

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

**SECOND APPEAL NO.192 OF 2016**

Babulal Manik Shaikh,  
Age 62 yrs., Occ. Agri.,  
R/o Talni, Tq. Ausa, Dist. Latur.

... **Appellant.**

... **Versus** ...

- 1 Babu Maruti Samudrawane,  
Age 59 yrs., Occ. Agri.,  
R/o Talni, Tq. Ausa, Dist. Latur.
- 2 Shahuraj Shankar Samudrawane,  
Age 54 yrs., Occ. Agri.,  
R/o Talni, Tq. Ausa, Dist. Latur.
- 3 Ram Shankar Samudrawane,  
Age 49 yrs., Occ. Agri.,  
R/o Talni, Tq. Ausa, Dist. Latur.

... **Respondents.**

...

Mr. D.P. Deshpande, Advocate for the appellant

Mr. B.R. Warma, Advocate for the respondent No.1

Mr. N.R. Pawade, Advocate for the respondent Nos.2 and 3 - absent

...

**CORAM : SMT. VIBHA KANKANWADI, J.**

**RESERVED ON : 04<sup>th</sup> JULY, 2019**

**PRONOUNCED ON : 04<sup>th</sup> SEPTEMBER, 2019**

**JUDGMENT :**

1 Present appeal has been filed by original plaintiff challenging the Judgment and Decree dated 18.10.2013 passed in R.C.A. No.193 of 2010 by District Judge-2, Latur to the extent of ignoring the cross objection of the appellant, arising out of the Judgment and Decree dated 16.08.2008 passed in R.C.S. No.90/2000 by Joint Civil Judge Junior Division, Ausa, whereby though the suit was decreed against original defendant Nos.2 and 3, it was impliedly dismissed against defendant No.1, though in the suit the relief was sought against defendant No.1 also.

2 Heard learned Advocate Mr. D.P. Deshpande for appellant-original plaintiff and learned Advocate Mr. B.R. Varma for respondent No.1-original defendant No.1, who are the original plaintiff and defendant No.1 respectively. Learned Advocate for respondent Nos.2 and 3 Mr. N.R. Pawade was absent.

3 Before turning to the grievance, that has been raised, it is necessary to see that the present appellant-original plaintiff had filed initially the suit for declaration and injunction, however, later on he sought possession of the encroached area shown in A, B, E, F as per para No.8 of the plaint. Plaintiff contended that he is the owner and possessor of agricultural

land bearing Sy.No.115/1 admeasuring 02H 07R and Sy.No.115/2 admeasuring 01H 65R, which has been more particularly described in para No.1 of the plaint. The said lands are situated at village Talni, Tq. Ausa, Dist. Latur. Defendants are the owners and possessors of agricultural land bearing Sy.No.114. It was stated that the land belonging to the plaintiff is separated by survey number bandh which was shown in the map with green line from A-B. A water stream passes through the agricultural land of the plaintiff which is running parallel to the common bandh A-B. It is stated that the common survey number bandh was demolished by defendants on 15.10.1999 and there was an attempt to encroach over the plaintiff's land, and therefore, the suit was filed for declaration and permanent injunction. However, it is then by way of amendment contended, that the defendants have actually encroached on the portion which has been shown by the area A, B, E and F in the map drawn in para No.8 of the plaint.

4           The defendant Nos.1 to 3 resisted the claim of the plaintiff by filing written statement. They admitted that they are the owners and possessors of land bearing Sy.No.114, whereas the plaintiff is the owner and possessor of lands bearing Sy. Nos.115/1 and 115/2. They denied that there is a common bandh, which has been shown by green colour A-B and there were boundary marks between the land of the plaintiff and the defendants.

They have contended that the water stream itself is a boundary between the agricultural land of the plaintiff and defendants. Plaintiff had dug a well in the bed of water stream. The debris from the digging activity were stored on the opposite side of the water stream in the land of defendants. It is stated that the alleged disputed area is, in fact, part and parcel of their land i.e. Sy.No.114 and they are in possession of the same. They denied the allegation of committing encroachment and forcible possession of the disputed area.

5           Taking into consideration rival contentions, issues were framed, additional issues were also framed. Parties have led oral as well as documentary evidence. Taking into consideration said evidence on record and after hearing both sides, the learned Trial Court had decreed the suit. It was declared that the plaintiff is the owner and possessor of land Sy.No.115/1 and 115/2. Permanent injunction was granted against defendant Nos.2 and 3. So also, the defendant Nos.2 and 3 were directed to hand over the peaceful possession of the encroached land admeasuring 25 R to the plaintiff.

6           Original defendant Nos.2 and 3 challenged the said Judgment and Decree in R.C.A. No.193/2010. As aforesaid, the said appeal was heard and dismissed on 18.10.2013. The respondent-original plaintiff had filed cross objection at Exh.18 challenging the dismissal of the suit as against

defendant No.1. It is to be noted, there is absolutely no mention about the decision on the cross objection in the judgment of the appeal. Hence, present appeal has been filed.

7           The learned Advocate appearing for the appellant submitted that though a specific cross objection was raised before the learned District Judge-2, Latur, he had not considered that cross objection and therefore, the appeal filed by the aggrieved party is maintainable. The learned Trial Court had not given any proper and cogent reason, as to why the suit was dismissed, as against respondent No.1. My attention is drawn to the findings to issue No.1, additional issue Nos.2 and 3, wherein those issues were answered in the affirmative i.e. in favour of plaintiff. Prayer is, therefore, made to correct the said decree.

8           Per contra, the learned Advocate appearing for the respondent No.1 submitted that the learned trial Court had come to the conclusion that green line A, B shown in para No.8 of the plaint is the common survey number bandh separating the land of the plaintiff from that of the land of defendant Nos.2 and 3 and therefore, taking into consideration the immediate evidence regarding the ownership of the property, the suit was rightly dismissed as against respondent No.1. Merely because the said point was not argued before the learned First Appellate Court, the matter can not

be remanded nor the operative order requires any interference.

9           At the outset, the scope of the second appeal is very much limited and therefore, the matter was taken up for final hearing immediately on the consent of both the parties. It appears that the original defendants No. 2 and 3 i.e. the appellants before the Trial Court have not preferred any appeal challenging dismissal of their appeal by the learned First Appellate Court nor in this appeal there is any attempt to lodge cross objections. Under such circumstance, the said decree dated 18.10.2013 became final, as against the original defendants No. 2 and 3. The only question was in respect of the relief against defendant No.1.

10           When the cross-objections, though filed were not considered, definitely case was made out for framing substantial question of law as contemplated under Section 100 of Code of Civil Procedure. As the matter has been taken up for final hearing at the stage of admission, the said substantial question of law is “Whether learned First Appellate Court was justified in ignoring cross-objections filed by present appellant-original plaintiff ?”

11           Perusal of the plaint would show that a clear statement was made that the defendants are the owners of land Sy.No.114 and since they

have encroached on the land belonging to the plaintiff, they should hand over the possession of the encroached area to the plaintiff. Further, the perusal of written statement would show that all the defendants i.e. defendant Nos.1 to 3 have admitted that they are the owners of the suit property. After considering the evidence on record the learned Trial Court had come to the conclusion that plaintiff is the owner and occupier of suit portion. He has proved the existence of bandh between his land as well as land of defendants. It was also held that all the defendants have demolished the said bandh situated between the land belonging to the defendants and that of plaintiff. It was also held that the plaintiff had proved that the defendants had committed encroachment over the land admeasuring about 25 R and the plaintiff is entitled to recover the possession of the said encroached portion from the defendants. Thus, when the word "defendants" has been used it will have to be presumed that all the three defendants were included in the same. In spite of the said conclusion, it appears that a statement has been made, that the green line A-B shown in para No.8 of the plaint is the common survey number bandh separating the land of the plaintiff from the land of the defendant Nos.2 and 3. When defendant No.1 is also the owner of the property, the learned Trial Court ought to have decreed the suit against defendant No.1 also. At the costs of repetition it can be said, that since many of the points/issues have been answered in the affirmative in favour of

plaintiff, this Court cannot go into those aspects once again as it has achieved finality. It was deposed on oath by the plaintiff as well as documentary evidence was produced to prove, that all the defendants were the owners and possessors of land Sy.No.114. The testimony of DW 1 Babu, who is defendant No.1, would also show that he was also claiming ownership over Sy.No.114. According to him, his share is to the extent of 6 Acres 20 Gunthas, but then he has not given the place/ location of the land, which has come to his share. No doubt, in the cross-examination it was extracted that his 6 Acre 20 Gunthas land is not adjacent to the plaintiff's land and only the land belonging to defendant Nos.2 and 3 is adjacent to the land belonging to the plaintiff. He also says that his land is towards western side of the stremllet. He has produced the Hissa Form at Exh.70 to support his contention, however, it is to be noted that it cannot be said to be a proper evidence to come to that conclusion. No such contention, as raised in his testimony, was taken in the written statement. If he was not at all concerned with the encroached area, then he ought to have pleaded and proved the same. The testimony of defendant No.1 would show, that at one breath he claims ownership over the entire property and at another breath he says, that there was a partition between him and the other co-sharers. He has not given the date of the partition. Therefore, on the basis of such vague evidence the learned Trial Court ought not to have dismissed the suit against the

defendant No.1. In fact, the Judgment of the Lower Court is very much silent on this point as to why he has dismissed the suit as against defendant No.1. No doubt, there is no specific order of dismissal, yet, when a relief is claimed and it is not granted, it amounts to refusal and therefore, the appellant was required to knock the doors of appellate Court by way of cross-objections.

12           When the Trial Court had refused the decree against defendant No.1, though the appeal was filed by the original defendant Nos.1 and 2, cross objection was filed at Exh.18 by the plaintiff. The learned First Appellate Court was absolutely not justified in not considering the cross objection at all. In the normal course, if cross objection would not have been considered by the First Appellate Court, then it would be a fit case to remand the matter. However, in this case there is absolutely no necessity to remand the case for the simple reason that, much deliberations are not required on the point, in view of the findings given by the learned Trial Court, which have been referred above. Not saying anything regarding cross objection also amounts to its refusal and therefore, the original plaintiff was justified in approaching this Court. With these observations the appeal deserves to be allowed. Hence, following order.

### **ORDER**

1           Appeal is allowed.

2           The Judgment and Decree passed in R.C.S. No.90/2000 by  
learned Joint Civil Judge Junior Division, Ausa, Dist. Latur dated 16.08.2008  
is hereby set aside in respect of implied refusal of the decree as against  
original defendant No.1.

3           The said suit stands decreed as against defendant No.1 also.

4           He is permanently restrained from disturbing the peaceful  
possession of the plaintiff over the suit land.

5           Defendant No.1 is also directed to hand over the peaceful and  
vacant possession of the encroached land admeasuring 25 R shown in lines A,  
B, E and F, as shown in para No.8 of the plaint.

6           No order as to costs.

**( Smt. Vibha Kankanwadi, J. )**

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