

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 238 OF 2015
WITH
CIVIL APPLICATION NO. 510 OF 2015 IN SA/238/2015**

Hiralal Surajkaran Surana

..Appellant

Vs

1. Madhav Kashinath
Nikumbha, since deceased,
through his L.Rs.
1. Shakuntala Madhavrao
Nikumbha and Ors.

.. Respondents

Mr. R.D.Soni, Advocate, i/b Ram & Co. for Appellant.
Mr. N.R.Bubna, Advocate for respondents no.1 to 4.

CORAM : R.G.KETKAR,J.
DATE : 30/04/2015

PC:

1. Heard Mr. R.D.Soni, learned counsel for the appellant and Mr. N.R.Bubna, learned counsel for the respondents at length.

2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908, (for short, 'C.P.C.'), original plaintiff has challenged the Judgment and decree dated 24.3.2008 passed by the learned Civil Judge, Jr. Dn, Manmad (City), Tal. Nandgaon, District- Nashik, in Regular Civil Suit No. 65 of 2004 as also the Judgment and decree dated 8.1.2015 passed by the learned Adhoc District Judge-1, Malegaon in Regular

Civil Appeal No.29 of 2008. By these orders, the Courts below dismissed the suit instituted by the appellant, hereinafter referred to as 'plaintiff', for declaration that he is the owner of an open space, admeasuring 9 meters x 1.5 meters, situate between C.T.S.No. 327-A and 327-B (for short, 'suit lane') and for perpetual injunction restraining the respondents, hereinafter referred to as 'defendants', from obstructing his peaceful possession over the suit lane-cum-open space, situate on the eastern side of his house in CTS No.327-A and allowed counter claim made by the defendants for removal of construction made by the plaintiff on the encroached land to the extent of 15'x30' on C.T.S. No.327-B. Parties shall, hereinafter, be referred to as per their status before the trial Court.

3. The plaintiff contended that he is the owner of City Survey No.327-A, admeasuring 83.6 sq.meters (900 sq.ft). He is the owner and in possession of the said property. An open piece of land, i.e. lane, is situate on the eastern side of his structure in C.T.S.No.327-A, i.e. lane (9 meters x 1.5 meters). The suit lane is part and parcel of C.T.S.No.327-A. The defendants own and possess C.T.S.No. 327-B, admeasuring 84.4 sq.meters, situate on the western side of C.T.S.No. 327-A. It is the case of the plaintiff that the defendants started

obstructing possession of the plaintiff over the suit lane. He, therefore, instituted suit for declaration of his ownership over that lane and for perpetual injunction restraining the defendants from obstructing his possession.

4. The defendants resisted the suit, inter alia, contending that the suit lane is not part and parcel of C.T.S. No.327-A. The defendants contended that the suit lane is part and parcel of C.T.S.No. 327-B. The plaintiff committed encroachment in their property. The defendants also set up counter claim and prayed for removal of construction made by the plaintiff on the suit lane as also for perpetual injunction restraining the plaintiff from obstructing the possession of the defendants over the suit lane.

5. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues. After appreciating the evidence on record, the learned trial Judge dismissed the suit and allowed the counter claim. The learned trial Judge held that the defendants have successfully established that the disputed lane is part and parcel of C.T.S.No. 327-B. The plaintiff is neither owner nor possessor of the suit lane. Consistent with these findings, the learned trial Judge issued mandatory injunction in terms of prayer clause (c) of the Counter claim.

6. Aggrieved by that decision, the plaintiff preferred Appeal. The learned District Judge dismissed the Appeal. It is against these decisions, the plaintiff has instituted the present Second Appeal.

7. In support of this Appeal, Mr. Soni strenuously contended that the Courts below committed serious error in dismissing the suit and in allowing the counter claim. He submitted that the Courts below decided the case mainly relying upon Exhibit 150-Map and report submitted by the Court Commissioner. The Courts below did not consider other relevant documentary evidence on record. He submitted that the Courts below, on the basis of the report of the Court Commissioner and Map at Exhibit 150, held that the suit lane is owned by the defendants. Perusal of report and Map at Exhibit 150 shows that the Court Commissioner did not carry out measurement and also did not record measurements of C.T.S No.327-A and 327-B. The Court Commissioner cannot decide the issue of title. Mr.Soni has taken me through the pleadings of the parties, oral evidence as also Maps at Exhibits 115, 119, 150, 151 and 180.

8. On the other hand, Mr Bubna supported the impugned orders. He submitted that the Court had appointed Mr Nilkanth B. Patil who was working as Taluka Inspector of Land

Records as a Court Commissioner. The Court Commissioner had prepared Map at Exh.150 after giving notices to the parties. Parties were present at the time of visit of the Court Commissioner. None of the parties filed any objection to the report of the Court Commissioner. He submitted that Mr Nilkanth Patil was examined as PW 4 by the plaintiff. In his evidence, he clearly admitted that the suit lane is part and parcel of C.T.S. No.327-B. He, therefore, submitted that the Courts below after appreciating the evidence on record held that the suit lane is part and parcel of C.T.S. No.327-B and no question of law, much less any substantial question of law, arises in this Appeal.

9. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, Mr Nilkanth Patil was appointed as Court Commissioner. It is not in dispute that after giving notices to the parties, he visited the disputed site in the presence of the plaintiff and the defendants. He has accordingly prepared Map at Exhibit-150 as also submitted report. He recorded statements of witnesses and had drawn panchnama. Perusal of the Map at Exh.150 and the legends therein clearly show that the suit lane is part and parcel of C.T.S. No.327-B.

10. Mr. Soni submitted that the Court Commissioner cannot determine issue of title. The Courts below decided the issue of title only on the basis of the report of the Court Commissioner. I do not find any merit in this submissions. Perusal of the evidence on record and in particular the Maps at Exhibits 150, 151 and 119 clearly shows that the disputed lane does not form part of C.T.S. No.327-A, rather it is clearly part and parcel of C.T.S.No.327-B. Perusal of Map at Exh.150 and in particular legends therein clearly shows that the suit lane is part and parcel of C.T.S. no.327-B. Legend no.1 shows boundaries of C.T.S. number as per the boundaries of City Survey Record. Legend no.2 shows dotted red line is the disputed boundary between C.T.S. no.327-A and B. Legend No.3 shows portion in red colour where window of defendants opening towards C.T.S. no.327-A is located. Legend no.6 shows the suit lane over which ownership dispute is raised. Having regard to these legends as also shape of C.T.S. no.327-A (rectangular portion) and C.T.S. No.327-B (square portion), I am more than satisfied that the suit lane is part and parcel of C.T.S. No.327-B.

11. Mr.Soni submitted that it is not disputed that the plaintiff is owner of area admeasuring 83.6 sq.meters. Even at this stage, measurement may be carried out and boundary

may be fixed taking into consideration the plaintiff's area about 83.6 sq.meters. It is not possible to accept this submission. It is well settled law that If there is dispute with regard to area and boundaries, the boundaries will prevail over.

12. After considering the material on record, I do not find that the Courts below committed any error in dismissing the suit. The plaintiff was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that they are contrary to the evidence on record. The findings recorded by the Courts below are based upon evidence on record. In view thereof, no substantial question of law arises in this Appeal. Hence, Appeal fails and the same is dismissed. In view of dismissal of Appeal, Civil Application No. 510 OF 2015 for stay does not survive and the same is disposed of.

13. This brings to me to the submission of Mr. Soni that the Courts below were not justified in allowing the counter claim in terms of prayer clause (c). It is clarified that whatever encroachment is made by the plaintiff in the disputed lane which is held to be a part and parcel of C.T.S. No.327-B, shall be removed by the plaintiff at his own costs within 12 weeks from today. Order accordingly.

14. At this stage, Mr. Soni orally prays for stay of this order for a period of 12 weeks from today. He assures that within two weeks from today the appellant will file usual undertaking in this Court incorporating therein that in case the appellant does not get suitable orders from the higher Court within 12 weeks from today, he will remove encroachment in the suit lane at his own costs.

15. Subject to filing of the aforesaid undertaking by the appellant within two weeks from today, this order shall remain stayed for a period of 12 weeks from today.

(R.G.KETKAR, J.)