

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.160 OF 2018
WITH CA/2770/2018 IN SA/160/2018

MADHUKAR S/O ARJUNRAO WAGHMODE
VERSUS
DHARMARAJ S/O APPARAO PATTE AND OTHERS

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Mr. B. R. Waramaa, Advocate for the appellant.
Mr. A. M. Gholap, Advocate for respondent Nos.1 to 3.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 01.09.2021

ORDER :-

. Present appeal has been filed by the original plaintiff to challenge the concurrent judgment and decree. He had filed Regular Civil Suit No.83 of 2001 before the learned Civil Judge Senior Division, Beed for declaration and mandatory injunction. The said suit came to be dismissed on 26.11.2012. He then challenged the said judgment and decree before the learned District Court, Beed by filing Regular Civil Appeal No.13 of 2013. The said appeal was heard and dismissed by learned District Judge-4, Beed on 08.12.2017. Hence, this second appeal.

2. Heard learned Advocate Mr. B. R. Waramaa for the appellant and learned Advocate Mr. A. M. Gholap for respondent Nos.1 to 3.

3. It has been vehemently submitted on behalf of the appellant – original plaintiff that both the Courts below have not appreciated the evidence properly and have not taken into consideration the law points involved. The documentary as well as oral evidence would show the existence of the suit plot owned by the plaintiff. One Narayan Mugaji Hogale had purchased Plot No.2 from defendant No.3 by registered sale-deed dated 15.06.1984. Thereafter, present plaintiff had purchased the said plot from said Narayan Hogale on 10.04.1991. He, thereafter, constructed house totally admeasuring 1600 square feet. The dispute between the plaintiff and the defendant was in respect of the area towards western side. In fact, in the sale-deed in favour of plaintiff, the boundary towards western side has been wrongly shown as plot belonging to defendant No.1. Thereafter, a correction deed has been executed on 13.06.2000 by Narayan Hogale in favour of the plaintiff correcting it as towards the western side, there is Government road. In fact, there was no land available belonging to defendant No.3 towards the western side of the plot. Still, she sold area admeasuring 20 x 50 sq. feet to defendant Nos.1 and 2 by sale-deed dated 19.06.1984. It is stated that, that sale deed is illegal and, therefore, the plaintiff filed suit for declaration and removal of encroachment made by defendant Nos.1 and 2. If we consider the sale-deed executed by defendant No.3 in

favour of Narayan Hogale, which was prior in time to the sale-deed executed by defendant No.3 in favour of defendant Nos.1 and 2, then it can be seen that there is absolutely no land left towards the western boundary. It was stated that there is Government land. But taking disadvantage of the fact, it appears that the said sale-deed was executed by defendant No.3 in favour of defendant Nos.1 and 2 and then there was a mistake on the part of the predecessor of the plaintiff in the sale deed executed in favour of plaintiff to mention the plot of defendant No.1 towards the western side. Both the Courts have not considered the map produced by the plaintiff, which he had submitted to the Municipal authorities prior to the construction. The plaintiff had examined his predecessor on the point that, in fact, there was no area left towards western side belonging to defendant No.3, which she could have sold in favour of defendant Nos.1 and 2. Therefore, substantial questions of law are arising in this case as both the Courts below have taken perverse approach.

4. Per contra, the learned Advocate appearing for respondent Nos.1 and 3 relied on the reasons given by both the Courts below while dismissing the suit and appeal.

5. At the outset, this Court cannot go into the questions of facts much in detail unless it is shown that the approach of the Courts below

was perverse on the face of the record. Here, it is to be noted that the plaintiff's predecessor purchased the suit plot from defendant No.3 on 15.06.1984. Thereafter, immediately on 18.06.1984, defendant Nos.1 and 2 had purchased the plot from defendant No.3. Though the plaintiff's predecessor has been examined to prove that he sold the plot which he had purchased from defendant No.3 to plaintiff on 10.04.1991, it is the fact on record that the correction deed had taken place on 13.06.2000. That means, there was about 9 years of gap in between the sale-deed and the correction deed. Why it took so much of time to get the correction effected is a question. It appears to be not answered either by the plaintiff or his predecessor. Further, it can also be seen that the predecessor is not explaining as to why he had not taken any action to challenge the sale-deed between defendant Nos.1 and 2 with defendant No.3. He doesn't come with the case that he was not aware about the said transaction. Now, as regards the facts in the case are concerned, both the Courts below have held that plaintiff has failed to prove his title and possession over the suit property i.e. the disputed area, on which it is stated by the plaintiff that there is encroachment by defendant Nos.1 and 2. Further, both the Courts have held that plaintiff has failed to prove that defendant Nos.1 and 2 have unauthorizedly and illegally committed encroachment to the extent of

20 x 50 sq. feet area. Both the Courts have also held that in spite of opportunity was given to the plaintiff to produce the sanctioned lay out of the property belonging to defendant No.3, he has not produced it on record. That document, in fact, would have shown whether the plot which was sold to defendant Nos.1 and 2 was in existence or not. Plaintiff could have made that document available though he may not be the ordinary custodian of that property. Both the Courts below, therefore, rightly drawn the adverse inference against the plaintiff as he has failed to produce best possible evidence to show the existence of the disputed area. There was also no attempt on his part to get the land measured by appropriate authority. Therefore, when so many lacunas have been left by the plaintiff to prove his case, then both the Courts below appear to be justified in dismissing the suit as well as appeal. No substantial question of law as contemplated under Section 100 of the Code of Civil Procedure is arising in this case to admit the second appeal. The second appeal deserves to be dismissed at the threshold. Accordingly, it is dismissed.

6. Pending civil application stands disposed of.

[SMT. VIBHA KANKANWADI, J.]