

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

SECOND APPEAL NO.176 OF 2016

Shri Gulab Kalu Shirsath ...Appellant

V/s.

Shri Hiranman Parvat Mondhe & Ors. ...Respondents

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Shri Girish R. Agrawal, advocate for the appellant.

Shri S. P. Dighe, advocate for the respondent No.5.

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CORAM : M.S.KARNIK, J.

DATE : 20th JUNE, 2019

P.C. :

1. Heard learned counsel for the appellant and learned counsel for the respondent No. 5.

2. It is the case of appellant that he alongwith other plaintiffs are the owners of land bearing Gat No.372/2. The defendant Nos. 1 to 8 are the owners of land bearing Gat No.496.

3. It is the contention of appellant that there was an old Nashik-Saputara Road which was passing through the land bearing Gat No.372/2 and Gat No.496. With the passage of time, a different road was constructed for approaching Saputara from Nashik. This resulted in the road passing between their

lands not being used for years.

4. Learned counsel for the appellant contended that the road in question is adjacent to his property. The road was being used by him for ingress and egress to his property. It is his contention that as the same is Government property, it cannot be allowed to be encroached upon. It is his further contention that the encroachment was made by the defendant Nos. 1 to 8 on this old Saputara Road which is impermissible and against the interest of the public, apart from causing obstruction to his ingress and egress to the property.

5. Shri Agrawal, learned counsel for the appellant invites my attention to the findings of the appellate court which has discarded the cadastral surveyor's report. According to him, the cadastral surveyor was appointed to find out the exact nature of encroachment. He would submit that if the cadastral surveyor has failed in performing his duty in submitting a correct report and if the lower courts have disputed the report, then for the mistake of the cadastral surveyor, the plaintiffs' suit could not have been dismissed. He would submit that the cadastral

surveyor should have been asked to submit a fresh report.

6. Shri Agrawal would further submit that during the pendency of the appeal, he had filed an application for production of additional evidence. He wanted to bring on record the order passed by the Tahsildar on 15/09/2014 directing the concerned who have encroached on the said road to hand over the possession. Shri Agrawal would submit that instead of deciding the said application finally when the appeal was heard as contemplated by Order 41 Rule 27 of the C. P. C., the appellate court by the order dtd.16/06/2015 has rejected the application much before the appeal could be heard.

7. Shri Agrawal would submit that in any case as public property has been encroached upon, the courts below should have directed cadastral surveyor to submit a fresh report as regard the encroachment. In support of his submission, he relied upon the decision of the Apex Court in the case of **Ram Lal & Ors. V/s. Salig Ram & Ors. [2019(2) Civil Court Cases 465 (S.C.)]**.

8. Learned counsel for the respondent No. 5 on the other

hand supported the order passed by the courts below. He invited my attention to the findings of the trial court as well as the first appellate court. He submits that in view of the concurrent findings of fact based on the evidence on record that there is no encroachment by defendant Nos. 1 to 8 proved, no interference is warranted.

9. There is no dispute that the old Nashik-Saputara Road was passing through the property between the lands bearing Gat Nos. 372/2 and 496. After construction of a new road, the usage of the old road stopped. The property in respect of which encroachment is made belongs to the Government. The appellate court was of the opinion that the plaintiffs have not described the suit property correctly. Be as it may, it is the defence of defendant Nos. 1 to 8 that the portion of the road which the plaintiffs alleged the defendants to have encroached is in fact not in possession of the defendants but in possession of Krushi Go Seva Samitee.

10. During the cross-examination, the plaintiff No. 4 Shri Bharat Belkhede (PW-1) admitted that Krushi Go Seva Samitee

has constructed the shed, water tank and compound in the suit property. He further admitted that one Vijay Bora and other persons are looking after the work of Krushi Go Seva Samitee. He also clarified that all these persons of Krushi Go Seva Samitee had constructed compound wall on this encroached area and there are 50-70 animals in the shed of Krushi Go Seva Samitee. It is in this view of the matter that the appellate court has accepted the defence of the defendant Nos. 1 to 8 that the area is not encroached by them, but it is in fact in the possession of the Krushi Go Seva samitee which fact has been admitted by the witness of the plaintiffs. The appellate court has also noted that some portion out of the area of land bearing Gat No.496 of which the defendants are the owners is also in possession of Krushi Go Seva Samitee.

11. In this view of the matter, there is substance in the submission of the learned counsel for the respondents that without making Krushi Go Seva Samitee as a party to the suit, no relief could be claimed against the present defendants. In view of the evidence on record, the courts below came to the

conclusion that the encroachment on the said road by the defendant Nos. 1 to 8 could not be proved for it was the specific case of plaintiffs that encroachment was by defendant Nos. 1 to 8.

12. Insofar as the submission of the learned counsel Mr. Agrawal that only because the surveyor's report is discarded will not by itself result in dismissal of the suit, in my opinion, will be of no assistance to the appellant's case. The finding is that there is encroachment on the road but it could not be proved that the same is made by the present defendants against whom the appellant sought relief. This submission is therefore rejected.

13. The decision relied by the learned counsel in the case of **Ram Lal & Ors. (cited supra)** was in respect of the case where the property belonging to the plaintiff was encroached upon. In the present case there is no encroachment on plaintiff's property but on a public road. Thus, the said decision will not have any application to the facts of the present case.

14. Insofar as the contention of the learned counsel for the appellant that the application for leading additional evidence

should have been considered by the appellate court while finally hearing the appeal, I find in the order dtd.16/06/2015 the appellate court has clearly recorded that looking at the documents placed on record sought to be filed as additional evidence, the same has to be considered by this court at the time of hearing of the appeal on merits. Even this contention of the appellant deserves to be rejected.

15. The appeal does not involve any substantial question of law. I am not inclined to interfere with the concurrent findings recorded by the courts below after appreciating evidence on record.

16. Needless to mention that if appellant files appropriate proceedings for removal of encroachment, the same obviously will be considered on its own merits and in accordance with law. Even otherwise, as encroachment is alleged on the public road, the State Government can always initiate proceedings to remove the encroachment. Shri Agrawal pointed out that the proceedings have already been initiated before the Mamalatdar's Court and appropriate orders have been passed.

17. The appeal is therefore dismissed with no order as to costs.

(M.S.KARNIK, J.)