

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 786 OF 1999

KINIKO CO-OPERATIVE HOUSING SOCIETY,
Through its Chief Promoter,
Syed Shah Quodri Rais,
S/o. Gulam Mohammed Quodri,
Age : 52 years, Occu. Business,
R/o. Chalipura, Aurangabad

.. APPELLANT
(Ori. Plaintiff)

VERSUS

- 1] The State of Maharashtra,
Through the Tahsildar,
Aurangabad
- 2] The City and Industrial Development
Corporation, Aurangabad,
Through its Administrator,
Office at N-5, CIDCO, Town Centre,
Aurangabad

.. RESPONDENTS
(Ori. Defendants)

WITH

**CIVIL APPLICATION NO. 4134 OF 2007
CIVIL APPLICATION NO. 6246 OF 2014
CIVIL APPLICATION NO. 5800 OF 1999**

...
Shri P.V. Mandlik, Sr. Advocate i/b. Mr. G.R. Syed, Advocate for appellant
Shri B.V. Virdhe, AGP for respondent no. 1
Shri A.S. Bajaj, Advocate for respondent no. 2
...

CORAM : MANGESH S. PATIL, J.

**RESERVED ON : 11 JANUARY 2022
PRONOUNCED ON : 18 JANUARY 2022**

JUDGMENT :

Civil Application no. 4134 of 2007 is filed for intervention by a third party, who happens to be the widow and the grandson of the defendant in Regular Civil Suit no. 139 of 1987, being relied upon by

the appellant. Needless to state that they may have their remedies which they can independently pursue in the competent court. In the matter in hand, their presence is not necessary for just decision of the second appeal. Therefore, they are not entitled to be heard while deciding the second appeal and their Civil Application no. 4134 of 2007 is liable to be rejected. Civil Application no. 4134 of 2007 is, therefore, rejected.

2. By the order dated 02-08-2000, this appeal was admitted observing that the grounds no. XXI(1) to XXI(4) of the appeal memo would be the substantial questions. The questions would be like this :

- (1) When the plaintiff established his possession over the suit land on the basis of sale deed, city survey record, revenue record and the decree passed in Regular Civil Suit no. 139 of 1987 and further established his possession over the suit property and the defendants having no right, title or concern over it, whether the decree passed by the trial court could have been set aside by the appellate court ?
- (2) When it is mandatory on the part of the court below to frame proper points for determination, in view of the Order 41 of the Code of Civil Procedure and when admittedly, the court below has not framed proper points for determination and delivered a judgment, whether the

said judgment is a nullity and liable to be set aside in view of the ratio laid down in the case which has been reported in AIR 1985 BOM 92 ?

- (3) When the toach maps and review sheet and other relevant record does not show that the suit property is part and parcel of the survey no. 117 and when only one document i.e. measurement/review sheet, prepared behind the back of the plaintiff, showing survey no. 117 over the portion of CTS No. 11489/1, whether relying on such evidence, which has not even been proved by calling original record, decree passed by the trial court can be reversed by the appellate court ?
- (4) When the judgment and decree passed by the civil court in RCS 139/87 holding the vendor Shafi Ahmedkhan as owner and possessor of the suit property has not even been challenged by anybody and when vendor Shafi sold land to the plaintiff under a registered sale deed, under such circumstances, without setting aside the decree in RCS No. 139/87, whether the finding of the court below that the plaintiff is not in lawful possession of the suit property, can be sustainable ?

3. These points arise from following facts and circumstances:

The appellant claiming to be the owner in possession of the suit property, filed a suit for perpetual injunction restraining the respondent no. 2, which is a development authority constituted under the Maharashtra Regional & Town Planning Act, 1966, from obstructing his possession. He described the suit property as a portion admeasuring 10721 Square metres (2 Acres 26 Gunthas) bearing city survey no. 11489/1 of Aurangabad. He asserted that it was a part and parcel of the erstwhile land survey no. 115. He also averred that it was duly recorded in his name in the property card of the city survey office. Besides, his predecessor had succeeded in obtaining a decree regarding declaration of his right and title in the same property in Regular Civil Suit no. 139 of 1987. Pursuant to the sale deed he entered into possession and has erected a shed and a shop. He averred that without there being any right or concern, the respondent no. 2 (hereinafter "**CIDCO**") is obstructing his possession.

The respondent no. 2 contested the suit by filing a written statement. It denied title of the predecessor of the appellant over the suit property and also consequently denied the appellant having derived any title and possession. It contended that the suit property bearing CTS no. 11489/1 is, in-fact, a part and parcel of land survey no. 117 and not land survey no. 115, as is being averred by the appellant. It

contended that by virtue of a Government notification, being a development authority constituted under law, the land survey no. 117 was allotted to it for the purpose of development. By falsely pretending that it is a part and parcel of survey no. 115, the appellant is laying claim over a portion of land survey no. 117. It admitted that it has no concern with the land survey no. 115. It was also contended that the decree obtained by appellant in Regular Civil Suit no. 139 of 1987 was a collusive one.

4. The trial court framed necessary issues and by the judgment and order dated 30-04-1994 decreed the suit, holding that the suit property was a part and parcel of survey no. 115 and not survey no. 117.

5. CIDCO went in appeal and by the judgment and order under challenge in this second appeal, it was allowed. The decree of the trial court was quashed and set aside and the suit was dismissed.

6. Learned Senior Advocate Mr. Mandlik would vehemently submit that admittedly the CIDCO has no concern with land survey no. 115 and only the land survey no. 117 was allotted to it. The appellant has not been asserting any claim in respect of land survey no. 117. He had succeeded in establishing that the suit property was carved out from land survey no. 115. The evidence was correctly appreciated by the trial court. Even there was a corroboration in the form of the decree passed in Regular Civil Suit no. 139 of 1987 and

such correct appreciation of the trial court has been unnecessarily interfered with by the first appellate court which even failed to formulate the points for determination in accordance with the provision of Order XLI Rule 31 of the Code of Civil Procedure. There was also a revenue record and the record of the city survey office which substantiated the appellant's averments. Without there being any error committed by the trial court in appreciating the evidence, the appellate court has jumped to the conclusion on the basis of inadmissible evidence and overlooking all the aforementioned facts and circumstances. It is in the light of such state-of-affairs, the second appeal has been admitted on the aforementioned questions.

7. Mr. Mandlik would further submit that considering the peculiar nature of the dispute, it cannot be resolved unless there is a joint measurement of both survey no. 115 and 117 undertaken in presence of both the sides. That is why even separate application being Civil Application no. 6246 of 2014 has been filed and is pending to ascertain the exact location of the piece of land being claimed by the appellant.

8. The learned Advocate Mr. Bajaj for CIDCO would submit that no substantial question of law arises in the facts and circumstances of the case. He would submit that the only dispute that needs to be addressed is, as to whether the suit property claimed to have been purchased by the appellant, is a part and parcel of land survey no. 115.

He would submit that admittedly, the land survey no. 117 is allotted to CIDCO and if that is so, once it is found that city survey no. 11489 is carved out from land survey no. 117, there remains nothing to be adjudicated. He would submit that a witness from the survey office was examined who specifically stated that city survey no. 11489 is carved out from land survey no. 117 and not land survey no. 115. The trial court had failed to appreciate the evidence. The error has been corrected by the appellate court by appreciating such evidence. The toach map along with the testimony of the surveyor (DW1) was correctly appreciated by the appellate court while allowing the appeal.

9. Mr. Bajaj would submit that though the points for determination were not formulated, all the aspects were duly considered and decided touching the issues framed by the trial court and, therefore, no prejudice was caused to the appellant, even if the points for determination were not meticulously formulated under Order XLI Rule 31 of the Code of Civil Procedure.

10. He would further submit that inspite of the serious dispute as to the title of the appellant to the suit property having been raised by CIDCO, the trial court had conveniently ignored the revenue record showing that the land survey no. 115 was, in-fact, not a private property. There was a revenue record showing that it was standing in the name of the erstwhile ruler and subsequently, as the Government land. In fact, going by the nature of that property wherein a graveyard and a

mosque was situated and part of it was a hilly region which was inconvenient to be developed, that the land survey no. 115 was subsequently deleted at the request of the CIDCO from the array of lands that were allotted to it by the Government.

11. He would submit that the appellant is claiming that his predecessor had derived title on the basis of a grant by the erstwhile ruler, however, it was never duly established and proved. He would further submit that in-fact, the description of the suit property itself was faulty. The appellate court has clearly demonstrated as to how the boundaries of the suit properties as mentioned in the plaint clearly indicate that the piece of land i.e. the suit property being claimed by the appellant is nothing but a portion from land survey no. 117. Since all these facts and circumstances and the evidence was not correctly appreciated by the trial court, it is on re-appreciation of such evidence that the appellate court has reached a plausible conclusion, which is clearly borne out from the pleadings and the evidence and it has rightly interfered with and reversed the judgment of the trial court and dismissed the suit.

12. So far as the Civil Application no. 6246 of 2014 is concerned, Mr. Bajaj would submit that by way of improvisation, the appellant is seeking to create some evidence which cannot be allowed at the second appellate stage. He would submit that there is no dispute about the extent and dimension of the land survey no. 117. The piece

of land being claimed by the appellant as suit property, is nothing but a portion to the north-west corner of land survey no. 117. No purpose would be served by relegating the parties by undertaking a fresh measurement. He would submit that it is not a dispute of boundaries but essentially a dispute pertaining to identity of the property and the measurement even if it is undertaken afresh would not help this court in deciding the second appeal.

13. I have carefully considered the rival submissions, perused the record and proceedings and the judgments of the two courts below. As can be appreciated, the dispute does not pertain to any boundary but essentially is regarding identity of the suit property, whether it is the part and parcel of survey no. 115 or survey no. 117. Pertinently, there is no dispute about the fact that CIDCO is not laying any claim in respect of survey no. 115. Conversely, even the appellant is not disputing that the land survey no. 117 has been allotted to CIDCO. It is in the light of such a scenario that one will have to approach the dispute.

14. Simultaneously, it is also important to note that apart from the above mentioned dispute, the CIDCO is seriously disputing title of the appellant to the suit property, by contending that the land survey no. 115 was never a private property but was a property of the erstwhile ruler and the Government which could not have been independently transferred to an individual who was the predecessor of the appellant.

But then, this dispute as to the title would come into play if it can be demonstrated that the suit property is a part and parcel of survey no. 115 and not survey no. 117.

15. Needless to state that since CIDCO was not a party to the Regular Civil Suit no. 139 of 1987, albeit, the predecessor of the appellant had succeeded in getting the decree regarding declaration of his right over a portion of survey no. 115, that would not be binding on the CIDCO. Besides, as is mentioned earlier, even that fact would have no bearing on the matter in hand, if ultimately it is concluded that the suit property is a part of survey no. 117 and not survey no. 115.

16. Now turning to the dispute, true it is that there is a sale deed describing the suit property as is being claimed by the appellant. There is also a revenue record created initially and the city survey record and the property card showing him to be holder of the suit property. But again all such evidence would be a peripheral evidence. The crux of the dispute would again boil down to the fact as to if the suit property is a part of survey no. 115 or survey no. 117.

17. It is in the light of such a state of scenario, the testimony of the surveyor Sayyed Manjuruddin (DW1) will have to be appreciated. He had brought the original sheet of city survey no. 11489. He had also brought a sheet no. 360 and 369 of that city survey number. On the basis of such original record of his office, he specifically stated that city survey no. 11489 has been carved out and is a part and parcel of

survey no. 117. He further deposed that though initially city survey no. 11489 was admeasuring 9870.07 square metre, the portion covered by survey no. 115 while preparing the original record (Waslewar) was not calculated. He specifically deposed that no portion of city survey no. 11489 is a part of land survey no. 115. He also brought on record the original record by which survey no. 11489 was sub-divided and also produced the measurement map Exhibit-96 on the record. He further testified that from the original sheet, review sheet was prepared and certified copy of the review sheet is at Exhibit-97. He stated that on the basis of such record, it can be seen that city survey no. 11489/1 is a part and parcel of survey no. 117.

18. During his testimony, he was unable to tell as to on what basis the original sheet of city survey no. 11489 mention about survey no. 115. He was also confronted with the list of the properties maintained by his office which he himself had brought. Couple of errors were admitted by him which he was unable to explain as to how the review sheet Exhibit – 98 does not tally with the list of properties which was also exhibited as 98. However, conspicuously, this record as coming from the proper custody and clearly demonstrated that city survey no. 11489/1 is a part and parcel of land survey no. 117.

19. Pertinently, this witness was an official witness, who had no axe to grind and clearly testified on the basis of the record maintained by his office. When on the basis of land record, he had clearly testified

that city survey no. 11489/1, which is nothing but a suit property, is part and parcel of survey no. 117, the conclusion is inescapable, since admittedly survey no. 117 was allotted to CIDCO. No plausible and appreciable reason was assigned by the trial court for refuting the testimony of this witness.

20. At the cost of repetition, if one bears in mind the fact that the dispute does not pertain to boundary, but identity of the property, going by the dispute being raised by the appellant, there being no dispute about the topography, it is quite apparent that the appellant has been asserting the claim on the basis of the sale deed over the north-west corner portion of the land survey no. 117, and is claiming it to be a part of survey no. 115. This is what precisely has been appreciated and considered by the appellate court. It has clearly demonstrated in paragraph no. 35, as to how the description of the suit property did not correspond to the toach map and review sheet of the survey office and clearly demonstrated that the suit property was not a part and parcel of city survey no. 115 and there was a serious error about the identity of the property.

21. Similarly, the appellate court has clearly demonstrated as to how based on such sale deed, the revenue record and city survey record prepared on that basis, claim is now being laid in respect of a portion of land survey no. 117. In my considered view, no error is committed by the appellate court in re-appreciating the evidence and

rectifying the error committed by the trial court in appreciating the evidence in proper perspective.

22. As regards actual possession over the suit property is concerned, admittedly, the appellant has been laying claim to such possession on the basis of the sale deed of the year 1989. He has not examined his predecessor in title as witness to substantiate such delivery of possession. The photograph on the record and the report of the commissioner appointed by the trial court under Order XXVI Rule 9 of the Code of Civil Procedure was not specifically traversed by the appellant. The report clearly demonstrates that whatever structures were erected there, were of recent origin. It was obviously to be so, inasmuch as the suit was filed soon after the plaintiff purchased the suit property under sale deed dated 03-01-1989. Therefore, by no stretch of imagination can it be said that he was in settled possession of the suit property, so that he could be entitled to the equitable and discretionary relief of injunction also.

23. Once having reached such a conclusion, mere failure of the appellate court to formulate the points for determination, as is required under Order XLI Rule 31 of the Code of Civil Procedure, cannot be a sufficient ground giving rise to any substantial question of law. In the result, the above questions of law, in-fact, do not arise in the facts, circumstances and evidence in the case, for the reasons discussed herein-above.

24. To repeat, since it is a matter regarding identity of the suit property and not a boundary dispute, even a request for undertaking a fresh measurement, would be an exercise in futility. The Second Appeal is dismissed. Civil Application no. 6246 of 2014 is rejected.

25. Other pending Civil Applications also stand disposed of.

[MANGESH S. PATIL]
JUDGE

26. After pronouncement of the judgment, learned Advocate Mr. Mandlik for the appellant submits that the interim relief granted vide order dated 02-08-2000 was in operation till date and now that the appellant wants to approach the Supreme Court, stay may be continued. Mr. Bajaj for the respondent no. 2 opposes the request.

27. Order dated 02-08-2000 to continue for a period of eight (8) weeks from today.

[MANGESH S. PATIL]
JUDGE

arp/-