

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7528 OF 2012

Karbhari s/o Narayan Kamble
Age 56 years, Occ. Service
R/o Meera Nagar, Near Kirana Stores,
Padegaon, Aurangabad.

Petitioner

Versus

1. Shaikh Kasim s/o Shaikh Shakoor
(Deceased through LRs)
- 1A) Rehana wd/o Kasim Shaikh
Age 55 years, occ. Household
- 1B) Rameez s/o Kasim Shaikh
Age 34 years, Occ. Private Service
- 1C) Nilofer w/o Riyaz Shaikh
Age 38 years, Occ. Household
- 1D) Azra w/o Samir Shaikh
Age 36 years, Occ. Household
- 1E) Amreen w/o Parvez Shaikh
Age 32 years, Occ. Household

All R/o House No. 118, Priyadarshani Colony
Padegaon, Tq. & Dist. Aurangabad.

2. Shivilal s/o Chintaman Wani
Age Major, Occ. Agriculture
R/o Meera Nagar, Padegaon
Aurangabad.
3. Shivhamsing s/o Shivnarayansingh Verma}
Age Major, Occ. Agriculture } Deleted vide Court
R/o C/o Dr. Warma Neurologist Surgeon } order dt. 13.7.18

47, Krishna Marg, Nariman Nagar }
Ajmer Road, Jaipur (Rajasthan) }

4. Jahedabegum w/o Shaikh Hamid
(Died through LRs)

4-a) Shaikh Asif s/o Shaikh Hamid
Age 44 years, Occ. Service
R/o Quarter No. 4 & 5, Cantonment
Hospital Compound, Cantonment Area
Aurangabad.

4-b) Shaikh Sajid s/o Shaikh Hamid
Age 44 years, Occ. Service
R/o Quarter No. 4 & 5,
Cantonment Hospital Compound,
Cantonment Area, Aurangabad.

Respondents

Mr. K.N. Lokhande, Advocate for the petitioner.

Mr. M.M. Joshi, Advocate for respondents No. 1A to 1E, 4A and 4B.

CORAM : M.G. Sewlikar, J.

RESERVED ON : 17th July, 2021.
PRONOUNCED ON : 30th July, 2021

JUDGMENT :

1. Rule. Rule made returnable forthwith.

2. By consent of the parties, heard finally at the admission stage.

3. By this petition under Article 227 of the Constitution of

India, petitioner – original defendant No. 1 is challenging the order dated 3rd August, 2012, passed by the learned District Judge – 1, Aurangabad below Exhibit 58 in Regular Civil Appeal No. 194/2008.

4. In nutshell, facts leading to this petition are as under :-

Respondent No. 1 – plaintiff filed Regular Civil Suit No. 844/2012 in the Court of Civil Judge (J.D.) Aurangabad contending therein that he is the owner and possessor of plot No. 22 of Gat No. 18 (old Survey No. 10/4) situated at Padegaon. It is his further contention that this property was purchased by him by registered sale-deed dated 13th November, 1981 from original defendant No. 2 (respondent No. 2 herein). Possession of the plot was handed over to respondent No. 1 by respondent No. 2 on the same day. Respondent No. 1 constructed fencing and tin shed on this property. It is further contended that respondent No. 2 sold many plots out of Gat No. 18 (old Survey no. 10/4). Respondent No. 2 changed the original lay out of the property. In the new lay out, the property in dispute is shown at different places. As a result of which, its boundaries have been changed. Thereafter, respondent No. 2 sold plot No. 62 P to respondent No. 1. Respondent 1 sold plot No. 62 and 62P to one

Shivhamsing s/o Shivnarayaning. Plaintiff used to visit the property in dispute after a month or two. On 16th June, 2002, he found that the tin shed was not there on the property in dispute. He noticed that defendant No. 1, who is the owner of plot No. 62 and 62 P, had made encroachment over the property in dispute to the extent of 50 ft in North-West in length 20 to 22 ft. on eastern side. Petitioner had also removed tin shed behind the back of respondent No. 1. on this ground, aforesaid suit came to be filed by respondent No. 1.

5. Petitioner filed his written statement at Exhibit 24 in the record of the trial Court. He denied all the contentions made by respondent No. 1. It is the contention of petitioner that he purchased plot No. 62 and 62P totally admeasuring 473.72 sq. meter sitauted at Gat No. 18 (survey no. 10/4) by registered sale-deed dated 1st November, 2000 from one Shivhamsingh s/o Ramnarayansingh Varma. Since then, petitioner is residing there with his family. The property in dispute is not in existence.

6. Respondent No. 2 filed his written statement at Exhibit 20 and denied all the contentions of respondent No. 1. He contended that he did not sell any plot to respondent No. 1. Respondent No. 1

does not know his plot. He had never constructed any tin shed. He, therefore, prayed for dismissal of the suit.

7. The learned trial Court dismissed the suit by judgment and order dated 3rd May, 2008. Therefore, respondent No. 1 herein preferred Regular Civil Appeal No. 194/2008. At Exhibit 58, respondent No. 1 filed an application for appointment of Court Commissioner for measuring the land and determining encroachment. The said application came to be allowed by the learned District Judge – 1, Aurangabad, by order dated 3rd August, 2012. This order is assailed by petitioner – original defendant No. 1 in this writ petition.

8. Heard Shri Lokhande, learned counsel for the petitioner and Shri Joshi, learned counsel for respondents No. 1A to 1E and 4A and 4B.

9. Learned counsel Shri Lokhande submitted that respondent No.1 is an advocate. He is not a layman. He purchased the property without there being any lay out. He submitted that the learned trial Court observed in its judgment that the status of

respondent No. 1 is on higher pedestal. Despite that he purchased the property even when lay out was not sanctioned. He submitted that without ascertaining whether lay out was sanctioned or not, respondent No. 1 purchased the property. He submitted that no fruitful purpose would be served by appointing Commissioner when no lay out is sanctioned by the competent authority. He, therefore, prayed for allowing the petition.

10. Learned counsel Shri Joshi submitted that in the trial Court, respondent No. 1 had filed application for appointment of Commissioner for measuring the land. The learned trial Court did not pass any order on this application. He submitted that without passing any order on this application, the learned trial Court committed gross error in deciding the suit. He submitted that without measuring the land, it will not be possible to determine the encroachment. He submitted that encroachment can be determined only on the basis of measurement done by the TILR. The learned appellate Court did not commit any error in allowing the application.

11. It is pertinent to note that the suit is for removal of encroachment. Judgment of the learned trial Court shows that

application for appointment of Commissioner was filed by respondent No. 1 for measuring the suit property and for determining encroachment. Learned trial Court did not pass any order on this application. The learned trial Court committed gross error in deciding the suit without passing any order on this application. The learned trial Court has dealt with this aspect of the matter in its judgment thus :-

“27. Plaintiff has moved an application for appointment of commissioner at Exh. 73. While arguing the matter, he has stated that, the defendants have not filed the say. Hence, adverse inference is required to be drawn. This prima-facie shows that, they are not intending to get appointed the commissioner to verify whether or not the defendants have encroached on the suit property. However, mere filing of the application will not suffice. Plaintiff is an advocate. He knows the procedure better. If really he wanted court commissioner to be appointed, he would have insisted for the deciding the application. No adverse inference can be drawn on count that no say is filed. That itself does not means defendants have encroached on suit property. Hence, I do not find any substance in the argument of the plaintiff on this point.”

12. To say the least, the approach of the learned trial Court is not correct. The learned trial Court ought not to have posted the suit for judgment without passing order on this application. As stated above, the suit is for removal of encroachment. Without

measuirng the land, encroachment if any, cannot be determined. The error committed by the learned trial Court has been corrected by the learned appellate Court. I, therefore, do not feel that the learned appellate Court has committed any error in passing the impugned order. Petition is without any substance hence, it is dismissed with no order as to costs. Rule discharged.

(M. G. SEWLIKAR)
Judge

dyb