

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO. 02 OF 2022 AND
CIVIL APPLICATION NO. 64 OF 2022**

1] Sarangadhar S/o Murlidhar Autade,
Age : 38 years, Occu : Agri.,
R/o. Kolthanwadi Road, Harsool,
Tq. & Dist. Aurangabad

2] Murlidhar S/o Shankar Autade,
Age : 73 years, Occu : Agri.,
R/o. As above

.. Appellants
(Orig. Plaintiffs)

Versus

Kartarsingh S/o Sandhusingh Dhillon,
Age : 73 years, Occu : Agri.,
R/o. Kolthan, Tq. & Dist. Aurangabad

.. Respondent
(Orig. Defendant)

...
Mrs. Pooja V. Langhe, Advocate for appellants
Mr. V.I. Thole, Advocate for the respondent
...

CORAM : MANGESH S. PATIL, J.

DATE : 21 FEBRUARY 2022

ORAL JUDGMENT :

This is an Appeal under section 100 of the Code of Civil Procedure (“**CPC**” for short) by the original plaintiffs aggrieved by the consistent findings of the trial court as well as the appellate court dismissing their suit seeking declaration of they having become the owners of 18 Are portion from land gat no. 42/1 and 42/2 by operation of principle of adverse possession and, decreeing the counter claim of the respondent for possession of the selfsame 18 Are portion, based on title.

2. The facts are not in dispute. The respondent had filed regular civil suit no. 919 of 2011 against the present appellants alleging about they having encroached over 18 Guntha portion of their land gat nos. 42/1 and 42/2. The appellants obviously denied to have made any encroachment. The parties went to trial and by the judgment and order dated 27-06-2014, the trial court dismissed the respondent's suit, *inter-alia*, holding about he having failed to prove the encroachment.

3. Being aggrieved and dis-satisfied by the dismissal of his suit, the respondent preferred Regular Civil Appeal no. 173 of 2014.

4. While Regular Civil Appeal no. 173 of 2014 was still to be decided, the appellants chose to file Regular Civil Suit no. 1046 of 2014 seeking declaration of they having become the owners of the selfsame 18 Are portion from land gat no. 42/1 and 42/2 by operation of principle of adverse possession.

5. The respondent opposed the suit by filing written statement and also filed a counter claim seeking possession of the 18 Are portion based on title.

6. The trial court decreed the suit and the appeal preferred by the appellants has been dismissed by the judgment and order under challenge.

7. Learned Advocate for the appellants vehemently submitted that the counter claim of the respondent itself was not maintainable as it did not disclose any cause of action and as it did not contain the rough sketch as is required by Order VII Rule 3 of the CPC (Bombay High Court amendment). The learned Advocate would also submit that the decision in the earlier suit of the respondent having reached finality now, it would operate as *res judicata* and, therefore, even the counter claim is liable to be dismissed atleast at this stage.

8. Per contra, learned Advocate for the respondent would submit that the decision in his suit for encroachment would not operate as *res judicata* inasmuch as it was merely a claim for removal of encroachment which he had failed to establish. Independently, by way of counter claim he is now seeking possession of the suit property i.e. 18 Are portion based on his title. He would submit that there could not be dispute as to the title of the respondent over land gat no. 42/1 and 42/2. Appellants by putting up the claim on the basis of adverse possession clearly admitted his title. Their failure to establish the claim of having become owners by adverse possession has met a logical and legal corollary in the form of a decree in the counter claim which has rightly been upheld by the appellate court. There are consistent findings of the facts of the courts below and no substantial question of law as is required by section 100 of the CPC arises for determination of this court.

9. Indeed, the facts as narrated herein-above present interesting state-of-affairs. In all probability, the impatience of the appellants is to be blamed for the situation they are in. Though the respondent had filed a suit for removal of encroachment but had failed to prove the fact of encroachment by leading cogent and relevant evidence and there being some defect in carrying out the measurement by the surveyor. The matter was still sub judice before the first appellate court in the form of challenge by him to the dismissal of his suit.

10. Without allowing that decision to reach finality, the appellants were emboldened to file the present suit seeking declaration of they having become the owners of the selfsame encroached portion of 18 Are by way of adverse possession and naturally had to face the counter claim by the respondent to recover possession based on his title and obviously, based on the stand taken by the appellants admitting his title to the encroached portion.

11. Interesting enough to note that both the appeals i.e. one filed the respondent against the dismissal of his suit for removal of encroachment as also the one filed by the present appellants against the decree in the counter claim of the respondent for possession were before the selfsame Judge who decided both the appeals on the same day and dismissed both the appeals.

12. The fact remains that the counter claim was decreed by the trial court and the appeal against it has been dismissed. The judgment and order to the extent it dismissed the suit of the respondent had not reached finality and obviously, there was no question of it operating as *res judicata* as is required by section 11 of the CPC. Plea of operation of *res judicata* was not available to be made by the appellants before the lower appellate court.

13. Besides, as is required by section 11 of the CPC, the issue that was directly and substantially in issue in the suit filed by the respondent was one for removal of encroachment whereas the issue that was directly and substantially in issue, raised by way of counter claim in this suit was in respect of respondent's claim for possession based on title. Therefore, even otherwise the decision in the suit filed by the respondent could not have operated as *res judicata* in entertaining the issue raised by way of counter claim in the appellants' suit.

14. As far as the objection regarding absence of cause of action for filing the counter claim, true it is that the plea was raised by the appellants in their written statement for rejection of the counter claim under Order VII Rule 11 of the CPC. However, admittedly it was not pressed not even an issue was insisted to be framed by the appellate court. Besides, the cause of action is nothing but a bundle of facts leading to the filing of the proceeding.

Paragraph no. 17 of the written statement / counter claim of the respondent reads thus :

“17. The Plaintiffs by way of this suit, admitted the ownership of the Defendant in respect of 18 Gunthas of the land, from the eastern side and claimed the adverse possession. Since, the Plaintiff has admitted the ownership, this Defendant on the basis of title, seeking the possession of the land from the Plaintiff by way of this counter claim.”

A bare look at the contents of this paragraph clearly reveals that the respondent has disclosed the cause in the form of filing of the suit by the appellants admitting his title to the land admeasuring 18 Are. If that is so, it cannot be said that counter claim did not disclose any cause of action.

15. Same is the case with the objection being raised by learned Advocate for the appellants as regards non-compliance with the provisions of Order VII Rule 3 of the CPC (Bombay High Court amendment) inasmuch as the rough sketch indicating the encroached portion was not annexed to the counter claim. Again, when the appellants on their own admitted the location and the factum of encroachment and even claimed to have derived title by way of adverse possession, in my considered view, there is no substance even in this objection.

16. Appellants have been well aware of the location of that 18 Are portion and that is why they could lay a claim regarding adverse possession.

17. Considering all the afore mentioned facts and circumstances, I find no error in the judgment of the courts below decreeing the counter claim and confirming it. No substantial question of law arises for determination in this second appeal. It is dismissed summarily.

18. After pronouncement of the judgment, the learned advocate for the appellants submits that during pendency of the appeal before the lower appellate court, execution and operation of the judgment and decree in the counter claim was stayed. Even this Court by order dated 10-01-2022 had stayed the execution to the extent of actual delivery of possession. She, therefore, submits that to enable the appellants to approach the Supreme Court, the interim relief may be continued for a reasonable time.

19. The learned Advocate Mr. Thole for the respondent strongly opposes the request.

20. Considering the nature of the dispute, since it is a matter of execution of the decree for possession of an immovable property, the interim relief granted by this Court by order dated 10-01-2022 shall continue for a period of four weeks.

21. Pending Civil Application no. 64 of 2022 is disposed of.

[MANGESH S. PATIL]
JUDGE

arp/