

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

27. SA/415/2012

CHAIRMAN, SHASTRINAGAR SAHAKARI GRUHNIRMAN SANSTHA MARYADIT,
DONDAICHA THR JAMNADAS GOKULDAS GUJRATHI
V/S
MAHESHKUMAR MADHUJARAO BHAVSAR AND ANR

Mr. Subhddh P. Shah, Advocate for appellant.

CORAM : T.V. NALAWADE, J.
DATED : 12th October, 2015.

ORDER :

1. The appeal is filed to challenge the judgment and decree of Regular Civil Appeal No. 23/2005, which was pending in the Court of District Judge-1, Dhule. The first appellate Court has dismissed Regular Civil Suit No. 13/2003, which was filed by the appellant in the Court of Civil Judge, Junior Division, Dhule and the decree given by the trial Court in favour of present appellant, plaintiff is set aside by the first appellate Court. Heard the learned counsel for appellant.

2. The appellant, plaintiff is a Cooperative Housing Society. It is the case of plaintiff that the Society has constructed 16 houses in the property bearing Survey No. 117/2B and 117/2D and the construction is made as per the plan approved by the authority. It is contended that after the northern boundary

of these two properties, in development plan, 12 Mtrs. width D.P. road is shown and this road is sanctioned in development plan of the Local Body, defendant No. 2. It is contended that defendant No. 1 owns plot from C.T.S. No. 409, but he has started making construction on the aforesaid D.P. road and due to that the road is virtually closed and the members of the Society are deprived of the use of said road. Relief of perpetual and mandatory injunction was claimed and relief of removal of encroachment made by the defendant was also claimed.

3. Defendant No. 1 contested the suit and contended that he has not made any encroachment, but it is the plaintiff Society, who has made encroachment over the D.P. road. Defendant No. 2 also filed written statement and it contended that if there is the encroachment, the encroachment needs to be removed. It contended that if completion certificates are given by defendant No. 2 regarding construction made, that cannot regularize the encroachment if such encroachment is made on D.P. road.

4. On the basis of oral evidence, the trial Court held that there was the encroachment made on D.P. road and gave decree of injunction and directed defendant No. 1 to remove the

encroachment made on the road. The first appellate Court considered some record of measurement made in another suit and held that defendant No. 1 had probably not made encroachment over the D.P. road. Some record was produced by original defendant No. 1 in the first appeal to show that it is Housing Society, who has made encroachment over the D.P. road.

5. It is the grievance of the present appellant, original plaintiff that the record of measurement which was not available before the trial Court and which was not proved, is considered by the first appellate Court. Even if this record is ignored, it was necessary for the plaintiff Society to prove that defendant has made encroachment over the aforesaid D.P. road. Such case cannot be decided on the basis of oral evidence. For proving such case, it was necessary for the plaintiff to follow the procedure given in Order 7, Rule 3 of Civil Procedure Code and to prove the encroachment. Encroachment was not proved that way and on the basis of oral evidence, it cannot be said that defendant No. 1 has made encroachment and it is to a particular extent.

6. In view of the aforesaid circumstances, nothing can

be achieved by admitting the appeal. There is no material on the basis of which substantial question of law can be formulated. This Court wants to make it clear that the decision of the present matter cannot be treated as decision against the Local Body. The Local Body will be at liberty to take action against the persons, who have made encroachment over the D.P. road.

7. In the result, the appeal stands dismissed.

[T.V. NALAWADE, J.]

SSC/