

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.428 OF 2016

Vishwas Shankarrao Bankar .. Appellant

Vs.

Subhadrabhai Namdev Dhavan
(Deceased) through her LRs. .. Respondents

...

Mr. A.V. Nikam for the Appellant.

Mr. Vipashyana Ingle i/b Mr. Siddharth Karpe for the
Respondent.

...

CORAM: SMT. BHARATI DANGRE, J.

DATED : 25th FEBRUARY, 2020.

P.C:-

1. Admitting the appeal on the substantial questions of law formulated in Ground Nos.E and F of the Memo of Appeal, the respective counsel for the parties are heard on the questions of law.

2. The Plaintiff (the Appellant in the Appeal), who is the owner of land bearing Survey No.193/2 admeasuring 4 Hectors and 17 Ares situated in the Municipal area of Baramati, has filed a Regular Civil Suit seeking perpetual injunction restraining the Defendant from erecting a tin shed over the suit property i.e. Survey No.190 which is located on the western side of the suit property belonging to the Plaintiff. The Civil Court framed an issue as to whether the Plaintiff is the owner of the said suit property and by answering it in the affirmative proceeded to answer the second issue as to whether there is an alleged obstruction on the said property at the instance of the Defendant and answered the said issue in the negative.

3. By clearly recording that the plot of land on which the Plaintiff had her construction is distinct from the plot of land on which the Defendant intended to carry out the construction and both the parcels of land being separated by Morgaon – Baramati Road in between them, the trial Court returned a finding that it is not possible for the Defendant to encroach on the suit land by crossing the said road. By answering to the said issue as above, a clear finding was returned that there was no obstruction at the instance of the Defendant and resultantly the suit came to be dismissed on 30/04/2010.

4. The said finding is set aside by the District Judge, Baramati in Civil Appeal No.51 of 2010 by recording as follows:

“25] Learned Trial Court has recorded finding about alleged obstruction at the hands of defendant in para No.6 to 11 of the Judgment that -

- i) it is not possible for the defendant to encroach over the land by crossing Morgaon – Baramati road,*
- ii) plaintiff has not specifically pleaded as to for what reason defendant is causing obstruction to her in use of suit land,*
- iii) maps [Exh.55, Exh.56 and Exh.87] are of no use for the plaintiff to establish alleged obstruction,*
- iv) suit is not for removal of encroachment,*
- v) There is no burden on the defendant to establish that his land is beyond Morgaon – Baramati road from suit land and*
- vi) no reason for the defendant to encroach over suit land for erecting tin stall adjacent to highway.*

I do not agree with these observation because aggressor can enter upon another's land and challenging the title and possession and can obstruct his possession, even if there is a road as

to what had happened in this case.

In fact when defendant says that, he is erecting tin shed over his own land, he can do it after measuring his own land, under the pretext of boundary he cannot enter upon neighbours land like present case, and can erect shed or to make any construction.

It is to be noted that then for what reason he had sought appointment of Court Commissioner before Hon'ble High Court, Bombay as observed in above Para No.22 of this Judgment.

In short plaintiff has proved alleged obstruction at the hands of defendant. Whenever there is infringement of right, title and interest in the immoveable property by aggressor then the owner of that immoveable property can redress remedy of perpetual injunction against him. Plaintiff has rightly taken an action against defendant which is legal one. Therefore, Judgment and decree passed by learned Trial Court needs interference to the extent of obstruction. I have already observed that learned Trial Court has held that plaintiff has proved her legal possession over the suit property and by way of cross objection her cross appeal there is no challenge by the then defendant. For these reasons I answer above points accordingly and pass following order -

ORDER

- 1] Appeal is allowed.*
- 2] Judgment and decree passed in Regular*

Civil Suit No.137/2003 by learned Jt. Civil Judge J.D. Baramati dtd. 30/4/2010 is set aside.

- 3] Defendant – respondent, his agents, servants or any other persons claiming through him is / are perpetually restrained from causing obstruction to plaintiff's possession and also restrained from making any construction or erecting any shed/tapari etc on suit land belonging to plaintiff.*
- 4] Parties to bear their own costs.*
- 5] Decree be drawn accordingly.”*

5. The Appellate Court made a reference to the cross-examination of the defendant in paragraph No.18 of the judgment which clearly culled out as follows:

“18] Cross-examination of defendant reveals following relevant points -

- i) There is open space of 34 to 35 feet between plaintiff's land and road and dispute is about the open space touching to road.*
- ii) There is side-strip of 7 ft width near to road.*
- iii) There is sub-water channel and at the end*

land of plaintiff starts and there is open space between that sub-water channel and road and that is disputed portion.

iv) Defendant claims his right over the portion which is towards East of the road.”

6. In the light of the said cross-examination and the position being brought on record, the finding recorded by the Appellate Court only on an assumption that an aggressor can enter upon another's land and challenge the title and possession and can obstruct his possession, even if there is a road and this is what had precisely happened in the case, can only be referred to as an assumption and surmises bereft of the factual scenario which has been clearly ignored by the Appellate Court.

7. In such circumstances, the judgment passed by the District Judge in Civil Appeal No.51 of 2010 which is impugned in the present Second Appeal cannot be sustained. The Appellant has made out a case for interference with the said judgment in the light of the proposition of law that the Appellate Court has recorded a finding averse to the factual material which has been brought on record resulting into a perverse finding which itself is a substantial question of law permitting the interference at the instance of this Court under Section 100 of the Code of Civil Procedure. Thus, the Appeal is allowed.

8. Judgment of District Judge, Baramati in Civil Appeal No.51 of 2010 is set aside. Judgment of the Civil Judge, Junior Division dated 30/04/2010 is restored.
9. Decree be drawn up accordingly.
10. No order as to costs.

[SMT. BHARATI DANGRE, J.]