

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.576 OF 1994

1 Smt. Rajubai Neminath Ekhande
Age 78 yrs., Occupation: Household,
R/o Bombay and at present
Neelanagar, Solapur.

2 Jaikumar Eknath Ekhande,
Age 48, Occupation: Service,
R/o. Block No.7, Room No.5,
Neelanagar, Solapur.
Versus

... Appellants

1 Sidheshwar Malleshappa Mashal
Age 42 yr, Occupation: Service,
R/o 950-A, North Kasaba, Solapur

2 Channappa Malleshappa Mashal
Age 37 yrs., Occupation: Service,
R/o. 950-A, North Kasaba, Solapur

... Respondents

.....

Mr. Rohan P. Surve, Advocate for the Appellants .
Mr. R.S.Alange, Advocate for the Respondent Nos.1 and 2.

.....

CORAM : S.C.GUPTE, J.

DATE : 10 FEBRUARY 2017

ORAL JUDGMENT :

. This second appeal impugns the judgment and order passed by the District Court at Solapur in Civil Appeal No.182 of 1991. By this impugned

judgment and order, the learned District Judge dismissed the appeal filed by the Appellants herein against the judgment and decree passed by the Joint Civil Judge Senior Division, Solapur in Regular Civil Suit No.191 of 1986. The Appellants' suit thus stood dismissed.

2 The dispute between the parties pertains to a wall on the Western side of the Plaintiffs' house (Appellants herein), bearing house no.981, in the city of Solapur. It is the case of the Plaintiffs that the Defendants (Respondents herein) have their house, being house no.950, towards the Eastern side adjacent to the Plaintiffs' house. It is the Plaintiffs' case that in the year 1985, the Defendants pulled down their house and whilst doing so damaged the Western wall of the Plaintiffs' house. The Plaintiffs thereupon filed a complaint to the police which led to criminal prosecution. The parties thereafter compromised the matter. The understanding between them was recorded on 19.12.1985 in the form of an agreement under which the Defendants promised to repair the suit wall. Since the Defendants did not repair the suit wall, according to the Plaintiffs, the latter filed the present suit for directions to repair the suit wall as also removal of encroachment by the Defendants. The trial Court came to the conclusion that the suit wall was not exclusively owned by the Plaintiffs; that there was no encroachment by the Defendants upon the Plaintiffs' property; and that the Plaintiffs were not entitled to any mandatory or perpetual injunction in this behalf. The first appellate Court affirmed these findings.

3 The main reason on which the Plaintiffs' appeal was dismissed by the first Appellate Court was that the suit was for enforcement of rights

under an agreement but the Plaintiffs had not averred or proved that they were ready and willing to perform their obligations under the agreement. The appellate Court found that the agreement between the parties provided for withdrawal of the cases filed by the Plaintiffs and yet the Plaintiffs had not withdrawn the cases but proceeded to conduct the same. Further, the appellate Court noted that the Plaintiffs had agreed to contribute goods and expenses for construction of the wall but there was no evidence that there was any readiness or willingness on their part to discharge these obligations. The appellate Court, in the premises, came to the conclusion that the Plaintiffs were not entitled to any discretionary relief of specific performance.

4 One of the legal issues raised in the present Second Appeal is that the mandatory injunction claimed by the Plaintiffs was not in the nature of a claim for specific performance. There is no merit in this contention. The relief of mandatory injunction claimed in the suit was squarely based on the obligations of the parties under the agreement. Any performance claimed from the Opponent in pursuance of the agreement can only be termed as specific performance under the agreement, whatever be the nomenclature of the actual relief sought.

5 On merits, it is pertinent to note the observations of the first Appellate Court that the Plaintiffs' house had a wall on the Eastern side, whereas the Defendants' house had a wall on the Western side; that the two walls were so adjacent and touching each other that they looked like a single wall ; and that the Defendants had admittedly constructed their wall. There was oral evidence and also photographs to that effect. There

was, on the contrary, no evidence to come to the conclusion that the Defendants had damaged the Plaintiffs' wall

6 Learned counsel for the Appellants submitted that there was also an encroachment on the Plaintiffs' wall on the part of the Defendants and that the suit could not have been dismissed as far as that relief was concerned. Both the trial Court and appellate Court by concurrent findings held that there was no case of encroachment. The Plaintiffs had not got their properties measured by any competent authority; on the other hand, the Defendants had undertaken measurements through the City Survey Office and got their property duly measured. The construction on their property was thereafter made by the Defendants as per the approved lay out plan. This again is a pure finding of fact and cannot be said to be vitiated by any error of law.

7 In the premises, there is no merit in the second appeal and the same is dismissed. No order as to costs.

(S.C.GUPTE, J.)