

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.190 OF 2023

Shri Prakash Kashinath Shetkar,

Age: 57 yrs. Occ : Agri.,

R/o. Nilanga, Tal. Nilanga,

Dist. Latur.

.. APPELLANT

[Orig. Defendant]

VERSUS

1. Babuappa s/o. Shivramappa Shetkar [Died],
Through his LRs.

1/1. Godawari w/o. Babuappa Shetkar (Patil)
Age: 89 yrs., Occ : Household,
R/o. Peth, Mehboob Ganj, Nilanga,
Tq. Nilanga, Dist. Latur.

1/2 Shivraj s/o. Babuappa Shetkar (Patil)
Age: 69 yrs., Occ : Agri.,
R/o. Peth, Mehboobganj, Nilanga,
Tq. Nilanga, Dist. Latur.

1/3 Vilas s/o. Babuappa Shetkar (Patil)
(Deceased)
Through his LRs.

1/3/1 Anita w/o. Vilas Shetkar (Patil)
Age: 59 yrs., Occ : Household,
R/o. Peth, Mehboobganj, Nilanga,
Tq. Nilanga, Dist. Latur.

1/3/2 Rameshwari d/o. Vilas Shetkar (Patil)
Age: 29 yrs., Occ : Household,
R/o. Peth, Mehboobganj, Nilanga,
Tq. Nilanga, Dist. Latur.

- 1/3/3 Ambika Vilas Shetkar (Patil)
Age: 27 yrs., Occ : Household,
R/o. Peth, Mehboobganj, Nilanga,
Tq. Nilanga, Dist. Latur.
- 1/3/4 Payal Vilas Shetkar (Patil)
Age: 25 yrs., Occ : Household,
R/o. Peth, Mehboobganj, Nilanga,
Tq. Nilanga, Dist. Latur.
- 1/3/5 Rushikesh Vilas Shetkar (Patil)
Age: 23 yrs., Occ : Education,
R/o. Peth, Mehboobganj, Nilanga,
Tq. Nilanga, Dist. Latur.
- 1/4 Sushila Chandrakant Birajdar,
Age 65 yrs. Occ. Household,
R/o. Tadlapur, Tq. Udgir,
At Present R/o. Udgir,
Dist. Latur.
- 1/5 Shridevi Vishwanath Devne,
Age: 63 yrs. Occ. Household,
R/o. Bodhan, Dist. Nizamabad.
- 1/6 Shobha Vijaykumar Patil,
Age: 61 yrs. Occ. Household,
R/o. Limbala, Tq. Nilanga,
Dist. Latur.
- 1/7. Rajkumar Babuappa Shetkar (Patil)
Age : 59 yrs. Occ. Agri.
- 1/8. Lata Babuappa Shetkar (Patil)
Age : 52 yrs. Occ. Household.
- 1/9. Nagesh Babuappa Shetkar (Patil)
Age: 49 yrs. Occ. Agri.

1/7 to 1/9 R/o.Peth Mehboob Ganj, Nilanga,
Tq. Nilanga, Dist. Latur. .. **RESPONDENTS**
[Orig. Plaintiffs]

...

Mr.Rahul M. Gaikwad, Advocate for the appellant
Mr.T.M.Venjane, Advocate for the respondent no.1/7

...

CORAM : ARUN R. PEDNEKER, J.

Reserved on : 06.07.2023
Pronounced on : 14.07.2023.

ORDER :

1] By way of present Second Appeal, the appellant is challenging the judgment and order dated 11.04.2019 passed by the Joint Civil Judge Senior Division, Nilanga in Regular Civil Suit No.68 of 2011 and also the judgment and order dated 04.11.2022 passed by the District Judge-2, Nilanga in Regular Civil Appeal No.19 of 2019 whereby the Appellate Court dismissed the Appeal filed by the appellant and confirmed the decree of the trial Court, directing defendant to hand over the possession of encroached area of 1 H. 63 R. in Survey No.2 situated at village Peth Maheboobgunj, Taluka Nilanga, District Latur, within two months from the date of judgment and further restraining

the defendant from causing obstruction to the possession of the plaintiff over the land in Survey No.2 to the extent of 8 H. 27 R.

Brief facts leading to filing the present Second Appeal is as under:

2] The subject matter of the suit is the suit property which is described in plaint bearing survey No.2 admeasuring 1 H. 63 ares land, which is in possession of the defendant Prakash Kashinath Shetkar. The suit was originally filed by deceased Babuappa. The suit is continued by the legal heirs of the deceased Babuappa. It is the case of the plaintiff that Survey No.2 admeasuring 8 H. 27 Ares land were common lands and the entire 8 H. 27 Ares land was given to the plaintiff under Hyderabad Tenancy Abolition and Cash Grant Act as a restricted owner. Mutation entry was taken and as such the plaintiff became owner and possessor of the land i.e. 8 H. 27 ares land. There was some prior litigation in respect of the property, between the parties as earlier one Civil Suit No.566/1952

was filed in which there was a compromise between the plaintiff and defendants' father. Accordingly, compromise decree was passed.

3] It was noticed by the plaintiff in the year 1996 that the defendants had encroached upon the land of the plaintiff and the defendants refused to remove the encroachment. As such it was agreed between the parties to get measured the said land in the year 1999. After the measurement, 1 H. 63 R. land was found as encroached by the defendants out of Survey No.2 towards southern side. The map was prepared accordingly. However, the defendants refused to vacate the suit land. Thus, Civil Suit was filed for removal of encroachment to the extent of 1 H. 63 R.

4] In the said suit, the Court accepted the ownership of the plaintiff but held that there was no joint measurement of properties and the said suit was dismissed. Thereafter, the plaintiff preferred Appeal No.110 of 2005 and also made an application for amendment. The

amendment was allowed by the Appellate Court, against which, the Writ Petition was preferred before the High Court in which the order of District Court as allowing of amendment was upheld. Accordingly, the suit was amended, the counter written statement was also allowed to be filed and the District Court being first Appellate court without taking any further evidence, dismissed the said appeal.

5] Against the aforesaid order, the Second Appeal No.857 of 2009 was preferred before this Court in which Civil Application was made as Civil Application No.3753 of 2010 which was allowed by the High Court and on 13.04.2010 an opportunity was granted to file fresh suit. Accordingly, the plaintiff has filed the suit i.e. Civil Suit No.68 of 2011. The plaintiff in the fresh suit claimed relief of possession of the encroached portion of the land to the extent of 1 H. 63 R. of land. The appellant – defendant appeared in the said suit. It is contended by the appellant defendant that there is no cause of action and the property

which have been described cannot be the subject matter of the suit. It is further contention of the appellant – defendant that the defendants' father was the possessor and owner of Survey No. 2 admeasuring 20 acres of land as restricted owner and denied any compromise decree and submitted that there is no partition of properties between the parties. On the contrary, the defendants' suit for partition is pending before the Civil Court. Therefore, the suit is not tenable and not maintainable. It is further contended by the appellant – defendant that the plaintiff's suit No.14 of 2018 for partition is pending and it is specifically pleaded that in respect of the said bandhara, the same is running east west around 7 to 8 feet and some old trees of about 30 years are on the said bandhara. As such, there is no question of any sort of encroachment and claimed for dismissal of the suit.

6] The trial Court on consideration of the pleadings formulated the following issues along with findings :

	<u>Issues</u>	<u>Findings</u>
1.	Whether plaintiff prove that he is owner of the suit property ?	In the affirmative.
2.	Whether plaintiff prove that defendant unauthorizedly encroached upon 1 H. 63 R. land out of S.No.2, situated at village Peth Maheboob Ganj ?	In the affirmative
3.	Whether plaintiff prove that he is entitled to get possession of land encroached portion 1 H. 63 R land out of S. No.2, situated at village Peth Maheboob Ganj ?	In the affirmative
3A.	Whether the suit is within limitation?	In the affirmative
4.	What order and decree ?	As per final order.

7] The trial Court on consideration of material held that the plaintiff is entitled to get possession of encroached portion of 1 H. 63 R. from the defendant.

8] In the appeal filed by the defendant – appellant, the appellate Court formulated the following points for consideration :

Sr.No	Point	Findings
1.	Whether appellant / plaintiff proved that he is the owner of suit property to the extent of 8 H 27 R ?	...Yes.

2.	Whether appellant / plaintiff proved that the defendant had encroached upon the suit property to the extent of 1 H 63 R ?	...Yes.
3.	Whether appellant / plaintiff entitled for the possession of land encroached to the extent of 1 H 63 R i.e. the suit property ?	...Yes.
4.	Whether the learned Lower Court had committed manifest error of law as well as facts while appreciation of evidence on record and to come to the proper conclusion ?	...No
5.	Whether the decree is legally sustainable ?	Yes.
6.	Whether interference by this Court is requires in the present set of facts and circumstances ?	No.
7.	What order ?	...Appeal dismissed as per final order.

9] The Appellate Court examined points nos.1 and 2 and held in para 27, 28 and 29 as under :

27. Now coming to the evidence on record, the plaintiff entered into the witness box by filing the affidavit of examination in chief Exh.50, in which as pleaded, it is contended that the suit property was came to him by way of grant of the Inam land. In this respect, relied upon the documents filed on record. It appears that the revenue entry filed on record, certified copy by the Nilanga Tahasil, in which it appears

that the same was given to Babu Shivram i.e. deceased plaintiff on payment vide Mutation Entry No. 12. Though this document have not been exhibited, however, the certified copy of the Government record issued by competent authority, hence is to be read into. Exh.8 is the 7/12 extract filed on record, in which sy. no.2, 20 acres 17 gunthas land shown in the name of Babu Shivram i.e. Iplaintiff from 1961 to 1973-74 and thereafter till 1991-92.

28. It also appears that the Sy.No.1 is also the Inam land, which is shown in the name of Prakash Shetkar i.e. the defendant to the extent of 9 H 53 R. Further Exh. 12 and 13, 14 are the 7/12 extract in respect of the suit property i.e. 8 H 27 R land. Exh.10 and 11 are in respect of other Gat No.12 and 11.

29. Now in addition to this as it is submitted that Sy.No.1 is of the defendant as they inherited from his father. Further, it is contended in para 7 of his deposition that in the year 1966, the defendant had made encroachment on the land out of Sy. No.2. Same was agreed to be return, but it was avoided and hence, it was agreed that lands to be measured. Accordingly, he made an application for measurement and found 1 H 63 R land was encroached by defendant.

10] The Appellate Court held in para no.41 that there is absolutely no hesitation that the plaintiff had

established his ownership as well as encroachment to the extent of 1 H. 63 R. out of Survey No.2 and that the plaintiff is entitled for possession of the said encroached land to the extent of 1 H. 63 R., and therefore, the Appellate Court confirmed the decree passed by the trial Court. The present appellant – defendant has challenged the orders passed by the trial Court so also by the Appellate Court by filing the present Second Appeal.

11] It is contention of the appellant – defendant that both the Courts below have failed to appreciate the admission given by the plaintiff in its cross examination and consequently it has impacted upon the conclusion drawn by the Courts below. It is the case of the appellant – defendant that the admissions are of such nature that the plaintiffs have admitted in its evidence that they were in joint possession of the property and that partition suit is also pending and that they were jointly in possession prior to 1960, as such, there is no encroachment over the suit property. As such, the appellant – defendant contends that

the findings recorded in the suit are erroneous and the substantial questions of law arise in that regard.

12] The trial Court so also the Appellate Court has rendered findings of fact that the plaintiff is able to establish his title on the suit property as the same was inam land and the plaintiff became the owner of the land by virtue of the suit land being sanctioned to the plaintiff under the provisions of the Hyderabad Tenancy Abolition and Cash Grant Act as restricted owner only. The title of the plaintiff is also established on account of the earlier compromise between the parties qua the suit property. The plaintiff and defendants measured the land jointly and after the measurements, 1 H. 63 R. land was found as encroached by the defendants out of Survey No.2 towards southern side. As such, concurrent findings are recorded by both the Courts below that the plaintiff is owner of the suit property and there is an encroachment. The findings are recorded by the Courts below taking into entire evidence on record. Such findings of fact cannot be altered on mere

examining part of evidence. Thus, no substantial question of law arises for consideration, as such, the present Second Appeal is dismissed.

[ARUN R. PEDNEKER]
JUDGE

DDC