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

**SECOND APPEAL NO.445 OF 2017
WITH
CIVIL APPLICATION NO.8434 OF 2017
IN
SECOND APPEAL NO.445 OF 2017**

Manik s/o Bhagwant Chavan,
Age: 69 years, Occ: Pensioner,
R/o. Ward No.7, Labade Wasti,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar.

..APPELLANT

VERSUS

1. Sau. Rohini Dhondiram Kurhe,
Age: 50 years, Occ: Business,
2. Sau. Suman Manik Chavan,
Age: 64 years, Occ: Household,
3. Ibrahim Bakshu Shaikh,
Age: 61 years, Occ: Labour,
4. Shabira Ibrahim Shaikh,
Age: 59 years, Occ: Labour,
5. Hausabai Abaji Dhumal,
Age: 69 years, Occ: Household,

Nos. 1 to 5 All R/o. Ward No.7,
Labade Wasti, Shrirampur,
Tq. Shrirampur, Dist.Ahmednagar.

6. Asha Sanjay Sanvatsarkar,
Age: 39 years, Occ: Household,
R/o. Shingnapur, Tq. Kopargaon,
At present R/o. Labade Wasti,
Ward No.7, Shrirampur,
Tq. Shrirampur, Dist.Ahmednagar. ..RESPONDENTS

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Mr R.A. Tambe, Advocate for appellant;
Mr N.C. Garud, Advocate for respondent No.1

CORAM : NITIN W. SAMBRE, J.

DATE : 30th JUNE, 2017

ORAL ORDER :

Heard.

2. This second appeal is by original defendant No.1 to Regular Civil Suit No. 202 of 2003 initiated by respondent No.1-plaintiff for possession and permanent injunction.

3. Respondent No.1-plaintiff claimed in the suit that the land 0H.01R, which is identified as the 'suit property', was purchased vide registered sale deed dated 21st January, 1998 from Namdeo s/o Pandharinath Kale. There was oral partition between Namdeo and his two brothers i.e. Nivrutti and Babasaheb in 1973/74. Respondent No.1-plaintiff claimed in the suit that Namdeo being owner of the suit property, by virtue of above partition,

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carried out mutation.

4. The brother of Namdeo i.e. Nivrutti inducted Manik-defendant No.1, Ibrahim-defendant No.3, Housabai-defendant No.5 as tenant. Defendant Nos. 2 and 4 are wives of defendant Nos. 1 and 3, whereas defendant No.6 is daughter of defendant No.5.

5. It is claimed that Nivrutti filed various suits against the aforesaid persons for recovery of arrears of rent and possession.

6. It is also claimed that Manik, tenant of Nivrutti filed Regular Civil Suit No.571 of 2000 for injunction against present respondent No.1 and predecessor-in-title of respondent No.1 namely Namdeo, which was dismissed on 31st July, 2003

7. After dismissal of above referred suit, the plaintiff then noticed on 5th August, 2003 that there was encroachment by the defendants. As such,

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suit in question.

8. Defendant Nos. 1 and 2 at Exhibit-34, defendant Nos. 3 and 4 at Exhibit-22 and defendant Nos. 5 and 6 at Exhibit-30 filed their respective written statement.

9. Learned trial Court framed following issues at Exhibit-74 and answered the same accordingly.

ISSUES

FINDINGS

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| (1) Does the plaintiff proves that she is owner and in possession of suit land? | In Affirmative. |
| (2) Does the plaintiff proves that defendants are obstructing her peaceful possession over the suit property? | In Affirmative. |
| (3) Does the plaintiff proves that during the pendency of suit, defendant no.1 to 4 have made encroachment over suit property?
If yes, to what extent? | In Affirmative
To the extent of 6.00 sq.m. by defendant no.1 & 2 and 6.00 sq.m. by defendant no. 3 & 4 as shown |

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in Map Ex.112.

(3A) Whether plaintiff is entitled for removal of encroachment as prayed? In Affirmative.

(4) What order and decree? Suit is decreed As per final order.

10. The suit of respondent No.1-plaintiff came to be decreed vide judgment and order dated 30th April, 2010 directing the defendants including the appellant herein shall put the plaintiff in possession of the suit property as specified in Map Exhibit-112 and also restrained from disturbing possession, which was confirmed in Regular Civil Appeal No.4 of 2013, which was dismissed on 9th June, 2017. As such, this second appeal.

11. Mr. Tambe, learned Counsel for the appellant would submit that the appeal needs consideration on the following questions of law.

(a) Whether both the Courts below had committed an error apparent on the face of record in accepting judgment in Regular Civil Suit No. 571 of 2000

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contrary to the scheme of Sections 41 to 43 of the Evidence Act.

(b) Whether encroachment was properly proved by the plaintiff or not?

12. Mr. Garud, learned Counsel for respondent – plaintiff opposed the claim and sought dismissal.

13. Considered rival claims.

14. The fact remains that present appellant initiated Regular Civil Suit No.571 of 2000 for simplicitor injunction, which was dismissed on 31st July, 2003, during pendency of which, injunction was in operation.

15. In the said suit, findings qua ownership of present respondent No.1-plaintiff were recorded. It is then noted that said findings are very much binding on the present appellant.

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16. Respondent No.1-plaintiff, who was examined at Exhibit-76, placed judgment in the said suit on record and come out with plea that same is binding on the present appellant-defendant No.1. In the said suit, finding qua oral partition between brothers of Namdeo was recorded. The dimension of the property, which has come to the share of Namdeo, through whom to the present respondent No.1-plaintiff is also broiught on record in the said suit based on the registered sale deed dated 21st January, 1998.

17. Both the Courts below, in the backdrop of sale deed executed in favour of respondent No.1, appreciated oral evidence of the defendants and noticed that the defendants have failed to establish the fact that the sale deed by which the plaintiff has relied his case is bogus or nominal document. In paragraph-19 of the judgment, the lower appellate Court considered the effect of evidence of the defendant-present appellant qua findings recorded in Regular Civil Suit No.571 of

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2000, particularly having regard to the nature of evidence and noticed that the present appellant has failed to establish any case, which warrants interference in the findings recorded by the trial Court.

18. As such, the claim of the appellant that the Courts below have delivered judgment contrary to the scheme of Sections 41 to 43 of the Evidence Act will be of hardly any assistance.

19. Apart from above, it is required to be noted that to prove encroachment made by the appellant, the report of Taluka Inspector of Land Records was on record and Surveyor Hemant Rane was examined in support of such encroachment.

20. Having regard to the concurrent findings recorded by both the Courts below, there is hardly any material to infer any perversity, which warrant interference.

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21. In the backdrop of above, the second appeal, against concurrent findings, fails and stands dismissed.

22. Consequently, civil application stands disposed of.

(NITIN W. SAMBRE, J.)

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