

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.656 OF 2017
WITH
CIVIL APPLICATION NO.2012/2017**

M/s Gangasagar Sahakari Grih
Nirman Sanstha Maryadit,
Nakshatrawadi, Aurangabad.

**= APPELLANT
(Orig.Plaintiff)**

VERSUS

1) Shubhangi w/o Satish Vaidya
and ors.

**= RESPONDENTS
(Orig.Defendants)**

Mr.PN Sonpethkar, Advocate for Appellant

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 9th February, 2021.

PER COURT :-

1) Present appeal has been filed by original plaintiff to challenge the judgment and decree in Regular Civil Appeal No.87 of 2013 by learned Ad-hoc District Judge-3, Aurangabad on 21-11-2016; whereby the learned District Judge has reversed the judgment and decree passed in Regular Civil Suit No.472 of 2008 by learned Joint Civil Judge Junior Division, Aurangabad, Dist. Aurangabad on 28-02-2013. The suit, filed for perpetual injunction by the present appellant-plaintiff, was decreed by learned Lower Court; however, it came to be dismissed in the appeal. Parties would be referred by their original status, henceforth, for the sake of convenience.

2) It is not in dispute that the plaintiff is a

registered housing society. Original defendants are the owners of adjoining lands to the land of the plaintiff.

3) Original plaintiff has come with a case that it is the owner and possessor of suit land Gat No.7, admeasuring 5 Acres situated in village Nakshatrawadi, Tal. and Dist. Aurangabad. Plaintiff had purchased the suit land on 12-01-1983. It is contended that there was a joint measurement of the suit land in 1982. The land of the defendants was shown as 100 meters. Thereafter, the layout of the defendants was sanctioned by the Municipal Corporation, Aurangabad in respect of that 100 meters. Thereafter, the defendants' land was once again measured in July 2004 without any reason, but at that time, the east-west land was shown as 103 meters. The Municipal Corporation has granted permission of construction to the defendants in respect of 103 meters. It is the case of the plaintiff that in fact, the defendants have planned to encroach on its area by showing 3 meters land excess. Defendants have tried to dig pits on 27-05-2008, however, they were restrained by the plaintiff. Hence, the suit was filed for restraining the defendants from committing encroachment.

4) The defendants resisted the claim of the plaintiff by filing written statement. Defendants denied the description of the boundaries of the suit property. They have challenged the *locus standi* of the person filing the suit on behalf of plaintiff. They have denied that there was joint measurement of the lands in 1982 and their land was shown as 100 meters. One Chandabai Patki had applied on 25-01-1982 for measurement of entire land Gat No.7. Accordingly, it was measured on 06-06-1982. It was not mentioned that

land of the defendants is 100 meters. The measurement carried out in 2004 is as per the actual possession, sale-deed and 7 x 12 extract. The defendants No.1 to 4 have sold their share on 29-12-2004 to one Megh-Malhar Sahakari Gruha Nirman Sanstha, New Neelam Sahakari Gruha Nirman Sanstha by executing 4 sale-deeds in respect of the different plots. Construction was undertaken by defendant No.5 as building contractor and it was in progress.

5) After the issues were framed, the parties have led oral as well as documentary evidence. After going through the evidence and hearing both sides, the learned Lower Court has come to the conclusion that plaintiff proved the boundaries as per map Ex.47. It has been further held that the plaintiff has proved that the defendants are causing obstruction to the possession of the plaintiff over the suit land. The suit was decreed. Original defendants approached the First Appellate Court. After hearing both sides, the appeal has been allowed. The decree passed by the learned Lower Court has been set aside. The suit has been dismissed. Hence, this appeal by original plaintiff under Section 100 of the Code of Civil Procedure.

6) Heard learned Advocate Shri. P.N. Sonpethkar for the appellate/plaintiff. Perused the impugned judgments and other documents produced on record. It is not even necessary to issue notice to the respondents/defendants. Unless the appellant-plaintiff shows that the appeal, under Section 100 of Code of Civil Procedure, is giving rise to a substantial question of law, it is not necessary to issue notice to the defendants.

7) It has been submitted on behalf of appellant-plaintiff that the plaintiff has proved its ownership over the property i.e. Gat No.7 to the extent of 5 acres. The said ownership has been proved by proving the boundaries. The dispute was in respect of length of east-west boundary. It was 100 meters. The appellate Court has also held that the plaintiff has proved ownership over the suit property, but the suit came to be dismissed on the ground of non-joinder of necessary party. It appears that the defendants had not pressed that point and no issue was also framed by the learned Lower Court to that effect. Suit could not have been dismissed only on the ground of non-joinder of necessary party. The dispute was not considered on merits, but only on the technical point, the appeal has been decided. Therefore, the substantial questions of law are arising in this case.

8) At the outset, it can be seen that the defendants had specifically contended in the written statement itself that defendant No.1 to 4 have sold out their land in 2004 by executing 4 separate sale-deeds. In spite of these specific pleadings, there was no step taken by the plaintiff to implead those parties, who had purchased the land in 2004. The suit is filed on 09-06-2008. Therefore, it appears to have been filed against wrong persons also, who were no longer the owners of the property. That means the suit was not only suffering from non-joinder, but also mis-joinder. Now, it is harped upon the point that no issue was framed and it was not pressed by defendants before the learned Lower Court. It can be seen that the plaintiff can not blame the defendants for this. They had raised the specific pleading. The plaintiff did not act upon

it. However, the plaintiff had every knowledge of the case that was required to be proved by him. Therefore, now, he can not take advantage of the said fact. Another fact to be noted is that defendant No.5 was the building contractor. He has examined himself in the case. In his examination-in-chief itself, he has stated that he is not authorized by defendant Nos.1 to 4 to make any construction. He was developing the land for those societies, who had purchased the land from defendant Nos.1 to 4. In spite of this evidence led in the matter, if the plaintiff fails to take any step to include the owners of the lands/plots; then he should be ready for the consequence also. It appears that the learned Lower Court failed to consider this aspect and went on to decree the suit against those persons who are no longer the owners of the lands/plots. The decree that was passed in the suit was totally unexecutable. If the plaintiff, even after knowledge, does not take any step then, now he can not say that the suit ought not to have been dismissed on the count of non-joinder of necessary party.

9) Further, even if we consider the case on its merits, then it can be seen that the plaintiff had come with a case that there was measurement in 1982. However, the learned Lower Court has stated that no evidence has been adduced to prove the said measurement. Thereafter, the plaintiff has adduced evidence to show that measurement has taken place twice in 2004. The plaintiff is relying on one of those measurements that was carried out in July 2004. He is discarding or not relying on the measurement done in September 2004. The plaintiff can not pick and choose in such a manner. Both the measurements were not done at his behest. The plaintiff did not get any

measurement done independently. Another fact to be noted is that the plaintiff was asking for relief of injunction, but it appears that though the measurements were done in 2004, he did not approach the Court of law immediately. He filed the suit after a period of 4 years. Therefore, the latest position was not brought on record. The suit suffers from delay and latches. Another fact is that when already the work was on the verge of completion, then whether the suit for the relief of only injunction can be said to be maintainable? Answer is "No". Even if it is accepted, for the sake of arguments, that the plaintiff had proved that length of the boundary was 103 meters, then also, the suit in the present form was not maintainable. The plaintiff had every idea about the ground situation, yet such suit has been filed. It has further come on record that the layout of the defendants was sanctioned by the Municipal Corporation and building permission has also been sanctioned. The plaintiff had the opportunity to raise dispute before the municipal authorities, yet that opportunity is also not taken by it. It appears that now he had filed objection with Municipal Corporation, by giving letter dated 24-11-2020 i.e. during the pendency of this second appeal. He was asked by the authorities to produce any order passed by this Court vide letter dated 13-01-2021. No order has been passed by this Court in favour of appellant-plaintiff till today. This appears to be his belated attempt. It will not be out of place to mention here that the societies, who have purchased the lands/plots and making constructions are the societies of Government Servants and employees of Zilla Parishad, who had taken loan from Government and financial institution. Under such circumstance, unless it is proved by cogent evidence, no discretionary

relief could be granted.

10) Under the above circumstance, no substantial questions of law are arising in this case, requiring admission of the appeal. The appeal deserves to be dismissed and accordingly, it is dismissed. Pending Civil Application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV