application at Exh.44 moved by the defendant. After issuing notices to

all the parties which included the plaintiff and the defendant, the measurement was carried out on 20th July, 2010. It was then found that the defendant was in possession of excess land. The measurer was examined as PW 4 and he has clearly brought on record the encroachment committed by the defendant. It is on that basis that the appellate Court decreed the suit to the extent of 75 sq. ft. On perusal of this material on record, including the map at Exh.63, it can be seen that the plaintiff had clearly proved that such encroachment was committed by the defendant. The finding in that regard arrived at by the appellate Court is based on the material available on record. This appreciation of evidence cannot be said to be perverse.

In view of aforesaid, the substantial question of law is answered in the affirmative. The Second Appeal is accordingly dismissed. No order as to costs.

Judge

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