

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

916 SECOND APPEAL NO.85 OF 2013

ABDUL JAVID S/O ABDUL SAIED SHAIKH AND ANOTHER
VERSUS
HARISH VYANKATRAO MORE

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Mr. P.V. Barde, Advocate for appellants

Mr. B.L. Sagar (Killarikar) and Mr. K.G. Anmole, Advocates for the sole
respondent

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 29th SEPTEMBER, 2021.

ORDER :

1 Present appeal has been filed by the original plaintiffs challenging the dismissal of their appeal bearing Regular Civil Appeal No.84/2009 by learned 2nd Adhoc District Judge, Latur on 16.06.2012, thereby confirming the Judgment and Decree passed by learned Civil Judge Junior Division, Ausa, Dist. Latur in Regular Civil Suit No.79/2002 dated 18.04.2009.

2 Heard learned Advocate Mr. P.V. Barde for the appellants and

learned Advocate Mr. B.L. Sagar (Killarikar) for the sole respondent. In order to cut short, it can be said that they have argued in support of their respective contentions.

3 Present appellants-original plaintiffs had filed the said civil suit for recovery of encroached portion and for perpetual injunction. It has been contended that the plaintiffs are the brothers and they are the owners of 5 acres land from North-East corner bearing Sy.No.4 situated at Pirmagajwadi, Tq. Ausa, Dist. Latur. It is contended that out of the suit land 02 Acres 20 Gunthas from eastern side is owned by plaintiff No.1 and western side 02 Acres 20 Gunthas is by plaintiff No.2. They had purchased the said land by registered sale deed dated 08.04.1980 from original owner Murlidhar Dudhankar and his sons. The names of the plaintiffs came to be mutated in the year 1981. Prior to that and thereafter there was measurement by Taluka Inspector of Land Records of the pot hissas (sub division). That was in the year 1971 and 1983. It is further contention that plaintiff No.1 got appointment as a Clerk in Medical College, Aurangabad in the year 1993 and, therefore, he could not cultivate the land. According to the plaintiffs, taking advantage of the said fact, defendant has encroached upon the northern side to the extent of 97 R in April, 1995. There is a rivulet (Nala) flowing in east-west direction from the suit land and the flow of the Nala has shifted towards

south by efflux of time. It is also stated that there is two mango trees and two jamun trees owned and possessed by the plaintiffs in the suit land. It is then stated that in the year 1985 the eastern side neighbour Ram Pawar has caused obstruction to the plaintiffs' possession and, therefore, they had filed Regular Civil Suit No.102/1985 and during that suit Taluka Inspector of Land Records came to be appointed as a Court Commissioner. It was then reported by the Court Commissioner on 18.08.1996 that the defendant has also caused encroachment. Plaintiffs had requested the defendant to hand over the encroached portion on 25.03.2002, however, it was refused and, therefore, the suit has been filed.

4 It is to be noted that the defendant had filed written statement denying all the allegations in respect of encroachment.

5 After the issues were framed and the matter was for evidence the plaintiffs have got their land measured through Taluka Inspector of Land Revenue, Ausa once again, by getting him appointed as Court Commissioner on 29.05.2004. It was then reaffirmed that the defendant had made encroachment to the extent of 97 R.

6 After the scanning of the evidence and hearing both sides, the learned Trial Judge has held that the plaintiffs have proved that they are the owners to the extent of 5 Acres land in total. However, they have failed to

prove that the defendant has not proved the encroachment to the extent of 97 R. The suit is held to be within limitation. However, it was held that the plaintiffs are entitled to get injunction to the extent of 01 Hectare from the suit land. Accordingly, the suit was partly decreed. Defendant was perpetually restrained from causing any obstruction to the possession of the plaintiffs over 01 Hectare from suit land without due process of law.

7 It is to be noted that only the original plaintiffs filed appeal i.e. Regular Civil Appeal No.84/2009 and as aforesaid, it has been dismissed on merits. Hence, this Second Appeal.

8 At the outset, it is to be noted that when the defendant has not challenged the relief of injunction to the extent of 01 Hectare, the scope of the appeal was limited to the extent, as to whether the plaintiffs had proved the encroachment to the extent of 97 R. Two factors are on record; one is that a Court Commissioner was appointed in another suit i.e. Regular Civil Suit No.102/1985, which was against Ram Pawar filed by the present plaintiffs and that measurement appears to have been done on 18.06.1996. Even in that case it is said that the present defendant had made encroachment. In fact, there is no explanation by the plaintiffs, as to why they had not added the defendant in that suit and sought relief about possession in that suit itself. But then it appears that the request for handing

over the possession of the encroached land was made by the plaintiffs to the defendant on 25.03.2002. The suit was filed on 16.04.2002. Defendant was not party to the earlier suit and, therefore, the said measurement that was carried out in that case cannot be said to be binding on the defendant in this case. There appears to be no evidence brought on record before both the Courts below, as to whether the present defendant was given notice by the then Taluka Inspector of Land Records, who had measured the land on 18.08.1996. But then in this case, again the plaintiffs got the land measured through TILR on 29.05.2004. Now, as regards the present measurement is concerned, the evidence of the TILR was examined before the Trial Court shows that the said measurement was carried out without any *tipan* of Sy.No.221 i.e. the land of the defendant as it was not available. Further, it appears that the original survey number was then sub divided and according to the plaintiffs, even at that time also there was measurement. It is to be noted that the defendant had admitted the existence of the land of the plaintiffs as Sy.No.4, however, the location is disputed. In a sense that the plaintiffs are contending that the Nala has changed its direction. There is no statement on oath by the plaintiffs that when they purchased the land from Murlidhar, at that time there was measurement carried out by them. From the evidence led by the plaintiffs, it has been gathered by the Courts below that the total area of Sy.No.4 is 15 Acres 3 Gunthas, which was purchased by

the plaintiffs and their mother. The pot hissas of Sy.No.4 are considered and in fact, Murlidhar i.e. the purchaser of the plaintiffs and mother was to the tune of 06 H 64 R. According to the plaintiffs, they both are having possession of 02 Acres 20 Gunthas each. The record of the revenue Namuna No.4 Exh.95 shows that area of 03 H 38 R is mutated in the name of the plaintiffs. That means, Exh.95 shows 09 Acres 08 Gunthas more than even claimed by the plaintiffs. Under such circumstance, how there could be encroachment. One more factor, that is, required to be considered is Exh.128 was produced before the Trial Court, which was the certified copy of the letter issued by TILR office to the Superintendent of Land Records for correcting the area of Sy.No.4 and 7. It was stated that the said area is overlapping each other. The said fact has also come on record through the testimony of the Cadastral Surveyor. Exh.131 is another letter issued by TILR, AUSA in the name of Plaintiff No.2, informing him about the letter issued by them to the Superintendent of Land Records for correcting the revenue record. It appears that there was no further correction in pursuant to those letters. Yet, it appears that the Cadastral Surveyor went on to measure the land on the basis of that incorrect revenue record. Therefore, both the Courts below have caused serious doubt about the encroached area arrived at/shown by the Cadastral Surveyor.

9 It will not be out of place to mention here that in catena of Judgments this Court has held that there should be an admitted map before the Courts below and it would be for the Courts to bring such documents on record. If reliance is to be made, then it is so observed in **Ushabai w/o Sharadchandra Bannore vs. Wasudeo Baliramji Mehare and others, 2004 (2) Mh.L.J., 594**. Further, this Court has also considered that if the Trial Court fails then there are powers with the Appellate Court also to get such measurement done and bring the admitted map on record. It is so also in **Sulemankhan Mumtajkhan and others vs. Smt. Bhagirathibai wd/o Digamber Asalmol and another, 2014(5) ALL MR 552**. Now, in this case, there was absolutely no attempt either in earlier suit or in the present suit to get the revenue record corrected and then go for the measurement. The ratio in above said authorities could be made applicable only if the revenue record is correct. In fact, there is no such step taken by either the revenue authorities or even the plaintiffs to get the said record corrected and then go for the measurement. Each time the Courts are not expected to help the parties, who are erring. Further, when the suit was dismissed as regards the relief of encroachment is concerned, the plaintiffs-appellants could have taken resolve to Order XXVI Rule 10 Sub Rule (3) of the Code of Civil Procedure and get the further directions done. Under such circumstance, when plaintiffs had not taken any steps in any direction and admittedly, as per their own

contention they are only holding 02 Acres 20 Gunthas each, then question of encroachment does not arise. Both the Courts below have taken proper, consistent view. The scanning of evidence is not perverse. Therefore, no substantial questions of law are arising in this case, requiring admission of the Second Appeal. It deserves to be dismissed. Accordingly, it is dismissed.

(Smt. Vibha Kankanwadi, J.)

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