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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 97 OF 2018
WITH
CIVIL APPLICATION NO. 219 OF 2018
IN
SECOND APPEAL NO. 97 OF 2018**

Parshuram Tukaram Mitta(deceased) thru ... Appellant/Applicant
Lrs Shri Ganesh Parashuram Mitta

vs.

Shri Sanjiv Vasant Mitta and Ors ... Respondents

Mr. Shrishail Sakhare, for Appellant.

CORAM : GAURI GODSE, J.

DATED : 2nd JULY 2024

ORDER:

1. Heard learned counsel for the appellant. This Second Appeal is filed by the original defendant challenging concurrent judgments and decrees directing the appellant to hand over the possession of the encroached area.

2. Learned counsel for the appellant submitted that when the suit is filed for removal of encroachment, the plaintiff is under obligation to identify the encroached area by specifying the

boundaries in the plaint as required under Rule 3 of Order VII of the Civil Procedure Code, 1908 (“CPC”). He submits that in the absence of any description of the boundaries pleaded by the plaintiff, a suit for removal of the encroached area could not have been decreed. He further submitted that both the Courts have not called for any Court Commissioner’s report by appointing a Surveyor for ascertaining the exact boundaries with regard to the alleged encroached area. In support of his submissions, the counsel for the appellant relied upon the decisions of this Court in the case of *Manohar Mahadeorao Pagrut Vs Sau Sunanda Ramdas Tharkar*¹ and in case of *Ushabai w/o. Sharadchandra Bannore Vs Wasudeo s/o Baliramji Mehare and Ors*². By relying upon the principles laid down in the said decisions regarding the requirement of examining cadastral surveyor, he submits that the Second Appeal raises a substantial question of law to be decided by this Court.

3. I have considered the submissions made by the learned counsel for the appellant. Perused the papers. In response to the suit filed for possession after the removal of encroachment, the appellant filed a written statement denying the suit claim along with the counter-claim for a declaration that the appellant has perfected

1 2008(4) ALL MR 718

2 2004(2) Mh.L.J.

title by way of adverse possession. In the counter-claim, the appellant has not only accepted the description of the suit property but has also specified the boundaries of the suit property claiming title by way of adverse possession. Both the Courts have relied upon all the admitted descriptions of the suit property. The appellant has not disputed the descriptions of the suit property as pleaded by the plaintiff. However, the appellant's claim to retain the possession of the suit property is based on the relief of perfection of title by way of adverse possession.

4. Learned counsel for the appellant sought to argue that the appellant had denied the description of the suit property in the written statement. However, both Courts have recorded a finding after reviewing the pleadings and evidence that the appellant not only accepted the description of the suit property but also raised a claim of perfection of title by way of adverse possession. The Trial Court has specifically recorded findings regarding the description of the property and the encroachment made by the appellant.

5. The First Appellate Court, after examining the pleading and evidence with regard to the plaint as well as the counter-claim, has confirmed the findings of the Trial Court and held that the appellant failed to establish his ownership by way of adverse possession. The

First Appellate Court has referred to the description of the encroached area given by the appellant in the counter-claim and held that in view of the appellant's claim of perfecting title by way of adverse possession on the suit property, i.e. the encroached area, there was no requirement for any further adjudication of the description of the property.

6. Once the appellant's claim of adverse possession is disbelieved by both the Courts, the appellant has no other source of title to retain the possession. Hence, I do not see any reason to find fault in the decree passed by the Trial Court and confirmed by the First Appellate Court.

7. Considering the appellant's claim of perfection of title by adverse possession of the suit property, it cannot be said that there is any dispute on the identification of the property where the subject matter of the suit and the counter claim is same. Thus, there was no requirement to appoint a Court Commissioner for the identification of the suit property. It is not the appellant's case that any such application was made and was rejected. The parties are required to adduce the evidence to prove their respective claim and cannot rely upon the Court machinery to prove their rival claims. In view of the facts of the present case, the legal principles laid down by this Court

in the aforesaid two decisions relied upon by the learned counsel for the appellant are of no assistance to the arguments made by the learned counsel for the appellant.

8. In view of the aforesaid facts of the case, the question of law sought to be argued is not required to be considered by this Court. The Second Appeal does not raise any substantial question of law. Hence, the Second Appeal is dismissed. In view of the dismissal of the Second Appeal, Civil Application No. 219 of 2018 is dismissed as infructuous.

(GAURI GODSE, J.)