

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

**945 SECOND APPEAL NO. 71 OF 2016
WITH CA/1213/2016 IN SA/71/2016**

**NARAYAN MUNJAJI NIKHATE AND ANOTHER
VERSUS
SOPAN MADHAVRAO SASANE AND ANOTHER**

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Advocate for Appellants : Shri Anil M.Gaikwad
Advocate for Respondent No.1 : Shri P.P.Uttarwar
Advocate for Respondent No.2 : Shri S.V. Kurundkar

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CORAM : P.R. BORA, J.
Date: July 17, 2018

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ORDER :-

1 Heard Shri A.M.Gaikwad learned Counsel appearing for the appellants. Perused the Judgments passed by the Courts below.

2 The present respondents had filed Regular Civil Suit No.91 of 2004 against the present appellants claiming mandatory injunction against them for removing the construction carried out by these appellants, which according to the plaintiffs was obstructing their right of way. It was the defence raised by the present appellants that plaintiffs do not have any locus-standi to seek the relief of removing encroachment of public way since it falls within the domain of local authority. It was the contention of the original

defendants - present appellants that they were in continuous possession of the said space from last 29 years. In such circumstances, the Suit was resisted by the appellants.

3 The Judgment delivered by the Trial Court however, reveals that the appellants failed in substantiating the defence raised by them. I deem it appropriate to reproduce paragraph No.11 of the Judgment of the Trial Court, which reads thus:-

"11. However, in support of the contention of plaintiff, he examined himself as well as examined PW-2 Tukaram Kapure PW-3 Sopan Sasane. These witnesses specifically deposed that the defendant made encroachment over the disputed portion in the year 2002. Not only this PW-4 who is CO of Municipal Council Loha, he also specifically deposed that the suit portion is towards western side of Latur to Nanded road. Previous CO Surekha Mane had issued notice to the encroacher and said notice is below exh.23. They also given reply of notice stating therein that he is in possession over the said portion since last 28 years. Further he deposed that the defendants had not obtained any permission for construction from the Municipal Council,

Loha and the encroached portion is adjacent to the portion of said road. In support of the issuance of notice, the defendants failed to remove the said encroachment. Further in support of the contention of defendants, they also led their evidence by way of affidavit and only they deposed that they are in possession since last 29 years. But they have not filed any receipt on record to show that they paid any tax towards Government of Maharashtra for their unauthorised possession. Further they admitted that the Government of Maharashtra had not allotted said portion to them. This fact itself goes to show that the defendants are in illegal possession over the suit portion. Not only this the plot no.1051 in land S.No.31 and 32 was allotted in the name of wife of defendant no.1 and one plot no.1039 was allotted in the name of father of defendant no.2. They sold these plots even though without any right and concerned they illegally made encroachment over the suit site and therefore, they have also not specifically proved that their possession is since last 29 years. On the contrary plaintiffs by way of oral evidence proved that the defendants made encroachment towards the eastern side of their plot in the

year 2000. So, I answer on issue No.2 in affirmative and issue no.3 in negative accordingly."

4 After the Suit was decreed, the appellants filed Regular Civil Appeal No.800020 of 2006 before the District Judge-1, Kandhar at Nanded. The learned District Judge after having considered the submissions, dismissed the appeal. The observations, which are relevant so far as controversy raised in the present matter is concerned, are made in paragraph Nos.13, 14 and 15 in the said Judgment and the same are reproduced below:

"13. According to the defendants since last 29 years, they are possessing said portion. They made construction of their house on it and they are doing business of carpentership on it. Question arise whether they had given any evidence so as to show that they entered on the said portion lawfully. The defendant No.1 admitted that plot in S.No.31 and 32 are adjacent to Nanded-Latur road. Defendant No.2 also admitted that suit plot is situated towards western side of the Nanded-Latur road. They also admitted that they made encroachment over the suit plot adjacent to

the plaintiffs' plot. They also admitted that they are not having allotment letter with respect to the suit plot. They have also admitted that they are not having any documents in respect of death. According to them, they are possessing the suit portion since last 29 years, but they have failed to produce any documentary evidence to show that since last 29 years they are possessing the said portion authorizedly. On the contrary, they admitted that the said portion is part of land bearing S.No.31 and 32. Thus, from all these evidence it clearly shows that they are not the owner of the said portion. They were/are not possessing it authorizedly. It only reveals that in spite of not having any legal rights over it, they are claiming the said portion.

14. As per the admission of the defendants, it shows that the suit plots are the portion of land S.No.31 and 32. It only means that said portion is kept vacant by the State of Maharashtra with object that in the near future Latur-Nanded High Way road may likely to be increased and said portion is likely to be required for the extension of width of the High Way. It only means that said portion is

part of public road.

15. First question arise whether plaintiffs are having a locus-standi to institute the present suit. The ld. Adv. for the plaintiffs put reliance on the ruling ***Jiwanlal s/o Pokardas Motwani Vs. State of Maharashtra reported in 2004 (1) Mh.L.J. 265.*** Their Lordship observed where encroachment made on public road and inconvenience and wrong to the public including the plaintiff must be presumed. In such circumstances, the suit even though it is not sued in the representative capacity, need not show damages caused to him in order to obtain relief. Thus, the present suit is perfectly maintainable, considering the ratio of the said ruling."

5 After having considered the reasoning given by the Courts below and the evidence available on record, it appears to me that no case is made out to admit the appeal. No substantial question of law is pointed out by the appellants so as to consider the appeal on merits. As has been admitted by the appellants, they have not legally obtained possession of the suit portion. No legal right of the appellants over the suit portion can

said to have been proved at any point of time. Thus, no case is made out by the appellants for admitting the present appeal. Hence, the following order is passed:-

ORDER

- I) The Second Appeal stands dismissed.
- II) Pending Civil application also stands disposed of.

(P.R. BORA, J.)

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