

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

**SECOND APPEAL NO.326 OF 2008
WITH
CIVIL APPLICATION NO.7748 OF 2010**

1. Sau.Vandana Rajendra Kavade
Age: Major, Occu.: Agri.
2. Sau.Sunita Dhondiram Dhat
Age: Major, Occu.Agri.
At present Both R/o.Rimpa Apartment
Through their Power of Attorney
Prakash Manikrao Kavade
Age: Major, Occu.: Business,
R/o. Court Road, Kopargaon,
Tq.Kopargaon, Dist.Ahmednagar. ..Appellants
(Ori.Plffs.)

Versus

- . Dada Madhav Gavare
Age: Major, Occu.: Agri. Labour,
Now residing near Bhojade Chowki,
Post.Sanvatsar, Tq.Kopargaon,
Dist.Ahmednagar. ..Respondent

...

Advocate for Appellants : Shri S.T.Shelke
Advocate for Respondent : Shri S.K.Shinde

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CORAM : P.R.BORA, J.

Reserved On : 14th August, 2018

Pronounced On : 28th September, 2018

JUDGMENT :-

1. The plaintiffs in Regular Civil Suit No.501 of 1997 have preferred the present Second Appeal against the Judgment and order passed in Regular Civil Appeal No.125 of 2003 by District Judge-1, Kopargaon, Dist.Ahmednagar, on 17.10.2007. The appellants and the respondent are hereinafter referred to as plaintiffs and defendant as per their original status in the civil suit.

2. The plaintiffs had filed the suit for possession and perpetual injunction in the Court of Civil Judge, Junior Division, Kopargaon, against the defendant alleging that he has encroached 3 Are portion of the land Survey Nos.58/1 and 58/2 belonging to them situated at village Sanvatsar, Tq.Kopargaon, and was obstructing them from erecting the compound to their said land. It was the contention of the plaintiffs that the suit property was purchased by them in the year 1993. It was their further contention that the defendant by taking undue advantage of the fact that plaintiffs were not residing at village Sanvatsar, gradually started making encroachment in their land and encroached upon 3 Are portion of their land and erected a hut thereon and started using the encroached portion for keeping the cattle. It was the further contention of the plaintiffs that they got the

measurement done of their lands whereupon it was revealed that 3 Are portion was encroached upon by the defendant. It was also their contention that inspite of their request, the defendant did not remove the encroachment, on the contrary obstructed the plaintiffs from erecting the compound and as such they were constrained to file a suit against him. The plaintiffs had filed the aforesaid suit through their Power of Attorney Holder namely Prakash Manikrao Kavade.

3. The defendant filed his written statement opposing the contentions raised in the suit plaint. It was his contention that suit itself was not maintainable being filed by the Power of Attorney Holder. The plea of non-joinder of necessary parties was also raised. It was further contended by the defendant that the hut erected by him was not in the lands belonging to the plaintiffs but was on the premises owned by the Government and as such there was no cause of action for the plaintiffs to file the said suit against him. It was also contended by him that for occupation of the premises in his possession, he is regularly paying tax to the Gram Panchayat. The defendant has therefore, prayed for dismissal of the suit.

4. In order to substantiate the contentions raised in the plaint, the

Power of Attorney Holder of the plaintiffs deposed before the Court and the plaintiffs also examined one Sayad Mohammad Banemiya, the Cadastral Surveyor in the office of the T.I.L.R, Kopargaon. The map prepared by the said witness was duly proved and was marked as Exh.72. The defendant himself testified before the Court and also examined one Namdeo Sitaram Shinde, Talathi of village Sanvatsar.

5. The learned Civil Judge, Junior Division, after having assessed the oral and documentary evidence brought on record before him, decreed the suit filed by the plaintiffs. The defendant challenged the Judgment and decree passed by the Civil Court by filing Regular Civil Appeal No.125 of 2003 before the District Court at Kopargaon. The learned District Judge after hearing the learned Counsel appearing for the parties, set aside the Judgment and decree passed by the Trial Court and consequently, dismissed the suit filed by the plaintiffs vide his Judgment delivered on 17.10.2007. Aggrieved by, the plaintiffs have preferred the present Second Appeal.

6. Shri S.T.Shelke, learned Counsel appearing for the plaintiffs criticised the impugned Judgment on various grounds. The learned Counsel submitted that the Lower Appellate Court has grossly erred

in appreciating the evidence on record. The learned Counsel further submitted that the Lower Appellate Court has misread and misconstrued the evidence of PW-1 i.e. Cadastral Surveyor examined by the plaintiffs. The learned Counsel further submitted that the case of the plaintiffs was based on sound evidence and the plaintiffs had sufficiently proved by getting the land measured and by examining the Cadastral Surveyor before the Civil Court that the defendant has encroached upon 3 Are portion of land belonging to them and he was obstructing the plaintiffs from carrying out compound work of their land. The learned Counsel therefore, prayed for setting aside the Judgment and order passed by the Lower Appellate Court and to restore the order passed by the learned Trial Court in the Regular Civil Suit.

7. Shri S.K.Shinde, learned Counsel appearing for the defendant supported the impugned Judgment and order. The learned Counsel submitted that the Lower Appellate Court has rightly pointed out discrepancies in the evidence of Sayad Mohammad Banemiya (PW-1) - Cadastral Surveyor and the evidence of the Power of Attorney Holder (PW-2) of the plaintiffs. The learned Counsel pointed out that the Power of Attorney Holder of the plaintiffs had candidly

admitted that a canal is passing through Survey Nos.58/1 and 58/2 whereas in the map at Exh.72, the said position is not reflected. The learned Counsel further submitted that the defendant has not made any encroachment in the lands belonging to the plaintiffs. The learned Counsel further submitted that the Trial Court had erroneously decreed the suit and the Lower Appellate Court has rightly set aside the said decree and ultimately dismissed the suit filed by the plaintiffs by passing a well reasoned Judgment. The learned Counsel submitted that no interference is called for in the Judgment and order impugned in the present appeal. The learned Counsel, therefore, prayed for dismissal of the appeal.

8. I have given due consideration to the submissions made by the learned Counsel appearing for the parties. I have also perused the Judgments passed by the Courts below and the evidence adduced in the matter. The entire controversy revolves around the evidence of Sayad Mohammad Banemiya (PW-1) and the map at Exh.72. The Lower Appellate Court seems to have given undue weightage to the fact that the Power of Attorney Holder in his cross-examination admitted that a canal goes through the land at Survey Nos.58/1 and 58/2 and in the map at Exh.72 the said position has not been

reflected. However, if the evidence of Sayad Mohammad Banumiya (PW-1) is perused carefully, everything seems to have been clarified by him. PW-1 in his cross-examination has explained that the said canal had gone from the *Bandh* of Survey Nos.57 and 58 and since the canal does not come within Survey No.58, he has not shown the said in the map at Exh.72. In the circumstances, merely because some stray admission was given by PW-2, the fact that the defendant has made an encroachment in the lands belonging to the plaintiffs cannot be denied.

9. The map at Exh.72 shows that the defendant has encroached upon 3 Are portion of the lands belonging to the plaintiffs. The defendant has not brought on record any cogent and sufficient evidence in rebuttal. From the tax receipts filed on record by the defendant, no such inference can be drawn that the hut for which the Gram Panchayat tax seems to have been paid by the defendant, is not situated in the lands belonging to the plaintiffs.

10. After having considered the entire evidence on record, it appears that the learned Lower Appellate Court has without assigning sufficient and cogent reasons, has wrongly set-aside the

Judgment passed by the Trial Court. On perusal of the evidence on record, I have no hesitation in holding that the plaintiffs have duly discharged burden cast upon them to prove that the defendant had encroached to the extent of 3 Are in the lands belonging to them. Sayad Mohammad Banemiya (PW-1) is an independent witness and if his evidence and the map, which was duly proved in his evidence and marked as Exh.72, is perused there remains no doubt that the encroachment done by the defendant is in the lands belonging to the plaintiffs. The defendant has not denied the fact that he has made an encroachment. It was his contention that the encroachment made by him is not in the lands belonging to the plaintiffs. However, the defendant has not brought on record any evidence to show in which lands he has made an encroachment and erected his hut therein. The Lower Appellate Court has wrongly set aside well reasoned Judgment delivered by the Trial Court. I am, therefore, inclined to allow the present appeal. Hence, the following order:

ORDER

- I) The Second Appeal is allowed.
- II) The Judgment and order dated 17.10.2007 passed by District Judge-1, Kopargaon, in Regular Civil Appeal No.125 of 2003, is quashed and set aside.

- III) The Judgment and order dated 18.09.2003 passed by the Trial Court in Regular Civil Suit No.501 of 1997, is restored.
- IV) Civil Application No.7748 of 2010 also stands disposed of.

(P.R.BORA)
JUDGE

SPT