

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

**FIRST APPEAL NO.595 OF 2021
WITH
INTERIM APPLICATION NO.2188 OF 2020
IN
FIRST APPEAL NO.595 OF 2021**

Shivalik Ventures

...Appellant

V/s.

Adarsh Developers & Ors.

...Respondents

Mr. Atul Damle, Senior Advocate a/w. Mr. Ashwin Sawlani i/by Mr. Hassan Khan for Appellant.

Mr. Sanjeev Singh a/w Mr. Ritesh Singh for Respondent Nos.1 and 2.

Mr. Segal Todkar i/by Mr. Vijay Patil for Respondent No.3.

CORAM : AMIT BORKAR, J.

DATE : JANUARY 04, 2023

P.C.:

1. The appeal is directed against the judgment and decree dated 2nd January 2020, passed by the learned Ad-hoc Judge, City Civil Court, Dindoshi, Mumbai, thereby directing defendant no.2 to reconstruct partly demolished boundary wall in the same material within a period of three (3) months from the date of decree. The trial court in addition to the above direction restrained defendant no.2 from disturbing possession over the suit property.

2. The appellant is original defendant no.2. Respondent nos.1 and 2 had filed S.C. Suit No.1022 of 2008 seeking the relief of mandatory injunction directing defendant no.2 to reconstruct and/or restore boundary wall on the suit property i.e. the plot of land bearing C.T.S. No.22 (part) and the adjoining property. The case of the plaintiffs in short is as under.

3. Plaintiff no.1 is the developer and builder carrying out business of construction. Plaintiff no.2 is the society of slum dwellers registered under the provisions of Maharashtra Co-operative Societies Act, 1960. Plaintiffs had constructed boundary wall on the suit property after joint survey of the property. It is the case of the plaintiffs that defendant, without leaving compulsory open space, constructed the building. On 2nd May 2008, the defendants demolished boundary wall without following due process of law. Therefore, plaintiffs filed the suit.

4. Defendant no.1 appeared in the suit but failed to file written statement. The appellants (defendant no.2) contested the suit by filing written statement contending that the notice of survey allegedly carried out by the plaintiffs on 16th June 2006 was not issued to the defendant no.2. After the survey measurement dated 1st December 2006, old construction in the adjoining property was demolished as the suit boundaries were unidentifiable. When the plaintiffs carried out survey on 22nd April 2008 and it was revealed that the plaintiffs encroached on the property bearing CTS No.13 (part) by constructing boundary wall. Therefore, defendant no.2 called upon plaintiffs to demolish the

said wall. The development on plot nos.30 and 33 (part) was carried out after following due process. The learned trial court framed necessary issues and after granting opportunity of hearing and considering oral evidence lead by the parties decreed the suit. The defendant no.2 has, therefore, filed present Appeal challenging the judgment and decree.

5. Learned advocate for Appellant submitted that the finding recorded by the learned trial court in relation to the issues involved is contrary to the evidence on record. It is submitted that the details on record are not sufficient to hold that the plaintiffs had constructed boundary wall in the property owned by them. He submitted that the plaintiffs failed to discharge burden cast on them by the trial court by leading sufficient evidence on record.

6. Per contra, learned advocate for respondent nos.1 and 2-original plaintiffs submitted that the material on record in the form of testimony of witness no.1 of the plaintiffs and report of surveyor fixing boundaries of CTS Nos.22, 22/1 to 29 is sufficient to prove fact that joint survey was carried out on 16th June 2006 and boundaries of properties of plaintiffs and defendant no.2 were demarcated. It is submitted that the material evidence on record shows that the plaintiff no.2-society constructed boundary wall after the joint measurement on the property owned by plaintiffs. He invited my attention to the observations of the trial court in para 11.3. observing that defendants have not disputed the fact of construction of boundary wall was made by the plaintiffs. He, therefore, submitted that the demolition of wall was without

following due process of law, and therefore, the trial court was justified in passing decree in favour of plaintiffs.

7. Considering submissions made on behalf of both sides, following points arise for consideration:-

- (i). Whether, the plaintiffs prove that the construction of disputed wall was within the area owned by the plaintiffs;
- (ii). Whether, the plaintiffs prove that defendant no.2 demolish disputed boundary wall without following due process of law;

8. In order to prove that construction of disputed boundary wall was within the area owned by the plaintiffs, the plaintiffs have placed on record copy of application seeking measurement of the property and the copy of measurement map issued by survey authority. It appears that the survey authority had carried out measurement on 16th June 2006 and fixed boundaries of CTS Nos.22, 22/1 to 29. On perusal of the map, it appears that the survey authority has shown new construction by red line and area of re-development by yellow line. The boundary of CTS Nos.22, 22/1 to 29, was shown in dark black line. The plaintiffs' witness stated that the construction of disputed boundary wall was carried out after joint measurement of the property. The plaintiffs has proved survey map by examining the person having knowledge of survey.

9. The defendant no.2 in support of his defence examined witness who admitted in his cross-examination that he has no personal knowledge about the measurement. The defendant no.2 failed to prove survey map produced at exhibit-36 and 42 by examining surveyor. The trial court, therefore, recorded a finding that the defendant failed to discharge onus of proof on him after the same was shifted on the defendant.

10. On perusal of evidence on record, it appears that the trial court recorded a finding of fact based on material evidence in the form of notice of measurement, joint surveyor's map which shows that Appellant constructed the buildings without leaving open space required. Therefore evidence on record leads to the conclusion that the boundary wall was constructed in the area owned by the plaintiffs.

11. It is undisputed fact that the boundary wall was constructed by the plaintiffs. The defendants have not brought on record evidence to show that the said boundary wall was demolished after following due process of law. Without due process of law, the defendant no.2 could not have unilaterally demolished disputed boundary wall. Therefore plaintiffs deserve relief as prayed for.

8. The trial court based on the material on record rightly held that the plaintiffs proved the fact that the boundary wall was constructed in the area owned by the plaintiffs and it was demolished without following due process of law. Since the material on record is sufficient to prove demolition of boundary

wall without following due process of law, the present appeal needs to be dismissed by exercising power under order XLI rule 11 of the Code of Civil Procedure, 1908.

9. First Appeal is, therefore, dismissed. No costs.

10. In view of dismissal of first appeal, Interim Application No.2188 of 2020 does not survive. It is also disposed of.

(AMIT BORKAR, J.)