

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO.7221 OF 2020
WITH
SECOND APPEAL STAMP NO.1858 OF 2019
WITH
CIVIL APPLICATION NO.7222 OF 2020**

DEVLALI PRAVARA MUNICIPAL COUNCIL
THROUGH CHIEF OFFICER AND OTHERS

VERSUS

SHAIKH IBRAHIM BALAM (DECEASED)
THROUGH HIS LEGAL REPRESENTATIVES
AND ANOTHER

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Advocate for Applicants/Appellants : Mr. D. R. Markad
Advocate for Respondents No.1-A to 1-EE : Mr. R. R. Karpe
Advocate for Respondent No.2 ; Mr. Joyeb I. Shaikh
Advocate for Respondent No.3 : Mr. V. S. Bedre

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 01-10-2021.

ORDER :

1. Civil Application No.7221 of 2020 has been filed for condonation of delay of 180 days in filing second appeal. The applicants/appellants are the original defendants No.1 to 3. Present respondents No.1 and 2 are the original plaintiffs who had filed suit for perpetual injunction, recovery of possession, mandatory injunction and mesne profits. The said suit was filed before learned 2nd Joint Civil Judge, Junior Division, Rahuri, District Ahmednagar. It came to be partly decreed on 21-03-

2011. The present appellants had challenged the said Judgment and decree in Regular Civil Appeal No.197 of 2011 before District Court, Ahmednagar. The said appeal was heard by learned Adhoc District Judge-6, Ahmednagar, and was dismissed on 19-04-2018. Hence, the present appellants intended to file second appeal, however, there is delay of 180 days.

2. The applicants have contended that no regular Chief Officer was appointed to the Municipal Counsel Devlali Pravara and only the additional charge was with Chief Officer, Shirdi Municipal Counsel and for the other administrative problems they could not approach the Advocate for preparing second appeal.

3. The application has been strongly opposed by the legal heirs of respondent No.1 i.e. respondents No.1/A to 1/EE and respondents No.2 and 3. It has been contended that administrative problems cannot be the reason for not preferring a second appeal. Though that may be one of the consideration, yet the applicants have not explained as to why the in-charge Chief Officer could not have taken the action to file second appeal. Therefore, no reasonable ground much less sufficient has been shown for condoning the delay.

4. At the outset, it is to be noted that the appeal before the First Appellate court appears to have been filed within limitation. Only the delay is to approach this Court that means the appellants are not habitual as such to commit delay. They have put forward a reason that no regular Chief Officer was appointed for the Municipal Council and the charge was kept with Chief Officer of another Municipal Council. The chart has been given as to who had charged with whom and what was the period of the said charge. Though in-charge Chief officer is also having all the powers and rights to exercise the same powers of the regular Chief Officer, yet those administrative problems can be considered and taking into consideration the delay that has been caused i.e. 180 days, the same deserves to be condoned.

5. With consent of both the parties, the matter was taken up for admission immediately.

6. Heard learned Advocate Mr. D. R. Markad for applicants/appellants, learned Advocate Mr. R. R. Karpe for respondents No.1-A to 1-EE, learned Advocate Mr. Joyeb I. Shaikh for respondent No.2 and learned Advocate Mr. V. S. Bedre for respondent No.3. In order to cut short, it is stated that all of them

have made submissions in support of their respective contentions.

7. It can be seen that the original plaintiffs No.1 and 2 had initially filed the suit for perpetual injunction simpliciter in respect of agricultural land bearing Gut No.641/1 admeasuring 1 H 55 R situated in Devlali Pravara and house property No.2142 admeasuring 1053 Square Meters situated in the same village. However, subsequently the prayer for recovery of possession and mandatory injunction as well as mesne profits has been added. The original plaintiffs claimed that they are the co-sharers and owners of the suit property as well as suit house. They had taken electric connection about 15 to 16 years ago. They received notice on 07-04-2000 issued by the defendants directing them to remove the suit house. Threat was given that they would demolish the suit house if it is not removed/demolished. It was further contention that during the pendency of the suit, they had applied for measurement of their property and it was found that there is encroachment by the defendants to the extent of 3 R portion of the suit land by constructing shopping complex. Therefore, they added the prayer of removal of encroachment, possession and mesne profits to the extent of 3 R land.

8. The defendants by their written statement denied all the allegations. It has been contended that they had constructed the drainage and road within the limits of their property Gut No.1622 but they made allegation that plaintiffs are encroaching upon their land and caused obstruction to the construction of the drainage. It is stated that after getting knowledge that defendant No.1 would likely to remove the encroachment, the plaintiffs have filed false suit. It is stated that the shopping complex has been constructed within the limits of the council's property and it was constructed about 30 years ago. The plaintiffs did not object to the same and then they had also contended that since plaintiffs never objecting to the same, they have become owner of the land beneath the shopping complex by adverse possession. It is also stated that the persons to whom the shops have been allotted, are also necessary party to the suit as their interest would be affected. The suit is also not tenable without serving notice under Section 304 of the Maharashtra Municipalities Act.

9. As aforesaid, after the pleadings, issues came to be framed and parties have led oral as well as documentary evidence. The learned Trial Judge held that the plaintiffs are in lawful possession

over the suit house. The defendants are causing obstruction to their peaceful possession. The suit is not hit by the provisions of Section 304 of the Maharashtra Municipalities Act. Defendants have failed to prove that the plaintiffs have made illegal construction in Gut No.1622. Plaintiffs have proved that the defendants have made encroachment over the suit property and, therefore, they are entitled to get possession of the encroached area from defendant No.1. Plaintiffs are also entitled to get mandatory injunction, accordingly the suit was partly decreed and the First Appellate Court has maintained that decree.

10. Perusal of the issues framed as well as points for determination framed by the First Appellate Court, especially in view of the discussion of the First Appellate court in respect of point No.1, it is very much clear that the learned Trial Judge had not framed the issue of ownership over the suit property. Important point to be noted is that though the initial suit was for simpliciter injunction, yet by way of amendment, removal of encroachment to the extent of 3 R, was also prayed. Under the said circumstances, unless the plaintiff show that they are the owners of that 3 R land, or in other words, unless the plaintiff prove that the said land of 3 R is of their

ownership and then it has been encroached upon by defendants No.1 and 2. There could not have been a decree of removal of encroachment and possession. Unless the person is having ownership over the disputed encroached area, he cannot seek its removal and possession. Though the First Appellate court has observed that no issue to the effect that whether plaintiffs proved their ownership to the suit land was framed by the learned Trial Judge, yet no attempt was made to reassess the evidence in order to see whether the plaintiffs have proved their ownership over 3 R land. This point has been brushed aside on the basis of alternative claim of the defendants wherein they had claimed ownership by adverse possession over the said 3 R land. Learned Appellate Court ought to have seen that initially there is denial to the averment about encroachment by the defendants and then they were contending that since the construction is there since more than 30 years and no objection raised by the plaintiffs, then in that case they have become owner of the land beneath to the shops by adverse possession. Therefore, definitely this point requires to be gone into thoroughly by considering the entire evidence on record.

11. Plaintiffs had contended that they had received notice dated

07-04-2000 from the plaintiffs regarding demolition of the suit house. In fact, why that notice was sent and whether the plaintiffs have shown that they have made construction of their premises by taking all the necessary permissions, appears to have been not discussed at all by the learned Trial Judge as well as First Appellate Court. No issue was framed by the Lower Court on this aspect nor even the First Appellate Court has stated about it. One more aspect that requires consideration is that though the Cadastral Surveyor was examined as PW.3 and it appears that the map drawn by her was exhibited, it had come on record that the said map was used in Regular Civil Suit No.66 of 1995. Further, it also appears that when the measurement was done on 11-04-2006 by the said officer, the representatives of the plaintiffs as well as defendants were present and then she has come to the conclusion that defendant No.1 has made encroachment to the extent of 3 R. It is then also required to be considered as to whether both the Courts below have considered the point of ownership by adverse possession claimed by the defendants. When it had come on record that the said construction has been made by defendant No.1 about 30 years ago, therefore, definitely substantial questions of law are arising in this case requiring the second appeal to be admitted.

12. Civil Application No.7222 of 2020 is for 'Stay' to the impugned Judgment and decree passed by the Courts below. In view of admission of the second appeal, the parties are required to be adequately protected.

13. For the aforesaid reasons, following order is passed.

ORDER

1) The delay caused in filing second appeal is hereby condoned subject to deposit of cost of Rs.5000/- (Five thousand) within a period of one (1) month from today. Application for delay condonation stands disposed of.

2) After the amount is deposited, the second appeal be registered and the amount so deposited be given to legal representatives of respondent No.1 i.e. 1/A to 1/EE on one part and respondent No.2 on the other part, equally.

3) Second appeal stands **admitted**. Following are the substantial questions of law :-

(A) Whether findings given by both the Courts below is perverse ?

(B) Whether the Courts below were justified in directing defendant No.1 to handover the possession to the plaintiffs without seeking declaration of ownership ? or in other words, Whether both the Courts below were justified in proceeding ahead without framing requisite

issue/point in respect of alleged ownership of the plaintiffs over 3 R land which is stated to be encroached by the defendants ?

(C) Whether the defendants in the alternative had proved ownership by adverse possession over 3 R land area ?

(D) Whether the suit for removal of encroachment to the extent of 3 R land was within limitation ?

(E) Whether the suit was bad for notice under Section 304 of the Maharashtra Municipalities Act ?

(F) Whether interference is required ?

4) There shall be 'Stay' to the impugned decree passed by both the Courts below till the hearing and disposal of the second appeal to the extent of removal of encroachment. Application for 'Stay' stands disposed of.

5) Issue notice to the respondents.

6) Learned Advocate Mr. R. R. Karpe waives notice for respondents No.1-A to 1-EE. Learned Advocate Mr. Joyeb I. Shaikh waives notice for respondent No.2, and learned Advocate Mr. V. S. Bedre waives notice for respondent No.3.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-