

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

SECOND APPEAL NO. 219 OF 2022

Suresh s/o. Nagayya Swami
Age : 81 Years, Occ: Agriculture,
R/o Nandgaon, Tq. Tuljapur,
Dist. Osmanabad.

... APPELLANT
(Orig. Plaintiff)

VERSUS

Yasin s/o. Tolan Bhagwan
Age : 62 Years, Occd: Business,
R/o. Hangarga (Nal), Tq. Tuljapur,
Dist. Osmanabad.

... RESPONDENT
(Orig. Defendant)

Mr. S. B. Solanke, Advocate h/f Mr. Shaikh Ashraf Patel, Advocate for
the appellant

Mr. N. D. Kendre, Advocate h/f Mr. S. N. Patne, Advocate for the
respondent

CORAM : R. M. JOSHI, J.
RESERVED ON : 27/04/2023
PRONOUNCED ON : 12/05/2023

JUDGMENT :-

1. This appeal filed under Section 100 of the Code of Civil Procedure takes exception to the judgment and decree passed in Regular Civil Appeal No. 216 of 2011 dated 14th January, 2016 whereby the judgment and decree passed in Regular Civil Suit No. 220 of 2005 is modified. For sake of convenience parties are referred by nomenclature in suit.

2. The facts in nutshell which led to the filing of present appeal can be narrated as under:

(a) Suresh, plaintiff, filed RCS No. 220 of 2005 against Yasin defendant restraining him from interfering in his possession over house No. 1154 and 1156 situated at Nandgaon. It is the case of the plaintiff that he is owner and in possession of house No. 1154 admeasuring 80 x 20 feet and house No. 1156 having area 17 x 80 feet. It is contended that there are two rooms of made of tin shed and a stable with open area and he is in possession thereof. It is specifically claimed that house No. 1156 is in ancestral property whereas house No. 1154 is received by him from the erstwhile owner Abdul Rahim Jilani Shaikh. It is alleged that the defendant is obstructing his possession and he is attempted to carry out construction on the suit property and hence suit seeking injunction is filed.

(b) Yasin, defendant, filed written statement denying the allegations made by the plaintiff in the plaint. It is averred that the entry of house No.1154 and 1156 is made illegally. It is specifically claimed that plaintiff's house is admeasuring only 20 x 35 feet and towards west side of the said house, house of defendant is situated. It is further claimed that without there

being any cause of action suit is filed to grab suit house.

3. Both sides led oral as well as documentary evidence before the Trial Court. Trial Court partly decreed the suit. Injunction in respect of house No. 1154 is not granted whereas the injunction was granted in respect of house No. 1156 admeasuring 17 x 80 feet. Against the said judgment First Appeal being RCA No. 216 of 2011 came to be filed by defendant. The First Appellate Court modified the decree and granted injunction against the defendant in respect of area admeasuring 20 x 35 feet in respect of house No. 1156 village Nandgaon, Tq. Tuljapur.

4. Learned counsel for the plaintiff contends that the First Appellate Court has committed serious error in appreciating the material evidence on record and has arrived at incorrect finding that the plaintiff is entitled for the injunction only in respect of area admeasuring 20 x 35 feet whereas the Trial Court has rightly held that house No. 1154 admeasuring 17 x 80 feet deserves to be protected. Thus, according him substantial question of law is involved herein as the First Appellate Court has committed error in not appreciating evidence on record correctly.

5. Learned counsel for the defendant supported the judgment and decree passed by First Appellate Court. It is also sought to be argued that since the title of plaintiff is under the cloud of doubt, the suit for simplicitor injunction is not maintainable. To support his contention he placed reliance on the judgments of the Hon'ble Apex Court in case of **Anathula Sudhakar Versus P. Buchi Reddy (Dead) By Lrs. And Others, (2008) 4 Supreme Court Cases 594** and **Jharkhand State Housing Board Versus Didar Singh And Another, (2019) 17 Supreme Court Cases 692**.

6. At the outset this court wishes to deal with the contentions of the defendant that suit is not maintainable. There cannot be two opinions about the law laid down by the Hon'ble Apex Court in case of **Anathula Sudhakar Versus P. Buchi Reddy (Dead) By Lrs. And Others** and **Jharkhand State Housing Board Versus Didar Singh And Another** (cited supra). However, it is pertinent to note that defendant has neither challenged maintainability of suit on this ground nor such issue was raised before the First Appellate Court. The said issue being not pure question of law and since involve question of facts as well, it cannot be permitted to be raised for the first time in the second appeal. Thus, in view of this Court the tenability of the suit now sought to be

challenged cannot sustain.

7. As far as the facts of the case are concerned, it is the case of the plaintiff that house No. 1156 is his ancestral property whereas house No. 1154 is received by him from Abdul Rahim Jilani Shaikh in the year 1985 and since then he is residing there. With regard to the claim of the plaintiff about house No. 1154 is concerned, the learned Trial Court has not accepted the case of the plaintiff and has declined to grant any relief in respect of the said house. There is no challenge raised by the plaintiff against the said refusal of injunction in respect of house No. 1154. The said finding, therefore, has attained finality and need not be reconsidered.

8. As regards the house No. 1156 is concerned it is a case of plaintiff that it is his ancestral property. To support his claim he has placed reliance on the extract of the record of Grampanchayat (Exhibit 8) which indicates that house No. 1156 admeasures 17 x 80 feet and it stands in the name of the plaintiff. As against this defendant has filed specific written statement contending that the plaintiff is in possession over 20 x 35 feet area from house No. 1156. Defendant has also challenged the correctness of the entry in the Grampanchayat record. Defendant in his evidence on oath has also

categorically stated about creation of record in respect of suit house in collusion with the members and officers of Grampanchayat. There is no specific cross examination of defendant denying his said statement made on oath. Defendant, therefore, by taking specific plea his written statement as well as by leading evidence has discharged his burden of challenging entry in Grampanchayat record about house No. 1156. In the light of this it was necessary for the plaintiff to lead evidence to show that said entry Exhibit 8 is genuine. No witness is examined to prove the said document. Moreover, there is no whisper about the said document in the oral evidence of plaintiff nor his witness Chanvirappa Rachappa Patil (Exhibit 38) states anything about the same. When there is specific challenge raised to the said entry made by the Grampanchayat in respect of house No. 1156, which plaintiff has failed to prove. it was absolutely necessary for plaintiff to substantiate his case about possession of 17 x 80 feet area in house No. 1156. However, since the defendant has admitted fact plaintiff is in possession area of about 20 x 35 feet from house No. 1156, the First Appellate Court has granted injunction to the said extent. In the facts and circumstances of the case, said finding can not be called as perverse.

9. In fact the learned Trial Court had committed error in not

appreciating the challenge to the record of the Grampanchayat by defendant and failure on the part of the plaintiff to substantiate that he is in possession of the area of of 17 x 80 feet and which is rightly modified by First Appellate Court.

10. This Court, therefore, does not find involvement of any substantial question of law in this appeal. Resultantly, appeal stands dismissed.

(R. M. JOSHI, J.)

ssp