



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

**SECOND APPEAL NO.53 OF 2022
WITH
CIVIL APPLICATION NO. 949 OF 2022
WITH
SECOND APPEAL NO. 54 OF 2022
WITH
CIVIL APPLICATION NO. 950 OF 2022**

1. Shivaji S/o Anaji Nagare,
Age : 63 Years, Occ. Agriculture,
2. Shayaji S/o Anaji Nagare,
Age : 51 Years, Occ. Agriculture,
3. Vastalabai D/o Anaji Nagare,
Age : 69 Years, Occ. Agriculture

All resident of Shedgaon Tq. Sangamner,
Dist. Ahmednagar

..Appellants
(Orig. Plaintiffs)

VERSUS

1. Bhiva s/O Pandurang Nagare,
Age : 75 Years, Occ. Agriculture
2. Gangaram S/o Pandurang Nagare,
Age : 70 Years, Occ. Agriculture,
3. Janardhan S/o Pandurang Nagare,
Age : 66 Years, Occ. Agriculture

All Resident of Shedgaon, Tq. Sangamner,
Dist. Ahmednagar.

...Respondents
(Orig. Defendants)

....

Advocate for the Appellants : Shri. K. N. Shermale

Advocate for Respondent Nos. 1 to 3 : Shri. Rahul A. Tambe

....

CORAM : SANDIPKUMAR C. MORE, J.

DATE : 08.04.2024

COMMON ORDER:-

1. Both these appeals are filed by the appellants who are the original plaintiffs in Regular Civil Suit No. 291 of 2004, against the common judgment and decree dated 08.10.2021 passed by the learned District Judge-1 Sangamner (hereinafter referred to as the “learned first Appellate Court”) in Regular Civil Appeal Nos. 135 of 2009 and 136 of 2009, whereby the judgment and decree passed by the learned trial Court i.e. Joint Civil Judge, Junior Division, Sangamner dated 10.11.2009, has been confirmed by dismissing the appeals. The appellants/plaintiffs thus challenged the original judgment and decree passed by the learned trial Court, whereby their suit for perpetual injunction has been dismissed and the counter-claim of the respondents/defendants is allowed. Thus, it appears that these Second Appeals are filed against the concurrent findings of both the learned Courts below.

2. Brief facts are as under :-

The appellants/plaintiffs filed a suit bearing Regular Civil Suit No. 291 of 2004 for getting permanent injunction against the respondents/defendants for not to obstruct their possession over the suit land Gut No.300 situated at

Shedgaon, Tal. Sangamner, Dist. Ahmednagr.

3. After appearance in the said suit, the respondents/defendants resisted the suit by filing written statement and also filed counter-claim, claiming the same relief of permanent injunction against the plaintiffs/appellants for not to obstruct their possession over their land Gut No. 298 which is adjacent to the suit land Gut No. 300.

4. The learned trial Court, after hearing the suit, dismissed the same by allowing the counter-claim of respondents/defendants by granting injunction against the appellants/plaintiffs. Thereafter, the plaintiffs filed two appeals namely First Appeal No. 135 of 2009 against the order of dismissal of their suit and Regular Civil Appeal No. 136 of 2009 against grant of permanent injunction which restrained them from obstructing possession of the respondents/defendants over land Gut No. 298. Admittedly, the learned First Appellate Court has dismissed both the appeals by upholding the decree and judgment passed by the learned trial Court. Hence, this Second Appeal.

5. The learned counsel for the appellants vehemently argued that both the learned Courts below have miserably failed in properly appreciating the evidence on record and

especially the evidence of Cadastral Surveyor, who had measured the lands in dispute and prepared the map Exh.80. The learned counsel for the appellants objected the evidence and map of the Surveyor mainly on the ground that he carried out the measurement against the provision of norms and wrongly observed that some portion of land of the appellants/plaintiffs was acquired for road, in absence of any evidence. He tried to point out from the evidence of said Surveyor that the measurement of land was in fact carried out without giving notices to the defendants. In support of his submissions he relied on the following judgments :-

- (a) **High Court of this Bench in the case of Sudhakar S/o Baburao Kulkarni Vs. Gorabai w/o Thansing Marag and others in Second Appeal No. 482/2018 dated 22.04.2019**
- (b) **High Court of this Bench in the case of Isaq Nawab Shaikh Vs. Maidabee w/o Turabsab Shaikh and others in Second Appeal No. 607 of 2016 dated 28/02/2019.**
- (c) **High Court of Nagpur Bench in the case of Prabhakar Sahadeo Talokar Vs. Shri. Sanjay Shatrughan Dhomble in Second Appeal No. 335 of 2016 dated 11.09.2017.**

(d) **High Court of Nagpur Bench in Laxman Wamanrao
Nagapure Vs. Shankar Haribhau Adhau and others
in Second Appeal No. 123 of 2013 dated 09.04.2014.**

6. On the contrary, the learned counsel for the respondents/defendants strongly opposed the submissions made on behalf of the appellants/plaintiffs. According to him, there was no error committed by the Surveyor while carrying out the measurement which was under the direction of the learned trial Court. He pointed out that the said report was only in respect of factual position on the spot and it was not for deciding the suit for claiming possession of the encroached portion. He specifically pointed out that the suit of the plaintiff is only for the perpetual injunction and eventhough it has come on record by way of map Exh.80 that the plaintiffs had in fact constructed house on 3 R land of the defendants from the Gut No. 298, the defendants do not wish to claim it since they permitted the plaintiffs to construct the said house in their land. As such, he prayed for dismissal of both the appeals at admission stage.

7. Heard rival submissions and also perused entire documents on record.

8. Though the learned counsel for the appellants has submitted in the appeal memo that ground Nos. 1, 3, 4, 6, 11, 12 and 17 of the appellants involve substantial questions of law, but from the record itself it appears that there is only one substantial question of law involved and that is, whether both the learned lower Courts have properly appreciated the evidence of Surveyor and map Exh.80 on record.

9. It is extremely important to note that the suit of the plaintiffs/appellants is only for permanent injunction and they have not come with the case that certain portion from their land Gut No. 300 was encroached upon by the respondents/defendants. Therefore, both the Courts below were not entertaining a dispute based on the encroachment carried out by the defendants. On the contrary, it is only to ascertain whether rival parties are interfering possession of each other on their respective lands. Both the Courts below have discussed the evidence on record and specially the evidence of Surveyor i.e. D.W. No.2 Nilkanth in detail and has come to the conclusion that the appellants/plaintiffs failed to establish the fact that respondents/defendants were trying to disturb their possession over land Gut No. 300. On the contrary, it has been established that major portion of land

Gut No. 300 of the appellants/plaintiffs has gone for utilization of Sangamner-Shibalapur road and only 4 or 5 R land is available for the plaintiffs. The learned counsel for the appellants/plaintiffs, by referring the evidence of said Surveyor D.W. No.2 Nilkanth, submitted that the evidence of this Surveyor suffers from many infirmities, such as he did not issue notices of the measurement to the defendants and the measurement was not carried out as per the rules and that he deposed that major portion of land Gut No. 300 was acquired for the road leaving behind only 4 to 5 R area.

10. It is significant to note that the learned counsel for the appellants/plaintiffs relied on the various judgments of this Court. However, the facts of those cases in that judgments are different from the present facts. Also the nature of controversy involved in those judgments is different from the case in the present suit. In all those judgments, there was prayer of possession of encroached portion of the concerned lands by the plaintiffs therein, and therefore, this Court in those judgments, by referring the settled law that in case of dispute over boundary joint measurement is necessary, either reversed the impugned decree or remanded the matter back to appreciate the evidence of Surveyor afresh. Such is not the

case in the instant matter. Here, there is only suit for permanent injunction without any prayer of alleged encroachment and possession of such encroached portion. The learned trial Court has specifically observed that the Court Commissioner i.e. Surveyor D.W. No.2 was appointed to carry out measurement of land Gut No. 300 and Gut No.298 only for showing the situation appearing on the spot and he was not directed by the Court to take measurement of the land of the lands of the plaintiffs and the defendants and to fix the boundaries as per the provisions of Survey Manual.

11. Thus, the main controversy between the parties in the instant matter was only to see who was in fact obstructing the possession of other. Therefore, the map Exh.80 was to be considered for only to ascertain the factual situation on the spot and from the evidence of Surveyor, it is apparent that nothing has been brought on record in his cross-examination that he had flouted certain rules of measurement. On the contrary, it appears that certain suggestions were given to the said Surveyor by relying on the said map from the side of the plaintiffs.

12. The learned counsel for the appellants/plaintiffs vehemently argued that the Surveyor, without any evidence,

stated that certain part of the suit property i.e. land gut No.300 was acquired. He submitted that recently the Railway Department has issued notice to the plaintiffs for acquisition of land from the suit premises to the extent of 24 R. However, as I said earlier, the purpose of the aforesaid map was only to the extent of ascertaining the factual possession on the spot. This is not the suit for deciding title of the parties or for possession of allegedly encroached area. Therefore, the map at Exh. 80 is to be considered only to the limited extent.

13. On going through the said map, it appears that the defendants/respondents are cultivating their field in the limit of their land Gut No. 298. On the contrary, it shows that the plaintiffs/appellants have, in fact, constructed their house as shown in the map at Exh.80 in the field of the defendants/respondents to the extent of 3 R land. However, it is equally important to note that the learned counsel for the respondents/defendants clearly stated before the Court at the time of argument that the defendants themselves permitted the appellants/plaintiffs to construct the said house in their land as some of the portion of the land of appellants was being utilized for Sangamner-Shibalapur road. As such, the judgments relied by the learned counsel for the appellants/

plaintiffs for setting aside the findings of both the learned Courts below or remand the matter back to the trial Court to re-appreciate the evidence of Surveyor, are not helpful in this matter, since the suit by the appellants/plaintiffs was only for permanent injunction. Therefore, considering all these aspects, it appears that the appellants/plaintiffs could not establish the *prima facie* case as well as balance of convenience which is required for grant of permanent injunction against the other party. Further, it is apparent from the record that the respondents/defendants have not made any encroachment over the land of appellants/plaintiffs, and therefore, no question of any irreparable loss exists. Thus, both the learned courts below appear to have appreciated the evidence on record properly and have given concurrent findings in favour of the respondents/defendants. As such, no substance is found in the present appeals and accordingly both the Second Appeals are dismissed at admission stage along with pending civil applications therein. Interim relief, if any, stands vacated.

(SANDIPKUMAR C. MORE, J.)

Y.S.K.