

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

SECOND APPEAL NO. 473 OF 2002

Smt. Maltabai w/o Marotrao Rode,
aged about 55 years, occupation -
Household work, r/o Laxmi Nagar,
Amravati, Tq. & District – Amravati. ... APPELLANT

Versus

Baburam s/o Matasaram Yadav,
aged about 55 years, r/o Laxmi
Nagar, Amravati, Tq. & District -
Amravati. ... RESPONDENT

Shri S. D. Dharaskar, Advocate for the appellant.

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CORAM : PUSHPA V. GANEDIWALA, J.
DECEMBER 14, 2020.

ORAL JUDGMENT :

Heard Shri Dharaskar, learned counsel for the
appellant – original defendant. None for the respondent –
original plaintiff.

2. This appeal was admitted by an order dated
19.09.2005 on the following substantial questions of law :

“1. Whether the lower appellate court erred in

law in reversing the finding of fact recorded by the trial court that the plaintiff had not proved the encroachment ?

2. Whether the finding of fact recorded by the lower appellate court is perverse ?”

3. By the judgment and decree dated 06.08.2002 in Regular Civil Appeal No. 182 of 1998 the first Appellate Court reversed the judgment and decree of the trial Court and decreed the suit for declaration, removal of encroachment and possession. The admitted facts which need mention here are as under:

The appellant – original defendant purchased southern side half portion of plot No. 25, 600 sq. ft. (plot total admeasuring 1200 sq. ft. S. No. 32 of Mouza - Tarkheda, Pragane Badnera, Tq. and District - Amravati) from original vendor Vishwanath Vishwakarma. The respondent – plaintiff also purchased Plot No. 24 which is situated towards North of plot No. 25 from the same owner. Both the plots are given private plot numbers as they are part of the same layout. Defendant's purchase is prior in time of the plaintiff's purchase.

4. It is the case of the plaintiff that the defendant carried out kaccha construction on plot No. 24 in the year 1992. This is said to be the cause of action for filing the suit.

5. It is the case of the defendant that she purchased portion of plot No. 25 prior to the purchase of plot by the plaintiff and she is in possession of the said plot since its purchase. She denied encroachment.

6. The learned trial Court framed issues, recorded evidence as adduced by the parties and dismissed the Suit vide judgment dated 21.04.1997 in Regular Civil Suit No. 50 of 1993 by recording the finding that the plaintiff had failed to prove the encroachment by the defendant.

7. The learned first Appellate Court reversed the finding of the trial Court and decreed the Suit mainly on the following grounds.

“1. In reply to the notice, the defendant – Maltabai

admitted that she is the owner and in possession of plot No. 24.

2. The evidence of Gangarde, a retired government servant, who prepared the map Exh 55 deposed that the defendant has committed encroachment on plot No. 24.

3. The vendor's son, PW-4 also deposed about the encroachment on plot No. 24."

8. I have perused the records and considered the submissions on behalf of the appellant.

9. At the outset, the ownership of plots i.e. Plot No. 24 of plaintiff and half portion of plot No. 25 of defendant, is not disputed. It is also not disputed that the defendant's purchase is prior in time of the plaintiff. The plaintiff has failed to prove that he got measured the plot area at the time of its purchase. Exh. 55 is a plaint map allegedly prepared by the retired government servant. Undisputedly it is a private map and prepared at the behest the plaintiff without issuing notice to the defendant and, therefore, can not be considered in favour

of the plaintiff. The presumption under section 83 of the Evidence Act cannot be drawn in favor of the map which is not prepared by the government servant in his official capacity on the basis of government records.

10. Furthermore, there is a material defect in the plaint inasmuch as the plaintiff has failed to plead the details of the encroachment. Order 7 Rule 3 of Civil Procedure Code requires that the plaint shall contain the description of the property sufficient to identify it. In a suit for removal of encroachment, it is necessary for the plaintiff to show as to which portion of the land is in possession of the plaintiff and as to what portion the defendant encroached upon and the date of encroachment. The trial Court has dealt with this issue in detail in paragraph 16 of the judgment. The appellate court has failed to consider this issue.

11. The witnesses i.e. PW-4 - son of the original owner – Vishwakarma and PW-2 – Gangarde, who prepared map have made omnibus statements about encroachment by the

defendant on plot No. 24. The first appellate court committed grave error in relying on these omnibus statements in reversing the decree of the trial court. The appellate court ought not to have relied on this type of evidence.

12. Considering the vague pleadings of the plaintiff with regard to encroachment, the suit cannot be decreed as the decree would be rendered inexecutable decree.

13. Even if we assume that the defendant encroached on Plot No. 24 fully, it is nobody's case that plot No. 25 is not in existence. It is also not denied that the defendant is not the owner of 600 sq. ft. of plot No. 25. The ownership of both the plots of respective parties is not disputed. The defendant's purchase and possession is prior in time. The plaintiff nowhere pleaded about his physical possession to the plot any time after purchase. It appears without verifying the boundaries of the plot, plaintiff purchased it. The pleadings in plaint with regard to encroachment is vague and therefore, long possession of the defendant cannot be disturbed.

14. In the circumstances, the finding of the first appellate Court in favour of the plaintiff with regard to encroachment, being perverse, needs to be set aside. Hence, Second Appeal needs to be allowed. The judgment and decree of the first appellate court dated 06.08.2002 in R.C.A. No. 182 of 1998 is hereby quashed and set aside. The judgment and decree of the trial Court dated 21.04.1997 in R.C.S. No. 50 of 1993 is restored. The suit is ultimately dismissed. The parties to bear their own costs.

JUDGE

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