

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION***
SECOND APPEAL NO. 136 OF 2018**ALONGWITH**
CIVIL APPLICATION NO. 1777 OF 2017
IN
SECOND APPEAL NO. 136 OF 2018**Dilip Damodar Gokhale****..... Appellant**
(Org.Defendant)**VERSUS****Pradip Damodar Gokhale****..... Respondent**

Ms. Neeta Karnik, i/b. Mr.Mihir Joshi for the Appellant.

Ms.Deepti N. Wadkar, a/w. Mr.Amardeep Singh for the Respondent.

CORAM : R.D. DHANUKA, J.**DATE : 9th AUGUST, 2019****P.C.**

By this second appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant (original defendant) has impugned the decree passed by the learned trial judge and also the part of the decree passed by the Appellate Court.

2. There was a partition deed between the petitioner and the respondent in respect of the plot of land. The respondent (original plaintiff) was given 3/4th share in the said property whereas the appellant was given 1/4th. Both the parties had agreed to develop their respective portion of land. Both the parties had carried out the construction on their respective plot.

3. It was the case of the plaintiff that the defendant while carrying out construction, constructed a house without leaving open space of 3 feet and carried out various construction without obtaining prior permission of the authority. The plaintiff accordingly filed a suit *inter alia* praying for perpetual and mandatory injunction against the defendant. The said suit was resisted by the defendant by filing written statement and also counter claim. The learned trial judge framed eight issues. Both the parties led oral and documentary evidence before the learned trial judge.

4. The learned trial judge after considering the oral and documentary evidence held that the plaintiff was entitled to remove 3 feet out of house situated in City Survey No.2836 and balcony. The respondent no.1 was also entitled to remove the water tank situated in its open plot. The plaintiff had proved that there was right of pathway which was proceeded with in front of the defendant's house. The defendant could not prove before the learned trial judge that he had any right to suit property to approach the tar road. Being aggrieved by the decree passed by the trial court, the defendant preferred an appeal bearing no.84 of 2009 before the learned District Judge.

5. The learned District Judge partly allowed the said appeal filed by the defendant. Insofar as the directions issued by the learned trial judge for removal of the instant portion of the defendant's wall and to leave 3 feet open space is concerned, the appellate court has set aside that part of the decree passed by the learned trial judge.

6. Ms.Karnik, learned counsel appearing for the appellant invited

my attention to some of the prayers in the plaint filed by the respondent, the findings rendered by the learned trial judge, some portion of the cross examination of the plaintiff's witness and the findings rendered by the learned District judge.

7. It is submitted by the learned counsel that in view of the Order 7 Rule 3(A) of the Code of Civil Procedure, 1908, since there were allegations of encroachment made by the plaintiff against the defendant, such issue of encroachment could not have been decided by the learned trial judge without the plaintiff producing copy of the map. She contended that in the plaint filed by the plaintiff, there were allegations of encroachment made by the defendant on the property of the plaintiff.

8. The next submission of the learned counsel is that the learned trial judge did not appreciate the evidence led by her client and also the cross examination of the plaintiff's witness in the impugned judgment and decree.

9. Learned counsel for the respondent (original plaintiff) on the other hand submits that there were no allegations of encroachment made by the plaintiff. This issue is dealt with in great detail by the appellate court in paragraph (13) of the impugned judgment and decree. She submits that since there were no allegations of encroachment made by the plaintiff against the defendant, the question of producing any map as contemplated under Order 7 Rule 3A of the Code of Civil Procedure did not arise. She submits that both the parties as a matter of record had produced the joint map of their properties which was duly considered by both the courts below.

10. Learned counsel for the plaintiff submits that the defendant has already complied with the directions issued by the appellate court in paragraphs 2(c) and (d). It is submitted that both the courts on the other issues have rendered findings of fact which are concurrent and the findings being not perverse and no substantial question of law having arisen in this second appeal, this court cannot interfere with those findings of fact in this second appeal filed under section 100 of the Code of Civil Procedure.

11. A perusal of the plaint filed by the plaintiff clearly indicates that there were no allegations of encroachment as sought to be canvassed by the learned counsel for the defendant. The defendant had admitted the partition deed between the parties. The description of the suit property as well as the property of the defendant was admitted. The parties had produced joint map of their properties which was part of the record thereby identifying the properties partitioned in favour of both the parties.

12. After considering the oral and documentary evidence led by the parties, the learned trial judge rendered various findings of fact in favour of the plaintiff and directed the defendant to remove the compound wall within a period of one month from the date of decree and also to remove the portion of his house in City Survey No.2836 to the extent of 3 feet from the boundary of the house of the plaintiff. The learned trial judge also directed the defendant to remove the balcony constructed towards the northern side of his house and also foundation of the sintex water tank installed in the open space in the southern side of the house.

13. The appellate court also formulated 15 points for determination and inadvertently considered the documentary as well as oral evidence led by the parties. The appellate court has rendered a finding that there were no allegations made by the plaintiff that the defendant had encroached upon the suit property. The partition deed was already admitted by the parties. Both the parties had already annexed joint map of their properties to the partition deed itself. The question of submitting any further map under Order 7 Rule 3A of the Code of Civil Procedure therefore did not arise. In my view, there is no substance in the submission of Mrs.Karnik, learned counsel for the appellant that the decrees passed by the two courts below are in gross violation of Order 7 Rule 3A of the Code of Civil Procedure.

14. On other issues framed by the courts below, there are concurrent findings of fact rendered by the two courts below. The findings of fact of two courts below are rendered after considering the oral and documentary evidence led by both the parties. The findings being not perverse, cannot be interfered with by this court in this second appeal filed under section 100 of the Code of Civil Procedure. In my view, there is no substantial question of law arises in this second appeal. Second appeal is devoid of merit and is accordingly dismissed.

15. In view of the dismissal of the second appeal, Civil Application No.1777 of 2017 does not survive and is accordingly disposed of. No order as to costs.

[R.D.DHANUKA, J.]