

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

SECOND APPEAL NO. 555 OF 2017
WITH
CIVIL APPLICATION NO.10795 OF 2017
IN SA/555/2017

NIMBA SONU WALUNJWANI AND OTHERS
VERSUS
KASHINATH KRUSHNA PATIL

...
Advocate for the Appellants : Shri Shirsath P.B.
Advocate for the Respondent : Shri Subodh P. Shah.
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 31st January, 2018

Per Court:

1 The Appellants are the original Defendants, who are aggrieved by the concurrent findings of the Trial Court dated 05.02.2011 in RCS No.3/2005 filed by the Respondent/ Plaintiff and the judgment of the first Appellate Court dated 19.07.2017 delivered in RCA No.32/2011.

2 I have considered the strenuous submissions of the learned Advocates for the Appellants/ original Defendants and the Respondent/ original Plaintiff.

3 The learned Advocate for the Appellants has stated that the Second Appeal is based primarily on the following issues :-

- (a) RCS No.137/1987 was earlier filed against the Appellants for removal of encroachment.
- (b) By the judgment of the Trial Court, the said suit was decreed and the Appellants preferred the Regular Civil Appeal, which was dismissed. The Appellants then preferred the Second Appeal, which was also dismissed.
- (c) Since the construction has not been removed by the Appellants pursuant to the judgment of the Trial Court in RCS No.137/1987, the execution proceedings have been initiated by the original Plaintiff and the same are pending.
- (d) In the above backdrop, RCS No.3/2005 alleging encroachment in 2005, could not have been filed. The Appellants specifically raised this ground in the Written Statement and contended that the earlier verdict in the 1987 suit, which is now subject matter of the execution proceedings, precludes the filing of the 2005 suit.
- (e) Article 113 of the Limitation Act with regard to the filing of the suit for removal of encroachment, has been specifically invoked by the Appellants.
- (f) When the Appellants have already suffered the judgment and decree in the 1987 suit, the second suit for the same purpose in 2005 could not have been filed.

- (g) The Appellants have suffered double jeopardy.
- (h) When the allegations of encroachment in the 1987 suit pertain to that period, the 2005 suit filed for the same cause alleging that the construction has taken place in 2005, is a misrepresentation by the Plaintiff.

4 On the basis of the submissions of the learned Advocate for the Appellants as have been recorded above, a picture has been created before me that RCS No.137/1987 has been filed by the same Plaintiff, who has also filed RCS No.3/2005. It is also sought to be conveyed that when the encroachment of 1987 has been adjudicated upon by the competent court, notwithstanding the fact that the Appellants have still not obeyed and implemented the said judgment, the second suit in 2005 in the same cause, cannot be filed. The above submissions of the Appellants appear to be aimed at misleading this Court considering the fact situation that emerges from the second suit preferred in 2005.

5 The learned Advocate for the Respondent/ original Plaintiff has submitted on the basis of the record that the 1987 suit has been preferred by a different individual with regard to the encroachment committed by the Appellants on the eastern side of the plot. The said encroachment was in the form of the compound wall which encroached on the nine meters wide public road. The litigant residing opposite the

residence of the Appellants across the road, was aggrieved by the said encroachment and hence, the 1987 suit.

6 It is then pointed out that the Appellants caused the encroachment by construction of the compound wall on the western side of their plot and the said compound wall encroached upon the plot owned and possessed by the Plaintiff. Hence, the Plaintiff preferred the said suit in 2005 which is for a completely different and independent cause of action.

7 Upon considering the submissions of the learned Advocates and on perusing the record and proceedings, it is obvious that both the Courts below have noted that the Plaintiff in the second suit and the Appellants herein owned triangular plots and the said map with regard to the positioning of the plots and encroachment committed by the Appellants was placed on record at Exhibit-99. A rough sketch prepared by the original Plaintiff in the second suit is placed on record before me and which is marked as "X" for identification.

8 The Trial Court has noted that the moment the Appellants began encroaching the triangular plot of the Plaintiff in 2005, he has filed the 2005 suit. The Appellants, though led evidence before the Trial Court, could not establish that the encroached portion on the western side into the plot of the Plaintiff was a construction of 1991. Such oral and documentary evidence was not brought before the Trial Court to convince

it that the said construction was of 1991. The defence put forth by the Defendants was, therefore, not established and the Trial Court then concluded that as the Plaintiff rushed to the Court with the 2005 suit upon the encroachment committed by the Defendants, the suit was well within the limitation of three years.

9 Even otherwise, the earlier suit was with regard to the encroachment on the public road on the eastern side dating back to 1987 and the cause of action in the 2005 suit was the encroachment on the western side into the plot of the Plaintiff.

10 The record and proceedings of the Courts below are available. Insofar as the encroachment is concerned, the Trial Court has placed reliance upon the Court Commissioner's report and the map as well as the oral evidence recorded. The witnesses of the Defendants admitted that they had no evidence to prove that the encroachment on the western side was of 1991. The Appellate Court, while dealing with the Regular Civil Appeal, went through the record and proceedings and evidence and noticed that the encroachment on the western side into the plot of the Plaintiff was established. The Defendants could not prove that the compound wall occupying the land on the western side, fell into the area of the land which they had purchased and possessed.

11 Considering the above, I do not find that the Appellants have succeeded in making out any substantial question of law in this Second

Appeal. The Second Appeal being devoid of merit is, therefore, dismissed.

12 The pending Civil Application does not survive and stands disposed of.

13 The record and proceedings received from the Courts below be returned to the said courts expeditiously.

kps

(RAVINDRA V. GHUGE, J.)