

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 430 OF 2017

Shri. Baban Amruta Wagh

.....Appellant

V/s.

Smt. Nanda Ashok Shinde

....Respondent

* * * *

Mr. Sanjay P. Shinde, Advocate for the appellant.

Mr. Girish R. Agarwal, Advocate for the respondent.

CORAM : SANDEEP K. SHINDE, J.

Tuesday, 15th January, 2019.

P.C. :

1. Heard learned Counsel for the parties.
2. This Appeal is preferred by the plaintiff in Regular Civil Suit No. 87 of 2004, whose suit for mandatory injunction was decreed by the learned trial Court. It was challenged by the defendant in Regular Civil Appeal No. 04

of 2009. The learned Appellate Court reversed the judgment of the trial Court by judgment and decree dated 27th July, 2016. It is against this judgment and decree, present Second Appeal is preferred.

. The suit was for mandatory injunction wherein it is alleged that the defendants while constructing the house in Gat No. 217B encroached over the land of the plaintiff bearing Gat No. 216. It is alleged that, while constructing the house, projection of the balcony of the defendant's house was falling within the limits of the land of the plaintiff bearing Gat No. 216. The alleged encroachment is to the extent of 4 feet wide and 25 to 30 feet long. The defendant before commencing construction of his house had obtained permission from the Gram Panchayat. However, when the plaintiff had noticed the encroachment on his land as stated hereinabove, he had filed the subject suit for mandatory injunction. In support of his assertion, he had examined himself, a Gram Sevak and one witness by name, Chagan Amrut Wagh, who is the relative of the plaintiff.

3. It is submitted by the learned Counsel for the appellant that, the Appellate Court while reversing the decree of the trial Court ignored the documentary evidence (Exhibit-37-the Gram Panchayat Property extract) which establishes the fact that the land Gat No. 216 is exclusively owned by him. It is contended that the learned Appellate Court has given undue importance to the oral evidence of the witness by ignoring the vital documentary evidence and this itself constitutes a substantial question of law as it goes to the root of the matter. The learned Counsel further submitted, the learned Appellate Court has erred in holding that towards the northern side of Gat No. 217B, there was an open space and there was no evidence to establish that, this open space was owned by the plaintiffs.

4. The learned Counsel for the appellant has taken me through the evidence of his witnesses. I have perused the same. Besides, the plaintiff, Chagan Amrut Wagh, deposed as a witness for the plaintiff. He was cross-

examined wherein he has admitted that the open space on which the projection of the house of the defendant lies is the open space and there is no evidence either in the office of the Gram Panchayat or elsewhere to show that the said open space is owned by the plaintiff. The Appellate Court, while appreciating the evidence has considered the evidence of this witness who in cross-examination has admitted that, there is no evidence on record to indicate or establish that the northern side of Gat No. 217 being a open space is owned by the plaintiff.

. As against this, it is submitted that, the documentary evidence in the form of Gram Panchayat Property Extract (Exhibit-37) shows the open space over which the projection of the house of the defendant lies, is owned by the plaintiff.

5. After going through the evidence and upon perusing the judgments of the Courts below, his dispute essentially was a boundary dispute. Therefore, the plaintiff

ought to have examined the Surveyor to establish that the defendant had encroached over his plot Gat No. 216. The Appellate Court having found that, no such evidence of this quality was adduced, the evidence of the plaintiff's witness-Chagan Wagh was rightly considered and appreciated by the Courts below to hold that the plaintiff has failed to prove the alleged encroachment.

6. It may also be stated that, Exhibit-37 i.e. the Gram Panchayat Property Extract is certainly not a document of title. There is no other evidence placed on record by the plaintiff's to establish the alleged encroachment on their plot by the defendants.

7. Thus, in my view, the Appeal does not give rise to any substantial question of law.

8. It is hereby clarified, any observations by the Courts below relating to title of the plaintiff's land shall not

constitute as a finding and it is open for the plaintiff to adopt appropriate remedy to protect his right and title in his plot. With this observation, the Appeal is dismissed with no order as to costs.

(SANDEEP K. SHINDE, J)