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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 405 OF 2018
WITH
CIVIL APPLICATION NO. 954 OF 2018
IN
SECOND APPEAL NO. 405 OF 2018**

Shri. Jingoda Malgaonda Patil

.....Appellant

Vs.

Rajgonda Appasaheb Patil and others

.....Respondents

Ms. Anjali R. Shiledar Baxi for the appellant

Mr. Shinde Dilip a/w Mr. Mohan Kumbhar, Vikas Mali for respondents

CORAM : GAURI GODSE, J.

DATE : 16th OCTOBER 2024

ORDER:

1. Heard learned counsel for the parties. This second appeal is preferred by the defendants to challenge the concurrent judgements and decrees directing the defendants to handover possession of the encroached portion of the plaintiff's land.

2. Learned counsel for the appellant submits that initially, dismissal of the first appeal was challenged by the defendants before this Court

in a second appeal. She submits that this Court remanded the matter to the first Appellate Court for carrying out measurements of both the lands. She submits that after remand, the Court Commissioner was appointed and fresh measurement was carried out. She, however, submits that the measurement was not carried out as per the approved Rules. To support her submissions that proper Rules were not followed at the time of carrying out measurements, she relied upon cross examination of the surveyor. She submits that the admissions given by the surveyor indicate that the approved procedures as prescribed in the manual were not followed. She, thus, submits that once it will be proved that the survey was not carried out as per the approved Rules, the survey map showing encroachment cannot be accepted as a document to hold that defendants have carried out any encroachment. She submits that the findings recorded by the first Appellate Court would indicate that the admissions given by the surveyor in the cross examination are not properly appreciated.

3. Learned counsel for the appellant points out that inspite of the specific directions by this Court at the time of remand, the defendant's land was not measured. She, therefore, submits that the second appeal would require consideration on the ground that the evidence on

record is not correctly appreciated and the admissions given by the Court Commissioner are ignored by the first Appellate Court.

4. I have perused the impugned judgements. Both the Courts have concurrently held that the defendants have encroached upon the plaintiff's land. The reasons recorded by the first Appellate Court in examining the surveyor's map and report indicates that all the factors have been considered by the first Appellate Court. A clear finding of fact is recorded by the first Appellate Court that both the lands were measured by the surveyor which shows compliance of the directions issued by this Court at the time of remand. The first Appellate Court also referred to the objections raised on behalf of the defendants. The first Appellate Court has recorded findings that the defendants have not raised any objection to the surveyor's map on the ground that incorrect directions are shown in the map. The surveyor's map and the report is considered by both the Courts in the light of oral evidence recorded after the survey was carried out during the pendency of the first appeal.

5. After examining the oral evidence on record, the first Appellate Court being the last fact finding Court has recorded a clear finding of

fact that surveyor's map is duly proved by the witness examined in support of the map. The reasons recorded by the first Appellate Court indicates that the objections raised on behalf of the appellant regarding the procedure followed for carrying out survey is also considered by the first Appellate Court. The reasons recorded by the first Appellate Court indicates that the procedure was followed by the surveyor with the help of ETS machine and the particulars pointed out on the map pursuant to the survey are also been examined by the first Appellate Court.

6. Thus, all the grounds raised on behalf of the appellants are clearly considered by the first Appellate Court. I do not find any legality or perversity in the reasons recorded by the first Appellate Court. The first Appellate Court being the last fact finding Court, has thoroughly examined the evidence on record and has recorded a clear finding of fact on the encroachment by referring to the survey map and the report. Thus, the grounds raised on behalf of the appellant would amount to reappreciation of the evidence on record which is not permissible under Section 100 of Code of Civil Procedure, 1908, unless there is any perversity seen in the reasons recorded by the first Appellate Court. There is no illegality or perversity seen in the reasons

recorded in the impugned judgments.

7. The second appeal does not raise any substantial question of law. Hence, the second appeal is dismissed.

8. In view of dismissal of the second appeal, Civil Application No. 954 of 2018 is disposed of as infructuous.

[GAURI GODSE, J.]