

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 364 OF 2023
WITH
INTERIM APPLICATION NO. 7907 OF 2023

Dnyaneshwar Ananda Nandan ...Appellant
Versus
Dattatraya Waman Chitte & Ors. ...Respondents
Mr. Mahendra N. Sandhyanshiv, for the Appellant.

CORAM : MADHAV J. JAMDAR, J.
DATED : 13th JUNE 2023

P.C. :

1. Heard Mr. Mahendra Sandhyanshiv, learned counsel appearing for the Appellant.
2. By way of the present Second Appeal, the Appellant has challenged the Judgment and Decree dated 9th February 2018 passed by the learned Civil Judge, Junior Division at Satana, Dist. Nashik in Regular Civil Suit No.17 of 2010 as well as the Judgment and Decree dated 2nd December 2022 passed by the learned District Judge -2, Malegaon in Regular Civil Appeal No.63 of 2019.
3. The Appellant is the original Defendant No.1. The Respondents i.e. Plaintiffs filed said Regular Civil Suit No.17 of 2010 for declaration of ownership, perpetual injunction and seeking recovery of possession

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of encroached portion. The learned Trial Court recorded the finding that the property in which the Defendant has constructed the Well i.e. Gat No.81 is owned and possessed by the Plaintiff and the Defendant No.1 has encroached 15 R land and therefore, directed the Defendant No.1 to vacate and handover peaceful possession to the Plaintiff. The learned Appellate Court confirmed the said decree and dismissed the appeal filed by the present Appellant.

4. It is the contention of Mr. Sandhyanshiv, learned counsel appearing for the Appellant that following two substantial questions of law are involved in the present Second Appeal:-

- i. Whether the report of the Cadastral Surveyor can be taken into consideration when he admits that, he has not measured the suit land of the Defendant?
- ii. Whether the suit was bad for non-joinder of co-owners of Gat No.137?

5. Before considering the substantial questions of law raised by Mr. Sandhyanshiv, learned counsel appearing for the Appellant i.e. Defendant No.1, it has to be recorded that the Defendant No.1 has not entered into the witness-box and therefore, both the Courts have drawn

adverse inference against the Defendant No.1.

6. As far as the 1st substantial question of law raised by learned counsel appearing for the Appellant is concerned, it is to be seen that as the Defendant No.1 has not stepped into the witness-box, he has failed to prove his right, title and interest with respect to the said portion of 15 R of the suit. Apart from that, the said contention is considered by both the Courts. The learned Appellate Court confirmed the finding with respect to said aspect of the learned Trial Court in paragraph 10 by recording following reasons:-

“10) From the testimony of the measurer, it appears that though he did not conduct joint measurement of the suit land and the land of the defendant No. 1, he carried out the measurement of the entire survey number, instead of measuring the suit land only. Apart from the same, the measurement was carried out by him on the basis of two permanent marks, which are sufficient for proceeding with the measurement. The factual scenario, in the authorities relied upon was different, for the simple reason that, in the case at hand, the entire survey number came to be measured, that too, on the strength of two permanent marks. In the backdrop of this factual scenario, I do not find any error in the observation made by the learned trial

court that there was no grave error or discrepancy in the measurement. **Apart from the same, an adverse inference needs to be drawn against the defendant No. 1, for his abstention from stepping into the witness box, that the defence set up by him is not correct, particularly in the circumstances that no efforts were at all taken for the examination of the defendant No. 1. There is absolutely no need to direct joint measurement, by remanding back the matter, in the foregoing peculiar facts and circumstances of the case at hand.”**

(Emphasis added)

7. Therefore, it is clear that the Commissioner has carried out the measurement of entire survey number and has found the encroachment and recorded the same in his report. By giving cogent reasons, the learned Appellate Court has rejected the contention raised by the Appellant regarding joint measurement. There is no perversity in the said reasoning. As the Defendant No. 1 has not entered into the witness-box, the learned Appellate Court as well as the learned Trial Court has drawn adverse inference against Defendant No.1. Therefore, there is no substance in the first substantial question of law raised by the Appellant.

8. As far as the second substantial question of law that suit was bad for non-joinder of co-owners of Gat No.137 is concerned, it is the submission of learned counsel appearing for the Appellant that the learned First Appellate Court has not taken the said aspect into consideration at all. However, it is to be noted that there is nothing on record to indicate that the said point was agitated before the learned First Appellate Court. The said point was agitated before the learned Trial Court and the learned Trial Court has given cogent reasons to reject the said contention in paragraphs 25 to 27, which read as under:-

“25. It is the case of defendant no. 1 that plaintiffs ought to have added all co holders of his land gat no. 137. The defendant no.1 in his written statement specifically stated that Hirman Ananda, Dagubai Ananda, Leelabai Tukaram, Latabai Sitaram and Nandabai Ashok are co owners of gat no. 137. It is also reveals from 7/12 extract of gat no. 137 which is at Exh. 56 that the name of aforesaid co holders were shown in the ownership column of the gat no. 137. **Admittedly the plaintiffs have not arrayed all the co holders of gat no. 137 in the suit.** Therefore, it is proper to determine whether aforesaid co holders are necessary parties for determination of the suit.

26. For this purpose, the plaintiff no. 2 in his evidence specifically stated that the defendant no. 1 Dnyaneshewar Ananda is cultivating gat no. 137. He has further stated that Hiranman Ananda and Dagubai died whereas, Leelbai, Latabai and Nandbai have no concerned with gat no. 137. The plaintiff further stated that only Dnyaneshewar tried to dig well in the suit property. The said evidence of the plaintiff gone unchallenged during the course of cross examination. Therefore, on the basis of oral evidence of plaintiff it transpired that only defendant no. 1 encroached in the suit property and constructed well.

27. Plaintiffs witness P.W no. 3 Pandharinath has stated that defendant no. 1 Dnyaneshewar has started to dig well in 2010. At that time the plaintiff had lodged police complaint. Thereafter he and other members of the society intervened the dispute and therefore both parties arrived at compromise. Accordingly both parties wrote down compromise deed on 12/02/2010. In the compromise deed the defendant has specifically stated that he is digging well towards western side of gat no. 81. The defendant no. 1 also admitted that he executed compromise deed. Therefore it is clear that out of all the co holders of gat no. 137 only defendant no. 1 made encroachment and constructed well in the suit property. In

this factual background, I do not found that all the co holders of gat no. 137 are necessary parties of adjudication of the suit. Hence, I answer to this issue in the negative.”

(Emphasis added)

9. It is very clear that the allegation in the plaint is that Appellant i.e. Defendant No.1 has encroached the property. Both the Courts have concurrently recorded the finding that the Plaintiffs are the owners of the suit property and the Defendant No.1 has encroached to the extent of 15 R land. Therefore, there is no substance in the second substantial question of law raised by the learned counsel appearing for the Appellant.

10. For the above reasons and as there is no substance in the substantial questions of law raised by the Appellant, the Second Appeal is dismissed, however with no order as to costs.

11. In view of the dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also dismissed.

[MADHAV J. JAMDAR, J.]