

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.8959 OF 2014
IN SA/524/2014

PRADEEP S/O SUKHDEO AHIRE AND ORS
VERSUS
RAMCHANDRA VITHAL PAWAR AND ORS

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Mr. K. M. Nagarkar, Advocate for applicants.

Mr. A. V. Hon, Advocate for respondent Nos.1, 2-A to 2-C.

Mr. A. M. Phule, AGP for respondent Nos.3 to 5.

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CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 20.07.2021

Pronounced on : 26.07.2021

ORDER :-

. Present application has been filed for stay in Second Appeal No.524 of 2014.

2. Present applicants – appellants are original defendant Nos.1 to 3. Present respondent No.1 is the original plaintiff, who had filed Regular Civil Suit No.132 of 2006 for declaration and injunction as well as removal of encroachment before the learned Civil Judge Senior Division, Kopergaon. The said suit came to be dismissed and counter claim of defendant No.1 was also dismissed. Original plaintiff had then filed Regular Civil Appeal No.35 of 2009 before the learned District Judge,

Kopargaon, Dist. Ahmednagar challenging the decree passed by the learned Trial Judge. The said civil appeal came to be allowed by reversing the impugned decree. Defendant Nos.1 to 3 and defendant No.5 were directed to remove kiosk erected by them in front of the property owned by the plaintiff. Hence, they have filed this second appeal. The second appeal was admitted by this Court by framing substantial question of law on 10.09.2014. Status quo was granted till the respondents are served and it appears that it was not got extended thereafter, but ultimately on 05.07.2021, learned Advocate for the original plaintiff made a statement that his client will not go ahead with the execution proceedings before the Executing Court before the next date; the hearing of the application has taken place now.

3. Heard learned Advocate Mr. K. M. Nagarkar for the applicants, learned Advocate Mr. A. V. Hon for respondent No.1, 2-A to 2-C and learned AGP Mr. A. M. Phule for respondent Nos.3 to 5. In order to cut short it can be said that all of them have made submissions in support of their respective contentions.

4. At the outset, it can be seen that there is no concurrent finding of both the Courts below. The plaintiff had come with the case that he is the owner of the property, thereby he claimed title as well as possession

over the same, but the learned Trial Judge had given the finding in the negative. The learned Trial Judge has also held that the plaintiff had failed to prove that defendant Nos.1 to 3 are trying to make construction over the suit property illegally. However, it was also held that defendant No.1 has failed to prove his title and possession over the suit property. Therefore, suit as well as counter claim was dismissed by the learned Trial Judge. But the first Appellate Court has given a finding that plaintiff is the owner of City Survey No.1896. He has also proved that defendant Nos.1 to 3 had encroached upon the land owned by defendant No.6. It is also held that the plaintiff has proved that the defendant Nos.1 to 3 had encroached on the access of the plaintiff for to and fro the public highway. Now, in the second appeal, which is already admitted, it will have to be considered as to whether the plaintiff has proved his title over the suit property and it appears from the judgment and decree passed by the learned first Appellate Court in favour of plaintiff that the construction that was raised or obstruction that was raised by defendant Nos.1 to 3 was not on the property belonging to the plaintiff, but then it appears that the plaintiff contended that it is affecting his right to ingress or egress. Whether such easement can be claimed is a question. When all the things are required to be gone into in the second appeal in view of the fact that there are contrary

judgments of the Courts below, it is necessary to preserve the property in the same position as it was at the time of filing of the suit or on the date of the impugned decree. Hence, Civil Application stands allowed in terms of prayer clause 'B' till the final hearing and disposal of the second appeal.

[SMT. VIBHA KANKANWADI, J.]

scm