

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.614/2017

Pandurang s/o Bhikaji Ghode ..Vs.. Prakash Krushnarao Deshmukh & anr.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Mr. O. Y. Kashid, Advocate for appellant.

CORAM : V.M. DESHPANDE, J.

DATED : NOVEMBER 24, 2017

1. Heard Mr. O. Y. Kashid, learned counsel for the appellant. The present appeal is filed by the unsuccessful plaintiff who lost his case in both the Courts below.

2. Submission of the learned counsel for the appellant is that perversity has crept in the judgment of the learned lower appellate Court since the lower appellate Court has not considered the Commissioner's report. Besides this, there is no other submission.

3. The appellant-plaintiff has filed a suit for removal of encroachment and for delivery of possession of the encroached portion. According to the plaintiff, he got possession from the society, Swastik Sahakari Gruh Nirman Society on 30.03.1998. The learned trial Court, on rival pleadings framed the issues. The parties went on trial in respect of the respective issues. The learned trial Court recorded a finding of fact that the plaintiff has failed to

prove that the defendant no.1-Prakash has committed encroachment to the extent of 66 Sq. ft. land owned by the appellant. It is also the finding of fact recorded by the learned trial Court that the defendant no.2-Shivdas is a bona fide purchaser for valuable consideration. Consequently, the suit was dismissed.

4. Being dissatisfied with the said judgment, an appeal was preferred. During the pendency of the appeal, an application was moved by the appellant for appointment of D.I.L.R. as Commissioner to measure the plot. The said application was allowed and the Commissioner was directed to measure the entire layout, pointing out the location, the area within four boundaries and measurement of each plot in the layout. Accordingly, the Commissioner submitted his report. Objections were raised to the report filed by the Commissioner. Therefore the appellate Court again directed the D.I.L.R., the Commissioner to submit fresh report with all details and he was again directed to carry out the measurement of the entire layout at the costs of appellant. However, the appellant, for the reasons best known to him, failed to deposit the Commissioner's fee. Thereafter, the appellant has filed another application Exh.-58 and sought a direction for the Commissioner to reconsider his report with appropriate rectification in the map. The said application was rejected by the learned lower appellate Court. The said order was carried before this Court by the appellant by filing Writ Petition No.3339/2010. However, the said writ petition

was withdrawn by the appellant with a liberty to file fresh application. The appellant again exercised the liberty granted by this Court and filed another application. However, this application was rejected by the trial Court since he has not complied with the earlier directions given by the appellate Court. This particular order was not challenged by filing any writ petition before this Court.

5. Thus, it is crystal clear that the submission of the learned counsel or the appellant that there is a perversity in the judgment of the learned lower appellate Court in not considering the Commissioner's report, is devoid of any substance. The Commissioner has in fact filed a report which was objected. Again fresh opportunity was given to the appellant with a direction that on payment of costs of the Commissioner, the Commissioner shall submit the report. The said opportunity was not availed by the appellant. Consequently, there was no reason for the Commissioner-D.I.L.R. to carry out the measurement again. Consequently, the earlier report was on record which was showing that there was no encroachment. The plaintiff himself has given certain admissions in his evidence which show that though he has taken possession on 30.03.1998, he submits that he noticed that encroachment was on 15.03.1998. Admittedly the sale deed was executed much later.

6. All these aspects are nothing but evaluation of the evidence. Both the Courts below have considered the

evidence and pleading in correct perspective and have noticed that the appellant has failed to prove that the defendants have committed any encroachment.

7. No substantial question of law is involved in the present second appeal. All findings pertain to the finding of facts. The appeal is therefore rejected. No order as to costs.

JUDGE

kahale