

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 619 OF 2019

WITH

CIVIL APPLICATION (CAS) NO. 399 OF 2019

- | | | | |
|----|---------------------------------------|---|----------------|
| 1. | Shri Vasant Hari Birmole |] | |
| | Age about 52 years, Occ. Business |] | |
| | R/o. Golden Sun Shine Point |] | |
| | Hotel Niujaga, Vengurla, |] | |
| | Dabholi Road, Tal. Vengurla, |] | |
| | District – Sindhudurg. |] | |
| | <u>Presently</u> |] | |
| | R/o. Golden Sandhya Beach Resort, |] | |
| | Keluskarwadi, Tarakarli, Tal.Malavan, |] | |
| | District Sindhudurg. |] | |
| 2. | Shri Jhon Luis Mendosa |] | |
| | Age about 60 years, Occ. Service |] | |
| | R/o. A.L. 6/9/4, Mayank Apartment |] | |
| | Sector No.5, Aroli, |] | |
| | Navi Mumbai – 400 708 |] | ... Appellants |

V/s.

Shri Luis Manvel Disouza	]	
Age about 43 years, Occ. Agriculture	]	
R/o. Dabholi, Christianwadi,	]	
Tal. Vengurla, District Sindhudurg	]	... Respondent

Mr.S.H. Joshi for Appellants.

Ms.Preeti Shah for Respondent.

CORAM : A.S. GADKARI, J.

DATE : 30th August 2021.

ORAL JUDGMENT :

1. Appellants, original Defendants, in R.C.S. No. 24 of 2010 filed by the Respondent, original Plaintiff, have preferred the present Second Appeal under Section 100 of the Civil Procedure Code, impugning Judgment and Order dated 8th October 2018 passed in R.C.A. No. 128 of 2014, by the learned Principal District Judge, Sindhudurg-Oros, dismissing their appeal with costs and confirming the Judgment and Order dated 2nd August 2014 in R.C.S. No. 24 of 2010 passed by the learned Civil Judge, Jr. Division, Vengurla.
2. Heard Mr.Joshi, learned Advocate for the Appellants and Ms.Shah, learned Advocate for the Respondent. Perused record.
3. Respondent (original plaintiff) had filed R.C.S. No. 24 of 2010 in the Court of Civil Judge, Jr. Division, Vengurla for permanent as well as mandatory injunction against the Appellants and for removal of four huts unauthorizedly constructed by the Appellants on his property i.e. suit land. The suit land in-question is a piece or parcel of land bearing Survey No.76, Hissa No.6-C lying and situated at village Mouje Dabholi, Tal. Vengurla and specifically described in para No.1 of the plaint, owned and possessed by the Respondent. The land bearing Survey No.76, Hissa No.6-B belonging to Appellant No.2 is adjacent to the suit land towards its eastern side. The

Appellant No.2 has given his land to the Appellant No.1 for running a hotel business in the name and style of 'Golden SunShine Points'. Two years prior to filing of the said suit, the Appellant No.1 was doing the said business with the consent of Appellant No.2. Appellant No.1 had constructed 6 huts and some other construction allegedly on the property belonging to Appellant No.2. As the Appellant No.2 had given his land to the Appellant No.1 for the said business, the Respondent did not pay much attention to it assuming that, the said hotel business was/is being run on the land belonging to Appellant No.2. As the Respondent wanted to develop the suit land, he got it cleaned and measured through the Survey Department and decided to fence its boundary. The Respondent thereafter submitted an application to the Taluka Inspector of Land Record (T.I.L.R.), Vengurla on 24th February 2010. The concerned authority accordingly measured the suit land vide M.R. No. 622 of 2010 and fixed its boundary. The survey department also gave a Map (Exh.71) showing the exact situation on the suit land to the Respondent and fixed its boundaries. The Respondent thereafter came to know that, 4 huts of the hotel being conducted by the Appellant No.1 have been constructed on the suit land owned by the Respondent. It is the case of the Respondent that, as per the boundaries fixed by the Survey Department, he went to the suit land on 16th April 2010 and embedded some concrete poles on its boundary through his labourers. That on 17th April 2010 the Respondent again went in the suit land

for embedding/fixing remaining poles and at that time, the Appellant No.1 came their along with other persons; caused obstruction to the Respondent; removed poles; abused Respondent in filthy language and threatened him with serious consequences. Appellant No.1 being a businessman having man and muscle power and the Respondent being poor person could not resist the Appellant No.1. The Respondent therefore approached Vengurla Police Station for lodging complaint, however the police lodged N.C. bearing No. 153 of 2010 on 17th April 2010 and told the Respondent to approach the Court of law. The Respondent therefore filed aforestated R.C.S. No. 24 of 2010 on 27th April 2010.

4. After receipt of suit summons, the Appellants appeared before the Trial Court and resisted the said suit by filing their Written Statements (W.S.) and Say below Exhibit-49 & 43 respectively. The Appellants denied the contentions of Respondent, denied the title and possession of Respondent over the suit land and also specifically denied encroachment and construction of 4 huts in the suit land as alleged by the Respondent. As per the say of the Appellants, all the construction of hotel business was and is in the land belonging to Appellant No.2 and they are carrying the said business for a substantially long period. It is to be noted here that, in his Written Statement the Appellant No.1 in para No.14 has categorically stated that, he told the Respondent to establish his right over the suit property by adopting lawful

procedure and thereafter take possession of the suit property from Appellant No.2 and it is the reason the Respondent in the month of February 2010 without taking possession of his alleged suit property went back. That the Appellant No.1 neither abused Respondent in filthy language nor extended threats to him. The Trial Court accordingly framed issues below Exh.46.

5. The Respondent laid evidence through his Power of Attorney (P.O.A.) Kum. Benita Manvel D'souza (his real sister). The Respondent also examined two witnesses, namely, Mr.Ramkrishna S. Chavan (PW-2), Cadastral Surveyor, who carried out survey of the suit property on 10th March 2010 in presence of Respondent, Appellant No.2 and others. This witness has proved Map (Exh.71), which indicates that 4 huts out of 6 huts of the Appellants were found in the suit property. The Respondent also examined Mr.Pradeep D. Khot (PW-3), Cadastral Surveyor, who had also taken joint measurement of the suit property belonging to the Appellant No.2, on the basis of the application submitted by Appellant No.2 on 26th March 2010. Mr.Pradeep Khot (PW-3) has proved Measurement-sheet (Exh.93) and Map (Exh.94).

It is to be noted here that, the Appellants did not lead any oral evidence in support of their case.

6. The Trial Court by its Judgment and Order dated 2nd August 2014 was pleased to decree the said suit with costs and ordered mandatory injunction against the Appellants and directed them to remove construction of

4 huts standing in the suit land within a period of two months from the date of passing of the decree, failing which the Respondent would be entitled to get it removed through Court at the costs of Appellants. The Trial Court also passed decree of perpetual injunction against the Appellants.

7. As noted earlier, the R.C.A. No. 128 of 2014 preferred by the Appellants has been dismissed with costs by the learned Principal District Judge, Sindhudurg-Oros by its impugned Judgment and Order dated 8th October 2018.

8. Mr.Joshi, learned counsel for the Appellants submitted that, Kum. Benita Manvel D'souza (PW-1) has deposed on behalf of Respondent Mr.Luis Manvel Disouza, as his P.O.A., which is not permissible under Order-3 Rule-1 & 2 and Order-18 Rule-4 & 19 of Civil Procedure Code. In support of his contention he relied on a decision of the Hon'ble Supreme Court in the case of *Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank Ltd. & Ors., reported in (2005) 2 SCC 217*. He submitted that, it is the substantial question of law which arises for consideration for this Court and therefore the present Appeal may be admitted.

9. Per contra, Ms.Shah, learned counsel for Respondent opposed the Appeal and submitted that, Kum. Benita Manvel D'souza (PW-1) is real sister of Respondent and has equal knowledge about the suit property, as the Respondent has. She submitted that, there is no question of any personal

knowledge involved in the present case which was necessarily to be deposed by the Respondent. She submitted that, the facts involved in the decision in the case of *Janki Vashdeo Bhojwani (supra)* are different than the facts in the case in hand and therefore the said decision is not applicable to the present case. She therefore prayed that, the present Appeal may be dismissed.

10. Perusal of record indicates that, the Respondent apart from Kum. Benita Manvel D'souza (PW-1) has also examined Mr.Ramkrishna Chavan (PW-2) and Mr.Pradeep D. Khot (PW-3), both Cadastral Surveyors, who have surveyed the suit land and the land belonging to Appellant No.2 and have submitted report that, the Appellants have committed encroachment by constructing 4 huts on the suit property. Their evidence is not shaken in the cross-examination conducted by the Appellants. Assuming for the sake of argument, even the evidence of Kum. Benita Manvel D'souza (PW-1) is kept aside from consideration, the record clearly indicates that, the Respondent has proved his case beyond doubt by leading evidence of Mr.Ramkrishna Chavan (PW-2) and Mr.Pradeep D. Khot (PW-3) and other documents which are on record, such as, Map (Exh.71), Measurement-sheet (Exh.93) and Map (Exh.94). The evidence in the present case is in the nature of documents on record. It is to be noted here that, in the present case, no personal knowledge, which only the Respondent can have for just decision of the suit, could have been deposed by him and not by his constituted attorney, is involved. There is

nothing on record to even remotely indicate that, the Respondent had any exclusive personal knowledge about the facts involved herein, which were necessary for the decision of the said Suit and the constituted attorney of Respondent i.e. Kum. Benita Manvel D'souza (PW-1) was unable to depose the said facts, which required his stepping into witness box to depose in that behalf.

11. As noted earlier, the evidence in the present case is based on documents of which the constituted attorney of Respondent, namely, Kum. Benita Manvel D'souza (PW-1) was also having sufficient and substantial knowledge. Upon a query raised by this Court as to whether the Appellants had filed an application or raised any objection about deposition by Kum. Benita Manvel D'souza (PW-1) before the Trial Court, he fairly conceded to the fact that, such an application was never filed and objection for her deposition on behalf of the Respondent before the Trial Court was never raised. It is to be noted here that, the facts involved in the decision of the Supreme Court in the case of *Janki Vashdeo Bhojwani (supra)* differ than the facts involved in the case in hand and therefore the reliance placed by the learned counsel for the Appellants on the said decision is of no avail to him. The Respondent is successful in proving beyond doubt that, the Appellants have encroached upon his land (suit property) and has constructed 4 huts therein.

12. In view of the above and on perusal of record, it clearly appears that, no substantial question of law is involved in the present Appeal.

Appeal being *dehors* of merits is accordingly dismissed.

13. Trial Court is directed to proceed with the execution proceedings as per the provisions of law.

14. In view of disposal of Appeal, Civil Application (CAS) No. 399 of 2019 does not survive and is accordingly disposed off.

[A.S. GADKARI, J.]

OMKAR
SHIVAHAR
KUMBHAKARN

Digitally signed
by OMKAR
SHIVAHAR
KUMBHAKARN
Date:
2021.09.29
14:46:43
+0530