

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.204 OF 2018
WITH CA/3601/2018 IN SA/204/2018

Kishan s/o Gana Gawali and another

... Appellants

Versus

Raghunath s/o Madhavrao Gawali

... Respondent

.....
Mr. D. B. Pawar, Advocate for appellants.

Mr. B. N. Patil, Advocate for respondent.
.....

CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 15th February, 2021

Pronounced on : 4th March, 2021

ORDER :-

. Present appellants are original defendants and present respondent is the original plaintiff. Plaintiff had filed Regular Civil Suit No.392 of 2006 before the learned Civil Judge Junior Division, AUSA, District Latur for removal of encroachment and possession. The said suit came to be decreed on 16.01.2009. Present appellants were directed to hand over the possession of land admeasuring 18 R and 5 R respectively to the plaintiff within a period of two months from the date of the decree. The said judgement and decree was challenged by the present appellants before District Court, Latur by filing Regular Civil Appeal No. 306 of

2012. The said appeal was heard by the learned Ad-hoc District Judge – 2, Latur. The judgement and decree passed by the learned lower court was confirmed. The appellants want to challenge the said judgement and decree in this Second Appeal under Section 100 of the Code of Civil Procedure.

2. Heard learned Advocate Mr. D. B. Pawar for appellants and learned Advocate Mr. B. N. Patil for the respondent.

3. It has been vehemently submitted on behalf of appellants that both the Courts below have committed error of law and fact. They have not appreciated the evidence properly. Undue weightage has been given to the evidence of Taluka Inspector of Land Records, when in fact the map drawn by him cannot be said to be legal. Both the Courts below failed to consider that the Civil Court had no jurisdiction to entertain the issue in connection with Prevention of Fragmentation and Consolidation of Holdings Act. The land of the plaintiff was exchanged with the land of his brother at the time of implementation of the consolidation scheme. Plaintiff in his deposition admitted that the consolidation scheme was implemented in his village. Both the Courts below failed to consider that the Taluka Inspector of Land Records had not measured the land belonging to the appellants. How he could have arrived at the

conclusion that present appellants had encroached upon the land belonging to the other person, only on the basis of measurements of the land of the plaintiff. The error committed in the implementation of the consolidation scheme could not have been corrected by the Civil Court in view of bar under Section 36-A of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as the 'Consolidation Act'). Therefore, substantial question of law that arises in this case is in respect of jurisdiction of the Civil Court. Learned Advocate for appellants, therefore, prayed for admitting the Second Appeal.

4. Per contra, the learned Advocate appearing for the respondent strongly supported the reasons given by both the Courts below and submitted that no substantial question of law is arising in this case requiring admission of the Second Appeal. Plaintiff had come with a specific case that both the defendants had made encroachment on his land and, therefore, he had got his land measured. In order to prove the fact of encroachment, he has examined Taluka Inspector of Land Records, who had visited the land and carried out the measurement. He has been cross-examined at length by the appellants. They had never raised any point in respect of bar of jurisdiction under any Act. Now, for the first time in Second Appeal, they cannot raise any such point. The

plaintiff is not challenging the consolidation scheme. There was ample evidence to prove that the plaintiff is the owner of the suit property. The factual situation showed that defendant No.1 had made encroachment on the land belonging to the plaintiff to the extent of 18 R and defendant No.2 had made encroachment to the extent of 5 R land, as shown in the map. Plaintiff being the owner of the said land was entitled to get possession thereof. Learned Advocate for the respondent, therefore, prayed for the dismissal of the Second Appeal.

5. At the outset, it is to be noted that plaintiff is the owner of land admeasuring 3 H 10 R situated on the northern side of Gat No.367 in village Yakatpur (Baroda), Tal. Ausa, Dist. Latur. Defendant Nos.1 and 2 are the adjoining owners of the said land. Plaintiff was a government servant and, therefore, was out of village for a considerable time prior to suit. Plaintiff had got his land measured on 22/23.05.2006. When it was transpired that the defendants have made encroachment on his land, then he has filed suit. He has examined the cadestral surveyor to prove the encroachment. Defendants had denied the measurement in their written statement. PW.2 Shaikh Abdul Turab - Surveyor has deposed that he had given notice of measurement to the defendants. His file was containing the acknowledgement. He has examined entire Survey Nos.125 and 126. Those lands have been converted in Gat

number and it consists of lands of the plaintiff and defendants. That means, though plaintiff had prayed for the measurement of his land, yet he has correctly measured the entire land. There was no attempt by defendants to get their land measured once again through Court Commissioner after they had filed written statement. If there would have been any such point to get the land measured, then they could have made use of the provisions in Order 26 of the Code of Civil Procedure. In fact, the cross-examination of the defendant would show that he is claiming ignorance of measurement. Ignorance cannot be taken as denial. Perusal of the testimony of the Surveyor would show that he has given all those details which are required to prove the map. The evidence of the plaintiff, his brother and P.W.4 Subhash Nagure would suggest that they are the co-sharers in Gat No.367 and they were also present at the time of measurement. They have stated that defendants were also present on that day. P.W.2 Shaikh Abdul Turab has also stated that though in the certified copies of the map, he has not shown the sub-divisions (pot-hissa), but it is shown in the original, which he had brought before the Court. Defendants could have requested the Court to keep that document on record, if they had the desire. No such request was made. There is nothing in the cross-examination of the surveyor, which will discard his testimony.

6. Much stress has been laid by the learned Advocate for the appellants on the fact that the Surveyor had not taken a note that a road is passing adjacent to Gat No.367 and measurement has been done excluding that area. Though there appears to be an attempt on the part of the defendants to show that the said road was part of Gat No.367; yet, defendants have not led any evidence to support this contention. If some portion of the land from Gat No.367 would have been acquired for the purpose of road by the Government, then such documents would definitely be available with concerned department. When there was possibility of documentary evidence, the non-production thereof will not make oral evidence on that point permissible or admissible.

7. Another point that is harped upon by the appellants is that the Civil Court had no jurisdiction under Section 36-A of the Consolidation Act to decide the dispute. It can be seen from the testimony of the plaintiff, his brother and defendants that there was exchange of lands at the time of implementation of the consolidation scheme. Defendant No.1 admits in his cross that he had received less area than the area given to plaintiff and his brother. Thus, it can be seen that it was for defendant No.1 to approach Consolidation authorities, if he was aggrieved. He cannot blame plaintiff or his brother. The said exchange was complete long back and the effect of the same was of perfecting

title. Plaintiff was not seeking declaration of his title, but had positively come with a case of title and encroachment. Therefore, there is no such question of law involving Section 36-A of the Consolidation Act. This point appears to be not raised before both the Courts below, cannot be raised for the first time in Second Appeal.

8. The plaintiff had proved that the defendants had encroached upon his land to the extent of 18 R and 5 R respectively, as shown in the map. Appellants have failed to show that matter requires remand for any defect in the measurement. Under such circumstance, no substantial question of law as contemplated under Section 100 of the Code of Civil Procedure is arising in this case requiring admission of the case. Therefore, this appeal stands dismissed with costs.

9. Pending civil application stands disposed of.

[SMT. VIBHA KANKANWADI, J.]

Later on :-

. Learned Advocate appearing for the appellants prayed for stay to the order passed by this Court today contending that he is in possession and he want to approach the Hon'ble Apex Court. It is to be noted that

there is concurrent findings of both the Courts below and so also this Court has come to the conclusion that encroachment has been properly proved by the plaintiff. Under such circumstance, merely because the appellant is in possession, that does not mean that the order should be stayed. Oral application is rejected.

[SMT. VIBHA KANKANWADI, J.]

scm