

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

APEAL FROM ORDER NO.44 OF 2019

PREMSUKH MOTILAL TOTLA
VERSUS
AURANGABAD MUNICIPAL CORPORATION,
AURANGABAD THROUGH IT'S DEPUTY
COMMISSIONER, AURANGABAD.

...

Advocate for Petitioner : Mr.A S Bajaj Anil S.
Advocate for Respondent : Dube Anjali (Bajpai)

...

CORAM : V.K. JADHAV, J.
Dated : February 28, 2020

...

PER COURT :-

1. With the consent of the parties, heard finally at admission stage.

2. The appellant is the original plaintiff. The appellant has instituted the suit bearing Regular Civil Suit No.94 of 2010 for a decree of perpetual injunction in respect of the suit plot nos.20 to 24, CTS No.19669/17 to 21. Respondent/defendant Corporation has strongly resisted the suit by filing written statement. It has been contended that so far as the open space which is numbered as plot No.26, the appellant/original

aaa/-

plaintiff has made encroachment to the extent of 15.06 square meters. In terms of the building bylaws, 15% area of the total area is to be kept as open space, however, in the year 1992 the Government has sanctioned revised bylaws of Development Control Rules, wherein 10% of the land of a particular lay out is to be kept as open space. However, the Division Bench of this Court by way of interim order in the pending writ petitions directed to maintain the position prior to the amendment. Meanwhile, in terms of the amended provisions, the area of the plot in excess was returned to the original owner and, as such plot no.26 was carved out. The said interim order passed by this Court was confirmed on 5.3.2015 and as such, it is incumbent to keep the open space to the extent of 15% of the total area of a particular lay out. It has thus contended that the Corporation gets right over that area and the appellant/plaintiff has made construction over the area of the said plot no.26 to the extent of 15.06 square meters. Both the parties lead their oral and documentary evidence in support of their contentions

aaa/-

and the Trial Court by judgment and decree dated 5.11.2012 decreed the suit and thereby restrained the respondent/Corporation from causing any obstruction to the peaceful possession of the appellant/plaintiff over the portion of the suit property. Being aggrieved by the same, the respondent/Corporation has preferred Regular Civil Appeal No.1 of 2013 and the learned District Judge-2, Aurangabad by impugned judgment and order dated 11.6.2019 partly allowed the appeal, quashed and set aside the judgment and decree passed by the Trial Court, remanded the matter to the Trial Court for fresh consideration with certain directions and in terms of the observations made in the body of the judgment. Hence, this appeal from order.

3. Learned counsel for the appellant/plaintiff submits that in terms of the pleadings, the Trial Court has framed issue no.1 as to “*whether the plaintiff has proved that he has made construction over the suit property in terms of the construction permission granted by the respondent/Corporation*”. Learned

aaa/-

counsel submits that the appellant/plaintiff was constrained to file the suit since the Corporation has given a notice for removal of the encroachment over the portion of the said plot no.26. Thus, in terms of the pleadings, the Trial Court has framed the issue no.1 and recorded the finding in the affirmative to the said issue. Learned counsel submits that, however, the the lower appellate Court has observed that the Trial Court ought to have framed the issue to the effect that “*Whether the plaintiff proved that he is in possession of the area of the suit property as referred in the title document.*” Learned counsel submits that the effect of framing of the issue no.1 and finding recorded on it is the same. Learned counsel submits that in paragraph no.36 of the judgment, the Trial Court has made observations with the help of the revised lay out and specifically observed that there is no increase or decrease in the area of the disputed plot in possession of the appellant/plaintiff and five years after sanction of the revised lay out, the Corporation has granted construction permission after satisfying on all the aspects. The Trial Court has

aaa/-

specifically observed in paragraph no.36 that the appellant/plaintiff's construction is within limits of his suit property. Learned counsel submits that it is for the lower appellate Court to assess the evidence and find out as to whether the Trial Court has made said observations erroneously and contrary to the evidence on record. Learned counsel submits that the remand order is unwarranted and uncalled for.

Learned counsel for the appellant in order to substantiate his contentions placed reliance on a judgment in case of **Leela wd/o Purushottam Kshirsagar and others Vs. Mandabai wd/o Bapuraoji Kshirsagar and others reported in [2018 (3) Mh.L.J.] 240.**

4. Learned counsel for respondent/defendant submits that the lower appellate Court after considering the evidence of PW 2 surveyor Anil Salunke and PW 4 Ashok Sanap observed that both of them have only measured the area of the suit property. Even, the lower appellate Court after referring the evidence of surveyor DW 1 Mr. Pungale observed that while carrying out

aaa/-

survey or measurement, he had not at all considered fixed points. The lower appellate Court has observed that it was the duty of the surveyor to measure entire property including the property belonging to adjacent owner to find out the encroachment. The lower appellate Court has also observed that surveyor Mr. Pungle while measuring the plot no.26/open space ignored the measurement of the suit property. The lower appellate Court has thus come to the conclusion that the survey report available on record as prepared by the surveyors from both the sides cannot be considered in answering the fact in issues. In the backdrop of these observations in paragraph no.28 of the judgment, the lower appellate Court has observed that it is necessary on the part of the respondent to ask for declaration regarding his right over the area in his possession and also observed in paragraph no.27 of the judgment that it is desirable to provide an opportunity to both sides to rectify the mistake and to get survey done by following due procedure prescribed in that behalf. Learned counsel submits that the lower

aaa/-

appellate court has, therefore, rightly quashed and set aside the judgment and decree passed by the Trial Court and remanded the matter to the Trial Court for fresh consideration by keeping in mind the observations made in the judgment. The lower appellate Court has also directed to allow the parties to amend the pleadings according to law, to frame additional issue, if required and to allow the parties to lead additional evidence, if required. The lower appellate Court has also directed to appoint the Court Commissioner from DILR department for survey of the suit property as well as alleged open space or plot no.26 at once and particularly by determining fixed points/boundaries, at the equal cost from both sides. Learned counsel submits that there is no substance in this appeal from order and the appeal from order is thus liable to be dismissed.

5. After carefully going through the contents of the plaint, so also the written statement and the judgment and decree passed by the Trial Court, it appears that, the appellant/plaintiff has instituted the

aaa/-

suit for perpetual injunction in respect of the suit property. It is not at all disputed that the appellant/plaintiff is owner in possession of the suit property plot no.20 to 24 CTS No.19669/17 to 21. So far as the allegations about encroachment allegedly made by the appellant/plaintiff over the adjacent plot no.26 is concerned, unfortunately there is no counterclaim submitted by the respondent/Corporation. In the light of these admitted facts and in terms of the notice issued by the Corporation, when the appellant/plaintiff was constrained to institute the suit for a decree of perpetual injunction, Trial Court has framed issue no.1 for which no objection has been raised by respondent/Corporation. In paragraph no.36 of the judgment after discussing the evidence at length, Trial Court has specifically observed that in terms of the revised lay out there is no increase or decrease in the area of the suit property plots. It has also been observed in the same paragraph that five years after the revised lay out, after satisfying on all aspects, Corporation has issued permission for construction over

aaa/-

the portion of the suit property in favour of the appellant/plaintiff. It has further observed by the Trial Court that plaintiff's construction is within limits of his suit plots and there is no convincing evidence about encroachment over the portion of adjacent plot no.26. Though, the appellate Court has given reference to the survey reports and further pointed out the shortcomings in the said survey reports, however, the lower Appellate Court has ignored that in absence of the counterclaim whether the theory put forth by the respondent/Corporation about alleged encroachment over the portion of plot no.26 can be considered. Apart from this, in terms of the pleadings by the appellant/plaintiff the relief is claimed to the extent of perpetual injunction and on the basis of the evidence adduced by the parties when the Trial Court has observed that the plaintiff has proved his construction over his portion of the suit property, then it is for the lower appellate Court to find out as to whether the observations and conclusions thereon drawn by the Trial Court are in consonance with the evidence on

aaa/-

record or it is contrary to the evidence. In my considered opinion, the order of remand is unnecessary and the lower appellate Court could have disposed of the appeal on the basis of the evidence adduced by the parties before the Trial Court. In view of the same, I proceed to pass the following order.

ORDER

- i. Appeal from order is hereby allowed.
- ii. The impugned order dated 11.6.2019 passed by the District Judge-2, Aurangabad in Regular Civil Appeal No.1 of 2013 is hereby quashed and set aside with the following directions :-
 - a] Regular Civil Appeal No.1 of 2013 shall be restored to its original number.
 - b] The lower Appellate Court shall dispose off the Regular Civil Appeal No.1 of 2013, as expeditiously as possible, however, within a period of SIX MONTHS from the date of this order.
- iv. Appeal from order is accordingly disposed off.

(V.K. JADHAV, J.)

...