

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

SECOND APPEAL NO. 199 OF 2001

Nana Chandru Navalkar	...	Appellant
V/s.		
Mahadeo Govind Navalkar	...	Respondent

- Mr.Vinayak Kumbhar i/b. Mr.N.V. Bandiwadekar for Appellant.
- Mr.Vikram N. Walawalkar a/w. Mr.Sambhaji Kharatmal i/b. Mr.Gajanan Shinde for Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 2nd AUGUST, 2018.

P.C. :

1] Heard learned counsel for the Appellant and learned counsel for the Respondent.

2] This Second Appeal takes an exception to the judgment and decree dated 23/01/2001 passed by the Additional District Judge, Gadhinglaj, in Regular Civil Appeal No. 39 of 1998, which was preferred against the judgment and decree dated 20/01/1998 passed by the Civil Judge, Junior Division, Ajara, in Regular Civil Suit No. 69 of 1988.

3] The said suit was filed by the present Appellant, simpliciter for injunction, restraining the Respondent from causing obstruction to his peaceful possession in the suit property, which is an open space called as “backyard” behind his house property, bearing Grampanchayat No.20/1. According to the Appellant, when he started constructing the fencing around his property, the Respondent has obstructed thereto and hence, he was constrained to file this suit.

4] Respondent has resisted this suit by filing written statement at Exhibit-20 and denied that the Appellant is in possession of the said open space and house and he caused obstruction to Appellant's possession thereon.

5] On the respective pleadings of the parties, the trial Court framed necessary issues. In support of his case, the Appellant has examined himself and one witness, namely, Mr.Govind Dhondiba Kamble; whereas the Respondent examined himself alone.

6] In the light of the evidence adduced before the trial Court, the trial Court found that the house property bearing Grampanchayat No.20/1 is owned and possessed by the Appellant; whereas the house property bearing Grampanchayat No.20 is owned and possessed by

the Respondent. Till the year 1983, in the Grampanchayat extract, there was no mention of the open space surrounding these two house properties. Only in the year 1983, for the first time, in the Grampanchayat extract there is mention of the open space in respect of both the properties. The trial Court also considered the admission given by the Respondent in his cross-examination that the house and open space of the Appellant is situate on the eastern side of his house. In view thereof, the trial Court decreed the suit and restrained the Respondent from causing obstruction to possession of the Appellant in the suit property.

7] When the Respondent approached the First Appellate Court, the First Appellate Court, however, framed the issue as to “whether the possession of the Appellant is referable to valid title” and then on re-appreciation of the evidence on record; especially that of the evidence of the witness examined by the Appellant herein, was pleased to reverse the judgment and decree of the trial Court and allowed the Appeal, thereby dismissing the suit.

8] This Appeal was admitted on following substantial questions of law, as stated in ground Nos.1, 2, 3 and 4 of the 'Appeal Memo' :-

- “1. In view of the admission given by Defendant in his evidence that the open space and house property of Defendant is situated at the western side of the suit property and further that the house cum open space property of Plaintiff is situated at the eastern side of his (Defendant's) house, whether the lower Appellate Court was justified in holding that the Plaintiff has failed to prove his possession over the suit property?”*
- 2. In view of the fact that the Grampanchayat record was consistent with the evidence of the Defendant himself, by which it was established that the house cum open space property of Defendant was different than that of the Plaintiff, whether the lower Appellate Court was right in setting aside the decree of perpetual injunction, by holding that the Plaintiff was not the owner of the suit property?”*
- 3. That since the Grampanchayat record in respect of property owned by Plaintiff and by the Defendant showed only house property till the year 1983 and thereafter since 1984 the said record showed house cum open space property to both houses separately, whether it could be held that the Plaintiff was the owner and person in possession of the open space (suit property) attached to his own house property?”*

4. *That admittedly the Plaintiff is the owner of house property situated at G.P. No.20/1 and therefore whether it could be said that the Plaintiff was not the owner of open space (backyard) attached to said house property, more particularly when the Defendant who also owns the adjacent house property claims to be in possession of similar open space at the backside of his house, which is distinct and separate from suit property?”*

9] In this Second Appeal, the submission of learned counsel for the Appellant is that the First Appellate Court has totally ignored the admission given by the Respondent and unnecessarily entered into the question of title; especially when the suit was simpliciter for injunction.

10] Per contra, learned counsel for the Respondent has submitted that the Appellate Court has rightly appreciated the evidence of the witness examined by the Appellant and held that the said witness is not at all reliable. The Appellate Court has also considered that the entries in Grampanchayat Assessment Record cannot be treated as proof of title and hence, rightly held that the Appellant, herein, has failed to prove his possession over the open

space referable to valid title.

11] In my considered opinion, as can be seen from the judgment of the trial Court, the trial Court has considered the relevant Grampanchayat extracts of both the properties of the Appellant and the Respondent and found that till the year 1983, only the house properties were shown in Grampanchayat and only in the year 1983 for the first time there is entry of open spaces in respect of property of the Appellant and the Respondent. The case of the Appellant that towards the western side of his open space there is open space of the Respondent is admitted by the Respondent himself in his cross-examination, by stating that on the western side, he is having his house and on eastern side there is house and open space i.e. courtyard of the present Appellant. His admission is thus unequivocal that the house and open space of the Appellant is towards the eastern side of his house.

12] In view of this clear admission given by the Respondent, the trial Court has rightly held that the Appellant has succeeded in proving his possession over the said open space and therefore, as the Respondent is causing obstruction thereto, it is necessary to restrain him from doing so.

13] The Appellate Court has, however, totally brushed aside this admission and unnecessarily entered into question of the title of the suit property, which was not at all disputed also. The judgment of the First Appellate Court therefore cannot be sustainable.

14] Even assuming that some admissions were given by the witness examined on behalf of the Appellant and the evidence of that witness is excluded all together from consideration, the admission given by the Respondent himself cannot be ignored at all and that admission clearly go to prove that the Appellant is in possession of the open space surrounding his house, which open space is situate towards western side of the Respondent's house and open space. Hence, the decree of the suit passed by the trial Court should not have been disturbed by the First Appellate Court. In the Second Appeal therefore, the interference is warranted.

15] Accordingly, the Second Appeal is allowed. The impugned judgment and decree passed by the First Appellate Court is set-aside. As a result, the judgment and decree passed by the trial Court is restored.