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

**SECOND APPEAL NO.126 OF 2017
WITH
CIVIL APPLICATION NO.137 OF 2017**

Tanaji Nanaso Desai and Ors.

... Appellants

Vs.

Sambhaji Nanaso Desai (deceased)
through LRs. and Ors.

... Respondents

Mr. Anand Patil for the Appellants/Applicant.

Mr. Umesh R. Mankapure for the Respondent No.4.

Mr. Amitkumar D. Sale for Respondent Nos.1/2 to 1/5.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 11th FEBRUARY 2020.

P.C.:

1 Heard. The appellant herein impugns the judgment and order dated 25th August 2016 passed by the District Judge, Sangli thereby allowing the application of the obstructionist in the execution petition filed by the decree holder i.e. the appellant and the appellate Court had declared that the area of the property out of City Survey Nos.46 and 47 situated at Eastern side admeasuring East-West 14 ft. and South-North 67.5 ft. belong to the appellant as owner of it.

2 The facts of the case are that the plaintiff herein had filed a suit for partition and possession on the basis of the sale deed dated 24th December 1945 which was executed between the plaintiff and one Ramrao Bhagat. That the ancestors of the appellants had purchased the said property from Mr. Bhagat. Clause No.3 of the said sale deed had indicated that open space which was adjacent to the suit property in North-South direction was in possession of one Bhikchand Chhaganchand Shah and Sitaram Sangle. It was shown that Bhikchand was on the eastern portion of the open space and it was in possession of Bikchand Shah and Sitaram Sangle. Needless to state that the said open plot which was in the North-South side direction was not included in the sale deed dated 24th December 1945. The specific measurement of the property purchased was described in the sale deed. According to the appellant, obstructionist in the execution petition i.e. the Respondent No.4 was only adjacent owner of the said property and the open space which was between the property of Respondent No.4 and the appellant was included in the sale deed and that was also sold to his ancestors by Mr. Bhagat.

3 According to the appellant, the issues which fall for determination under section 100 of Civil Procedure Code are as follows :

- “(i) Whether the Appellate Court ought to have applied the provisions of section 17 of the Evidence Act in order to hold that as relevant fact for determination of disputed issues. The Ld. Appellate Court therefore erred in accepting contention that the said license was binding upon the decree holders.
- (ii) Whether the Appellate Court is said to be right in relying the said leave and license agreement which itself is unregistered document and therefore, cannot be read in evidence and therefore, same cannot be relied upon.”

4 After passing of the decree, at the time of execution, the Respondent No.4 had filed an obstruction petition and had demonstrated that he was in possession of the suit property i.e. the open space which was mentioned therein. It was the contention of the obstructionist that since he was not a party to the said civil suit he could not raise objection and that he had learnt about pendency of the execution petition and had therefore intervened. In view of this, in the execution proceedings, the Respondent No.4 was directed to lead evidence vide order dated 3rd January 2015 by the Joint Civil Judge, Junior Division, Vita. The respondent had led evidence and had demonstrated the measurement of the suit property on the basis of the sale deed.

5 According to the obstructionist i.e. Respondent No.4, on 1st

March 2013, his father had issued notice and had sought possession of the property which had devolved upon defendant. On the basis of these admissions, the learned counsel for the appellant submits that the obstructionist had no title to the said property and therefore, he had no locus to file obstruction application. **According to the obstructionist as well as original defendant, Sambhaji Desai was put into possession only by Respondent No.4.** The trial Court had then recorded a finding that on the basis of the measurements in the sale deed dated 24th December 1945, it was observed that City Survey No.45, 46 and 47 did not form part of the sale deed dated 24th December 1945. On the basis of the said finding, the decree was passed which was challenged by way of an appeal. The said appeal filed by the Respondent No.4 was allowed and the obstructionist was declared as the owner of the disputed portion.

6 Writ Petition No.13210 of 2016 was filed and withdrawn as it was not maintainable and thereafter, the present second appeal has been filed. It is the contention of the appellant that in fact, the open space was included in the sale deed which was executed in favour of his ancestors and therefore, was liable to be included in his suit claim for partition and possession.

7 It is pertinent to note that it was the finding of the appellate Court that as per section 57 of the Indian Evidence Act, the facts which are admitted need not be proved. According to the learned counsel for the appellant, there is a mixed question of fact and law. It is submitted that the very fact that the evidence on record is not appreciated in its proper perspective would be a substantial question of law under section 100 of Civil Procedure Code.

8 The Court cannot be oblivious of the fact that although the suit was filed on the basis of the sale deed, the plaintiff had not described the property in its proper perspective. The description of the property was given as City Survey Nos.45, 46 and 47. It was also contended that in the open space on the western side the predecessor of Defendant No.1 had constructed two rooms and that the plaintiff had given him permission for the same. That the Defendant No.1 started construction in the southern portion and that was the cause of action for filing the suit. It was also contended that the defendant has taken the entire property in his favour. In the written statement itself the defendant had contended that his predecessor in title had not purchased the open plot and therefore, he was never put into possession of the same and that the construction in City

Survey No.45, 46 and 47 were beyond the property which were transferred in favour of the predecessor in title. In fact, the suit property ought to have been inspected through the Taluka Inspector of Land Records as per the description in the sale deed and then the properties could have been demarcated and handed over by metes and bounds between the plaintiff and the defendant. However, the Court had undertaken that exercise and there was no challenge to the same. That the appellate Court had recorded a finding in view of section 58 of the Evidence Act and the admissions of the plaintiff were taken into consideration. In view of the above, the second appeal is dismissed. In view of disposal of the second appeal, the civil application stands disposed of accordingly.

(SMT. SADHANA S. JADHAV, J.)