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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 639 OF 2024**

Bhagirathi Ganpat Dhuri since ... Appellants
deceased through his Legal Heirs

Vs.

Shyamsundar Shhadev Dhole ... Respondents
since deceased through his Legal Heirs

Mr. Milind D. Parab for the Appellants.

CORAM : GAURI GODSE, J.

DATE : 21st OCTOBER 2024

ORDER :

1. Heard learned counsel for the appellants. This appeal is preferred by the heirs and legal representatives of the original plaintiff to challenge the concurrent judgments and decrees dismissing his suit for possession after removal of encroachment. Learned counsel for the appellants submits that only based on the evidence of the Cadastral Surveyor both the courts have refused to accept plaintiff's contention regarding encroachment. He submits that the plaintiff was in long standing possession of the suit property since the year 1958. He submits that though the sale deed in favour of the plaintiff is an unregistered document the same should have

been accepted by both the courts as it was a 30 year old document. He submits that the revenue record and the unregistered document of sale deed supports the plaintiffs' case that they are owners and in possession of the suit property.

2. He further submits that during the pendency of the First Appeal plaintiffs' filed application under Exhibit 53 for leading additional evidence. They applied for appointing TILR as Court Commissioner for carrying out measurement of Hissa No. 17 and Hissa No. 16 of the Survey number in dispute i.e. Survey No. 689(687). He submits that the First Appellate Court rejected the said application. He thus submits that if a fresh survey was carried out of both the Hissa numbers the plaintiff would be in a position to point out the encroachment carried out by the defendants. He submits that in view of the dispute between the parties fresh measurement of the property was necessary. He thus submits that the Second Appeal would require consideration on the issue of the requirement of fresh survey of both the hissa numbers. He submits that the aforesaid arguments raise substantial questions of law which are required to be considered in the Second Appeal.

3. I have perused the impugned judgments. Both the courts have concurrently held that the plaintiff failed to produce any document

to support her ownership over the suit property and the alleged encroachment. Both the courts have exhaustively dealt with the documentary as well as oral evidence and concurrently held that the plaintiff failed to prove her ownership and further failed to prove that the defendants had carried out any encroachment as alleged in the suit.

4. The points with regard to the objections to the Court Commissioner's map at Exhibit 19, the First Appellate Court has exhaustively dealt with all the arguments raised on behalf of the plaintiff. The Court Commissioner's report as well as the survey map at Exhibit 19 is examined by the First Appellate Court and recorded findings based on the cross examination of the Surveyor.

5. The First Appellate Court has referred to the objections raised on behalf of the plaintiff that the area in possession of the defendants was not measured by the cadastral surveyor. On perusal of the reasons recorded by both the courts, it appears that the area in possession of the defendants was not measured at the time of cadastral survey report which was relied upon by the plaintiff.

6. The First Appellate Court thus referred to the cross

examination of the Cadastral Surveyor who admitted that he had conducted measurement of the suit property and as per his measurement there was one house and one hut in the suit property. The Cadastral Surveyor further admitted that he carried out measurement of suit property being Hissa no. 17 and there was no measurement carried out of Hissa no. 16 which was occupied by defendants. Admittedly Hissa No. 17 belongs to the plaintiff and Hissa No.16 belongs to the defendants as adjacent properties. Thus, both the courts refused to accept the Cadastral Surveyor's report and map relied upon by the plaintiff to support their contention that there was encroachment carried out by the defendants.

7. The First Appellate Court rightly held that the Map at Exhibit 19 is accepted by the plaintiff. It is further held that the plaintiff failed to prove ownership over the suit property; hence, no purpose would be served by directing fresh measurement as prayed by the plaintiff.

8. The application filed under Order XLI Rule 27 of the Code of Civil Procedure for carrying out fresh measurement was rightly rejected by the First Appellate Court on the ground that no reasons were mentioned to satisfy the parameters required for exercising

powers under Order XLI Rule 27. In the trial court the plaintiff was aware that joint measurement of both lands was not carried out. The application filed in the First Appeal does not indicate any reason for not making any efforts for joint survey to support the plaintiff's contention regarding encroachment.

9. The grounds raised on behalf of the appellants are pertaining to the factual aspects which cannot be considered in the Second Appeal. I do not see any illegality or perversity in the reasons recorded by both the courts. The grounds argued on behalf of the appellant do not raise any substantial question of law.

10. The Second Appeal does not raise any other substantial question of law. Hence, the Second Appeal is dismissed.

[GAURI GODSE, J.]