

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 306 OF 2004
WITH
CIVIL APPLICATION NO. 4098 OF 2017
AND
CIVIL APPLICATION NO. 2294 OF 2004

Dhondiram s/o. Narayanrao Dhage .. Appellant
Died through LRs. [original
Shaila d/o. Dhondiram Dhage Def.No.6]
Age.60 years, Occ. Business,
R/o. Driver Colony, Old AUSA Road,
Latur,Tq. & Dist.Latur.

Versus

1. Annappa Basappa Ainapure .. Respondents
Age. 63 years, Occ. Business, [Res.Nos.1
R/o. Mitra Nagar, Latur. to 6 ori.
Plff., Res.
No.7 to 11
ori. defs]
2. Bhikaji Apparao Kulkarni
Age. 21 years, Occ.Education,
R/o. Savewadi, Latur.
3. Dattatraya s/o. Apparao Kulkarni,
Age. 19 years, Occ. Education,
R/o. Savewadi, Dist. Latur.
4. Radhabai Govindrao Rawale
Age. 38 years, Occ.Household,
R/o. Latur.
5. Anil Baburao Tandale,
Age. 34 years, Occ. Business,
R/o. Dayaram Road, Latur.

6. Sow. Kamalbai Ramprasad Parikh
Age. 50 years, Occ. H.H.
R/o. Latur.
7. Vikramsing s/o. Dattusing Chavan
Age. 37 years, Occ. Agri.,
R/o. Latur.
8. Sk. Ahmed Sk. Budan (died)

8-1. Mohammad Ahmed Shaikh
Age. 62 years, Occ. Business,
R/o. Near Shivaji Statue,
Latur.

8-2. Ismail s/o. Ahmed Shaikh
Age. 57 years, Occ. Service,
R/o. C/o. Account Officer,
Panchayat Sammittee, Ahmednagar,
Tq. Ahmednagar, Dist. Latur.
9. Jeevan Hariprasad Thakre,
Age. 37 years,
10. Annappa Basappa Ainapure,
Age. 62 years,
11. Sow. Ranjanabai Govindrao Tawade,
Age. 34 years,

All R/o. Latur, Dist. Latur.

Mr.V.P. Savant and Mr. B.R. Kedar, Advocate for the appellant.

Mr.N.P. Patil Jamalpurkar with Mr. Girish Awale, Advocate for the respondents.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 27.09.2023
PRONOUNCED ON : 01.12.2023

J U D G M E N T :-

01. This Court by order dated 31.10.2007 admitted this Second Appeal on the following substantial questions of law.

(i) Whether in the facts and circumstances of the present case, the suit merely for mandatory injunction seeking removal of wire fencing without claiming possession of alleged encroached portion was maintainable and could be considered by the trial Court as the relief actually claimed was for possession?

(ii) Whether the first appellate Court rendered perverse finding as regards the question of encroachment and possession?

02. This Court is, therefore, required to answer both the substantial questions of law.

03. Heard the learned Advocates for the parties. Both the parties have made submissions extensively. This Court has also gone through the paper book and record.

The appeal arises out of the suit filed by respondent Nos.1 to 6. Present appellant is the heir of original defendant No.6. Respondent Nos.7 is original defendant No.2/heirs of defendant No.2. Respondent Nos.8-1 to 8-2 are the legal heirs of original defendant No.2A through General Power of Attorney holder respondent No.7. Respondent Nos.7 to 11 are legal heirs of original defendants. In view of the substantial question of law, this Court first has to consider the prayers made in the suit. The prayers in the suit reads as under :-

"1. That, it be declared by decree of this Hon'ble Court, the plaintiffs are the owners, possessors of their respective plots i.e. plot No.109, 107, 106, 11 and 108 as shown in plaint para Nos. (4,5,6,7,8) out of old Gat No.84/2/1 of village Khadgaon, Tal. Latur out of city sy. No.9918 comprised in N.A. permission No. 1980/JMB/CR/50 dated 20.12.1980 of Dy. Collector, Latur.

2. That, the defendants 1 to 2-D be restrained by means of perpetual injunction from interfering in peaceful possession of plaintiff over suit plots in any way.

3. That, by mandatory injunction the def. Nos.1 be directed and ordered to remove the wire fencing intruding in the portion of suit plots of plaintiffs i.e. plot Nos.106, 107, 108, 109

and 111 from and out of Gat No.84/2/1 City Survey No.9918 of village Khadgaon, Taluka Latur.

4. That, the costs of the suit be awarded to the plaintiffs from the defendants together with other equitable relief."

04. The case of the original plaintiffs is that the suit property land Gat No.84/2/1 admeasuring 4 Acres 3 Gunthas of village Khadgaon was owned and possessed by one Suryakant Dhage. The land was sold to defendant Nos. 2, 2A, 2B, 2C and 2D. Plaintiff No.1 is also shown as defendant No.2C after death of defendant No.2 and therefore he is also shown respondent No.10. Plaintiff No.6 purchased plot No.108 admeasuring 53 ft. East-West and 50 ft. on Southern side having width of 40 ft north south, as per the boundaries shown in the suit. The sale-deeds were executed in favour of the plaintiffs by defendant No.2 as a GPA holder of defendant Nos.2A to 2D. On the strength of sale-deed, plaintiffs became owner of the respective plots. There was some dispute between defendant No.1 and defendant No.2 in respect of some

portion of the suit land. There was also settlement between the parties whereby defendant No.2 agreed to pay the amount of Rs.18,000/- to defendant No.1 for his share in the well situated in the land. However, same was not honoured by defendant No.2. Defendant No.2, therefore, to bring pressure on defendant No.1 led wire fencing upon plots of the plaintiffs. The plaintiff, therefore, requested defendant No.1 to get the land measured of his share. Defendant No.1, therefore, got the land measured by the Authorities of the land records on 16.12.1983. In the said measurement it was found that wire fencing is erected to the extent of 0.05 R land in plots of the plaintiffs. The map was made part of the suit. The plaintiffs, thereafter, requested defendant No.1 to remove wire fencing. Since the wire fencing was not removed, the suit was filed for declaration and perpetual and mandatory injunction as referred above.

05. The defendants' case in written statement is that since the provisions of the Maharashtra Regional

Town Planning Act are not followed, the sale-deeds are not valid. There is no prior sanction obtained from the competent authority before transferring the plots. The land could not have been transferred in the fraction of the plots only with prior approval. There is also violation of the terms and conditions, incorporated in the NA permission. The plaintiffs have executed sale-deed without verifying correctness of the statement made by the seller in the documents of title. As regards well is concerned, it is accepted that the well is situated in the land falling to the share of defendant Nos. 2A to 2D. Defendant No.1 has also easementary right to have water from the well of Suryakant Dhage – defendant No.2. It is denied that the wire fencing is made to bring pressure on defendant No.2. The wire fencing is stated to be in existence since last more than 40 years. The averments as regards dispute between defendant Nos.1 and 2 are denied. The cause of action is also denied. The ground of limitation is taken. It is stated that the plaintiffs are not entitled to file the suit after lapse of

limitation for want of proper steps within limitation period.

06. The learned Trial Court held that the plaintiffs are in possession having title over the suit plots. Defendant No.1 has put wire fencing on the suit plot. The Trial Court framed the issues in view of pleadings of the parties.

07. After taking evidence, the Trial Court proceeded and decreed the suit directing the defendants to remove the wire fencing restraining him from obstructing plaintiffs' possession over the plots, holding that the wire fencing was done only 8-15 days prior to the institution of the suit.

08. Present appellant challenged the said judgment and decree by filing appeal bearing Regular Civil Appeal No.16 of 2000. The learned Appellate Court dismissed the appeal without disturbing the findings and the conclusion

recorded by the Trial Court.

09. After taking this Court through impugned judgment and evidence, the learned Advocate for the appellant Mr.B.R. Kedar submitted that the suit of the plaintiff ought to have been dismissed in view of Order VII, Rule 3 of the CPC and Bombay Amendment, as no map showing encroachment was placed on record. In view of non-observing mandatory provision, the suit was not maintainable. The land was partitioned 40 years back and since then there was a wire fencing. The suit was thus not maintainable merely for mandatory injunction without making prayer for possession. Both the Courts below have committed an error by decreeing the suit. A specific question was framed in the appeal about maintainability of the suit without seeking relief of possession. The Court has not answered the question properly. The suit is collusive suit between the plaintiff and defendant No.2 and other defendants. He submitted that the learned Courts below have erred in discarding the Commissioner's

report. Both the properties were not measured. The wire fencing was since prior to the execution of the sale-deed and thus there ought to have prayer for possession.

10. Learned Advocate Mr. Jamalpurkar for the respondents submits that the prayer in the suit was only to remove wire fencing. For such prayer no further prayer is required of possession. When it is not a case of the plaintiffs that they are not in possession, from evidence of the defendant himself it is clear that he did not claim possession over the disputed land. When the identification is given in the sale-deed, there is no question of giving further particulars. He justified the judgment of the Courts below and prayed for dismissal of the appeal. He submitted that in the written statement, there is no ground taken about Order VII, Rule 3 of the CPC, neither same is raised in the appeal. The appellant cannot raise such ground for the first time in this Court. This Court is sitting in the second appeal and cannot go into appreciation of the evidence. He

submitted that the question of possession is a mixed question of fact and law and prayed for dismissal of the appeal.

11. After hearing the parties, this Court finds that in the written statement the averment is about limitation. Even from the evidence it is seen that the case of the appellant/original defendant is that the suit is not within limitation stating that the wire fencing is there since last more than 40 years and in any case prior to the execution of sale-deed. The Commissioner report Exh.25, which is referred by the appellant also shows that there is wire fencing erected on the disputed land. The panchanama on the basis of which the Commissioner's report is prepared shows that the spot was visited by the Commissioner.

12. Learned Advocate Mr.B.R.Kedar relies on the judgment in the case of Misrilal Ramratan & Ors. Mansukhlal & Ors. Vs. A.S. Shaik Fathimal (dead) By LRs.

And Ors., reported in 1995 Supp. (4) SCC 600. In the said case the Hon'ble Apex Court held that the report of the Commissioner is part of record and therefore the report cannot be overlooked or rejected on spacious plea of non-examination of the Commissioner as a witness, since it is part of record of the case. In that view when there was report of the Commissioner stating that age of the building as per the sanctioned plan of 1928 was of 70 years and building requires demolition. In that case such report was discarded and overlooked. This Court does not find that this case is relevant for decision of this appeal.

13. He further relies on the judgment in the case Sadashiv Lakhuji Choudhary Vs. Laijabai Ramji Madavi & Ors. reported in 2020 DGLS (Bom) 1269. It is held that in the suit for declaration and mandatory injunction alleging encroachment on the land, it was necessary to produce map in view of Order VII Rule 3 of the CPC, where the subject matter of the suit is immovable property.

There is no doubt about the said proposition. However, in the present matter it not case of the plaintiff that there is encroachment. There is also no prayer for removal of encroachment or for possession. The direction is only of removal of wire fencing that was put up 8 to 15 days prior to lodging of the suit. The defendants could not show or establish that they are in possession of the suit land. On the contrary, in their evidence witness has specifically accepted that he has not encroached upon the land of plaintiff. Their case is only that the fencing is standing since last more than 40 years. However, they could not prove the said fact.

14. Mr. Kedar further relied upon judgment in the case of Laxman Wamanrao Nagapure Vs. Shankar Haribhau Adhau in SA No.123 of 2013. In that case the substantial question of law was framed as to - whether the Courts below were right in not directing re-measurement of the suit field and the adjoining lands, by following due procedure governing the measurements? It is held that it

was necessary to measure both the lands dividing boundary marks to find out as to whether there is encroachment as alleged at the hands of the defendants. Said case is not applicable for the reasons already recorded.

15. He lastly relied upon judgment in the case of Manohar Mahadeorao Pagrut Vs. Sunanda Ramdas Tharkar reported in 2008 (3) Bom.C.R.4. Said judgment is delivered in writ petition. In that case in a suit for removal of encroachment Cadastral Surveyor admitted that no permanent measurement mark was there on one side of the land. In that view the defendant had applied for fresh appointment of Commissioner to measure both the lands. Said request was rejected and therefore the writ petition was filed. It was directed to measure the land afresh. This Court finds that this case is not applicable and the Court need not consider the same in view of substantial question of law already framed.

16. Learned Advocate Mr. Jamalpurkar relied upon

judgment in the case of Ramanuja Naidu Vs. V. Kanniah Naidu & Anr., reported in (1996) 3 SCC 392 on the point of scope of the second appeal. He further relied upon judgment in the case of Laxmidevamma & Ors. Vs. Ranganath & Ors., decided by the Hon'ble Apex Court in Civil Appeal No.176 of 2015, wherein the Hon'ble Apex Court has held that when both the Courts have recorded concurrent finding of fact, no substantial question of law arises in the High Court and there was no substantial ground for reappraisal of evidence. The High Court still proceeded to record finding of fact. It is held that it was not permissible in exercise of jurisdiction under section 100 of the CPC and the concurrent finding of fact could not have been upset by the High Court unless same is shown to be perverse. In the judgment in the case of Hero Vinoth Vs. Seshammal decided by the Hon'ble Supreme Court in Appeal (Civil) 4715 of 2000, it is held that the question of law raised will not be considered as substantial question of law, if it stands already decided by a Larger Bench of the High Court concerned or by the

Privy Council or by the Federal Court or by the Supreme Court, where the facts required for a point of law have not been pleaded.

17. This Court finds that these judgments cited by learned Advocate Mr. Jamalpurkar are applicable to the present case. Considering all these submissions and the record this Court finds that the suit was not for removal of encroachment or for possession, but was simply for removal of wire fencing. There is no material to show that the cause of action had arisen to pray for relief of possession. No grounds were also raised about Order VII Rule 3 of the CPC. In any case considering the substantial questions of law those were already framed while admitting the appeal, this Court finds that it was not necessary to claim possession and suit was maintainable with prayer made in the plaint. As regards second question, this Court finds that the findings of the Appellate Court are not perverse and no interference is called for.

18. The Second Appeal deserves to be dismissed and same is dismissed with no order as to costs. In view of dismissal of the Second Appeal, connected civil applications do not survive and are disposed off accordingly.

[KISHORE C. SANT, J.]

. At this stage, learned Advocate for the appellant makes a request to continue the stay that was in operation pending the appeal. Since the stay was running for more than five years, same shall be continued for further period of four weeks from today.

[KISHORE C. SANT, J.]