

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.584 OF 2019
ALONG WITH
CIVIL APPLICATION NO.1228 OF 2019

Vilas Baburao Dudhane] ... Appellant

Vs.

Dattu Dnyanu Patil (Deceased)]
Through LRs. & Ors.] ... Respondents

...

Mr. Pratap Patil for the appellant.

Mr. Suryajeet P. Chavan for the respondents.

...

CORAM : SMT. BHARATI DANGRE, J.

DATED : 30TH MARCH, 2022.

P.C. :-

1. Heard the learned counsel for the appellant and the learned counsel for the respondents.
2. Since both the parties have expressed their willingness to

argue the matter for admission and the compilation of documents, comprising the orders of the courts below and the copy of the plaint and appeal memo was placed before me, I deem it appropriate to take the appeal for final hearing.

3. The respondent (original plaintiff) filed a suit for possession of agricultural land admeasuring 5 Ares allegedly encroached by the defendant and the suit property was described as land in Gat No.122 admeasuring 0.16 Ares with its boundaries being stated, the plaintiff pleaded that the suit property is the ancestral property of the plaintiff and he is in occupation and possession of the said property. It was pleaded that the defendant, who is the owner of Gat No.121 has his property situated on the southern end of the plaintiff's property and taking advantage of the said property abetting the land of the plaintiff, he has encroached upon the plaintiff's land. A permanent injunction as well as mesne profit were the relief sought in the suit.

4. The first court i.e. the court of the Joint Civil Judge, Junior Division, Tasgaon, settled the issues in the suit based on the pleadings as to whether the plaintiff has proved that the defendant has encroached upon the suit property and whether he has caused any impediment in the peaceful enjoyment of the suit property by the plaintiff. The issue came to be answered in the negative and the suit was dismissed. It would reveal from the finding that the learned Judge was of the opinion that since the plaintiff was

claiming that there is an encroachment by the defendant, which was based on the report of the DILR, Sangli dated 25/05/1994 and since the said document was in the form of a map drawn by the concerned authority was not proved by the plaintiff, he had failed to establish the alleged encroachment and since this document was the basis of the claim, recording that the subsequent measurement dated 27/04/1995 is after filing of the suit and, therefore, the relief as sought in the plaint was refused and the suit was dismissed.

5. On an appeal being filed by the plaintiff before the learned Principal District Judge, Sangli, the learned Judge deliberated on the issue as to whether the plaintiff has proved that he is the owner and possessor of the suit property and issue No.2 was framed to the effect that: Does the plaintiff further prove that defendant committed encroachment in the suit property to the extent of 05 AREs and a further issue being framed as to whether the defendant is still trying to encroach upon the suit property.

6. The appellate court appreciated the evidence that was placed on record through the witnesses and particularly PW-1 Sulochana Sampat, the daughter in law of the original plaintiff since, by then, the original plaintiff was no more alive to step into the witness box. PW-1 Sulochana Sampat has deposed that the suit property was purchased through a registered sale deed dated 15/12/2003 and in order to establish the said transaction, evidence of PW-2 Baburao Sampat was also taken into account. PW-2 Baburao

Sampat specifically deposed about the execution of the registered sale deed for consideration of Rs.50,000/- on 05/12/2003 in respect of the suit property and also deposed that since then Sampatrao Patil was in possession of the suit property. Recording that the said evidence was not at all contradicted, Issue No.1 that the plaintiff is the owner and possessor of the suit property was answered in the affirmative. As far as Issue No.2 i.e. encroachment by the defendant is concerned, the learned Judge specifically appreciated the evidence of PW-3 Ashok Jadhav (Exh.-102/72), who was working as Parirakshan Bhumapak (Superior Surveyor) with the office of Land Records, Yelavi, Division Tasgaon. He has specifically deposed that the Mojani Register was entrusted to him for measuring Gat No.121 of Village Nagarale. This measurement was carried out at the instance of the defendant. PW-3 Ashok Jadhav deposed that at the time of measurement, the parties were present. He carried out the measurement of Gat No.121 and upon the measurement, it surfaced on record that some area of land at Gat No.122 was in possession of the owner of Gat No.121 and the area worked out was 4.75 Ares. This area was demarcated by him and shown in the map in red colour and he proved A sheet map at Exh.-106/76.

7. Relying upon the said map, which came through PW-1, Sulochana Sampat, which reflected the measurement carried out in the presence of both the parties on 27/04/1995, in particular when defendant No.1 in cross-examination has admitted about such a

measurement, the appellate court reversed the findings of the trial court and Issue No.2 stood answered in favour of the plaintiff.

8. The learned counsel for the appellant questions the said finding rendered by the appellate court in the present appeal and the ground, which is sought to be projected as a substantial question of law is, as to whether the measurement taken on 25/05/1994 should have been taken into consideration since the suit was filed on 08/08/1994 or the measurement carried out on 27/04/1995, which was after filing of the suit.

9. On appreciation of the findings rendered by the two courts below, I can only observe that the first court has completely erred in recording that the plaintiff has failed to prove the pleading of encroachment by the defendant and since what was relied upon was the measurement carried out on 25/05/1994, which was not produced on record. It is trite position of law that a cause of action is a bundle of facts, which entitle the plaintiff to claim the remedy, but the burden is on the plaintiff to make good the pleadings, on which the claim is made. Here is a case where the plaintiff alleges that the defendant had encroached upon the suit land and was continuing to encroach upon the suit land, rather expanding the encroachment in the suit property and, therefore, the pleading was made good during the course of trial by bringing on record the measurement which was carried out at the instance of the defendant on 27/04/1995. The argument, which is sought to

be canvassed is that the only evidence, which was available at the institution of suit, ought to have been taken into consideration is not what the law permits since on institution of the suit, the plaintiff has to prove the case since the burden is cast on him by bringing the cogent evidence before the court and, in this case, the plaintiff has discharged the said burden. In the wake of the above, since no substantial question arise in the present appeal. The appeal is dismissed.

10. In view of dismissal of the appeal, the civil application is also dismissed.

[SMT. BHARATI DANGRE, J.]