

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 200 OF 2014

Murlidhar s/o Vedu Dusane,
Age : 57 years, Occu. Business,
R/o Light Bazar, Nawapur,
District Nandurbar

APPELLANT
(OIRG. DEFENDANT)

VERSUS

Sanmukhlal Govardhandas Shah,
Age : 86 years, Occu. Agri.,
R/o Sangarh, Tq. Songarh,
Dist. Tapi (Gujrat)

RESPONDENT
(ORIG. PLAINTIFF)

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Mr. Sharad V. Natu, Advocate for the Appellant
Mr. J.R. Shah, Advocate for the respondent

CORAM : SANGITRAO S. PATIL, J.

DATE : 31st JULY, 2017

ORAL ORDER :

Heard the learned counsel for the parties.

2. The appellant (original defendant) has challenged the concurrent finding of facts recorded by the Trial Court in Regular Civil Suit No. 15 of 2001 and confirmed by the First Appellate Court in Regular Civil Appeal no. 21 of 2008 vide judgments and decrees dated 8th September, 2008 and 10th December, 2013,

respectively.

3. The appellant is the tenant of the respondent. It is the case of the respondent that there was a lane having width of 3 to 4 feet East-West in front of the premises let out to the appellant. The appellant encroached upon that lane and made it difficult for the respondent to make use thereof for having access. He, therefore, instituted the suit for removal of that encroachment. The said suit came to be decreed and the First Appellate Court confirmed that decree.

4. The learned counsel for the appellant submits that when there was dispute in respect of the encroachment, it was necessary for the respondent to get the disputed property measured and demarcated. According to him, in the absence of the measurement map prepared by the Surveyor, the Trial court should not have decreed the suit. In support of this contention, he relied on the judgment in the case of **Bento Antonio Gomes alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro and others 2014(4) Mh.L.J. 366**, wherein it has been held that when there is question of boundary dispute or an encroachment, it is appropriate that the Court should exercise power under Order XXVI Rule 9 of

the Code of Civil Procedure for local investigation for proper adjudication of the dispute. He submits that the impugned judgments and decrees, based on the evidence of the photographer and the witnesses of the respondent, are not sustainable. According to him, these are the substantial questions of law involved in this appeal.

5. On the other hand, the learned counsel for the respondent submits that there is no boundary dispute involved in this suit. The appellant is a tenant of the respondent. The appellant encroached upon the lane that was in front of the premises let out to him and made it difficult for the respondent to have access to his shop premises. He submits that the map of the City Survey was produced wherein the existence of the lane was specifically mentioned. There is sufficient evidence on record to show that the appellant encroached upon that lane. The Trial Court as well as the First Appellate Court considered the evidence on record and decreed the suit. He submits that the concurrent finding of facts recorded by the Courts below needs no re-consideration in this appeal, more particularly when there is no substantial question of law involved in the appeal.

6. As seen from the facts of the case, there is no

boundary dispute between the appellant and the respondent. The appellant is occupying the premises owned by the respondent. The respondent is not disputing the possession of the appellant over the premises let out to him. The only question is in respect of the lane that was in front of the premises let out to the appellant, which is evidenced from the record of the City Survey. The oral evidence and the evidence of the photographer produced by the respondent also clearly establish existence of the lane and encroachment committed thereon by the appellant. This factual aspect has been considered by the Trial Court as well as the First Appellate Court in its proper perspective. Since no boundary dispute is involved in this case and since the appellant is not claiming ownership over any portion of the lane, in my view, the above cited judgment would be of no help to the appellant to seek appointment of the Commissioner and for that purpose, seek remand of the suit. There is concurrent finding of the facts recorded by the Trial court as well as the First Appellate Court. No substantial question of law is involved in this appeal. The Second Appeal is dismissed. No costs.

7. In view of dismissal of the Second Appeal, the pending Civil Applications stand disposed of.

[SANGITRAO S. PATIL]
JUDGE

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