

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

**SECOND APPEAL NO.1129 OF 2012
with
CIVIL APPLICATION NO.130 OF 2013**

Shankar Bala Kamble
since deceased through:
1A. Mohan Shankar Kambale & Ors. ... Appellants

Vs.

Balasaheb Mahadu Kambale
since deceased, through:
1A. Akkatai Balasaheb Kambale & Ors. ... Respondents

Mr.P.J. Thorat for the Appellants
Mr.Girish R. Agarwal for Respondent Nos.1A to 1D, 3 to 10

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: APRIL 17, 2018**

P.C. :

1. This Second Appeal is filed against the judgment and order dated 13.9.2012 passed by the learned District Judge, Satara and also the judgment and order dated 4.1.2011 passed by the learned 2nd Joint Civil Judge Junior Division, Wai. The appellant is the original defendant No.1 and respondent Nos.1 to 7 are the original plaintiffs. Respondent Nos.2 to 13 are the co-sharers alongwith the plaintiffs of the suit land. (For the sake of brevity, the parties shall hereafter be addressed to by their original status as 'plaintiffs' and

'defendants'). The plaintiffs filed Suit being RCS No.102 of 2003 for declaration and perpetual injunction in respect of the suit land bearing Survey No.2263/A admeasuring 34.5 sq.mtrs which includes a shed admeasuring 12.8 sq.mtrs. The shed is described as 1B and the land is described as 1A. However, 1A and 1B constitute the suit property. The land is jointly owned by plaintiff Nos.1 to 7 and defendant Nos.2 to 13. According to the plaintiffs, it is an ancestral property and they are enjoying the said property. It is the case that defendant No.1 has no right in the suit property. However, he has constructed a shed i.e., 1B and has encroached upon the land. Defendant Nos.8 and 9 joined hands with defendant No.1 and they supported the case of defendant No.1 by filing written statement and claimed that the shed was constructed in the year 1988 and since then, he is enjoying the possession of the shed. It also claimed that C.S No.2263 is entirely owned by defendant No.1. The trial Court framed issues and decreed the suit partly in favour of the plaintiffs by granting declaration and injunction in respect of the suit land No.1A and no relief was granted in respect of 1B. Defendant No.1, being aggrieved by the said order of injunction and declaration, in respect of property 1A, filed first appeal being Regular Civil Appeal No.85 of 2011. In the

said appeal, the plaintiff Nos.1 to 6 filed cross objections. The appellate Court though confirmed the judgment and decree of the trial Court in respect of 1A further allowed cross objections and the set aside the order of the trial Court in respect of suit property No.1B, decreed the suit and also declared that the plaintiffs and the defendant Nos.2 to 7 are the owners of the suit property i.e., CTS No.63A including the tin shed and directed defendant No.1 to remove the tin shed and hand over vacant and peaceful possession of the suit property to the plaintiff in two months. The said judgment and order dated 13.9.2012 is the subject matter of challenge in this appeal.

2. Mr.Thorat, the learned Counsel for the appellants, has submitted that in this case, all the plaintiffs did not file the cross objection and under such circumstances, whether such cross objections can be maintainable. He raised a substantial question of law as follows:

1A. Whether the Cross objection filed by the respondent Nos.1 to 7 challenging the dismissal of the Suit to the extent of mandatory injunction directing removal of the suit shed and handing over possession of the portion of land covered by the Shed was maintainable in absence of filing separate Appeal challenging the part dismissal of the suit?

1B. Whether the suit filed by the respondent Nos.1 to 7 for possession of the suit shed in the year 203 in the light of the admission of the co-owners i.e., Defendant Nos.8 & 9 about construction of the suit shed in the year 1988, is within the period of limitation?

1C. Whether the suit filed by the Respondent Nos.1 to 7 alleging encroachment on the suit property by the Appellant and one co-owner i.e., Defendant No.2 is maintainable in view of the fact that the Defendant No.2 has a right to put up construction on the suit property being the co-owner thereof?

1D. Whether the suit for possession is maintainable by the respondent Nos.1 to 7 against the co-owners of the said property in absence of seeking any relief of partition?

1E. Whether reliefs which have been refused by the trial Court to the Respondent Nos.1 to 7 can be challenged by merely filing cross objections in the Appeal filed by the Appellant without challenging the decree of part dismissal of the suit?

1F. Whether the clause 5 of the judgment and order passed by the first appellate Court is correct when no such prayer for declaration in respect of tin shed is made by the plaintiffs in the suit?

3. Learned Counsel for the respondents has argued that no substantial question of law is made out. He submitted that both the parties have tendered evidence and on the basis of the said evidence, the learned Judge of the appellate Court has rightly confirmed and modified the order of the trial Court and decreed the suit as a whole. The submissions of the learned Counsel for the appellants that when plaintiff No.7 has not joined in filing cross

objections with other plaintiffs, then such cross objections is not maintainable.

4. It appears that such objection was not taken at the first appellate stage by defendant No.1. Moreover, this objection is not maintainable. The parties aggrieved can always file cross objections or challenge the impugned order. One of the plaintiffs may opt for not taking steps in appeal. However, his decision cannot take away the rights of other parties to prosecute further any matter.

5. Much was argued in respect of limitation on the basis of the evidence tendered by the parties. It is the case of the plaintiffs that the shed was constructed by defendant No.1 in the year 2003. However, it is the case of defendant No.1, 8 and 9 that defendant No.1 constructed the suit shed in 1988 and, therefore, the suit is not within limitation. The first appellate Court has discussed this issue and the evidence and has submitted that no documentary evidence is proved by either of the parties. However, it is a suit for encroachment. It is further pointed out that the evidence of the DW2 Commissioner is also to be taken into account. It is to be noted that this being a case of encroachment, the TILR was

appointed as Court Commissioner who carried out measurements of suit land i.e., 63A in the presence of both the parties, and filed his report, which is taken on record at exhibit 46. The evidence is marked as exhibit 110. The trial Court has not properly considered the evidence of the Court Commissioner. However, the first appellate Court has discussed the said evidence on the point of encroachment and has stated that the suit land 2763/A is adjacent to land 2263, which is admittedly owned by defendant No.1 and major portion of the tin shed is on the suit land 1A. Thus, the first appellate Court has considered the admissions and the evidence correctly. It is rightly held by the first appellate Court and also the trial Court that the other defendant Nos.7 and 8 and defendant No.1 are having hand in glove and, therefore, they are supporting defendant No.1. The relations between these defendant Nos.8 and 9 are hostile with the plaintiffs and the other defendants. The learned Counsel has also raised the question that in the cross objection, whether the suit can be decreed when the findings in respect of mandatory injunction was not challenged by filing separate appeal by the plaintiffs. This cannot be framed as substantial question of law in view of Rule 22 and Rule 41 of the Civil Procedure Code. The cross objections filed is to be treated

as if the party has preferred a separate appeal.

6. Insofar as the the submissions in respect of clause 5 of operative portion of the order of the first appellate Court of giving declaration regarding the tin shed i.e., 1B is concerned, the learned Counsel for respondents concedes that such declaration in respect of tin shed is to be set aside and modified.

7. In view of this, considering the judgment of both the Courts and the submissions, I am of the view that no substantial question of law is made out. The points raised are based on the findings given on the facts. Hence, the appeal is dismissed except with a modification that clause 5 is to be read as it is except the declaration action in respect of the tin shed is hereby set aside and the order of the first appellate Court is hereby confirmed.

8. Civil Application also stands disposed of.

(MRIDULA BHATKAR, J.)