

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

Second Appeal No.240 of 1989

- * Apparao Madhavrao Gaddam
Since deceased through his
legal representatives:
- 1) Dattatraya s/o Apparao Gaddam,
Since deceased through his
legal representatives:
- 1.1 Ganesh s/o Dattatraya Gaddam,
Age 50 years,
Occupation: Business,
R/o Shivaji nagar, Nanded.
Taluka and District Nanded.
- 1.2 Omprakash S/o. Dattatraya Gaddam,
Age 45 years,
Occupation: Business, R/o As above.
- 1.3 Nagnath S/o. Dattatraya Gaddam,
Age 42 years, Occupation: Business,
R/o As above.
- 1.4 Vijay s/o Dattatraya Gaddam,
Age 40 years, Occupation : Business.
R/o As above.
- 2) Anusaya w/o. Narayanrao Alkatwar,
Since deceased, through her
legal representatives:-
- 2-a) Narayan Venkoba Alkatwar,
Age 69 years, Occupation : Business.
- 2-b) Suryakant Narayan Alkatwar,
Age 48 years, Occupation: Business.

- 2-c) Chandrakant Narayan Alkatwar,
Age 39 years, Occupation: Business.

All R/o Near Jyoti Talkies
Gokulnagar, Nanded.

- 2-d) Ashatai Jagdish Batalwar,
Age 45 years,
Occupation: Household,
R/o Jethewad Complex,
Bhagyanagar, Nanded.

- 2-e) Premila Yelappa Nartawar,
Age 42 years,
Occupation: Household,
R/o Bhokar, Taluka Bhokar,
District Nanded.

.. Appellants.

Versus

- 1) Manohar s/o Ramji Patil,
Occupation : Business,
R/o Phulenagar, Nanded
District Nanded.
- 2) Nanded Cooperative Industrial
Estate Ltd., College Road,
Nanded
Through Chairman.
- 3) Municipal Council, Nanded
Through Chief Officer, Nanded.

.. Respondents.

Shri. R.R. Mantri, Advocate, for appellants.

CORAM: T.V. NALAWADE, J.

DATE : 30 JUNE 2016

JUDGMENT:

1) The appeal is filed to challenge the judgment and decree of Regular Civil Appeal No.127/1986 which was pending in the Court of the Additional District Judge, Nanded. The appeal filed by original defendant No.2 against the judgment and decree of injunction given by the Court of the Civil Judge, Junior Division, Nanded in Regular Civil Suit No.111/1979 is allowed by the District Court. The decree of injunction is set aside and the suit is dismissed by the first appellate Court. Heard both the sides.

2) In short, the facts leading to the institution of the appeal can be stated as follows :--

3) The plaintiff is owner of a plot situated in Nanded Cooperative Industrial Estate area. It is the case of the plaintiff that plot of defendant No.2 is situated in the same area and there is a road having width of 50 ft between these two plots. It is contended that initially there was only plot bearing No.100 but it was divided by defendant No.1 into two portions and portion which was

given number 100/A was allotted to defendant No.2. It is contended that there is dispute over the area of Plot No.100/A. It is contended that defendant No.2 has started making illegal construction of his building by presuming that he is owner of area of 8740 square feet. It is contended that the defendant No.2 has not obtained any permission of local body for making construction over the plot allotted to him and he has made encroachment over the road situated between the plot of defendant No.2 and the plot of the plaintiff of 30 feet in width. Thus the main contention is about the alleged encroachment made by defendant No.2 over the road kept in lay out plan of 50 ft width. The plaintiff has no locus to challenge the allotment of the plot made by defendant No.1 to defendant No.2 in view of the nature of dispute.

4) Defendant No.1 did not contest the matter. Defendant No.2 contested the matter by filing written statement. He contended that he had obtained necessary permission of construction and before the date of suit his construction was completed and so relief of injunction cannot be given. He denied the allegation that he has

made encroachment over the public road, the road kept in lay out plan.

5) Defendant No.3, local body, filed written statement. It also contended that, plaintiff has no right to file such suit. It, however, contended that defendant No.2 was making construction illegally in breach of the terms and conditions of permission and so defendant No.3 is likely to take action against defendant No.2.

6) On the basis of the aforesaid pleadings, issues were framed by the trial Court. The main issue is in respect of the encroachment. Whether relief of injunction could have been granted when the construction was already completed can be kept aside for a moment to ascertain as to whether the encroachment itself is proved.

7) The trial Court decreed the suit by holding that there was evidence to prove the encroachment. Vague direction was given to demolish the construction which was on public road. District Court has set aside this decision by holding that plaintiff has no locus standi. It is further held that the encroachment is not proved.

8) This Court, other Hon'ble Judge, admitted the appeal by observing that substantial questions of law can be formulated on the basis of ground Nos.7,9,19,32,34 and 36. The grounds are as under :-

(7) Whether it was necessary for the appellant to give his own statement instead of his Mukhtyar, Narayan Alkatwar.

(9) Whether the Appellate Court carved out some sentences from the statement of witnesses and gave finding in respect of encroachment without considering the whole evidence.

(19) Whether the Appellate Court is legally correct in discarding the record produced by P.W. No.8, Assistant Director, Town Planning on the ground that, it was prepared by his predecessor, when it is official record produced from proper custody.

(32) Whether the finding of the Appellate Court that the appellant did not take objection for construction, is correct and whether such a construction is valid, which has been carried out when the injunction of the Court was in existence.

(34) When the original Plot No.100/C was 12729.50 sq. feet which was divided in Plot Nos.100/C and 100/A the area of divided Plot No.100/C being 6900 for the remaining Plot No.100/A cannot be more than 5800 square feet. Whether The Court below has failed to consider in this respect the evidence of P.W. Asthikar and the Architect Sham Deshpande.

(36) Whether the report of Architect Sham Deshpande at Exhibit 45 that the plot of respondent is only 5800 square feet is not considered by the appellate Court and the appellate Court has also not considered the map at Exhibit 86 and the document at Exhibits 119, 147.

9) It is already observed that the dispute is mainly in respect of so called encroachment made on public road, the road shown to be kept in lay out plan. To prove that such road was kept in lay out plan, witness Vilas Asturkar (PW 7) is examined by the plaintiff. He is employee of defendant No.1. In his evidence the lay out plan is proved at Exhibit 87 and it shows that in the lay out plan the road having width of 50 feet was left. Thus, there is sufficient evidence to prove that there is public road having width of 50 feet as contended by the plaintiff.

10) It was necessary for the plaintiff to prove that the defendant No.2 has made encroachment over the aforesaid road portion to make construction of his building. Most of the evidence is oral in nature. Only one witness Riazuddin (PW 11) who was appointed as Court Commissioner by the trial Court, has given evidence on so called encroachment made by defendant No.2. It appears that he gave evidence like examination-in-chief but in the midst of cross-examination he stopped giving evidence by giving lame excuses. Unfortunately the trial Court did not take action against him though he was appointed as Court

Commissioner and he was employee of the Government Department. In any case due to this circumstance evidence of Riazuddin is of no use to the plaintiff to prove the so called encroachment. Due to this circumstance, no relief could have been given to the plaintiff.

11) Though there are aforesaid circumstances that does not mean that local body has no power to take appropriate action if it finds that defendant No.2 has made encroachment over public road. It can take action and the decision of the present matter, dismissal of the suit filed by a resident of the area will not come in the way of the local body. So, the points are answered accordingly against the appellant and the appeal is dismissed.

Sd/-
(T.V. NALAWADE, J.)

rsl