

Dusane

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

**SECOND APPEAL NO.626 OF 2022
WITH
INTERIM APPLICATION NO.18146 OF 2022**

Shri. Ramraj Khakhanu Yadav ...Appellants
(since deceased)
1.1 Shri. Ramprasad Khakhanu
Yadav, through Power of Attorney
Vishnu Ramprasad Yadav

V/s.

Shri. Sakharam Jagannath ...Respondents
Nerurkar (since deceased)
Shri. Shridhar Jagannath Nerurkar
& Ors.

Mr. Atul Damle, Senior Advocate h/for for Mr. Sagar
A. Joshi for Appellants/Applicants

CORAM: MADHAV J. JAMDAR, J.
DATE: 12th June 2023

P.C.:

- 1.** Heard Mr. Damle, learned Senior Counsel appearing for the Appellants.
- 2.** The present Second Appeal is filed by the original Defendant Nos.1 and 2 challenging the legality and validity of the judgment and decree dated 19th March 2015 passed by the learned Joint Civil Judge, Junior Division, Kalyan, District Thane

in Regular Civil Suit No. 333 of 2000 as well as the judgment and decree dated 20th May 2022 passed by the learned District Judge- 2, Kalyan in Regular Civil Appeal No. 53 of 2015. The said Regular Civil Suit No. 333 of 2000 was filed *inter alia* seeking vacant and peaceful possession of 25 sq. mtrs. of encroached portion of suit land. The said Suit was partly decreed and the appeal filed challenging the said decree has been dismissed.

3. Mr. Damle, learned Senior Counsel appearing for the Appellants i.e. Defendant Nos.1 and 2 raised following substantial questions of law:

- (i) Whether the present suit i.e. Regular Civil Suit No. 333 of 2000 is barred under Order II, Rule 2 of Code of Civil Procedure, 1908 for having intentionally relinquished the claim in earlier suit i.e. Regular Civil Suit No.196 of 1985 ?
- (ii) Whether the present suit is barred for non-compliance of Order VII, Rule 3 (Bombay Amendment) of Code of Civil Procedure, 1908?

4. Before considering the substantial questions of law raised by Mr. Damle, learned Senior Counsel, it is necessary to set out certain factual aspects. It is an admitted position that the Respondents i.e. original Plaintiffs filed Regular Civil Suit No.196

of 1985 seeking possession of encroached portion of 13 sq. mtrs. It was the contention of the Defendants in the said Suit that they are in possession of said encroached portion since 1944 and they are the owners of the suit property. The learned Trial Court decreed the Suit by holding that the Plaintiffs have proved their ownership and therefore directed removal of encroached portion. Civil Appeal No.29 of 1996 was filed challenging the decree passed by the learned Trial Court and the said appeal was dismissed. However, while dismissing the said appeal, the learned First Appellate Court modified the decree passed by the learned Trial Court by directing that the map on record produced at Exhibit-61 shall form part and parcel of the decree. The present Appellants filed Second Appeal No. 137 of 1999 challenging the judgment and decree of the learned Trial Court and the learned First Appellate Court in said first round of litigation and *inter alia* raised contention that the decree has been passed for removal of construction shown in the map at Exhibit-61, which is much more than 13 sq. mtrs. encroachment as mentioned in the plaint. Therefore, although this Court dismissed the Second Appeal, it clarified that the decree passed by the learned Trial Court and the learned First Appellate Court relates to un-authorised construction of 13 sq. mtrs. as stated in paragraph 13 of the plaint, which is part of the map on record at

Exhibit-61. The said judgment of the High Court is dated 7th April 1999.

5. The Respondents i.e. Plaintiffs filed Regular Civil suit No. 333 of 2000 on 2nd May 2000 contending that the putting up of the shed like structure on the portion of the suit land by the Defendants i.e. present Appellants to the extent of 25 sq. mtrs. approx. (in furtherance to the earlier encroachment of 13 sq. mtrs.) is illegal and unlawful and praying for possession of the same. In the plaint, it has been stated that the said encroachment was done in the first week of April 2000 and stated that earlier encroachment of 13 sq. mtrs. was extended by further encroachment of 25 sq. mtrs. approx. The learned Trial court, by judgment and decree dated 19th March 2015 recorded a finding that the Plaintiffs are the owners of the suit property and that the Plaintiffs proved that the Defendants have made an encroachment of 25 sq. mtrs. of the suit property. While decreeing the suit, the learned Trial Court has taken into consideration the cross-examination of DW-1 i.e. Ramprasad Khakhanu Yadav, wherein he admitted about the encroachment of 40 sq. mtrs. i.e. 25 sq. mtrs of the present encroachment and 13 sq. mtrs. of the earlier encroachment. He has also admitted that he has not removed the encroachment of 13 sq. mtrs. about which decree has already been passed.

6. Mr. Damle, learned Senior Counsel fairly admitted that the said 13 sq. mtrs. encroachment is still in existence and execution is going on. The learned First Appellate Court, by judgment and decree dated 20th May 2022 dismissed the appeal by relying on the said statement of Defendant No.1 in the cross-examination in paragraph 14 that the Plaintiffs have encroached on 40 sq. mtrs. land.

7. Before considering the substantial question of law raised by Mr. Damle, the learned Senior Counsel, it is required to be noted that Mr. Damle has fairly admitted that the suit property is of the ownership of Plaintiff Nos. 1 to 6 and Defendant No.3. His only submission is that the provision of Order II, Rule 2 of Code of Civil Procedure, 1908 bars the fresh suit if the Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, then he shall not afterwards sue in respect of the portion so omitted or relinquished. He also submitted that Order VII, Rule 3 of CPC (Bombay Amendment) which specifies that where the subject-matter of the suit is an immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaintiff shall specify such boundaries or numbers. In case of encroachment a sketch showing as far as possible, the location

and extent of encroachment shall also be filed alongwith the plaint. He therefore submitted that the suit is also liable to be dismissed for non-compliance of Order VII, Rule 3 of CPC.

8. As far as the contention regarding Order II, Rule 2 of CPC is concerned, Mr. Damle, learned Senior Counsel stated that his objection to the plaint is on the basis of Order II, Rule 2(2) CPC, which is regarding relinquishment of part of claim. He fairly submitted that Order II, Rule 2 (1) and (3) CPC is not applicable to the present case. Said Order II, Rule 2(2) of CPC states that where a Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. In the present case, in fact the contention of the present Appellants in the earlier round of litigation is that although the plaint was only with respect to 13 sq. mtrs., the decree has been passed with respect to larger portion and therefore the learned Advocate appearing for the Respondents i.e. Plaintiffs restricted their claim to 13 sq. mtrs., which is the suit property. Therefore, the objection of the learned Senior Counsel will not apply to the present case. In the earlier round of litigation, the suit property or the encroachment mentioned in the suit was only with respect to 13 sq. mtrs. and as the decree was passed making reference to the map at Exhibit 61, which is the encroachment showing

larger area than the area which has been mentioned in the plaint and therefore the learned Advocate appearing for the present Respondents i.e. Plaintiffs, in the present suit as well as in the earlier round of litigation, stated that he restricts his claim to the suit claim i.e. 13 sq. mtrs. as mentioned in the plaint of earlier round of litigation. Therefore, the present objection raised by the learned Senior Counsel regarding Order II, Rule 2 (2) CPC will not apply. Therefore, there is no substance in the first substantial question of law raised by the learned Senior Counsel appearing for the Appellants.

9. As far as the contention raised with respect to second substantial question of law regarding Order VII, Rule 3 CPC (Bombay Amendment) is concerned, the DW-1 has specifically admitted by stating in the cross-examination as follows:

"हे म्हणणे खरे आहे की, सर्व्हे १७, हिस्सा ५ मध्ये माझे ४० चौरस मीटर पेक्षा जास्ती क्षेत्रावर बांधकाम आहे".

Mr. Damle, learned Senior Counsel has fairly admitted that ownership of said survey No. 17, Hissa No.5 is of the Respondents i.e. Plaintiffs 1 to 6 and Defendant No.3. Therefore, it is clear that the present Appellants have admitted that the present Respondents are the owners of the suit property and that there is an encroachment of 40 sq. mtrs. In view of this admission, the non-compliance of Order VII, Rule 3 is not fatal.

10. Mr. Damle, learned Senior Counsel also submitted that the Respondents i.e. original Plaintiffs filed an application bearing Exhibit 140 in Regular Civil Suit No. 333 of 2000 praying that the commissioner may be appointed for the purpose of elucidating the matter in dispute i.e. for ascertaining the exact location of the further encroachment to the extent of 25 sq. mtrs. made by the Defendants on the suit property and upon conducting such investigation, to report thereon to the Court. The said application Exhibit 140 was rejected by the learned Trial Court by order dated 6th July 2013. The said rejection was challenged by the Respondents by filing Writ Petition No. 7709 of 2013 and the same was also rejected on 18th October 2013. The said order was thereafter confirmed by the Supreme Court by order dated 27th January 2014 passed in Special Leave to Appeal (Civil) No. 953 of 2014. The reasons given for rejection of said application show that the said application for appointment of Commissioner was filed after the entire evidence is recorded and when the case was posted for final hearing. However, in view of admission of the Appellant No.1.1 i.e. D.W.1 accepting during his cross-examination that they are in possession of said 40 sq. mtrs. and a finding recorded in the earlier round of litigation that the Respondents are the owners of the suit property, dismissal of the said application for

appointment of the Commissioner will not affect the merits of the case.

11. In any case, in view of the position that the Respondents are the owners of the suit property and as the suit is for removal of encroachment on the suit property, the applicable Article will be Article 65 of Limitation Act, 1963. Article 65 prescribes a limitation of 12 years for a suit for possession of an immovable property or any interest therein based on title. The perusal of the contention raised by the present Appellants as well as examination-in-chief shows that he is claiming ownership over said 40 sq. mtrs. portion. For limitation to start as per Article 65, the Appellant has to accept the ownership of the Respondents and then contend that their possession has become adverse and specify the time limit when the Appellants have started adverse possession. However, in the present case, admittedly the Respondents are the owners of the suit property and yet the Appellants are contending that they are the owners of said 40 sq. mtrs. encroached portion. In any case, it is not the contention of the Appellants that they have become owners of adverse possession. Therefore, there is no substance in the contention that the Suit is barred by limitation. Thus, there is no substance in any of the substantial questions of law and other contentions raised on behalf of the Appellants.

12. It is further admitted position that although the decree regarding said encroached portion of 13 sq. mtrs. was granted on 29th April 1989 in a suit which has been filed in 1985 and which has attained finality by judgment and decree dated 7th April 1999 passed by the learned Single Judge in Second Appeal No. 137 of 1999 yet the Appellants are in possession of said 13 sq. mtrs. Therefore, the present Second Appeal is required to be dismissed with compensatory cost. Accordingly, the Second Appeal is dismissed with cost of Rs.10,000/-.

13. In view of dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also dismissed.

14. At this stage, Mr. Damle, learned Senior Counsel requested for stay of the decree passed by the learned Trial Court as confirmed by the learned First Appellate Court. However, in view of the facts and circumstances of the present case, the Appellants are not entitled for any stay order and therefore the said request is rejected.

(MADHAV J. JAMDAR, J.)

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