

VRJ

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.165 OF 2022

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Ramchandra Pandurang Lawand & Ors. ... Appellants

V/s.

Sambhaji Tukaram Jadhav ... Respondent

**WITH
INTERIM APPLICATION NO.1216 OF 2022
IN
SECOND APPEAL NO.165 OF 2022**

Ramchandra Pandurang Lawand & Ors. ... Applicants

V/s.

Sambhaji Tukaram Jadhav ... Respondent

Mr. Dilip Bodake for the appellants/applicants.

Mr. Ajay A. Joshi with Mr. Vikas Kolekar for the
respondent.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 28, 2023

P.C.:

1. The appellants are original defendants against whom respondent plaintiff filed Special Civil Suit No.270 of 2002 for possession of encroached area to the extent of 5R land from Gat No.486 admeasuring 75R.

2. According to the plaintiff, two years prior to filing of the suit

he measured his land through surveyor and he found that defendants encroached over suit land to the extent of 5R. Despite plaintiff's request, the defendants continued with possession of encroached portion and, therefore, plaintiff filed suit for possession of encroached portion described in the plaint.

3. The appellants resisted the suit by filing written statement and contended that the portion described in the suit is in possession of the defendants from the date of sale deed and they constructed pipeline and cattle shed over it. The measurement carried out by the defendants through surveyor indicates existence of bandh between plaintiff's and defendants' land. The defendants are in possession of disputed portion of land for more than fifty years.

4. The Trial Court framed necessary issues casting burden on the plaintiff to prove encroachment. In order to prove the case, the plaintiff filed an application for appointment of Court Commissioner and accordingly the Court appointed Taluka Inspector of Land Records for measurement of land. He submitted a report indicating that there is encroachment to the extent of 5R land. The map of suit land produced on record by the surveyor indicates encroachment by the defendants. Moreover, the plaintiff examined the surveyor who supported the findings in the report.

5. The Trial Court based on the report and map prepared by Taluka Inspector of Land Records along with oral evidence recorded a finding of fact that the defendants have encroached over the suit land to the extent of 5R. The Appellate Court

confirmed the said finding of fact.

6. Learned advocate for the appellants submitted that the surveyor in his oral evidence admitted that the stones indicating boundary marks of the plaintiff's land were not found by the surveyor and, therefore, the measurement based in ignorance of such crucial factor is defective and cannot be relied upon to record finding of encroachment. According to the learned advocate for the appellants, issuance of notice to all co-sharers is mandatory and since the surveyor failed to issue notice on the official address of defendant No.2, the report of surveyor cannot be accepted. According to him, in absence of relief of mandatory injunction to remove pipeline and cattle shed, suit for possession of vacant land is not maintainable.

7. I have perused the pleadings, oral evidence, measurement report and map submitted by the surveyor. On scrutiny of judgments of the Courts below, it appears that both the Courts below have recorded a finding of fact based on evidence on record. This is not a case where finding of fact is based on no evidence or in ignorance of material evidence or a finding based on inadmissible evidence which if ignored would led to opposite conclusion.

8. In so far as the contention raised on behalf of the appellants that the surveyor admitted in his cross-examination that he did not find boundary-mark stones at the site is concerned, it is not open for this Court exercising power under section 100 of the Civil Procedure Code, 1908 to re-assess the evidence particularly when

the finding of fact of encroachment is based on measurement carried out by the expert in the field. No circumstances brought on record by the defendants to indicate that the mandatory procedure as required under the provisions of the Maharashtra Land Revenue Code, 1966 has not been followed. The admission as alleged by the appellants is not clear or unequivocal. There is no dispute about the fact that defendant No.1 and defendant No.3 were present when the surveyor carried out the measurement. Defendant Nos.1 to 3 have filed common written statement. Two co-owners out of three were present at the time of survey. Therefore, no prejudice is caused to the defendant No.2 as defendant No.2 is not the owner of distinct portion of the suit land.

9. In so far as the contention raised by the appellants that the suit for possession is not maintainable in absence of relief of mandatory injunction is concerned, in my opinion, the substantive relief of possession is prayed by the plaintiff. The relief of injunction either mandatory or prohibitory is a discretionary relief and in a suit for removal of encroachment, proper relief is to seek possession of property by way of substantive relief. Therefore, in a suit seeking vacant possession of the suit property, it is not necessary to claim relief of mandatory injunction for removal of movable properties.

10. In so far as the submission that the plaintiff and the defendants have settled their dispute before the criminal Court and have agreed to withdraw the complaint is concerned, in my opinion, the document of compromise was not produced before

the Appellate Court by following the procedure under Order 41 Rule 27 of the Civil Procedure Code, 1908. Therefore, the Appellate Court was not bound to consider such documents without the procedure under Order 41 Rule 27 of the Civil Procedure Code being followed by the defendants.

11. On overall consideration of the judgments passed by the Courts below, it is apparent that the Courts below have recorded a concurrent finding of fact based on material on record in the form of oral evidence, measurement report and the map. The finding of fact recorded by the Courts below cannot be termed as perverse. Hence, no substantial question of law arises for consideration.

12. The second appeal is, therefore, dismissed. No costs.

13. In view of dismissal of the second appeal, the interim application does not survive and the same stands disposed of.

14. Considering the fact that there is ad-interim relief running in favour of the appellants, the same is continued for period of four weeks from today.

(AMIT BORKAR, J.)