

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.1 of 2012**

Ashok Kumar Sharma Son of Late Murlidhar Sharma, aged about 30 years, R/o Sarangarh, Tahsil Sarangarh, District Raigarh (CG)

----- **Appellant/Defendant No.1**

Versus

1. Smt. Phoolmani @ Phoolmati D/o Sammun Khais, aged about 60 years,

2. Jyoti Prakash S/o Shri Hichkol Khais, aged about 32 years,

Both resident of Sarangarh, Tahsil Sarangarh, Dist. Raigarh (CG)

----- **Plaintiffs**

3. State of Chhattisgarh, Through the Collector-Raigarh (CG)

----- **Respondents**

For Appellant/Defendant No.1:

Mr. Anurag Dayal Shrivastava, Advocate

For Respondents No.1&2/Plaintiffs:

Mr. R.N. Pusty, Advocate

For Respondent No.3:

Mr. Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

4/3/2021

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by the appellant/defendant No.1 are as under:-

"1. Whether the first appellate Court has legally erred in accepting the demarcation report (Ex.P/1) while decreeing the plaintiffs' suit?

2. Whether the first appellate Court is justified in holding that defendant has encroached upon plaintiffs' land by recording a perverse finding?"

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court].

2. The plaintiffs filed a suit for declaration of title coupled with relief of possession after removing the encroachment allegedly made by defendant No.1 over the part of suit land bearing Khasra Nos.476/3क, 477/ 3क and 478/3क area 0.474 hectare mentioned in Schedule "B" appended with plaint. It is the case of the plaintiffs that they have purchased the suit land as mentioned above admeasuring area 40x109"feet (total area 4360 sq.ft.) from Mohd.Nasir, Mohd.Mustaq and Mohd.Sharif vide registered sale deed dated 4.3.1998 (Ex.P-4) and defendant No.1 has encroached on the part of the suit land i.e. area 2943 sq.ft. shown in Schedule "B" appended with plaint, as such, they claimed decree for declaration of title and possession.

3. Resisting the suit, defendant No.1 filed his written statement and denied the averments made in the plaint stating inter-alia that he is in possession over the suit land bearing Khasra Nos.476/3, 477/3 and 478/3 area 0.121 hectare, which he has purchased by

registered sale deed dated 5.8.1998 (Ex.P-2) and he has not encroached on the suit land, as such, the suit deserves to be dismissed.

4. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 26.11.2008, dismissed the suit holding that the plaintiffs have failed to establish their title over the encroached area and further failed to prove that defendant No.1 has encroached over the suit land. On appeal being preferred by the plaintiffs, the first appellate Court reversed the judgment and decree of the trial Court and decreed the suit, which has been questioned by defendant No.1 in this second appeal under Section 100 of the CPC, in which two substantial questions of law have been formulated, which have been set-out in opening paragraph of this judgment for sake of completeness.

5. Mr. Anurag Dayal Shrivastava, learned counsel for the appellant/defendant No.1, would submit that the first appellate Court is absolutely unjustified in granting decree for possession. He would further submit that in the present case, decree for possession can only be granted after ascertaining the factum of encroachment and factum of encroachment can be proved only either

from the report of demarcation of the suit land or report of the Commissioner by local inspection. He would also submit that demarcation of the suit land can only be carried out through the authenticated map which is prepared under the provisions of the Chhattisgarh Land Revenue Code and proof thereof is in accordance with Sections 36 and 60 of the Indian Evidence Act as in this case the plaintiffs have filed demarcation report Ex.P-1, which has not been supported by the plaintiffs witness PW-5 revenue inspector Avinash Verma who has conducted demarcation and the plaintiffs despite having come to know that the said report is not accepted by the trial Court did not take any steps before the first appellate Court to get fresh demarcation, if any, as such, the extent of encroachment and the fact of encroachment that too by defendant No.1 has not been established entitling the plaintiffs to get decree for declaration of title and possession. He would lastly submit that by oral evidence, the extent of encroachment cannot be proved, as such, the judgment and decree of the first appellate Court deserve to be set aside. He would rely upon the decision of the Bombay High Court in the matter of Vijay Shende, Ambabai Shende and Ramkalibai Singrol v. State of Maharashtra and Chandrabhan

Nimbhaji Avadhare¹.

6. On the other hand, Mr.R.N.Pusty, learned counsel for respondents No.1 and 2/plaintiffs, would submit that the first appellate Court has rightly analyzed the evidence of the plaintiffs' witnesses and has rightly come to the conclusion that defendant No.1 is encroacher of the plaintiffs' land, therefore, the suit has rightly been decreed, which cannot be taken exception only on the ground that by way of demarcation, the extent of encroachment has not been proved. He would rely upon the judgment of the Supreme Court in the matter of **Fali Firoz Shah Bomanji v. State of Maharashtra and others**² and the judgment of the Madhya Pradesh High Court in the matter of **Mangilal and another v. Gaurishankar and another**³.
7. I have heard learned counsel appearing for the parties, considered their submissions made hereinabove and also went through the records with utmost circumspection.
8. It is not in dispute that the plaintiffs claimed that they have purchased the suit land bearing Khasra Nos.476/3क, 477/3क and 478/3क area 0.474 hectare from Mohd.Nasir, Mohd.Mustaq and Mohd.Sharif by registered sale deed dated 4.3.1998 (Ex.P-4), whereas defendant

1 (2009) 5 AIRBomR 764

2 JT 2000 (7) SC 399

3 AIR 1992 MP 309.

No.1 has purchased the land bearing Khasra Nos.476/3, 477/3 and 478/3 area 0.121 hectare. It is the case of the plaintiffs that defendant No.1 has encroached over 2943 sq.ft. of land.

9. In order to prove the fact of encroachment, the plaintiffs along with plaint filed demarcation report (Ex.P-1). Avinash Verma who has conducted demarcation has been examined as PW-5. He has not supported the case of the plaintiffs in his report. He has made statement as per report stating that statement of plaintiff No.2-Jyoti Prakash as well as the defendant's statement regarding the area of land sold and purchased and the extent of which land is in possession, the actual position could not be ascertained. The said witness has further deposed against the plaintiffs stating that Maheshram and Ramashankar are in possession of excess area to which they have purchased. The aforesaid fact of being possession of more than the area purchased has also been admitted by Maheshram (PW-4). Maheshram (PW-4) has stated in his cross-examination that he is in possession of more than the purchased area of the land, as such, the trial Court recorded a finding that the fact of encroachment has not been established vide Ex.P-1 and two other persons namely Maheshram and

Ramashankar are admittedly in possession of more than the area which they have purchased. The trial Court further recorded a finding that the extent of encroachment can be proved only by demarcation report and oral evidence is secondary and came to the specific finding that the plaintiffs have failed to prove the fact of encroachment and accordingly dismissed the suit, which has been reversed by the first appellate Court relying upon oral evidence.

10. Proof of factum of encroachment has been considered by the Bombay High Court in the matter of Vijay Shende (supra) and it has been held that the extent of encroachment is not a matter to be adjudicated upon oral evidence of any number of witnesses, who have witnessed the act of encroachment and it can be done by demarcation in accordance with the relevant Land Revenue Code. It was observed as under:-

"25. The extent of encroachment, i.e., area, is not a matter to be adjudicated upon oral evidence of any number of witnesses, who have witnessed the act of encroachment.

26. The witnesses, who may be the persons who have measured the land allegedly encroached with reference to public records in relation to the survey numbers or 'Pot Hissa' survey numbers on application by parties or under orders of Court, can certainly prove the fact of encroachment in terms of length, breadth, area etc.

31. The question of encroachment has a direct

bearing on the boundaries of land, which is subjected to land revenue and is measured and marked in the process of public survey on preparation of Land Records under the provisions of Maharashtra Land Revenue Code or law in existence prior thereto, and these records are public documents.

32. When the Court had to decide the issue as to encroachment, proof thereof was/is a matter governed by Sections 36 and 60 of Evidence Act. There are the public records which are relevant u/s 36 of the Indian Evidence Act. It shall be useful to quote and refer to Section 36 of the Indian Evidence Act, which reads as follows:

36. Relevancy of statements in maps, charts and plans.—Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.—Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts."

11. Suit was filed along with demarcation report Ex.P-1. The plaintiffs were quite aware that they have filed a suit for declaration of title with a pleading that defendant No.1 has encroached over the suit land i.e. 2943 sq.ft. In that view of the matter, the plaintiffs ought to have brought a specific evidence of encroachment and if Ex.P-1 was not acceptable to

them and the fact of encroachment is not correctly brought out, they could have make appropriate application during the course of trial for appointment of Commissioner to prove the fact of encroachment as per Section 36 read with Section 60 of the Indian Evidence Act, which has not been done by the plaintiffs for the reason best to known to them. It is not the case that it is a small area of land which is said to be encroached, it is 2943 sq.ft. of land which is said to be encroached by defendant No.1 and according to defendant No.1, he has already constructed house over the suit land and he is in possession of the said area. The plaintiffs took calculated chance to get a decree on the basis of demarcation report (Ex.P-1), which the trial Court did not found favour with the plaintiffs.

12. Now coming to the oral evidence which has been relied upon by the first appellate Court to grant decree in favour of the plaintiffs.

13. True, it is that the first appellate Court has considered oral evidence of the plaintiffs' witnesses and came to the conclusion on the basis of probabilities that defendant No.1 has encroached upon the plaintiffs land, but the fact remains that there must be appropriate legal evidence in the shape of

demarcation report to prove the fact of demarcation that too area of 2943 sq.ft. and that is correct approach of adjudicating the dispute particularly while granting decree for possession. Merely on the basis of probabilities particularly when the plaintiffs witness Avinash Verma (PW-5) has clearly stated that purchasers-Maheshram and Ramashankar both are in possession of excess area which they have purchased. Unless there is concrete evidence of clinching nature that defendant No.1 has definitely encroached upon the plaintiffs' land, merely on the basis of probabilities and merely on the basis of oral evidence when documentary evidence i.e. demarcation report (Ex.P-1) is not supporting the oral evidence of encroachment, decree for possession holding that defendant No.1 has encroached upon the plaintiffs' land could not have been granted by the first appellate Court, as such, finding recorded by the first appellate Court that defendant No.1 has encroached upon the plaintiffs' suit land to the extent of 2943 sq.ft. is finding, which is perverse to record and it is not supported by documentary evidence. In absence of documentary evidence, merely on the basis of unacceptable oral evidence, decree granted deserves to be set aside.

14. For the foregoing reasons, the impugned judgment and decree passed by the first appellate Court is hereby set aside and that of the trial Court is hereby restored by answering the substantial questions of law in favour of defendant No.1 and against the plaintiffs.

15. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

16. Appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-