IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 390 OF 2012
WITH
CIVIL APPLICATION NO. 6892 OF 2012

1. Natthu S/o Baliram Patil,
Age: 60 years, occu: Service,

2. Ravindra S/o Nattu Patil,
Age: 38 years, occu: Service,

3. Sanju S/o Natthu Patil,
Age: 33 years, occu: Service,

4. Raju S/o Natthu Patil,
Age: 40 years, occu.: Service,
All R/o Shashtri Colony, Sillod,
Tq. Sillod, Dist. Aurangabad,
Tq. & Dist. Aurangabad. ...APPELLANTS
(Ori. Defendants)

versus

Vimalbai w/o Ratanlal Jain,
Age: 61 years, occu: Household,
R/o : Pandhariba Aurangabad. ...RESPONDENT
(Ori. Plaintiff)

.....

Mr. Balaji Shinde, Advocate holding for
Mr. V.P. Latange, Advocate for appellants
Mr. P.F. Patni, Advocate for respondent

.....

CORAM : SUNIL P. DESHMUKH, J.

DATED : 7th SEPTEMBER, 2016.

JUDGMENT :-

1. Heard learned counsel for the parties finally with consent.

2. The appellants are original defendants in Regular civil Suit No. 94 of 1997. The suit came to be filed by present respondent - original

plaintiff initially seeking permanent injunction and later on possession, after dispossession from plots No. 18 and 19 of land survey No 377 situated at Sillod, Tq. Sillod, District Aurangabad.

3. It appears to be a case that the property claimed by plaintiff is adjacent to survey No. 5 wherein plots No. 403 and 435 are claimed to have been purchased by the defendants. The trial court appears to have considered that survey No. 377 situated at Sillod had been purchased by the plaintiff way-back in the years 1977 and 1981 and converted into non agricultural use and laid down plots in the same. Said fact is sufficiently corroborated by the revenue record. Later, the property came under jurisdiction of Gram Panchayat, Sillod which also referred to the property being owned and possessed by the plaintiff. The trial court further has considered that defendants claim to have been owners of plots No. 403 and 435 from survey No. 5 and said property as well has been taxed by the Gram Panchayat. It appears to have been contention of the defendants that four boundaries in the sale-deed under which they claim to have been owners of plots No. 403 and 435 were not correctly taken. The defendants had not filed sale-deed executed in their favour on record. It has emerged from the evidence of the defendants that even if plots were purchased there was no certainty of the four boundaries of the plots or for that matter identity of the plots. It has been further observed by the trial court that the town planning authority had prepared and approved the lay-out of survey No. 5 and four boundaries given in the sale-deed, on the basis of which the defendants are claiming right over the suit property and

the map are different one. It further emerges that while purchase was made by defendants, plots were not given any number. The trial court has scanned the evidence in quite some detail. The trial court has appreciated the evidence as had been brought on record and found that defendants have caused construction of one room and compound wall over these plots. The trial court found that there is substance in the claim made by the plaintiff and as such, decreed the suit and directed the defendants to deliver possession of the property as described in the plaint to the plaintiff.

4. During the pendency of regular civil appeal bearing No. 298 of 2005 at the instance of defendants before the District Judge, Aurangabad, on the request of defendants, appellate court had appointed court commissioner to measure the suit property. The appellate court in paragraph No. 13 of the judgment has observed thus :

> *"13. From the evidence of D.S.L.R. and from the contents of map (Exh.30) it is clear that the land survey no. 377 is situate to the west of Jalgaon to Aurangabad road, which is running north-south and that the land survey no. 5 is situate to the south of the land survey no. 377."*

5. The appellate court further in paragraphs No. 15, 16 and 17 of the judgment has observed thus:-

> *"15. The appellants have examined Anil (DW-2) at Exh.74. He states that his wife has purchased plot no. 15 out of survey no. 377. He then states that there is plot no. 14 to the east of plot no. 15, but he could not state the number of the plot situate to the west of plot no.15. He further states that to the north of the said plots there is a road. The said road is to the north of plot nos. 13*

to 19, which are in a straight line. From this evidence it is clear that plot nos. 13 to 19 which are the part and parcel of survey no. 377, are situate to the south of the road running east-west.

16. Appellant no. 1 admits that plot no. 17 which is situate to the east of the suit plots, belongs to one Meenabai Kumawat. The said Meenabai had filed R.C.S. No. 242/1997 against the present appellants. Copy of the judgment dated 08-08-2003 passed therein is produced at Exh. 62. It pertains to plot no. 17 out of survey no. 377, which was stated to have been purchased by her from the present respondent under a registered sale deed dated 21-12-1991. She had claimed the relief of perpetual injunction restraining the present appellants from disturbing her possession over the said plot. She was declared to be the owner and possessor of plot no. 17 admeasuring 15 X 10 metres out of survey no. 377 of Sillod having boundaries, to the east- plot no. 16, to the west-plot no. 18, to the south – land survey no. 5 and to the north 40 ft wide road. There is nothing on record to show that the appellants challenged the said judgment and decree passed against them on 08-08-2003. As such, it has got finality. From this judgment it is clear that the suit plot bearing no. 18 was found to be to the west of plot no. 17 out of survey no. 377 and to the north of the said plots there was 40 ft wide road.

17. From the above referred evidence of appellant no. 1 and that of Anil (DW-2) it is quite clear that to the south of 40 ft wide road there are some of the plots out of survey no. 377 which include plot no. 13 to 19. From the evidence of Anil (DW-2) it is clear that plot nos 13 to 19 out of survey no. 377 are in a straight line and to the north thereof there is a 40 ft wide road. Appellant no. 1 has specifically admitted that the said 40 ft wide road runs through the land survey no. 377. As per the certified copy of the judgment (Exh. 62) also it is clear that the suit plot bearing no. 18 is situate to the south of the said 40 ft road. With this evidence the case of the appellants that their plots are situate just adjacent to the south of 40 ft road cannot at all be accepted."

6. Mr. Balaji Shinde, learned counsel for appellants contends that the case appears to be of encroachment which entails proper measurement of the suit property. It has been contended that though Taluka Inspector of Land Records was appointed as Court Commissioner, however, he could not measure the land. In such a case, it would be incumbent to appoint Court Commissioner to remeasure the land. To support his submission, he relies on a judgment in the case of *Haryana Waqf Board Vs. Shanti Sarup and others* reported in *(2008)8 Supreme Court Cases 671* and contends that the High Court may in second appeal exercise power to issue commission for making local investigation. So far as this aspect is concerned, it may not be a debatable question that the court would have power having regard to provisions of Civil Procedure Code to appoint Court Commissioner, however, in the present situation the point involved is, whether such powers need to be exercised will have to be considered.

7. Having regard to observations of the appellate court as are quoted above and the evidence and past incidents as have been referred to are not seriously disputed by defendants-appellants, it does not appear to be a case that such appointment is essential, for, judgments of two courts sufficiently bear that there is sufficient evidence on record to show substance in the contention and rights claimed by the plaintiff in respect of the property situated in survey No. 377 and it being abutting to road as has been referred to in the quotations above including in a past suit by Meenabai, who happens to be wife of witness P.W.2-Anil. The learned counsel for the appellants

is not in a position to show observations, conclusion and evidence on record either is perverse or tends to be perverse. In the circumstances, there are concurrent findings in respect of the factual position, which do not seem to be away from record. This appears to be a second appeal wherein any substantial question of law can hardly be said to have arisen. As such, second appeal stands dismissed.

8. At this stage, learned counsel for appellants requests for extension of interim relief granted by this court under order dated 13th July, 2012 in civil application no. 6892 of 2012, so as to enable the appellants to challenge the order passed by this Court today, before the Apex Court. As such, interim relief operating during pendency of this appeal, stands extended for a further period of eight weeks.

9. In view of disposal of second appeal, pending civil application does not survive and stands disposed of.

Sd/-

(SUNIL P. DESHMUKH, J.)

MTK