

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

13 SECOND APPEAL NO. 22 OF 2016
WITH CIVIL APPLICATION NO.238/2016 IN SECOND APPEAL
NO.22/2016

BIKISHBEGUM HAIDER BAIG
VERSUS
SHANTABAI @ CHHABUBAI DATTATRAYA PAWAR

Advocate for Appellant : Mr. Kudale Bhagwan S.
Advocate for Respondent : Mr. Khande Avinash A

CORAM : T. V. NALAWADE, J

DATE : 15th April, 2016

ORDER :

1. The appeal is filed against the judgment and decree of Regular Civil Suit No. 54/2001 which was pending in the court of the Civil Judge, Junior Division, Majalgaon and the judgment and decree of Regular Civil Appeal No. 45/2008 which was pending in the court of the District Judge-1, Majalgaon.

2. The suit filed by respondent- Shantabai for the relief of declaration of ownership, for perpetual injunction and for mandatory injunction is decided in her favour. The relief of removal of encroachment and possession is also given in favour of respondent/plaintiff.

3. Heard both sides.

4. The respondent/plaintiff is the owner of Plot No.12 which is part of Survey No. 374 situated within the municipal limits of Majalgaon town. The appellant/defendant is the owner of Plot No.40 which is part and parcel of the same survey number. The appellant had purchased the plot in the year 1988 and the respondent/plaintiff purchased the plot on 12.09.1996 from the same vendor. In the plaint, size of the plot owned by the plaintiff and boundaries are given.

5. It is the case of the plaintiff that the plot of the defendant is situated beyond the road situated towards southern side of plot No.12, but the defendant made encroachment not only over this road but also on some portion of the plot of the plaintiff. It is contended that the plaintiff got measured her plot to ascertain encroachment and surveyor gave report that there is such encroachment. It is the case of plaintiff that she wants to make construction but due to encroachment made by the defendant over her plot, she is facing difficulty in making the construction.

6. The suit summons was served on the defendant and she filed appearance through advocate. She did not

file written statement and she did not remain present for cross examination of the witnesses examined by the plaintiff. The plaintiff examined herself and she examined cadastral Surveyor Mr. Gaikwad who had measured the property to ascertain the encroachment as Court Commissioner in the Suit. The cadastral surveyor has given evidence that due to encroachment made by the defendant, the road which was kept on southern side of plot No.12 is closed and some portion shown in the map of plot No.12 belonging to plaintiff is also occupied by the defendant. The map is duly proved as Exh.44. The other record like original sale deed etc. was produced. In view of this un-rebutted evidence, the trial court gave decree and directed the defendant to handover possession of the encroached portion as shown in Exh.44.

7. In the first appeal, the present appellant filed application under Order 41 Rule 27 of the Civil Procedure Code and sought permission to lead additional evidence. She produced some record like copy of her sale deed, copy of property card, receipt showing payment of penalty for N.A. Assessment and the construction permission.

8. The learned counsel for the appellant has placed reliance on the following reported cases:

(1)(2008) 5 Supreme Court Cases 444, Lachhman Singh (Deceased) Through legal representatives and others Vs. Hazara Singh (Deceased) Through Legal representatives and others.

(2) (2010) 2 Supreme Court Cases 316, Shyam Gopal Bindal and others vs. Land Acquisition officer and another.

9. In these two cases, the Apex Court has laid down that it is duty of the party to bring on record the documents on which the claim is based at the earliest opportunity available. It is observed that the appellate court can exercise jurisdiction under the provisions of Order 41 Rule 27 of the Civil Procedure Code and also when the document is required by the appellate court itself to pronounce judgment or for any other substantial cause. There cannot be any dispute over the propositions made by the Apex Court in these two reported cases.

10. It was submitted by the learned counsel for the appellant that the record produced in the appeal is

not considered by the first appellate court and no order was made on the application filed under Order 41 Rule 27 of the Civil Procedure Court.

11. This Court has gone through the aforesaid record. Even if the said record is considered, that record cannot help the appellant defendant. The boundaries of plot of the defendant described in sale deed show that on northern side of Plot No.40, there is a road which is required to be kept as per the approved development plan. There is also a map showing that between Plot No.12 and Plot No.40, there is such road. These circumstances are certainly not in favour of the defendant.

12. The evidence of the cadastral surveyor shows that he had given notice to both the sides before making measurement. His evidence shows that the defendant was present when the measurement was done by him. The relevant record is there. In view of this circumstance, nothing can be achieved only by considering the record like sale deed executed in favour of the defendant, construction permissions and the receipts showing that N.A. assessment fixed is paid by the defendant in respect of her plot. When there was

such measurement through the Court Commissioner, it was necessary for the defendant to go for superior measurement but such step was not taken. There is no reason to doubt the evidence given by the cadastral surveyor and the plaintiff. The findings given by the courts below are findings on facts and no substantial question of law as such is involved in the present matter. In the result, the appeal stands dismissed.

13. Civil application also stands disposed of.

(T. V. NALAWADE, J.)

JPC