

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.170 OF 1989

Gourishankar Prabhuappa Nigudge,
Age-46, Occ - Agriculture
R/o Latur

APPELLANT

VERSUS

1. Mallikarjin Shivappa Nigudge
Since Deceased LRs

RESPONDENTS

1(a) Raja Mallikarjun Nigudge
Age-35 years, Occ - Business

1(b) Manoj Mallikarjun Nigudge
Age-32 years, Occ - Business

1(c) Somnath @ Anant s/o Mallikarjun Nigudge,
Age-30 years, Occ - Business

1(d) Datta Mallikarjun Nigudge,
Age-28 years, Occ - Business

1(e) Smt. Parvatibai Shivappa Nigudge,
Age-42 years, Occ - Business

All R/o Latur, Taluka and District-Latur

2. Sidram Alias Bapu Shivappa Nigudge
Age - 38 years, Occ- Business
R/o Latur

.....
Mr. N. P. Patil (Jamalpurkar), Advocate for the appellant
Mr. A. B. Kharosekar, Advocate for respondents

.....
[CORAM : N. W. SAMBRE, J.]
DATE : 15th JANUARY, 2015

ORAL JUDGMENT :

1. Present second appeal is by original defendant.
2. The respondents filed Regular Civil Suit No. 560 of 1975 in

the court of learned 8th Joint Civil Judge, Junior Division, Latur for declaration of ownership and perpetual injunction in respect of municipal house No. 347/5 (old) and 189/1/10 (New), situated on Papnash Road, Latur. It was claimed by the plaintiff-respondents that they are brothers *inter se*, plaintiff No.1 is elder brother of plaintiff No.2 and was the Karta of the joint family and they reside jointly. The defendant is distantly related to the plaintiffs and is neighbour of them and further claimed that relation between plaintiffs and defendant is only inferred out of their common surname, but for any blood relationship.

3. It is claimed by the plaintiffs that the plaintiffs' house is east-west 80 feet towards northern side and sought-north 37 feet to eastern side and 70 feet towards western side, 21 feet east-west towards west south corner. As such, plaintiffs own property having irregular shape. The house position of the plaintiffs is claimed to be since the time of their forefathers and they continued in settled possession of the same. It is further alleged by the plaintiffs that there are total eight rooms of old construction, out of which one is on the eastern side and seven are on western side. The area in between i.e. the middle portion of east and west side is open to sky and also the corner of west-south is an open space, used by the plaintiffs for storing

disposables. It is further claimed that the defendant has no concern, whatsoever, with said house, but the defendant and his family members are trying to dispossess the plaintiffs from the open space. It is further claimed by the plaintiffs that on number of occasions, requests were made to the defendant not to obstruct plaintiffs' enjoyment, in spite of the same, the defendant continued his activities, which prompted the plaintiffs to file suit in question.

4. The defendant resisted the suit by filing written statement at Exhibit-29 and admitted relationship with the plaintiffs. The defendant also admitted that plaintiff No.1 is Karta of joint family. However denied the boundaries and the measurement of the suit property, as mentioned in the plaint. The defendant in addition to above, has filed sketch map along with written statement so as to establish his case, as regards incorrect measurements given by the plaintiffs.

5. Having regard to the pleadings raised by the parties, the learned trial court framed issues at Exhibit-30 and answered the same, which read thus -

"ISSUES

- (1) *Whether the plaintiffs is in actual possession of the suit premises*

- (2) *Whether the plaintiffs prove that there was physical obstruction by the Defendant on the date of cause of action*
- (3) *Whether Plaintiff is entitled to a perpetual injunction*
- (4) *Does the Plaintiff prove his ownership over suit property and whether suit is maintainable without declaration?*
- (5) *Is the relief of the Plaintiff for declaration of ownership over the suit property is within limitation?*
- (6) *What decree or order?*

6. *My findings on the above issues are as under:-*

My Findings

- (1) *Yes.*
- (2) *Yes.*
- (3) *Yes.*
- (4) *Yes.*
- (5) *Yes.*
- (6) *As per final order"*

6. Learned trial court, having considered the documentary and oral evidence, by a detailed judgment, has decreed the suit of the plaintiffs. It was declared by the learned trial court that the plaintiffs are owners of Old municipal house No. 347/5 and new municipal house No. 189/1/10 situated at Navandar Galli to Ujaniwala Galli, Latur i.e. the suit property and further endorsed the maps in favour of the plaintiffs, which are placed at Exhibit-206, approved by the municipal council and the map prepared by

Court Commissioner at Exhibit-97. Learned trial court further restrained the defendant, his agents, servants and family members from causing interference in the peaceful possession of the plaintiffs over the suit house described in paragraph No.3 of the plaint.

7. The defendant, feeling aggrieved thereby preferred Regular Civil Appeal No. 174 of 1983 in the court of learned Second Additional District Judge, Latur. Said appeal is decided by learned lower appellate court vide judgment and decree dated 31st December, 1988 whereby the appeal preferred by the defendant-appellant came to be dismissed and the view recorded by the learned trial court came to be endorsed.

8. Learned lower appellate court has considered points, which felt for its determination and recorded the same as under:-

"POINTS

(1) Whether the Plaintiffs Respondents have proved their title and possession to the suit property as described in the plaint.

(2) Whether there is obstruction to the Plaintiffs enjoyment from the Defendant.

(3) Whether the Plaintiffs claim for declaration of the title is barred by limitation.

(4) Whether Plaintiffs are entitled to a decree for

declaration of their title and for injunction.

(5) *What order?*

9. While questioning the legality and validity of the concurrent findings recorded by both the courts below Mr. N. P. Patil – Jamalpurkar, learned counsel for the appellant-defendant, has strenuously urged that both the courts below have committed an error apparent on the face of record, in ignoring the documentary and oral evidence brought on record by the defendant. According to him, the perversity in appreciating the evidence could be looked into, as the maps, which are brought on record by the Court Commissioner vide Exhibit-97 and the map approved by the Municipal Council at Exhibit-206, depict the picture in favour of the present appellant – defendant. He further urged that the entire evidence is required to be given re-look and this Court, for the said purpose, needs to remand the matter back.

10. Learned counsel for the respondents, in response to above referred submissions, has taken me through the findings recorded by learned trial court. According to the learned counsel for the respondents, the learned trial court has discussed the entire evidence in detail and has reached to a conclusion of

decreeing the suit. He further submits that the learned lower appellate court has rightly appreciated the evidence and re-appreciation of the same by the second appellate court is beyond the scope of section 100 of the Code of Civil Procedure. He further urged that the present second appeal is liable to be rejected.

11. Having considered the rival contentions of the parties, it is noticed that after framing of issues, the learned trial court has discussed the pleadings and evidence of the parties in its entirety. Learned trial court was alive of the fact as regards the details of the property, its measurement, its old house number and new house number etc. The trial court has also taken into account certain admissions given by the defendant in his evidence. The learned trial court, in specific terms, has taken into account the entire geography / topography of the suit property, as is found to be recorded in its judgment. The trial court has also taken into account the municipal record produced by the plaintiffs on record and has considered map Exhibit-206, approved by the municipal council and Exhibit-107 a receipt regarding payment of tax of the suit house dated 30th December, 1968 in which house No. 3475 is shown as situated at Ujaniwala Galli to Navandar Galli, Exhibit-20, 121 and 1211 regarding

extract of tax register of the suit house, Exhibit-108 – a city survey map and Exhibit-93 a copy of will deed. The trial court, having regard to the documentary evidence, which in clear terms has established the case put forth by the plaintiffs, has decreed the suit.

12. The lower appellate court has re-appreciated the entire set of facts and the evidence put forth by the respective parties and has formed an opinion that the learned trial court has rightly decreed the suit.

13. In my opinion, learned counsel for the respondent-plaintiffs is right in submitting that it is not open for this Court, in exercise of its jurisdiction under section 100 of the Code of Civil Procedure, to re-appreciate evidence and reach to an altogether different conclusion, unless a great degree of perversity is shown.

14. In that view of the matter, no case of interference is made out. Second appeal, which is devoid of merits stands dismissed.

[N. W. SAMBRE, J.]