

(1)

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

**SECOND APPEAL NO.599 OF 2011
WITH
CIVIL APPLICATION NO.13992 OF 2011
IN
SECOND APPEAL NO.599 OF 2011**

Sabirabegum w/o Nasir,
Age: 48 years, Occu: Household,
R/o Kagdi Ves, Beed,
Tq. & Dist. Beed .APPELLANT

VERSUS

Jahulinnisabegum w/o Abdul Salam
Deshmukh, Age: 58 years,
Occu: Household,
R/o. Beed, Tq. & Dist. Beed ..RESPONDENT

Mr M. M. Patil Beedkar, Advocate for appellant;
Mr Fayaz K. Patel, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 19th JULY, 2017

ORAL ORDER :

The present appellant filed Regular Civil
Suit No. 301 of 2001 for perpetual injunction
against the defendant-respondent claiming that one
Anisuddin Saheb, original owner of land Survey
No. 123, Taraf Pingle, Beed shifted to Hyderabad

(2)

and during his life time, his nephew Saheb Osman started cultivating the land Survey No. 123 and after death of original owner, he became owner of land Survey No. 123. Present appellant-plaintiff claiming to be successor of title to Osman, who had three legal heirs, widow-Chotibee, plaintiff Saberabegum-daughter and another daughter Aminabegum. It is claimed that in earlier round of litigation, her father Shaikh Osman has succeeded before various authorities, particularly in Regular Civil Suit No. 107 of 1973, wherein he is declared as tenant of suit land, which is claimed to be admeasuring 38 ft. x 85 ft., north south and 50 ft. x 82 ft., on east west out of Survey No. 123 at Beed. The plaintiff then claimed that the defendant tried to disturb her possession over the suit property and as such, she filed suit for injunction.

2. The suit claim was resisted by the defendant-respondent by filing his written statement vide Exhibit-21. According to her, she

(3)

is purchaser of land Survey No.121 and 122 to the extent of 4 Gunthas at Taraf Pingale for valuable consideration and further disclosed boundaries of land Survey No.122. It is also claimed that request of joint measurement was made so as to overcome the dispute, particularly about four boundaries of Survey No. 122 and 123, in response to which, measurement was carried out on 20th November, 2002 in presence of plaintiff and defendant by the Maintenance Surveyor. The boundaries were fixed on 15th December, 2000, in which location of Survey No. 122 was found to be on east of Survey No. 123. It is claimed that said boundaries are manipulated, based on which suit is brought in action. It is also claimed that Survey No. 123 Taraf Pingale was wakf property, as was donated by Anisuddin and as such, the plaintiff cannot claim right over such property. It is further claimed that in the measurement carried out by Cadestral Surveyor on 5th June, 1985, it was noticed that Chotibi, wife of Osman has encroached to the extent of 1-1/2 Are land in Survey No. 122.

(4)

3. The issues framed at Exhibit-32 are as under.

POINTS	FINDINGS
(1) Does plaintiff prove her ownership and possession over the suit property?	Not proved
(2) Does plaintiff prove that defendant tried to remove the tin shed and tried to enforce the possession of plaintiff?	Not proved
(3) Whether the plaintiff is entitled for relief claimed?	No
(4) What order and decree?	As per final order

4. After aforesaid issues were framed, trial Court proceeded to record findings against the plaintiff and dismissed the suit. The trial Court noted that ownership of the defendant over Survey

(5)

No. 121 and 122 to the extent of 4 Gunthas was not disputed by the plaintiff.

5. In appeal being Regular Civil Appeal No. 4 of 2007, learned District Judge, Beed dismissed the same by judgment and order dated 30th June, 2011. As such, this second appeal.

6. Mr. Patil, learned Counsel for the appellant-original plaintiff would urge that whether present appellant has encroached on the land of defendant or not is an issue, which can be gone into in a suit if any to be initiated by the defendant for removal of encroachment. He would urge that once the appellant, having noticed to be in settled possession of the suit property, she is entitled for perpetual injunction without establishing her title over the suit property. He would then urge that measurement by the Cadestral Surveyor i.e. DW-3 is required to be ignored and suit is to be remanded back for fresh hearing, as the measurement was carried out without notice to

(6)

the appellant. He would then urge that Cadestral Surveyor has not measured entire land and his report, as such, is not required to be accepted. According to him, the appeal needs to be allowed.

7. Mr. Patel, learned Counsel for the respondent supported the judgment of the Courts below. He would urge that being appeal against the concurrent findings is liable to be rejected, as this Court need not to re-appreciate the pleadings and evidence.

8. Having considered the rival claims, it is required to be noted that even before filing suit, there was measurement of the suit property. The Cadestral Surveyor is examined by the defendant as DW-3. In his evidence, it is brought on record by him that record of right maintained by his office, land Survey No. 123 located at Taraf Pingale, Beed was measured on 20th November, 2002 along with Survey No.122. According to him, for carrying out measurement, the application was given by the

(7)

defendant and notices were served on the mother of present appellant and other persons including wakf board pursuant to the application dated 17th May, 1985. According to him, before measuring, since notices were already served, measurement was attended by the defendant, her husband and mother of plaintiff Smt. Baby. According to him, he had drawn measurement map and report of Survey No. 121 to 124, which is available in office file No. 299/85, which is produced on record of the suit. He has also proved certified copy of map at Exhibit-68. He further deposed that encroachment to the extent of 1-1/2 Guntha was noticed on the land of defendant by Osmankhan and his wife Baby. He has also deposed about dimension and location of Survey No. 123 and 122. He further deposed that he has produced original record in relation to noting and map. According to him, boundary marking were carried out on 15th December, 2000 after the measurement of Survey No.122 and 124. Same was done in accordance with request of the defendant-respondent vide application dated 20th November,

(8)

2000. He stated that he has issued notice to the present appellant and carried out measurement in presence of plaintiff and defendant. He has placed on record original record in relation to measurement carried out in 2000. He has proved Exhibit-69-original record in relation to measurement carried out in 2000.

9. In the cross examination of this witness, nothing incriminating could be brought on record by the present appellant. Though he has stated that notices were served through Under Posting Certificate, he denied the suggestion that notice was not sent to the appellant-plaintiff. Though service of notice through Under Posting Certificate was disputed, however, he has earlier stated that during both the measurements, mother of plaintiff-appellant Chotibi (Baby) was present. In the aforesaid background, the claim as is sought to be put forth by learned Counsel for the appellant that before measurement, no notice was given to the appellant, appears to be contrary to the record and

(9)

evidence of defendant's witness DW-3. The contention of the appellant that defendant should have filed suit for possession of encroached portion and till then, possession of the appellant is required to be protected over encroached area by virtue of this order is not established through pleadings and evidence. It is rather required to be noted that title of the present appellant to the suit property is under cloud.

10. Apart from above, the concurrent findings of fact recorded by both the Courts below are based on the analysis of evidence and pleadings.

11. In my opinion, present appeal lacks merit and as such, stands dismissed.

12. Consequently, civil application stands disposed of.

(N.W. SAMBRE, J.)

Tupe