

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 347 Of 1991

1. Smt. Manoramabai Shripad Bhide }
 (since deceased) }
 Age-58 years, Occu: Agri, R/o at }
 Jamsande, Tal-Deogad, Dist-Sindhudurga }

2. Vasudeo Shripad Bhide (since }
 deceased) }
 Age-50 years, Occu-Agri, R/o at } ..Appellants
 Jamsande, Tal-Deogad, District- } (Appellant no.1, Ori.
 Sindhudurga. } Plaintiff no. 1)

3. Vasant Shripad Bhide }
 Age-40 years, Occu-Agri, R/o at } ..Appellant
 Jamsande, Tal-Deogad, District- } (Appellant nos.2 and 3,
 Sindhudurga. } Ori. Def. Nos. 3 and 4)

V/s.

1. Tukaram Ganu Tukrul }
 S/D. By his heirs and ors. }

2. Satyawar Tukaram Tukrul }
 All R/o at : Jamsande, Tal-Deogad, Dist- } ..Respondents
 Sindhudurga. } (Ori. Def. Nos. 1 and 2)

 Mr. V.S. Gokhale for the Appellants.

None for the Respondents.

CORAM : SMT. SADHANA S. JADHAV, J
DATED : 27th JANUARY 2020.

ORAL JUDGMENT:

None appears for the respondents although served. The appeal is of the year 1991. Hence, it would be necessary to decide the same. The appellants herein are the legal heirs of the original plaintiff. The suit was filed for mandatory injunction. Two sons of the plaintiff were added as defendant nos. 3 and 4. However, since the demise of the original plaintiff the defendant nos. 3 and 4 have been transposed as the appellants in present second appeal.

2. The substantial questions of law which falls for determination is as follows:-

F. Whether the Additional District Judge erred in law in relying on the so-called permission given by the Sarpanch of the Grampanchayat office for construction of Cattle Shed, on the land owned by the plaintiff.?

G. Whether the Additional District Judge was justified in law in setting aside the Trial Court decree on the ground of deficit court fee was paid despite, in fact the Trial Court has ordered in decree itself that Additional Court fees is to be paid by the Plaintiff and accordingly it was paid.?

3. It was the case of the plaintiff that she happened to be the original landlord of Gat No. 266 which was divided into two parts i.e. 266-2B and 266-2A. The said land is admeasuring 37 Ares. The portion demarcated as 266-2A is in the possession of the appellants. The portion demarcated as 266-2B remained with the defendant as he was tenant purchaser of the said portion. The lands are adjacent to each

other. It was the case of the plaintiff that about 20 years prior to institution of the suit the defendant had requested original plaintiff to grant him permission to keep his cattle in the portion demarcated as 266-2A and for that purpose, he had erected a thatched roof. However, it was noticed that subsequently he had erected a permanent shed. The plaintiff had raised an objection to the same. However, the defendant had not paid any heed to the said objections. Thereafter, the plaintiff had issued notice to the defendant on 26th May 1980. The defendant had refused to accept the notice and therefore, the plaintiff was constrained to file a suit seeking mandatory injunction. In the alternative it was also prayed that the possession be handed over to the plaintiff. In fact basically the suit was for removal of the encroached portion in Gat No. 266-2A which was in exclusive peaceful possession of the plaintiff. The defendant had, by way of written statement claimed tenancy rights. The plaintiff had examined Tukaram Ghadi as a witness for the plaintiff.

4. The said witness has admitted in the cross-examination that on the date when the portion 266-B was handed over to the defendant he had a house in land survey no. 266-B. The witness had further stated that the defendant was keeping his cart and bullocks at Shantiniketan and was residing at Belvadi. It is also stated that cattle shed was not in existence prior to 1953. The defendant had neither examined any witness in his defence nor had examined himself. The defendant had filed proceedings before the tenancy Court at Jamsande registered as 668/1969, in which the Court had passed an order that on the date of institution of the proceedings the plaintiff i.e. the

present defendant had become purchaser of the said land and by virtue of that the issue of tenancy would not arise.

5. It was the case of the defendant that the Sarpanch of the village had granted him permission to construct a permanent shed in suit land no. 266-2A which was in possession of the appellant. The Court of Civil Judge Junior Division, Devgad had held that the defendant nos. 1 and 2 admitted the plaintiffs case in their written statement. The court has specifically observed that in the tenancy proceedings he had not referred to any cattle-shed which was standing in 266-2A. The certificate issued by the Sarpanch of the village would have no bearing as a certificate issued by a Sarpanch would not confer a title to the defendant to construct a shed in the land of the plaintiff and therefore, the Court rightly held that these documents were prepared only in order to defeat the claim raised by the plaintiff. Hence, the issue no.1 is answered accordingly.

6. In view of the specific prayer made by the plaintiff the Civil Judge, Junior Division had passed the order as follows:-

“2.... The Defendant Nos. 1 and 2 remove the Cattle-Shed super construction from the suit land within two months after appeal period is over. If the Defendant Nos. 1 and 2 do not obey, then the plaintiff is at liberty to get it removed through the Court at the cost of the Defendant nos. 1 and 2”.

7. Being aggrieved by the said judgment and order the original defendant had filed Regular Civil Appeal No. 234 of 1984. The Appellate Court had allowed the appeal on the ground that the

plaintiff had not claimed restoration of possession. The Appellate Court further held that the Cattle-Shed was erected by virtue of the permission given by village Grampanchayat office. The Appellate Court has placed implicit reliance on the record produced at Exhibits 50, 52, 57, 58 and Exhibit 14. It is pertinent to note that the defendant had not examined the Sarpanch in his defence to show as to how the Sarpanch could grant permission to erect a structure in the land owned by the plaintiff. The certificate would have no bearing in the suit seeking perpetual injunction or restoration of the possession. The learned Appellate Court had held that the plaintiff had not obstructed the erection of the cattle-shed when the construction was in progress. Therefore, the appeal was allowed. Hence, this Second Appeal. The issues in Regular Civil Appeal No. 234 of 1984 read as follows:-

1. Whether the plaintiff proves that Defendant Nos. 1 and 2 constructed the Cattle-Shed 10-11 years back without the consent?.

3. Whether the Plaintiff is entitled to get mandatory injunction for removal of the Cattle-Shed?.

8. It was observed that the plaintiff had not paid Court Fees for seeking the relief of perpetual injunction. However, as directed by the Civil Judge Junior Division the Court Fees was accordingly paid.

9. In fact, the certificate issued by the Sarpanch was not proved in accordance with law. The Sarpanch had no power to grant such permission and therefore, the issue no.2 would have to be answered in the affirmative and deserves to be held that the Additional

District Judge had committed a grave error in relying upon the certificate issued by the Sarpanch when the same was not proved in accordance with law.

10. In fact, the plaintiff had prayed for restoration of possession in accordance with law, in the event that the defendant failed to hand over the peaceful possession by removing the structure of Cattle-Shed from Gat No. 266–2A which was in exclusive possession of the plaintiff.

11. In view of the above discussion, the second appeal deserves to be allowed. The judgment and decree dated 29th November 1990 is quashed and set aside.

12. Decree be drawn accordingly. Since the judgment and decree dated 12th September 1984 is restored, the Second Appeal stands disposed of.

(SMT. SADHANA S. JADHAV, J)