

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

**SECOND APPEAL NO.509 OF 2022
WITH
INTERIM APPLICATION NO.10402 OF 2022
AND
SECOND APPEAL NO.508 OF 2022**

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Shri. Mahadev Nathoba Choudhari ..Appellant

Versus

Shri. Baliram Hari Mhatre ..Respondent

Mr. Balasaheb Deshmukh, for the Appellant in both Appeals.

Ms. Anjali Helekar i/by Rajendra Parwani, for the Respondent.

CORAM : NITIN W. SAMBRE, J.

DATE : 24th NOVEMBER, 2022

PC.

1. When the matter is called out, counsel for the appellant submits that efforts to settle the matter moved by the respective counsels for the parties are not fruitful and as such, this Court may pass appropriate order in the matter. This Court has already dictated the facts and the rival submissions on 18th November, 2022. As such, this Court proceeds to record the reasons and the outcome of the appeal.

2. Mr. Balasaheb Deshmukh, counsel appearing for the appellant has claimed that DW-1, the witness of the defendant, a lawyer by profession has failed to produce Power of Attorney though

he has claimed so in the examination-in-chief. As such, according to him, DW-1 was not a competent witness. It is also claimed by him that DW-1, a lawyer has appeared for the defendant and as such ought not to have been examined himself in the matter.

3. The aforesaid contentions which are covered in grounds (a) to (d), in my opinion, are liable to be rejected for the following reasons. That the DW-1 became a lawyer in 2013 and has placed his appearance for defendant in a suit which was initiated in 2014 along with his senior lawyer. Apart from this fact the said witness has not signed any pleadings or actively participated in the conduct of the case, at least same is not established by the appellant by placing on record supporting material to that effect.

4. The relationship of DW-1 with that of defendant as son and father is not disputed by the appellant. It is also not in dispute that the DW-1 is a lawyer by profession. The fact remains that DW-1 has not produced Power of Attorney on record though he has stated so in the examination-in-chief. However, DW-1 has continued to examine himself as a witness of defendant being his biological son. There is no embargo on the right of a lawyer in his independent capacity as son of defendant No.1 to examine himself as witness. At least such case is not contested by the appellant during the course of hearing of the suit or at the time of recording of evidence. Even the appellant has failed to establish the mode and manner in which the witness of the defendant has spoiled or damaged the case in the

capacity of lawyer or conflict of interest between defendant and his son. As such, the aforesaid grounds, in my opinion, do not warrant any consideration in the form of substantial questions of law and as such are liable to be rejected.

5. The fact remains that the appellant has accepted the dismissal of his suit, however, by way of aforesaid grounds has only assailed the judgment impugned to the extent of directing removal of encroachment by the appellant/original plaintiff.

6. The fact remains that the appellant/plaintiff has claimed his right over the property by virtue of adverse possession. It was appellant's duty to establish the same which he has failed to and his ownership by virtue of perfecting his title by way of adverse possession is not proved by him. Once the appellant has failed to prove his ownership over the suit property by way of adverse possession, he has not taken any alternate plea of being in possession by virtue of any lawful mode. In that view of the matter, both the Courts below have proceeded to appreciate the case and recorded findings that the appellant has encroached on the land of the respondent and accordingly passed the decree of removal of encroachment which appears to be in tune with pleadings and findings recorded.

7. Apart from above, after the issues were re-casted, it was for the appellant to claim before the Court below for permission to

lead additional evidence, if any, which he has failed and rather tried to blame the Court below for not inviting to lead evidence.

8. In the aforesaid background, I hardly see any reason to infer that the appeal involves any substantial question of law which warrants consideration.

9. The present appeal which is against concurrent findings is devoid of merit and same stands dismissed.

10. In view of dismissal of appeal, interim application also stands disposed.

[NITIN W. SAMBRE, J.]