

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

**4 SECOND APPEAL NO. 191 OF 2016
WITH
CA/2878/2016
IN
SA/191/2016**

**BABADSAHEB VISHWANATH MOHITE
AND ORS.**

VERSUS

**PRASHANT ANANTRAO MOHITE
AND ORS.**

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Mr. S.S.Choudhari, Advocate for Appellants.

Mr. A.M.Gaikwad, Advocate for R – 1 & 2.

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CORAM : T.V.NALAWADE, J.

DATE : 04/07/2016

ORDER :

1. The Appeal is filed to challenge the Judgment and Decree of R.C.A. No. 123/2013 which was pending in the Court of the Ad-hoc District Judge – 1, Latur. The Appeal was filed by the plaintiffs of R.C.S. No. 59 of 2011 which was pending in the Court of the

Civil Judge [Jr.Division], Latur. The Suit was filed for relief of declaration and for possession. The trial Court had decreed the Suit partly. The first appellate Court has given the decree of possession of encroached portion of 17 R. against defendant Nos. 3 to 5, which is additional relief, and so this decision is challenged by the original defendant Nos. 3 to 5. Paper book prepared by the District Court for R.C.A. No. 123/2013 was shown to this Court. Heard both sides.

2. In the Suit, relief of declaration was claimed for setting aside the sale deed which was made before the Notary. This relief was granted and this decision was not challenged by the defendants by filing Appeal in the District Court. Thus, only the decision given by the first appellate Court for removal of encroachment and for handing over the possession of 17 R. from G.No. 54 situated at Kasargaon, Tahsil and district Latur is under challenge in the present matter.

3. It is the case of the plaintiffs that they are the owners of land G.No. 54 admeasuring 2 H. 3 R. It is their contention that the land was originally owned by

their grand-mother Mukrabai and due to the bad habits of the father of the plaintiffs, the land was given by her to the plaintiffs and she was acting as guardian of the plaintiffs. It is contended that the defendants made encroachment in or about the year 2002 from 2 sides of the land. The defendants/present appellants are owners of G.Nos. 55 and 56. Defendant No. 3 is the owner of G.No. 55 and there is allegation that he made encroachment to the extent of 2 R. Defendant Nos. 4 and 5 are owners of G.No. 56 and it is the contention of the plaintiffs that they have made encroachment of 15 R.

4. The title of the plaintiffs over land G.No. 54 is not disputed and the area shown on the record viz. 2 H. 3 R. is also not disputed. To prove the encroachment, plaintiffs have given evidence and they have examined Cadestral Surveyor as their witness to prove the encroachment. This Court has carefully gone through the evidence given by the Cadestral Surveyor namely Sk. Abdul. His evidence shows that he had given notices to all the adjoining owners including the appellants and then he had made measurements in the presence of the owner and the adjoining owners. The Map prepared by

him is duly proved as Exh. 42 and he has shown the encroachment made. The record is produced at Exh. 43 to show that the parties were present on the spot and the record of the notices sent to the parties was also produced. His evidence in the cross examination shows that first he made joint measurement of lands of plaintiff and defendants and then he made separate measurement. Nothing could be brought on record from the side of the defendants to create probability that the measurement was not correctly made. This measurement was never disputed by the defendants. In the Written Statement, it is only denied that defendants have made encroachment over the property of the plaintiffs. When there is record consistent with the oral evidence given by the Cadestral Surveyor, it was up to the Courts below to believe him or not to believe him. The last Court on facts has believed Cadestral Surveyor and as the record is consistent with the oral evidence. Before the trial court, the evidence in rebuttal was given only in respect of the property donated and the property shown to be given under sale deed which was notarized.

5. The learned counsel for the appellant

submitted that the first appellate Court had not framed points for consideration on the basis of the issues framed by the trial Court and vague points were considered and so the decision of the first appellate Court can not sustain in law. In support of his contention, he placed reliance on 3 cases reported as 2006 (6) Mh.L.J. - 759 [Khatunbi Wd/o Mohammad Sayeed & Ors. Vs. Aminabai W/o Mohammad Sabir], 2003 (4) Mh.L.J. - 853 [Janardan Nago Patil Vs. Ramanand Ramdas Mishra] and the case decided on 18/09/1984 by Hon'ble Shri. Justice R.A.Jahagirdar [Anita M.Barreto Vs. Abdul Wahid Sanaullah].

6. It is true that the first appellate Court is also expected to formulate points for consideration and that needs to be done on the basis of the issues framed by the trial Court and then finding needs to be given on each such point. The first appellate Court in the present matter, considered the points like “ whether the Judgment and Decree of the trial Court is legal, valid or interference is called in the said decision.” Though the points formulated were vague, the specific points in dispute were considered in the First Appeal. The

discussion about the encroachment starts from para No. 13 and the reasonings runs into more than 3 pages. The relevant evidence given by the parties is considered and the circumstance that no rebuttal evidence is given by the defendants on the evidence given on encroachment is also considered against the defendants. Nothing else was expected from the first appellate Court after formulating the point. As the relevant material is considered and then the finding is given against the appellants, this Court holds that no substantial question of law as such is involved in the matter. Proof of encroachment involves question of fact.

7. In the result, Second Appeal stands dismissed. In view of dismissal of Second Appeal, C.A. No. 2878 of 2016 stands disposed of.

[T.V.NALAWADE, J.]