

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.501 OF 2013

WITH CA/9595/2013

BHIMRAJ S/O GYANBA DHUMAL
AND OTHERS

VERSUS

SAU. SULOCHANABAI LAXMAN SHEVATE
AND OTHERS

.....

Advocate for Appellants : Mr. A. D. Sonkawade h/f Mr. K. B. Jadhav
Advocate for Respondent No.1 : Mr. V. M. Mane

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 29-09-2021.

ORDER :

1. Present appeal has been filed by original defendants to challenge the concurrent findings and decree.
2. Present respondents/original plaintiffs had filed Regular Civil Suit No.148 of 2002 before Civil Judge, Junior Division, Kopergaon District Ahmednagar, for permanent injunction. The said suit came to be decreed on 27-04-2007. Present appellants/original defendants challenged the said Judgment and decree before District Court, Kopergaon by filing Regular Civil Appeal No.22 of 2007. The said appeal was heard by learned District Judge-1, Kopergaon and dismissed on 26-09-2012. Hence, this second appeal.

3. Heard learned Advocate Mr. A. D. Sonkawade holding for Mr. K. B. Jadhav for appellants and learned Advocate Mr. V. M. Mane for respondent No.1.

4. It has been vehemently submitted on behalf of appellants that both the Courts below have not appreciated the evidence and law points properly. The Judgment of the Lower Appellate Court does not confirm with requirements of Order 41 Rule 31 of the Code of Civil Procedure. The points for determination have not been framed properly and not discussed them at all. The report of Court Commissioner Exhibit 48 in Regular Civil Suit No.525 of 2002 has also been considered and it is observed that since only 8 feet road is seen at the site, that report is disclosing encroachment to the extent of 6 feet by present defendants. Both the Courts failed to consider that plaintiffs had not proved the destruction of Bandh (boundary) as alleged. It could not have been a case for grant of injunction. Further, both Courts failed to consider that plaintiff No.1 had sold the land to plaintiff No.2 and, therefore, had no interest left in the suit land. The suit property was very much in existence, there was no cause of action for the plaintiffs to file suit. Regular Civil Suit No.525 of 2002 was filed by present appellants against adjoining

landholders. It was decreed. However, in order to give counterblast, present suit was filed. Plaintiffs had not come with clean hands to seek equitable relief. Substantial questions of law arise in this case to admit the second appeal.

5. Reliance has been placed on following authorities by learned Advocate for the appellants : -

- a)** Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs., reported in (2001) 3 Supreme Court Cases 179,
- b)** Malluru Mallappa (Dead) through Legal Representatives vs. Kuruvathapap and Others, reported in (2020) 4 Supreme Court Cases 313,
- c)** Kayalulla Parambath Moidu Haji vs. Namboodiyil Vinodan, reported in 2021 SCC OnLine 675,
- d)** Bento Antonio Gomes alias Antonio Bento Gomes vs. Rosario Salvador Carneiro and others, reported in 2014 (4) Mh.L.J. 366,
- e)** Gurunath Manohar Pavaskar and Others vs. Nagesh Siddappa Navalgund and Others, reported in (2007) 13 Supreme Court Cases 565.

6. Per contra, learned Advocate for respondent relied on the reasons given by both the Courts below.

7. It is submitted that both the Courts below have appreciated

the evidence properly and have also considered the law points involved. No substantial questions of law arise for determination. There is compliance of Order 41 Rule 31 of the Code of Civil Procedure. The learned First Appellate Court has discussed all the points which were raised by the present appellants.

8. It can be seen from the record that there is no much dispute about fact that since the date of purchase of land bearing Gut No.46/1A, is in possession of plaintiffs. That means the ownership and possession of plaintiffs over Gut No.46/1A is admitted to the defendants. It is also not in dispute that defendants have purchased road from the inner side of South-North bandh towards East of land Survey No.41/2B on 28-04-1987. It appears that there is common bandh towards their East and towards West of plaintiffs' land. It had also come on record that defendants had brought construction material at the bandh/road site. According to defendants they were not encroaching.

9. Defendants had filed Regular Civil Suit No.525 of 2002 on 19-11-2002 for injunction against on Thakoba Sapkal. It was alleged by defendants that Thakoba was trying to destroy road by taking crops on road, and was obstructing the vehicles using defendant's road.

There was Court Commissioner appointed in that suit. He had submitted report. The copy of the report is filed in this case and present defendants/appellants had no objection to read that report in this case. Defendants admitted it in cross-examination. Now appellants cannot raise objection for reading that report in this case. The said Court Commissioner had noted the width of road was 8' and not 14' as contended by defendants. It was found that there was Soyabean crop and Siphon on the road of 6'. thus, defendants had failed to show that the road in its position as it is as in the past.

10. As per the boundaries of the lands, there ought to have been road towards the Western bandh of plaintiffs. The said road was found to be 8', when it ought to have been 14' after the bandh. It was also noticed in report of Court Commissioner in Regular Civil Suit No.525 of 2002 that there was construction material on the said road. Learned Lower Court has inferred that that material would have been brought for constructing road. It was tried to be submitted on behalf of defendants that repairs could be carried out by defendants for maintenance of road. It had also come on record that road area/land was not measured by defendants immediately after purchase. Now defendants cannot contend for the first time in

second appeal that lands ought to have been measured. The decisions on the point of measurement relied by appellant are not applicable here.

11. The Judgment of learned First Appellate Court complies with requirement of Order 41 Rule 31 of the Code of Civil Procedure as contemplated in Santosh Hazari (Supra). Though points may not have been framed but discussion has been made, therefore on that count no substantial question of law is arising.

12. Both the Courts below have considered the facts and evidence properly. The law points involved are answered legally. The findings arrived at by them are not perverse, hence this Court cannot take the task of reassessment of the same in detail. No substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case, requiring admission of second appeal. Hence, second appeal stands dismissed. Pending civil application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-