

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

**SECOND APPEAL NO. 881 OF 2019
WITH
CIVIL APPLICATION NO. 100 OF 2020
IN
SECOND APPEAL NO. 881 OF 2019**

Ramesh Maruti Kadam ... Appellant
Versus
Hari Mahadev Kurne & Ors. ... Respondents

Mr. Siddharth C. Wakankar for the Appellant.
Mr. Nikhil Pawar, for the Respondent No.1.

CORAM : NITIN W. SAMBRE, J.

DATED : 11th NOVEMBER, 2022

P.C.:

1. This appeal is by the original defendant no. 5. The respondents/plaintiffs based on a title sought relief of declaration and perpetual injunction in respect of the CTS No. 46 situated at Tahasil-Shirala, District-Sangali. The said suit which was based on title came to be dismissed vide judgment and decree dated 01/03/2011 delivered by the Civil Judge, Junior Division, Shirala. The respondents/plaintiffs feeling aggrieved preferred Regular Civil Appeal No. 36 of 2011 which came to be allowed in toto vide impugned judgment and decreed dated 09/02/2016 delivered by the District Judge-2, Islampur. As such, this Second Appeal.

2. Few facts necessary for deciding the present second appeal are as under:

3. The suit property which is reflected in plaint, paragraph no. 1 claims to be the ancestral property and occupied by the plaintiff, whereas the defendants claim to be the owners of CTS No. 44 which is located on the eastern side of the suit property i.e. CTS No. 46.

4. It appears that the appellant/defendant no. 5 initiated RCS No. 314 of 1992 which was compromised on 16/03/1997 and the present respondents/plaintiffs were allotted $\frac{1}{4}$ th share from the northern side of CTS No. 47 and balance portion from the southern side was allotted to the appellant/defendant no. 5. Alleging that the T.I.L.R. in execution of the said decree carried out incorrect measurement, the suit in question came to be initiated.

5. The question of law which learned counsel for the appellant intends to canvass is, (a) whether it is open for the respondents/plaintiffs to open the compromise decree delivered in earlier suit being RCS No. 314 of 1992 which was compromised on 16/03/1997? and (b) in view of proviso to section 34 of the Specific Relief Act, whether the suit can be said to be maintainable particularly when the challenge to the sale deed of the appellant was not brought before the Court.

6. Learned counsel for the appellant has invited my attention, so as to substantiate the aforesaid question of law to the finding recorded by Trial Court so also the Appellate Court. According to him, the compromise decree on 16/03/1997 in RCS No. 314 of 1992 is not in the dispute. His claim is, once the compromise decree was passed and execution thereto is pending, the second suit ought not to have held to be maintainable at the behest of the respondents. He would further urge that the findings recorded by the Appellate Court where the incorrect measurement carried out by T.I.L.R. is also can't be looked into and interfered in the second suit at the behest of the respondents/plaintiffs.

7. He would further urge that the title of the appellant to the suit property by virtue of sale deed since is not disputed, the provision to section 34 of the Specific Relief Act will be applicable as the measurement mentioned in the sale deed of the appellant cannot be varied based on the interpretation of the documents.

8. Learned counsel for the respondents would oppose the prayer as according to him the Appellate Court has not interfered with the compromise decree. In its true letter and spirit considered and interpreted the same. According to him, the Appellate Court was sensitive to the terms of compromise decree and within four corners

has delivered the decree in the suit as the appellant has encroached on the part of the property which has come to the shares of respondents/plaintiffs. He would further urge that the present appellant by suppressing the existence of the compromise decree has given wrong measurement details to the T.I.L.R. based on which the incorrect measurement and allocation was made on the record of the T.I.L.R. which is duly and rightly so appreciated by the Appellate Court.

9. I have appreciated the said submissions.

10. This Court intends to first consider the question of law in relation to proviso to section 34 of the Specific Relief Act.

11. The issue pertains to holding of area by each of the parties to the suit i.e. appellant/defendant no. 5 and respondents/plaintiffs. Both the parties are claiming their right over the respective shares, which are from the CTS Nos. 46 and 47.

12. The Appellate Court was sensitive to the fact of compromise decree in RCS No. 314 of 1992 and has specifically referred to 1/4th share out of CTS No. 47 towards northern side be given to the respondents/plaintiffs and remaining portion to the present appellant/defendant no. 5. The said compromise decree does not specify the exact location of the area/share. However, the Trial Court

considers the said clause in the decree which is duly explained by the Appellate Court in its judgment. The Appellate Court has referred to the proceedings in Regular Darkhast No. 42 of 1999 which I am informed is still pending consideration as execution of the compromise decree delivered in RCS No. 314 of 1992 is sought therein.

13. Section 34 of the Specific Relief Act vest discretion in the Court as to the declaration to be claim by a person. While claiming declaration he is entitle to claim such legal character or status or right as to suit property, which suit can be brought in action against such party/parties who intend to deny or is denying right to such character. The Court in above eventuality is armed with discretion to order declaration. Plaintiff need not to ask for further reliefs in the such suit. However, if the plaintiff is able to seeks further relief that of mere declaration of title and omits to do so, the Court is not obliged to grant such declaration.

14. Apart from above, the fact remains that the area of CTS Nos. 46 and 47 has been duly taken into account and that being so it cannot be said that the alignment of area mentioned in the sale deed of the appellant is sought to be questioned by the respondents through the decree in question or has in any way tried to tamper

with the terms of the compromise decree.

15. From the detailed findings of the facts recorded by the Appellate Court, it can be noticed that the Appellate Court was sensitive to the steps taken in the execution of the compromise decree in Regular Darkhast no. 42 of 1999, the mistakes committed by the City Survey Officer in the matter of measurement of the area and the correct area as can be drawn from the available records.

16. As such, the Appellate Court, in my opinion was justified in considering the description of the property particularly about its total area in regard to CTS Nos. 46 & 47 and the entitlement of each of the the party i.e. plaintiffs and defendant no. 5 i.e. appellant based on the said documentary evidence.

17. Hence, no fault could be noticed with the judgment delivered by the Appellate Court so as to infer about involvement of any substantial question of law. Since the appeal lack any substantial question of law, same stands disposed of. Pending applications also stands disposed of.

(NITIN W. SAMBRE, J.)