

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

APPEAL FROM ORDER NO. 42 OF 2019

**SAVELRAM RAMCHANDRA GONDKAR AND OTHERS
VERSUS
DASHRATH TRIMBAK GONDKAR AND OTHERS**

...
Advocate for the Appellants : Shri A. S. Gandhi
Advocate for the Respondents : Shri S. S. Kulkarni
...

CORAM : RAVINDRA V. GHUGE, J.

DATED : 14th AUGUST, 2019.

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PER COURT :

1. By this Appeal from Order, the appellants have challenged the interlocutory order dated 10/07/2019 passed by the Appellate Court, in RCA No. 33/2019, by which, it has clamped injunction on the original defendants that they should restrain themselves from carrying out the construction of their own house in the suit plot.

2. I have considered the submissions of the learned Advocates for the respective sides.

3. The learned Advocate for the appellants, who are the

original plaintiffs, submits that the Appellate Court has noted *prima facie* that the re-measurement of the land was not properly done. But if a new measurement is carried out, it would bring the true picture to light. The Appellate Court has then observed that as the defendants are carrying out construction, it would cause hardships and inconvenience to the plaintiffs. The defendants are residing in alternate accommodation and, therefore, there is no harm in restraining them from carrying out their construction. Such restraining order would be necessary for avoiding multiplicity of litigation.

4. I find from the record that the plaintiffs had approached the Trial Court with an apprehension that the defendants are likely to erect their construction, by indulging in an encroachment on the land of the plaintiffs. It was prayed finally that the TILR be appointed to measure the land and if any encroachment is found, the same be removed and the possession be handed over to the plaintiffs.

5. By the judgment dated 11/01/2019, the Trial Court has concluded on the basis of oral and documentary evidence that

the plaintiffs could not establish encroachment in any form. They could not indicate the portion which they sold to the defendant. The Trial Court has specifically recorded in paragraph Nos. 9, 10, 11 and 12 of the judgment that petitioner Nos. 1 and 2, who had sold a portion of the property to defendant Nos. 3 to 13, were not willing to divulge the details. Questions with regard to the area of the properties, were offered the answer that the plaintiffs cannot say how much area was sold. The plaintiffs cannot say what are the dimensions of the property. The plaintiffs cannot say as to how many *pot-hissa's* are found in the property. The plaintiffs cannot say as to what is the number of the property sold to defendant Nos. 3 to 13.

6. The Trial Court noticed that the plaintiffs were not assisting the court and could not establish any encroachment on the part of the defendants.

7. I find from the impugned order that the Appellate Court has purely proceeded on sympathy. It lost sight of the fact that the original defendants were constructing a new home on the property and were residing in rented premises as an alternate

arrangement. They were paying rent for such premises and were constructing their home. The Appellate Court has completely ignored the aspect of comparative hardships and manifest inconvenience.

8. The original defendants have made a statement in their written say before the Appellate Court on 26/06/2019 that they have not encroached upon any portion of the land of the plaintiffs, have earmarked areas of 5 ft., 10 ft. and even 15 ft. from the borders of their plot and if it is eventually found that any portion of their home is constructed on the land of the plaintiffs, they would themselves demolish the said portion and remove the encroachment. It is further stated that the written say is being tendered with such an undertaking as the entire family and their children are living in a rented premises in grave hardships.

9. In view of the above, the Appellate Court should have noted that merely because the plaintiffs have filed an Appeal, would not mean that an injunction of such nature should be clamped on the defendants. The decision of the Trial Court in the suit would *prima-facie* indicate that the plaintiffs have

miserably failed to prove that there was any encroachment. They themselves held back necessary details about the portion of land sold to the defendants on which the construction was being erected. If the plaintiffs have decided not to assist the Trial Court, they alone are to be blamed and in this backdrop, the Appellate Court should not have imposed an injunction of preventing the defendants from constructing their home which would compel them to reside in rented premises and pay rent for the same.

10. As such, this petition is allowed. The impugned order dated 10/07/2019 is quashed and set aside. Application Exhibit 8 stands rejected.

11. Needless to state, the statement made by the petitioner original defendants as set out in paragraph No.10 of their written say dated 26/06/2019 at Exhibit 26, shall be maintained in this civil litigation.

(RAVINDRA V. GHUGE, J.)

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