

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.491 OF 2013

TUKARAM SAKHARAM YEOLE
VERSUS
POPAT RAMKRISHNA DHAMALE DIED
THROUGH LEGAL REPRESENTATIVES AND OTHERS

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Advocate for Appellant : Mr. Ruchir Wani holding for Mr. A. S. Bajaj
Advocate for Respondent No.1-A to 1-D, 2 and 3 : Mr. A. S. Joshi and
H. H. Padalkar

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
18-11-2021**

**Date of Pronouncing The Order :
07-12-2021**

ORDER :

1. Present appeal has been filed by the original plaintiff challenging the concurrent Judgment and decree passed by the Courts below. He had filed Regular Civil Suit No.72 of 1996 before Joint Civil Judge, Junior Division, Sangamner, District Ahmednagar, for permanent as well as mandatory injunction. The said suit came to be dismissed on 21-06-1999. He challenged the said Judgment and decree by filing Regular Civil Appeal No.134 of 1999 which is later on renumbered as Regular Civil Appeal No.845 of 2000. The said appeal came to be dismissed by learned District Judge-2, Sangamner, District Ahmednagar, on 05-12-2011. Hence, this second appeal.

2. Heard learned Advocate Mr. Ruchir Wani holding for Advocate Mr. A. S. Bajaj, learned Advocate Mr. A. S. Joshi and Learned Advocate Mr. H. H Padalkar for respondents No.1-A to 1-D, 2 and 3.

3. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the evidence properly and have given perverse finding. In fact, the plaintiff has proved his title by filing certified copy of his sale deed which he had obtained from Sub-Registrar's office. He had also filed the mutation entry on the basis of which his name came to be entered to the revenue records. The 7/12 extract was also filed, yet both the Courts have held that the plaintiff has failed to prove the title of his vendor and, therefore, it cannot be said that the plaintiff has proved his title. Thereafter, the plaintiff has also produced evidence in the form of witness who was present at the time of purchase transaction. He had got the land measured through Taluka Inspector of Land Records and thereupon it was shown that there is a construction made in the suit land, which is stated to be made by the defendants. When the said construction has been made on the open plot belonging to the plaintiff, mandatory injunction ought to have been granted. Both the Courts ought to have held that the

plaintiff has proved that the encroachment has been committed by the defendants. When evidence has not been properly appreciated and it has resulted into perversity, substantial questions of law are arising in this case.

4. Per contra, learned Advocate for respondents supported the reasons given by both the Courts below and submitted that no substantial questions of law are arising in this case.

5. It is to be noted that initially the suit appears to have been filed only for permanent injunction, however, later on, the prayer for mandatory injunction in respect of removal of structure in the form of a raised platform (Oata) admeasuring 4 x 10 feet, was added. That portion is stated to be on the Eastern corner. The suit was not filed for removal of encroachment in the stricter sense by valuing the property as well as a suit. Plaintiff had come with a case that he is the owner of the property as he had purchased the said open space from one Khandu Shankar Dhamale and Yamraj Shankar Dhamale on 09-10-1984. Defendants challenged the title of the plaintiff and contended that it is the ancestral property of the defendants. In view of the same, the issue in respect of title was framed. It was, therefore, expected by both the Courts below that

the plaintiff would prove his title by cogent evidence. No doubt, plaintiff produced the certified copy of his sale deed and gave explanation that his sale deed was sent to Photozinco but it is not received back, and he had obtained the certified copy from the concerned office. Defendant had challenged the alleged ownership of Khandu Dhamale and Yamraj Dhamale because a specific statement to that effect in the written statement was made that they had no concern with the suit property, but they were occupying a certain portion on the Eastern side. If this is so, it was then expected from the plaintiff to produce on record documentary evidence to prove the title of his vendors. Neither such document has been produced nor he examined his vendors. Examination of the witness, who was allegedly present at the time of sale deed, will not prove the title of the vendors. Both the Courts below were justified in concluding that plaintiff has failed to prove title to the suit property.

6. When the plaintiff had failed to prove his title, the suit should automatically stand dismissed as he will not be having any right to claim any relief in respect of that property. However, if we go further and consider the evidence on the point of alleged

encroachment, it is to be noted that though initially the suit land was measured by PW.3 Sayyed, yet during the pendency of the suit, the land was got measured through District Inspector of Land Records. PW.3 Sayyed was only the Cadastral Surveyor but the District Inspector of Land Records is the appellate authority. The concerned person i.e. D.W.2 Ashok Manjare who measured the land as per the orders of the Trial Court, has specifically deposed that he could not find that owner of land Survey No.264 has made encroachment on land Survey No.261. He could not find any raised platform or house in Survey No.261. In his cross-examination, nothing contrary has been transpired. Therefore, when the appellate authority of the Cadastral Surveyor had come to the conclusion that there is encroachment, then consequent finding would be that the plaintiff had failed to prove the claim. The suit was rightly dismissed, so also the appeal was rightly dismissed. There is no perversity in the conclusions drawn by the Courts below. 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 second appeal. Hence, the appeal stands dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-