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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 446 OF 2024
WITH
INTERIM APPLICATION NO. 10755 OF 2024
IN
SECOND APPEAL NO. 446 OF 2024**

Namdeo Bapu Rajekumbhar and Another ... Appellants

Vs.

Pradeep Hanmant Jadhav ... Respondent

Mr. Nikhil Wadikar a/w. Mr. Aniket Gole for the Appellants.

CORAM : GAURI GODSE, J.

DATE : 2nd AUGUST 2024

ORDER :

1. Heard learned counsel for the appellants. The original defendants preferred this appeal, challenging the concurrent judgments and decrees directing them to remove the tin shed structure erected over the suit properties belonging to the plaintiff.
2. Learned counsel for the appellants submitted that both the Courts failed to consider the vital admission given by the plaintiff in his cross-examination. He relied upon certain admissions in the cross-examination, which, according to the learned counsel for the appellants, indicates that the suit property purchased by the plaintiff

is only house property without any open space. He submits that the plaintiff has also admitted that the original house property purchased by him was demolished in the year 1965, and the present structure is a reconstructed structure.

3. Learned counsel for the appellants submits that since the plaintiff has admitted in cross-examination that he does not remember the directions of the boundaries at the time of reconstruction of the property, the same would support the case of the defendants that the plaintiff's property is only a constructed structure and there is no open space belonging to the plaintiff.

4. Learned counsel for the appellants submits that admittedly, no measurements were carried out with regard to the plaintiff's property; hence, only based on sale deeds both courts erred in accepting the plaintiff's contention that the tin shed belonging to the defendants would amount to encroachment on the ground that they formed part of the plaintiff's property. To support his submissions, learned counsel for the appellants relied upon the relevant part of the cross-examination of the plaintiff, the sale deed, as well as the pleading in the plaint.

5. Learned counsel for the appellants thus submits that in view of the admissions given by the plaintiff that his property is only

house property coupled with the fact that there was never any measurement carried out, it is clear that only the constructed part belongs to the plaintiff and the tin shed constructed by the defendants on the open space does not form part of the property owned by the plaintiff. He thus submits that ignoring the vital part of the admission given by the plaintiff in the cross-examination would amount to incorrect appreciation of evidence on record, which would require consideration by this court.

6. He thus submits that the Second Appeal raises a question of law regarding both courts' failure to properly appreciate oral and documentary evidence, and thus, in the Second Appeal, this Court is required to re-appreciate evidence on record.

7. In support of his submissions, learned counsel for the appellants relied upon the decision of the Apex Court in the case of *Ramlal and Another vs. Phagua and Others*¹ and *Yadarao Dajiba Shrawane (dead) by LRs vs. Nanilal Harakchand Shah (dead) and Others*².

8. I have considered the submissions made on behalf of the appellants. Perused the papers of the Second Appeal as well as the additional compilation placed on record containing the pleadings

¹ AIR 2006 SC 623

² AIR 2002 SC 2849

and evidence. Both Courts accept the plaintiff's ownership of the suit property based on title documents produced on record. Admittedly, the defendants have not placed on record any documentary evidence to show their right, title or any interest in the suit property, i.e. the encroached portion described by the plaintiff. A perusal of the reasons recorded by the trial court indicates that the sale deeds dated 3rd March 1944 and 14th June 1949, as well as the revenue records in the name of the plaintiff, are examined with reference to the hand-sketch map produced with the plaint to show the plaintiff's ownership.

9. The trial court recorded a clear finding by appreciating the documentary and oral evidence. The trial court has also referred to the judgment and decree passed in Regular Civil Suit No. 220 of 2009, which directed the defendants to hand over possession of the property bearing no. 315A to Shankar Baburao Raje-Kumbhar. The trial court records a clear finding of fact that the map produced on record by the plaintiff shows that property no.315A is situated towards the northern side of his property, and the defendants were ordered to remove the illegal construction of the tin shed. It is not in dispute that the decree passed in the said suit was not challenged. Thus, after examining the documentary and oral evidence on record and considering the absence of any documentary evidence

produced on record by the defendant to support his right in the suit property, the trial court has accepted the case of the plaintiff. A perusal of the reasons recorded by the trial court indicates that clear findings of fact are recorded by considering the entire evidence on record.

10. The First Appellate Court has re-examined the oral and documentary evidence on record and confirmed the trial court's findings. The reasons recorded by the First Appellate Court clearly indicate that the court has examined all the factual aspects with reference to the oral and documentary evidence on record.

11. The grounds argued on behalf of the appellants regarding the plaintiff's admission in his cross-examination cannot be read de hors the documentary evidence coupled with the rest of the oral evidence of the plaintiff. Only part of stray admissions given by the plaintiff would not be sufficient to completely ignore the remaining oral evidence, which supports the documentary evidence on record to indicate the ownership of the plaintiff over the suit property, including the encroached part.

12. Admittedly, no documentary evidence is shown by the defendants to claim rights with respect to the suit property. The documents of title in favour of the plaintiff are not in dispute. The

reasons recorded by both the Courts based on the description of the property in the sale deed, the revenue records and the judgment in the earlier suit indicate that there was open space belonging to the plaintiff, including the house property. Hence, I do not find any substance in the arguments raised on behalf of the appellants.

13. It is also pertinent to record that the defendants have not produced any documentary evidence to show their rights in the tin sheds constructed. Thus, I also do not find any substance in the argument of the appellants that in view of the admission given by the plaintiff, the sale deeds, which are the document of title in favour of the plaintiff, would lose importance with regard to the description of the property which records that the plaintiff purchased the house property along with the open space.

14. There cannot be any debate on the question of law as settled by the Hon'ble Apex Court in the decisions relied upon by the learned counsel for the appellants. However, in view of the facts of the present case and the reasons recorded by both courts based on the documentary and oral evidence on record, the legal principles relied upon by the learned counsel for the appellants are not applicable to the facts of the present case.

15. I do not find any illegality or perversity in the findings of fact

recorded by both the Courts. Hence, the grounds argued on behalf of the appellants would not require any consideration by this court. The Second Appeal does not raise any other substantial question of law. Hence, the Second Appeal is dismissed.

16. In view of the dismissal of the Second Appeal, Interim Application No. 10755 of 2024 is disposed of as infructuous.

[GAURI GODSE, J.]