

SPChauhan

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CIVIL APPLICATION NO. 16438 OF 2022
WITH
CIVIL APPLICATION NO. 16440 OF 2022
WITH
SECOND APPEAL STAMP NO. 31891 OF 2022

Vinayak Laxman Kamble ... Appellant

Versus

Vilas Shivaji Javle ... Respondent

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Mr. S.S. Kulkarni – Advocate for Appellant

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CORAM : GAURI GODSE, J.
DATE : 01st February, 2023

PER COURT :

1. This Civil Application No. 16438 of 2022 is filed for condonation of delay of 58 days in filing the Second Appeal. Notice of the application is served upon the respondent. None appears for the respondent. There is no opposition to condone the delay. For the reasons stated in the application, delay is condoned and Civil Application No. 16438 of 2022 is allowed.
2. Second Appeal is taken up for admission. Second Appeal is filed for challenging concurrent decree of injunction passed against the appellant, thereby, restraining the appellant from

obstructing the respondent's possession over the suit land. By the judgment and decree dated 06th April, 2013, passed by Civil Judge Junior Division, Wadwani, Regular Civil Suit No. 178 of 2008 filed by the respondent is decreed. By the judgment and decree dated 05th March, 2022, passed by the learned District Judge-2, Majalgaon, Regular Civil Appeal No. 37 of 2013 preferred by the appellant is dismissed and the decree passed by the trial court is confirmed.

3. Learned counsel appearing for the appellant states that the property owned by the appellant was purchased prior in time. The vendor of the appellant as well as respondent was same and has sold part of the land to the appellant and part of the land to the respondent.
4. The learned counsel for the appellant submits that the sale deed in favour of the appellant is prior in time and the respondent on the basis of the subsequent sale deed in his favour is trying to claim right over the property which is owned by the appellant. He further submits that respondent failed to prove that there was any notice served upon the appellant before carrying out the survey which is relied upon by the respondent for filing the suit. He further states that a specific query was made to the Cadestral Surveyor in the cross-examination with respect to identification

and fixation of boundary marks to which the response of Cadestral Surveyor was in the negative. He, therefore, submits that cross-examination of the Cadestral Surveyor would reveal that the measurement carried out by the Cadestral Surveyor was not in accordance with law and all the lands that were required to be measured were not measured by the Cadestral Surveyor.

5. Hence, he submits that the report as well as the evidence in support of the Cadestral Surveyor's report could not have been relied upon by both the Courts. He, therefore, submits that there is no proper appreciation of evidence for arriving at the conclusion that the appellant was trying to obstruct the possession of the respondent over the suit land. He, therefore, submits that substantial question of law arises in the Second Appeal as crucial evidence has been ignored by both the courts below, and that, the evidence on record is not properly appreciated by both the courts. He, therefore, submits that Second Appeal needs to be admitted on the question of law with respect to non-appreciation of proper evidence by both the Courts.
6. I have considered the submissions. The plaintiff has come up with a specific case in the plaint that survey was carried out by

the concerned authority i.e. TILR by issuing notices and by following the procedure for the purpose of carrying out measurement and on the basis of the survey report of the TILR the suit was filed with specific pleading that the respondent was disturbing the possession of the respondent over the suit land.

7. Perusal of the copy of the plaint as well as written statement shows that there is specific pleading by the plaintiff with respect to the survey report of the TILR, prepared after following the due procedure and this pleading is not specifically denied by the appellant. There is no specific assertion in the written statement that no notice was served upon the appellant at the time of carrying out the survey by the Cadestral Surveyor as pleaded by the respondent / plaintiff.
8. The trial court has examined the sale deeds of both the parties produced on record, which specifically provides the boundaries. The Cadestral Surveyor's report has been appreciated by the trial court by examining the supporting evidence that was on record of the Cadestral Surveyor. The reasoning given by the trial court shows that the evidence on record has been minutely considered by the court.

9. The cross-examination of the Cadestral Surveyor is specifically dealt with by the learned trial court and finding of fact is recorded on the basis of the documentary as well as oral evidence and the decree is passed by recording the finding that the respondent has proved the ownership and possession of the suit land. Hence, the appellant has been restrained from disturbing the possession of the respondent on the suit land.
10. Perusal of the judgment also shows that the appellant has sought to deny the title of the respondent over the suit land on the basis of the title documents. The trial court has recorded a finding on the title of the respondent by specifically framing an issue on the title of the respondent with respect to the suit land. A submission was also made by the learned counsel for the appellant that the suit could not have been decreed which was simplicitor for injunction without adding a prayer for declaration of title. With respect to this submission the learned counsel relied upon the judgment of Hon'ble Supreme Court in the case of *Annathula Sudhakar Versus P. Buchi Reddy*¹.
11. So far as this submission is concerned, the law laid down by the Hon'ble Supreme Court in the case of *Annathula Sudhakar* has laid down the general principles as to when a mere suit for

1 (2008 (4) SCC 594)

permanent injunction will lie and when it is necessary to file a suit for declaration and / or possession with injunction as a consequential relief. As per the principles laid down by the Hon'ble Supreme Court, a prayer for declaration of title will be necessary only when some apparent defect in the title of the plaintiff to a property, is raised. There is no such straight jacket formula that once a dispute has been raised by the defendant with respect to title of the property the plaintiff has to be relegated for filing of specific suit for declaration of title. In the present case the dispute is with respect to the boundaries of the properties purchased by both the parties from same vendors. Nevertheless, there was a specific issue framed by the trial court on the title of the suit land. Both the parties on the basis of the issue of title that was framed, have led their respective evidence on title with respect to the boundaries of the properties. The parties were aware that the issue on the title with respect to the boundaries will be examined by the trial court and hence, both the parties have led their respective evidence on title of the suit land. Hence, the submission made that a specific prayer for declaration of title was necessary has no merit.

12. The first appellate court has also framed specific points for consideration on the basis of the grounds raised by the appellant and after examining the documentary as well as oral evidence on record has confirmed the findings recorded by the trial court.
13. The submissions made on behalf of the appellant are purely based on facts which will require re-examination of the evidence. I do not find that Second Appeal involves any question of law.
14. For the reasons stated above, Second Appeal is dismissed. There will be no order as to costs.
15. In view of dismissal of Second Appeal, Civil Application No. 16440 of 2022 stands dismissed as infructuous.

[GAURI GODSE]
JUDGE