

SGPunde

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 20 OF 2015

Karbhari Bhimaji Mhaske & Anr. ... Appellants
Versus
Genu Raghu Mhaske ... Respondent

...
Mrs. C. E. Gaikwad – Advocate for appellants
Mr. N. C. Garud – Advocate for respondent
....

CORAM : GAURI GODSE, J.
DATE : 22ND FEBRUARY, 2023

PER COURT :

1. This Second Appeal is preferred by the original defendants for challenging the concurrent decree of injunction restraining them from obstructing the plaintiff from using his half share of the suit well.
2. Regular Civil Suit No. 4 of 2007 was filed by the respondent (“plaintiff”) for injunction restraining the appellants (“defendants”) from obstructing him from using the suit well on the ground that as per the oral partition, the plaintiff was given right to use the suit well to the extent of his half share. The case of the plaintiff is that, as per oral partition, Gut No. 59 was allotted to the share of appellants, however, the right to use the suit well in Gut No. 59, was agreed to be 50% of the defendants and 50% of the plaintiff.

3. The defendants appeared in the suit and filed written statement. The suit claim was denied, but it is not disputed that there was a common well in Gut No. 59 and that as per oral partition the plaintiff was given the right to use the suit well to the extent of half share. However, it is the contention of the appellants that the common suit well was filled up by the plaintiff and the existing well on Gut No. 59 was constructed by the appellants and hence the plaintiff had no right to use the well which is constructed on Gut No. 59.
4. The trial court considered the oral as well as documentary evidence on record and has recorded a positive finding of fact in favour of the respondent that the suit well is an ancestral property constructed on Gut No. 59 and that the respondent has half share to use the water from the suit well. The learned Civil Judge Senior Division, Ahmednagar, by judgment and decree dated 02nd May, 2008 decreed the suit granting permanent injunction restraining the defendants from obstructing plaintiff from using the common suit well. Being aggrieved by the decree passed by the trial court, the appellants preferred Regular Civil Appeal No. 145 of 2008. The learned District Judge-3, Ahmednagar, dismissed the Regular Civil Appeal by judgment and decree dated 20th January, 2012.

Hence, the present second appeal.

5. The learned advocate appearing for the appellants submitted that though it is not disputed that there was a common ancestral suit well on Gut No. 59, the revenue record do not show that the suit well which is in existence on Gut No. 59, is a common well and hence, the plaintiff is not entitled to claim half share in the suit well. He further submitted that the revenue entries on record are not properly appreciated by both the courts, hence, there is substantial question of law involved in the present second appeal and second appeal is required to be admitted.
6. The learned counsel appearing for the respondent submitted that there is no dispute that Gut No. 59 was allotted to the share of appellants. The appellants have nowhere disputed that at the time of oral partition, the respondent was given right to use the suit well to the extent of half share. Learned counsel for respondent further submitted that there is nothing produced on record to show that the existing well on Gut No. 59 is not the original ancestral common well. He further submitted that there is nothing produced on record to show that a new well was constructed by the appellants. He therefore, submitted that there is no merit in the submissions made on behalf of the

appellants and thus the second appeal be dismissed.

7. I have considered the submissions made on behalf of both the parties. I have perused the record of the second appeal. Both the courts have considered the evidence on record and have recorded a finding of fact that there was an existing common ancestral suit well on Gut No. 59. Both the courts have further also disbelieved the case of the appellants that the existing well on Gut No. 59 is a newly constructed well. It is not in dispute that the common ancestral suit well was in existence on Gut No. 59. It is further also not in dispute that there was oral partition and Gut No. 59 was allotted to the share of appellants and that the right to use the suit well was divided equally between the appellants and the respondent pursuant to the oral partition. In view of the said admitted facts and a concurrent finding recorded that the suit well is in existence, I do not see any reason to interfere with the decree of injunction passed by both the courts.
8. The submissions made on behalf of the appellants with respect to filling up of the old well and construction of new well by the appellants is purely on facts. The said contention is already considered by both the courts and on proper appreciation of evidence, have recorded a finding disbelieving the case of the

appellants. The submissions made which are based on facts would require re-appreciation of evidence, which is not permissible in the second appeal. I do not find any illegality or perversity in the reasonings recorded by both the courts. I do not find that the second appeal raises any substantial question of law and hence the second appeal is dismissed.

[GAURI GODSE]
JUDGE