

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

909 SECOND APPEAL NO.563 OF 2013

Shri. Pandit Deoram Koli (Dead)
Age 60 years, Occupation Agri.,
R/o Kasve Tq. Yawal Dist. Jalgaon.

Through Legal Representatives :

- 1) Mandabai w/o Pandit Sapkale,
Age 60 years, Occupation Household,
R/o Kasve, Post Duskhada
Tq. Yawal Dist. Jalgaon.
- 2) Sanjay s/o Pandit Sapkale,
Age 41 years, occupation Agri.,
R/o As above.
- 3) Vandana w/o Leeladhar Salunke,
Age 38 years, Occupation Household,
R/o Kolnhavi Tq. Dambhurni
Tq. Yawal Dist. Jalgaon.
- 4) Arun w/o Bhagirath Salunke,
Age 34 years, Occupation Household,
R/o Mordadkala Post Daryapur
Tq. Dist. Barhanpur (Madhya Pradesh)
- 5) Ranjana w/o Vijay Tayde,
Age 30 years, occupation Household,
R/o At Post Raipur Tq. Raver
Dist. Jalgaon.
- 6) Vijay s/o Pandit Sapkale,
Age 25 years, Occupation Agri.,
R/o Kasve Post Duskhada
Tq. Yawal Dist. Jalgaon.

..Appellants.

VERSUS

Kashinath Dayaram Mahale,
deceased, through his Legal
Representatives :

- 1) Jasabai @ Janabai Kashinath Mahale,
Age 75 years, Occupation Household,
R/o Kasve Tq. Post Duskheda Tq.
Yawal Dist. Jalgaon.
- 2) Smt. Vimalbai Devidas Tayde,
Age 55 years, Occupation Household,
R/o Tapat Kathora Tq. Bhusawal
Dist. Jalgaon.
- 3) Arun Kashinath Mahale,
Age 53 years, Occupation Service,
R/o Universal Residency, 'D'
Building, B-Wing, Flat No.19,
4th Floor, Warje, Malwadi
Pune – 58.
- 4) Smt. Pramilabai Pandit Zalte,
deceased through her Leral
Representative :
 - 4-A) Raju Pandit Zalte,
Age 27 years, occupation Labour,
R/o At Kasve, Post Duskheda
Tq. Yawal Dist. Jalgaon.
- 5) Indubai Narayan Tayde,
Age 47 years, Occupation Household,
R/o Sulwadi Post. Ainpur
Tq. Raver Dist. Jalgaon.
- 6) Ambadas Kashinath Mahale,
Age 42 years, occupation Service,
R/o At Post : Duskheda Tq.Yawal
Dist. Jalgaon.

- 7) Latabai Balu Koli,
Age 38 years, occupation Household,
R/o C/o Balu Ramchandra Koli,
Supreme Colony, Near Sharda
School, MIDC Area, Kusumba Road,
Jalgaon Tq. Dist. Jalgaon.
- 8) Mohan Kashinath Mahale,
Age 35 years, occupation Service,
R/o Sharad Colony, Sinnar,
Tq. Sinnar Dist. Nashik.

...Respondents.

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Mr. N. C. Garud, Advocate for appellants.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 01-03-2019.

ORAL ORDER :

1. Heard learned advocate appearing for the appellant. Appellant is the original plaintiff who had filed Regular Civil Suit No.38 of 1991 before Civil Judge, Junior Division, Yawal Dist. Jalgaon for permanent injunction as well as for mandatory injunction. Plaintiff had come with a case that, he is the owner of Grampanchayat House No.133 admeasuring 65 X 65 feet situated at village Kasve Tq. Yawal Dist. Jalgaon, which has been more particularly described in Paragraphs No.1 and 2 of the plaint.

2. It was contended that, the defendant has no right, title and interest over the suit property, however taking disadvantage and

conspiring with Sarpanch the defendant had started construction work towards the Western side of the suit property two days prior to the suit. When plaintiff objected to the same, he did not listen. In fact it is stated that, defendant is resident of village Kasve Tq. Yawal but highhandedly he has started the construction and has also kept the construction material. It appears that, during the pendency of the suit amendment was carried out and it is stated that, during the pendnecy of the suit the defendant has unauthorizedly made construction on the Western side except the area admeasuring 20 feet x 12 feet. The said construction made in bricks, mud and iron sheets. It was stated that, the defendant has made encroachment and thereby made construction, and therefore, it is necessary to pass an order for demolition of the said construction. Initially only permanent injunction was prayed but thereafter by way of amendment mandatory injunction of demolition of the construction was prayed.

3. The defendant appeared in the matter and filed written statement. It is denied that, the plaintiff is the owner of Grampanchayat House No.133 consisting of house made up in iron sheets and open space in all admeasuring 65 feet X 65 feet. It is

denied that, he had started construction in the open space belonging to the plaintiff from the Western side two days prior to the suit.

4. It has been contended that, since last 15 to 20 years he was using the said open space for tying his cattle with the permission of Grampanchayat. In fact the said open space is bearing Gaothan Gut No.1. By way of additional written statement it has been contended that, in fact he had already constructed four rooms prior to the institution of suit. In the alternative the defendant had also taken a plea of becoming owner of the suit property by adverse possession.

5. Taking into consideration the said rival contentions issues came to be framed. It appears that, at the time of adducing evidence, the plaintiff had filed his affidavit in chief, however thereafter the defendant and his advocate remained absent and the testimony of the plaintiff went unchallenged. No further evidence was given by the plaintiff. Under those circumstances after hearing the plaintiff, the learned trial Court had dismissed the suit.

6. Thereafter plaintiff challenged the said Judgment and decree in Regular Civil Suit No. 219 of 2002. It was heard by learned District Judge- 2, Jalgaon and after hearing both the sides, the appeal has

been dismissed on 30th July 2012. Hence, the original plaintiff intends to file this second appeal.

7. It has been vehemently submitted on behalf of the appellant that, both the Courts below have held that plaintiff has proved his ownership over the suit property i.e. Grampanchayat House No.133, however both the Courts have erred in holding that the plaintiff has failed to prove that defendant was making construction on the piece of land which was part and parcel of Grampanchayat House No.133. In fact whatever evidence was adduced by the plaintiff had gone unchallenged on record, and therefore, it ought to have been stated that the plaintiff has proved the claim. Further defendant had not led any evidence to prove that the construction made by him was on Grampanchayat bearing Gut No.1. So also he had not proved his alternative plea that he has become the owner of the suit property by adverse possession. Therefore, the evidence that was led by the plaintiff has not been considered properly by both the Courts, and therefore, there is perversity requiring the second appeal to be admitted.

8. The first and the foremost fact that is required to be considered is that, initially the plaintiff had filed the suit only for

permanent injunction. The suit was filed on 10-05-1991 but it appears that the amendment in respect of mandatory injunction that is in respect of the contents of the plaint as well as in the prayer clause was made in 2001. Admittedly plaintiff had not prayed for appointment of Taluka Inspector of Land Records to be appointed as a Court Commissioner and further the disputed property has not been properly described in the plaint itself. What has been described in paragraphs No.1 and 2 of the plaint is the property of the plaintiff but he had come with a initial case that the construction is being carried out from the Western side open space. That part was not described but when the amendment was carried out, it was stated that, except 20 feet X 12 feet on the Western side, the defendant has carried out construction in rest of the area. Even at that point of time proper description of the property has not been given at all.

9. No doubt both the Courts have come to the conclusion and as it appears that the plaintiffs evidence to the extent that he is the owner of Grampanchayat House No.133 is concerned, has gone unchallenged on record. But we are more concern with the fact that, where the construction was in progress when the suit was filed

and during the pendency of the suit, the construction was completed was the part and parcel of Grampanchayat House No.133. Except his statement, the plaintiff has not led any other evidence on record. When it comes to the measurements of the construction the expert is required to be examined as far as possible, and further the question was, when in 1991 the suit was filed, plaintiff had pleaded that the construction activity is going on since two days prior to the suit and it also appears that, he had filed the interim injunction application. The question is yet in 2001 he comes with a case that, the construction is complete. When that construction was completed was a question and under that circumstance the prayer which was subsequently added regarding mandatory injunction was within limitation or not. No doubt the said amendment was allowed, and therefore, that will go back to the date of the suit. However, except his bare words there is nothing on record, and therefore, both the Courts below have taken the factual aspect into consideration. When the plaintiff has not proved that, the portion on which the construction was made was part and parcel of the Grampanchayat House No.133 which could have been proved through appointment of Taluka Inspector of Land Records and no such attempt was made. Both the Courts justified in giving finding to that effect in the

negative. No doubt also that the defendant had come with a case that the construction carried out by him was on Gaothan Gut No.01 and he has not led any evidence to prove the same, yet the initial burden which was on the plaintiff to prove that the said construction was on his property, cannot be said to have been discharged, only on the basis of the statements on oath by the plaintiff. When there is no error committed by both the Courts below on the factual aspect, no case is made out much less the substantial question of law to admit second appeal. Hence, appeal is **not admitted** and disposed of accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.