



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

SECOND APPEAL NO. 467 OF 1993

Mohanilal Bansilal Soni
(Deceased through LRs)

1A Shrinivas Mohanlal Soni
age 51 years, occ. Business
r/o 2nd Cross Cloth Lane
Tq. & Dist. Latur.

1B Smt. Ramkuwar w/o Mohanlal Soni
age 80 years, occ. Household
r/o 2nd Cross Cloth Lane,
Latur, Tq. & Dist. Latur.

1C Smt. Kantadevi w/o Kisanlal Bang
age 60 years, occ. Household
r/o Vidyanagar, Parali Vaijanath
Tq. Parali (V), Dist. Beed.

.. Appellants

Versus

Sitaram Daji Rankhamb
(Deceased through LRs)

1. Shrirang Sitaram Rankhamb
(Deceased through LRs)

1A Jamuna Shrirang Rankhamb
age 60 years, occ. Household

1B Vyankat Shrirang Rankhamb
age 52 years, occ. Agriculture

1C Nilkant Shrirang Rankhamb
age 49 years, occ. Agriculture

1D Sanjay Shrirang Rankhamb
age 27 years, occ. Agriculture

- 1E Sunita Shrirang Rankhamb
age 30 years, occ. Household
- 1F Rekha Shrirang Rankhamb
age 27 years, occ. Household
- All r/o Khulgapur
At Post Kasar Kheda
Tq. & Dist. Latur.
2. Bajrang Sitaram Rankhamb
(Deceased through LRs)
- 2A Shashikala Bajrang Rankham } Abated vide order
dated 09.03.2016
- 2B Chandrashekhar Bajrang Rankhamb
age 42 years, occ. Agriculture
- 2C Rajesaheb Bajrang Rankhamb } Abated vide order
dated 09.03.2016
- 2D Anant bajrang Rankhamb }
- Both r/o Khulgapur
At post Kasar Kheda
Tq. & Dist. Latur
- 2E Sau Mangal Shrimant Borade
age 42 years, occ. Household
r/o Kargaon, Post Kargaon
Tq. & Dist. Latur
- 2F Sau. Laxmi Balasaheb Kadam
age 38 years, occ. Household
r/o Dhanori Post Dhanori
Tq. & Dist. Latur.
3. Kakasaheb Sitaram Rankhamb
4. Pilubai w/o Sitaram Rankhamb
(Deceased through LRs)

5. Haribai Vikram Mane .. Respondents

Mr. S. S.Bora, Advocate for the appellant.

Mr. V. C.Solshe, Advocate for respondents No. 1B to 1F , 2B to 2F.

CORAM : R. M. JOSHI, J.

RESERVED ON : 15th JANUARY, 2024.

PRONOUNCED ON : 24th JANUARY, 2024.

JUDGMENT :

1. This appeal filed under Section 100 of Code of Civil Procedure takes exception to the judgment and decree passed by the First Appellate Court in Regular Civil Appeal No. 68/1990 dated 3rd December, 1993 reversing the findings recorded by the Trial Court in Regular Civil Suit No. 430/1981.

2. Parties are referred to by their nomenclature in the original proceeding for the sake of convenience.

3. By order dated 15th December, 1993, appeal came to be admitted on the grounds No. 3, 5, 7 and 10. The facts which led to filing of the present appeal can be narrated in short as under :-

Land Survey No. 17 admeasuring 28 Acres 23 Are was originally owned by Badrinarayan Rathi. Plaintiff purchased half western side portion

admeasuring 14 Acres and 14 Are by registered sale-deed dated 29th August, 1953 and he was put in possession of the said premises by the owner. In the year 1966, vide registered sale-deed dated 11th May, 1966, defendant purchased remaining half eastern side portion of the said land admeasuirng 14 Acres 12 Are. Admittedly, both portions of the land purchased by plaintiff and defendant are adjacent to each other. In the year 1968, defendant tried to encroach upon some portion of survey no. 17A from eastern side. Plaintiff got the land measured and filed suit bearing Regular Civil Suit No. 312/1968 seeking possession of the encroached portion of his land from defendant. In the said suit, encroachment was not proved hence it came to be dismissed so also appeal filed against it. It is claimed that after dismissal of said suit plaintiff and defendants are in possession of their respective portion of land. It is specifically averred in the plaint that in 1973-1974, measurements were carried out under the scheme of Prevention of Fragmentation and Consolidation Act and it was found that both plaintiff and defendant are in possession land equally. Hence, the authority concerned, recorded 8 anna share (half share) to the ownership of each side. It is alleged that in 1976-1977, defendant again encroached upon the eastern side portion to the extent of 1 Acre 12 Are and since then, he is in illegal possession thereof. Since the request made by plaintiff for repossession was refused by defendant and as defendant had no right to retain possession thereof, present suit came to be

filed. The cause of action disclosed in the plaint for filing of the suit occurred on 15th May, 1981, when defendant refused to vacate 1 Acre 12 Are land.

4. Defendant filed written statement and admitted ownership of plaintiff in respect of land purchased by him but disputed the area purchased. Defendant claimed to have purchased eastern side portion of Survey no. 17 in the year 1966. A reference is also made to Regular Civil Suit No. 312/1968 filed by plaintiff against defendant alleging encroachment in land Survey No. 17A. According to defendant, the said suit was dismissed on 9th October, 1970. Defendant has also claimed title in the suit property by adverse possession.

5. Issues were framed at Exhibit 17 and burden was cast upon the plaintiff to prove that he is owner of suit land and that defendant has encroached upon the land admeasuring 1 Acre 12 Are and mesne profit. Plaintiff, without raising any objection of whatsoever nature in respect of the issues framed, went on with the trial. Plaintiff examined his son Shrirang at Exhibit 40 as his constituted attorney. Defendant stepped into the witness box and also examined Dilip Kulkarni, Court Commissioner at Exhibit 70. Court Commissioner was examined for the purpose of ascertaining situation at the spot. However, admittedly, no measurement of land was

sought either before the Trial Court or the First Appellate court. No such application is sought to be moved in this appeal too.

6. Learned counsel for defendant submits that the suit filed by plaintiff is for the encroachment of suit land by defendant in the year 1976-1977 and refusal of defendant to return said land in favour of plaintiff on 15th May, 1981 is said to be cause of action for filing suit. It is his contention that nowhere in the plaint the plaintiff is seeking possession of the suit property on the basis of his title in the suit property which was never in question. It is submitted that the Trial Court has rightly appreciated evidence on record in order to hold that the plaintiff has failed to prove encroachment made by defendant on the suit property and accordingly dismissed the suit. It is submitted that the First Appellate Court has committed error in decreeing the suit on the premise that the case of plaintiff is based upon title and not on encroachment made by defendant over the suit property without appreciating case of plaintiff correctly. This, according to him, is not permissible. In order to support his submissions, he placed reliance on the case of Bachhaji Nahar vs. Nilima Mandal and others, **AIR 2009 SC 1103**. According to him, in the said case, it is held that when neither party puts forth contention, then Court cannot obviously make out such a case not pleaded.

7. Learned counsel for plaintiff opposed the said submission by drawing attention of the Court to the written statement wherein the defendant has admitted ownership of plaintiff over the land pursuant to the registered sale-deed executed in his favour by erstwhile owner. He further submits that the defendant in the previous suit has given candid admission to the effect that if he finds land in excess of his possession pursuant to the sale deed, he is ready to return the same to the plaintiff. It is submitted that since plaintiff has proved his title over the suit land, it was incumbent on the part of the Court to direct defendant to vacate the same. Thus, according to him, there is no error committed by the First Appellate court in reversing the findings recorded by the Trial Court.

8. Substantial questions of law in this appeal and findings recorded thereon are as follows :

i) Whether the First Appellate Court has failed to consider the fact that plaintiff has failed to establish encroachment and consequently his possession and in such circumstances, order of decreeing the suit is not justified ?

Answer : Yes

ii) Whether the First Appellate Court has traveled beyond the pleadings of plaintiff and has accepted the case of plaintiff which was never made out in the plaint ?

Answer : Yes

iii) Whether the plaintiff would be entitled for decree of possession of suit land if he has failed to establish the alleged encroachment and dispossession ?

Answer : No

iv) Whether the plaintiff has substantiated the cause of action ?

Answer : No

9. It is settled law that the Court has to consider the entire pleadings of the parties in order to ascertain the case sought to be made out by them before the Court. Perusal of the plaint clearly shows that it was a specific case of plaintiff before the Trial Court that initially before 1968, defendant encroached upon 1 Acre 12 Are land belonging to plaintiff and hence suit was filed for removal of encroachment bearing Regular Civil Suit No. 312/1968. In the present plaint, it is vaguely stated that thereafter plaintiff and defendants are in possession of their respective portion of land. But there is no specific pleading about plaintiff regaining possession of the land allegedly encroached upon earlier by defendant, in respect of which previous suit was filed. It is however alleged that thereafter in 1976-1977,

defendant again encroached upon the eastern portion of the land illegally which admeasures same i.e. 1Acre 12 Ares as it was covered by previous suit. The cause of action for filing of the suit is also candidly stated to be 15th May 1981 when defendant refused to concede with the request of plaintiff for return of the said land. Possession of the suit land is sought on specific ground of encroachment done by defendant over the suit land in the year 1976-1977 and removal thereof as asked for. Perusal of pleadings in the plaint as a whole clearly show that the suit is filed on allegation of encroachment on land of plaintiff and not on title.

10. In the light of aforesaid pleadings, if the evidence on record is considered, then testimony of son of plaintiff shows that he claims to have regained the possession of the suit land from defendant forcibly. This evidence sought to be led is beyond pleadings of plaintiff. Moreover, there is nothing on record to show that any such possession of land was really regained. This witness has claimed presence of his servant at the relevant time, however, the said person is not examined in order to prove the said fact. On the contrary, this witness goes on to admit that while filing suit no instructions were given to his advocate to the extent that the suit land was repossessed forcibly by plaintiff. The evidence of plaintiff's witness creates serious doubt about his claim of repossession of the suit land from defendant

and further encroachment thereupon in the year 1976-1977 by defendant. Since plaintiff has filed a suit for possession on the ground of encroachment and removal thereof, the initial burden is on the plaintiff to prove that defendant has encroached upon suit land as claimed in the plaint, which he has failed to discharge.

11. On the other hand, defendant has specifically pleaded in the written statement about existence of a common bandh dividing two parts of same land and the said position exists since 7th May, 1964. He further specifically claimed that there is no change in bandh since then. Defendant examined himself at Exhibit 56 and apart from other contentions, he specifically deposed about existence of bandh dividing two fields belonging to plaintiff and defendant. His testimony gets further corroboration from the evidence of the Court Commissioner, DW 2 Advocate Kulkarni (Exhibit 70).

12. Evidence of Court Commissioner Advocate Dilip Kulkarni shows that he was appointed as Court Commissioner to ascertain position at spot. He visited the land in question and carried out inspection in presence of both sides. He submitted report (Exhibit 71) and map (Exhibit 72). From his report, it is clear that the land bearing Survey No 17 shows a bandh in between the lands of plaintiff and defendant. Though bandh is not continuous and is found absent at some places, but from map it is clear that

the bandh exists dividing the suit lands into two parts i.e. eastern side and western side thereof. Even, plaintiff's witness in his cross-examination has given candid admission about defendant not having put up any new boundary between the two fields. Though this witness claimed about there being no existence of any boundary in between the two fields, however, evidence of Court Commissioner clearly proves that the two fields are divided by a common bandh though interrupted in between. In the light of this evidence, if the case of defendant is considered, then he claims that he was put in possession of land towards eastern side after its purchase in the year 1966. Since plaintiff did not come with a case of possession on the basis of title, it was not necessary for the defendant to prove his sale-deed in order to rebut the case of plaintiff. The evidence led by defendant clearly shows that there is specific demarcation between two lands and that the possession of parties to either side of bandh is seen.

13. Pertinently, plaintiff in the year 1966 has claimed that defendant encroached upon his land to the extent of 1 Acre 12 Are. Though in the plaint it is not contended specifically that the land was repossessed, however, plaintiff's witness tried to improve the case to that effect, which is impermissible in law, as evidence sans pleading needs to be kept out of consideration. The allegations in the plaint specifically state about defendant

again encroaching upon the same portion of land in the year 1976-1977, but there is no evidence to prove this case of plaintiff. On the basis of evidence on record, said findings of the Trial Court are not perverse. Even First Appellate Court has not reversed the said finding and has not recorded any finding to the effect that in the year 1976-1977 encroachment was done by defendant on the suit land. The First Appellate Court however, proceeded on the basis that plaintiff has proved his title in respect of the land admeasuring 14 Acre 14 Are on the basis of registered sale-deed dated 29th August, 1953. Such finding would have been permissible provided the plaintiff has come out with a case seeking possession of the suit property on the basis of his title. Perusal of plaint as well as evidence sought to be led by plaintiff unambiguously show that case sought to be made out by plaintiff was about encroachment and removal thereof. It is needless to emphasis the importance of pleadings in the plaint as the same would accord an opportunity to the defendant to defend his case effectively. Though some concession can be given for the purpose of interpretation of the averments in the plaint, however, if its reading as a whole indicates the case being sought to be made of encroachment and removal thereof, it is not open for the Court to assume that the case on the basis of title when no such case is made out to that effect.

14. The Hon'ble Apex Court in the case of Bachhaji Nahar (supra) has squarely dealt with this issue in paragraph No. 11 as observed thus:-

11. The principle was reiterated by this Court in Ram Sarup Gupta (dead) by LRs. v. Bishun Narain Inter College MANU/SC/0043/1987 : (1987)2 SCR 805 :

It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise.

The Hon'ble Apex Court has dealt with the facts of the case in paragraph No. 13 of the judgment which read thus:-

13. A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an easementary right. A suit

for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right, relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner/occupier of such property.

Finally, it is held that a Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

15. In the light of aforesaid position of law, if the plaintiff has not come out with a case for possession of disputed land on the basis of title, the defendant is denied opportunity to defend such plea. A party cannot be taken by surprise which disentitles him to defend himself effectively. Had it been the case of suit for possession on the basis of title, the defendant would have substantiated his claim by taking appropriate defence. It therefore needs to be held that the plaintiff has filed suit for possession on the basis of alleged encroachment being done by defendant over the disputed land and plaintiff having failed to prove the same the suit must fail and First Appellate Court committed error in considering the case of plaintiff on title than for

encroachment. Resultantly, substantial questions of law deserve to be decided against plaintiff as recorded above.

16. In view of above discussion, appellant has made out a case for causing interference in the impugned judgment and decree passed by the First Appellate Court. It being perverse in ignorance of the pleadings and evidence on record and against settled position of law, it deserves to be set aside. The judgment and decree passed by Trial Court in Regular Civil Suit No. 430/1981 stands restored. In the result, the appeal stands allowed with cost.

(R. M. JOSHI)
Judge