

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 782 OF 2015****ALONGWITH****SECOND APPEAL NO. 795 OF 2015****ALONGWITH****CIVIL APPLICATION NO.1679 OF 2015****IN****SECOND APPEAL NO. 795 OF 2015****ALONGWITH****SECOND APPEAL (ST) NO. 25595 OF 2015****ALONGWITH****CIVIL APPLICATION NO.1674 OF 2015****IN****SECOND APPEAL (ST) NO. 25595 OF 2015****ALONGWITH****CIVIL APPLICATION (ST) NO.2886 OF 2016****IN****SECOND APPEAL (ST) NO. 25595 OF 2015****Vitthal Dadaso Suryavanshi & Anr. Appellants****VERSUS****Pandurang Sonba Chature
(deceased through his legal heirs) & Ors. Respondents****Mr.P.B.Shah, i/b. Mr.Kayval Shah for the Appellants.****Mr.V.S.Talkute for Respondent Nos. 1A, 1B, 1C, 2, 3, 4A to 4D, 5.****CORAM : R.D. DHANUKA, J.****DATED : 29th JANUARY, 2016****P.C.**

By consent, all the three appeals were heard together and are disposed off by a common order.

2. Civil Application (St) No.2886 of 2016 is not on board. Taken on board.

3. By these three appeals, the appellants who are the original plaintiffs before the learned trial judge have impugned the order passed by the lower appellate court on 17th June, 2015 dismissing Regular Civil Appeal No.33 of 2013 and Regular Civil Appeal No.34 of 2013 partly. By the impugned order dated 17th June, 2015, the lower appellate court has directed the appellants to remove the wire fencing erected over the suit property described as 'BDEF'. By the said order, the lower appellate court has set aside the permanent injunction order passed in favour of respondent nos. 3 to 5 in respect of the open space admeasuring 33 ft. x 70 ft. which was in front of their house.

4. It was the case of the appellants (original plaintiffs) that the appellants had been using the the courtyard in front of their house for last several decades without any obstruction from any of the members of the public. It was the case of the appellants that in the said open courtyard, the appellants were keeping their various articles without any interruption or obstruction of the respondents or any other members of the public. The appellants filed a suit on 6th September, 2010 (170 of 2010) before the learned Civil Judge, Junior Division, Phaltan inter alia praying for injunction against the respondents. In the said suit, the defendant nos. 1, 2 and 3 to 5 filed their respective written statements along with counter claims. Those defendants in their counter claim also applied for removal of fencing and for injunction against the appellants (original plaintiffs).

5. By an order and judgment dated 6th December, 2012 the learned Civil Judge, Junior Division, Phaltan dismissed the suit filed by the appellants and allowed the counter claim filed by the defendants. The appellants herein impugned the said order and judgment dated 6th December, 2012 by filing three separate appeals

bearing nos. 33, 34 and 35 of 2013 respectively.

6. By an order and judgment dated 17th June, 2015 the learned District Judge partly allowed Regular Civil Appeal No.32 of 2013 thereby setting aside the order of injunction granted in favour of the respondents in their counter claim against the appellants and dismissed the Regular Civil Appeal Nos. 33 of 2013 and 34 of 2013. The respondents did not challenge the order passed in Regular Civil Appeal No.32 of 2013.

7. Mr.Shah, learned counsel for the appellants invited my attention to the pleadings, oral evidence and the findings rendered by the learned trial judge as well as by the lower appellate court. It is submitted by the learned counsel that though there was no prayer for a declaration of ownership by the appellants in the plaint filed before the learned trial judge, the learned trial judge has rendered a finding of ownership against the appellants. He submits that the appellants had filed a suit simplicitor inter alia praying for injunction against the respondents from disturbing the possession of the appellants in respect of the residential property of the appellants as well as the courtyard.

8. It is submitted by the learned counsel for the appellants that though there was no independent witness examined by the respondents from Grampanchayat in support of their plea that the courtyard which was in possession of the appellants was a gaonthan property, the learned judge has rendered a finding against the appellants erroneously that the said courtyard was a gaonthan property which all the members of the village were entitled to use the said as and by way of access and for other purposes. He submits that the findings rendered by both the courts below are totally perverse. He submits that several documents produced by the

appellants were not considered by the two courts below.

9. The appellants had also filed a Civil Application (L) No.2886 of 2016 inter alia praying for permission to produce and bring on record the additional documents annexed to the civil application by invoking provision of Order 41 Rule 27 of Code of Civil Procedure, 1908. Learned counsel submits that though these documents were handed over to the learned advocate who was representing the learned advocate before the lower appellate court, the documents were not produced and/or relied upon by the learned advocate before the lower appellate court though such documents were important and were relevant for the purpose of deciding the appeals filed by the appellants before the lower appellate court.

10. Mr. Talkute, learned counsel for the respondents on the other hand invited my attention to the findings of fact recorded by the two courts below and also to the oral evidence led by the parties. He submits that since before the trial judge, the appellants had pleaded and contended that the appellants were the owners of the courtyard and had led evidence in support of that contention, the appellants cannot be allowed to urge before this court that no such findings could be rendered by the learned trial judge on that issue.

11. Insofar as submission of the learned counsel for the appellants that the suit property was not a gaonthan property and the findings rendered by the two courts below is contrary to the evidence on record or based on no proper evidence is concerned, it is submitted that in the cross examination of one of the witnesses examined by the appellants, it was categorically admitted that the courtyard was a gaonthan property. He submits that the lower appellate court thus was justified in considering the oral evidence led by the appellants themselves while rendering a

finding that the courtyard was a gaonthan property and was not ownership property of the appellants. He submits that since the findings recorded by the courts below are concurrent findings, which are not perverse, this court cannot interference with such concurrent findings of fact under section 100 of the Code of Civil Procedure, 1908.

12. Insofar as civil application filed by the appellants under Order 41 Rule 27 is concerned, it is submitted that such documents cannot be allowed to be relied upon at this stage. It is submitted that some of the mutation entries were already relied upon by the appellants before the learned trial judge which were already considered and rejected. He submits that in any event the reasons recorded in the civil application in relying upon these additional documents do not satisfy the conditions of Order 41 Rule 21 of Code of Civil Procedure and thus no such new documents can be relied upon at this stage.

13. A perusal of the record indicates that though the appellants had filed a suit for injunction simplicitor, it was a specific case of the appellants in the plaint that they were the owners in respect of the courtyard. The defendants in the written statement had denied the ownership in respect of the appellants. The learned trial judge has accordingly framed an issue about the ownership claimed by the appellants. The parties led oral evidence on the issue framed by the lower appellate court. The appellants never raised any objection before the learned trial judge when the issue of ownership was framed by the learned trial judge and on the contrary led evidence on the said issue. Even before the lower appellate court, the appellants did not raise any issue that issue of ownership was wrongly framed by the learned trial judge. Both the parties made their rival submissions on the issue of ownership before the lower appellate court also. The lower appellate court

also accordingly dealt with the documentary as well as oral evidence and has once again rendered a finding of fact that the appellants were not the owners of the suit property. In my view the appellants cannot be allowed to now urge that both the courts below could not have rendered any finding of fact insofar as ownership of the suit property is concerned.

14. Insofar as submission of the learned counsel for the appellants that no witness from the office of the Grampanchayat was examined on the issue whether the said courtyard was a gaonthan property or not is concerned, a perusal of the record indicates that the respondents had led evidence on that issue before the learned trial judge. Even the appellants had examined one of the appellants as their witness and had led evidence on the issue whether the courtyard was a gaonthan property or not. A perusal of the cross examination of the witness examined by the respondents as well as of the appellants clearly indicated that the witnesses of both the parties admitted that suit property was a gaonthan property. The lower appellate court has specifically considered the cross examination of one of the witness of the appellants in which he had admitted that the courtyard was a gaonthan property. In my view the courts below have thus rightly rendered a finding that the suit property was a gaonthan property and was not the property owned by the appellants. The learned counsel for the appellants could not point out any error in the findings rendered by any of the courts below which findings are rendered on the basis of the evidence led by both the parties that the suit property was a gaonthan property.

15. In my view since the courts below have rendered a finding of fact that the suit property was a gaonthan property in which all the villagers have a right to use the said property, the learned trial judge had rightly directed the appellants to

remove the fencing placed by the appellants on the said suit property. The lower appellate court had already set aside the relief of injunction granted against the action against the appellants and in favour of the respondents in one of the appeal filed by the appellants.

16. Insofar as submission of the learned counsel for the appellants that the learned trial judge has also refused to grant any injunction insofar as house property of the appellants is concerned, Mr.Talkute learned counsel for the respondents submits that the respondents are not claiming any interest in respect of the house property of the appellants and would not create any obstruction in respect of the use and peaceful possession of the house property of the appellants. Statement is accepted.

17. In my view the findings recorded by the two courts below are concurrent findings and are not perverse and thus no interference is warranted under section 100 of the Code of Civil Procedure, 1908. There are no substantial questions of law arising in any of the appeals filed by the appellants. The appeals are devoid of merits and are accordingly dismissed. In view of the dismissal of the second appeal, civil applications filed by the appellants do not survive and are accordingly disposed of.

18. Mr.Talkute, learned counsel for the respondents continues the statement made before this court that he would not execute the decree for a period of four weeks from today. Statement is accepted. It is made clear that during this period of four weeks, the appellants also would not create any third party rights in respect of the courtyard.

[R.D. DHANUKA, J.]