

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 681 OF 1992

rrpillai

1. Pandurang Dattaba Dhisal,
since deceased through his Legal
Representatives
- 1a. Sou. Shakuntala Jaysing Ghorpaday
Age-60 years, Occupation – Household
Residing at Kagal, Taluka – Kagal
District - Kolhapur
- 1b. Shri Dinkar Pandurang Dhisal
since deceased through his Legal heirs
- 1b1.1. Vinayak Dinkar Dhisal
Age : 36 years, Occupation – Business
R/o. 2769, C-Ward, Juni Budhwar Peth
Kolhapur
- 1b2 Sou Vishranti Shashikala Pawar
Age : 38 years, Occupation – Household
R/o. 2769, C-Ward, Juni Budhwar Peth
Kolhapur
- 1c. Smt. Vijaymala Ravsaheb Patil
Age : 54 years, Occupation – Household
Residing at Sirawad, Taluka – Shirol
District - Kolhapur
- 1d. Sou Mangal Vilasrao Deshmukh
Age : 50 years, Occupation – Household
R/o. Mharaja Sweets, Laxmi Market
Miraj

1e. Dilip Pandurang Dhisal

Age : 48 years, Occupation – Business

Residing at 2769, C-Ward, Juni Budhwar
Peth, Kolhapur

1f. Sou. Chaya Shivajirao Deshmukh

Age : 44 years, Occupation – Household

Residing at Miraj, Near Biroda Temple

... Appellants

Versus

Manuskhalal Dalsubhai Shah

Since deceased through LRs

1. Bipin Mansukhlal Shah

since deceased through LRs

1A. Meena Bipin shah

Age : 59 years, Occ : Household

Residing at 173/174 Sadesatranali

A-608 Sundraben Hadapsar

Pune 411 028

1B. Shruti Siddharth Bhayani

Age : 31 years, Occ : Household

Residing at 1 Mantri Court,

Opposite Sakhar Sankuli

Shivaji Nagar, Pune

1C. Dhawal Bipin Shah

Age : 28 years

Residing at 173/174 Sadesatranali

A-608 Sundraben Hadapsar

Pune 411 028

2. Bharat Mansukhlal Shah

since deceased through LRs

2a. Hina Bharat Shaha alias

Hina Milind Patava

2b. Rushabh Bharat Shaha aliAs

Rushabh Milind Patava

Both R/at 10, Sarvoday Nagar

Opposite Ganjimal Bus Stand

Nashik – 422 001

3. Nayna Mansukhlal Shah

4. Tina Mansukhlal Shah

R/at 424 'E' Ward, Shaupuri, Black 5,

Bhairav Chambers, Near Apsara Talkies

Kolhapur

... Respondents

Mr. Ajay Rajenimbalkar i/b Mr. S. S. Patwardhan for the Appellants.

Mr. S. S. Kulkarni for the Respondents

CORAM: GAURI GODSE, J.

DATE : 21st NOVEMBER 2024

ORAL JUDGMENT :

1. This Second Appeal is preferred by the heirs and legal representatives of the plaintiff to challenge the judgment and decree passed in the counterclaim filed by defendant no. 2 ('defendant'). The First Appellate Court allowed the counterclaim and directed the plaintiff to hand over possession of the suit premises admeasuring 5 feet south-north x 7 feet east-west to the defendant.

2. By order dated 23rd February 1993, the second appeal is admitted on questions of law involved in grounds nos. 7, 9 and 10. However, learned counsel for the appellants has confined his arguments on ground no. 7. Hence, I have heard the learned counsels for the parties on the substantial question of law formulated in ground no.7, which reads as under:

“It was also an error on the part of the learned lower Appellate Court Judge to pass a decree in terms of the counter claim preferred by the Respondent/Defendant and grant the prayer of possession and allow the Regular Civil Appeal No. 314 of 1989 wherein, in fact, the learned trial Court Judge has correctly appreciated the fact that in the counter claim which was sought to be preferred by the Defendant, no specific area has ever been mentioned about the encroached portion alleged to have been encroached upon by the Plaintiff, as contemplated by Order VII Rule 3 of the Code of Civil Procedure and therefore passing of the decree on the basis of the said counter claim in favour of the Defendant was totally illegal and bad in law deserving to be quashed and set aside.”

Facts in brief:

3. Appellants are the heirs and legal representatives of the original plaintiff. Respondent nos. 1 and 2 are the heirs and legal representatives of original defendant no. 2 ('defendant'). The plaintiff and defendant are tenants of defendant no. 1. However, the name of defendant no. 1 was deleted in the trial court. The plaintiff is a tenant of half portion of CTS No. 1832 from the southern side, and the defendant is a tenant of half portion of CTS No. 1832 on the northern side.

4. The plaintiff filed suit for an injunction restraining the defendant from obstructing the plaintiff's possession over the suit property, i.e. the half portion of CTS No. 1832 on the southern side. The defendant filed written statement and denied the suit claim. The defendant contended that during the pendency of the suit, the plaintiff encroached upon the defendant's area by taking undue advantage of the ex-parte order of injunction. The defendant further contended that in land acquisition proceedings, a major part of the plaintiff's area was acquired, and he was left only with a portion of around 2 feet. Hence, the defendant surrendered some part of his

area to the landlord, which was 5 feet, and the said portion was given to the plaintiff. Defendant thus contended that the plaintiff was in occupation of only 5 feet east-west x 7 feet of CTS No. 1832, and the remaining area in his possession was an encroachment on the defendant's portion. Hence, the defendant filed a counterclaim seeking possession of the encroached area. The trial court dismissed the suit as well as the counterclaim.

5. Being aggrieved by the trial court's decree, the plaintiff and defendant filed independent first appeals. Both the First Appeals are decided by a common judgment. The First Appellate Court dismissed the plaintiff's appeal and allowed the appeal filed by the defendant. Thus, the First Appellate Court decreed the counterclaim of the defendant and directed the plaintiff to hand over possession of the tenanted premises to the defendant, excluding the portion admeasuring 5 feet south-north X 7 feet east-west in his possession. Hence, this Second Appeal by the plaintiff to challenge the judgment and decree passed by the First Appellate Court allowing the counterclaim of the defendant.

Submissions on behalf of the Appellants (Original Plaintiff):

6. Learned counsel for the appellants submitted that a perusal of

the counterclaim of the defendant describes the area belonging to the defendant but does not describe the encroached portion. Learned counsel for the appellants relied upon the Bombay Amendment to Rule 3 of Order VII of the Code of Civil Procedure ("CPC"). He submits that the defendant failed to describe the encroached area by submitting a hand sketch map indicating the extent of the encroachment. He thus submits that the decree for possession passed by the First Appellate Court is not an executable decree. He submits that in view of the said provision, it was mandatory on the part of the defendant to describe the encroached portion, which can be identified by way of boundaries.

7. Learned counsel for the appellants submitted that, admittedly, the plaintiff was a tenant of half portion of CTS No. 1832 on the southern side, and the defendant was a tenant of half portion of CTS No. 1832 on the northern side. He thus submits that it is unbelievable that the plaintiff would have encroached upon the defendant's area. He submits that even after the acquisition, the plaintiff continued in possession on the southern side. Thus, there is no question of the plaintiff encroaching upon the defendant's area as, admittedly, the defendant was a tenant on the northern side of CTS No. 1832.

8. Learned counsel for the appellants submits that, admittedly, no hand sketch map is filed along with the plaint to describe the encroached portion. He submits that the First Appellate Court erred in granting a decree for possession only by relying upon the Court Commissioner's map at Exhibit 44. He submits that the encroached portion shown by the Court Commissioner in the map is not supported by any pleading. He submits that in the absence of any specific pleading regarding the exact area of encroachment, the Court Commissioner's map cannot be relied upon to accept the defendant's case that the plaintiff has carried out any encroachment on his area. Learned counsel for the appellants thus submits that the question of law framed by this court be answered in favour of the plaintiff and the impugned judgment and decree be set aside.

9. Learned counsel for the appellants submitted that the Second Appeal is preferred for challenging the impugned decree, allowing the counterclaim as well as dismissing the plaintiff's appeal. He submits that if the defendant is held disentitled to a decree for removal of encroachment, the plaintiff, in turn, is entitled to a decree of injunction. He thus submits that the question of law be answered in favour of the plaintiff, and the plaintiff's appeal also be allowed, and the suit be decreed.

Submissions on behalf of the Respondent (Defendant no.2) :

10. Learned counsel for the defendant supports the impugned decree. He submits that, admittedly, the portion in possession of the plaintiff was acquired by the Municipal Council. He thus submits that the Court Commissioner's map clearly indicates that the plaintiff encroached upon the portion in possession of the defendant. He relied upon demarcation made by the Court Commissioner, as shown in the map at Exhibit 44. He submits that the portion shown as number (2) is an encroached area that belongs to the defendant.

11. Learned counsel for the defendant relied upon the findings recorded by the First Appellate Court by examining the oral evidence of the parties. He submits that the plaintiff's brother's statements recorded in the criminal proceedings were examined by the first appellate court. He submits that the admissions given by the plaintiff's brother, Khanderao, as discussed by the First Appellate Court, support the defendant's case that after the acquisition of the plaintiff's area, hardly any area remained with the plaintiff. He thus submits that the Court Commissioner's map, coupled with the oral evidence of the Court Commissioner and the certified copy of Khanderao's statement, supports the defendant's case that except for the portion of 5 feet x 7 feet rest of the area in

possession of the plaintiff was an encroached area belonging to the defendant. He further submits that the First Appellate Court has thoroughly examined the oral evidence on record coupled with the Court Commissioner's map, which clearly indicates that the plaintiff has encroached upon the defendant's area.

12. Learned counsel for the defendant also relied upon a finding recorded by both courts that there was an ex-parte injunction in favour of the plaintiff, and by taking advantage of the order of injunction, the plaintiff encroached upon the defendant's area. He thus submits that if it is accepted that the plaintiff took forcible possession of the defendant's area by taking undue advantage of the ex-parte order of injunction, the *status quo ante* of the property is required to be restored.

13. Learned counsel for the defendant submits that the findings recorded by the First Appellate Court are by relying upon the Court Commissioner's map at Exhibit 44 supported by the evidence of the Court Commissioner and the supporting evidence of the defendant; hence, no fault can be found in the conclusion recorded by the First Appellate Court accepting defendant's contention regarding encroachment carried out by the plaintiff. He thus submits that the oral evidence and the Court Commissioner's map clearly identify

the area of encroachment. Hence, for want of a hand sketch map or for not providing a description in the counterclaim, the defendant's prayer for removal of encroachment cannot be dismissed by referring to the Bombay Amendment to Rule 3 of Order VII of CPC. He submits that the First Appellate Court has clearly recorded the identification of the encroached area, which accepts a portion of the property in possession of the plaintiff. Thus, the remaining area is rightly accepted as the encroached area. He, therefore, submits that the reasons recorded by the First Appellate Court cannot be faulted by referring to the provisions of the Bombay Amendment Rule 3 of Order VII of the CPC. Learned counsel for the defendant thus submits that the question of law should be answered in favour of the defendant and the impugned decree should be confirmed.

14. Learned counsel for the defendant submitted that the question of law argued on behalf of the appellants is regarding the decree passed in the counterclaim. He further submits that the second appeal is not filed against the dismissal of plaintiff's suit and first appeal. He submits that even if the defendant is held not entitled to a decree for possession by removing encroachment, that will not create any right in favour of the plaintiff to seek a decree for an injunction. He submits that no question of law is framed regarding

plaintiff's claim of injunction.

Analysis and Conclusions:

15. I have perused the record of the Second Appeal. I have considered the submissions made by both the parties. The original tenanted area of the parties is not in dispute. Admittedly, the plaintiff has been a tenant of the southern portion of CTS No. 1832, and the defendant has been a tenant of the northern half portion of CTS No. 1832.

16. A perusal of the defendant's counterclaim in detail describes the plaintiff's tenanted area. The defendant has pleaded that after the acquisition, only an area of 2 feet east-west remained in possession of the plaintiff. Defendant further pleads that out of his own area, 5 feet area was surrendered to the landlord, and it was given to the plaintiff as tenant. Thus, the defendant pleaded that 5 feet x 7 feet is the only area in the plaintiff's possession. It is further pleaded that the remaining area in the plaintiff's possession is an encroached area that belongs to the defendant. The prayer in the counterclaim seeks removal of encroachment and handing over possession by retaining 5 feet x 7 feet area in the plaintiff's possession.

17. The entire counterclaim does not describe the area in possession of the defendant as a tenant. However, the plaintiff's area is described in detail by the defendant. Except for pleading that the defendant is entitled to possession of the remaining area except for the portion of 5 feet x 7 feet in possession of the plaintiff, the counterclaim does not describe the encroached area as required under the Bombay Amendment to Rule 3 of Order VII. The Bombay Amendment to Rule 3 of Order VII of the CPC reads as under :

“3. Where the subject-matter of the suit is 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 plaint shall specify such boundaries or numbers.’

18. The party claiming possession after removal of encroachment is under obligation to provide a clear description showing as approximately as possible the location and extent of encroachment. Such description is required to be filed by way of a hand sketch map along with the plaint. The purpose of pleading and providing a hand sketch map showing the extent of encroachment is to enable the opponent to respond to the allegation of encroachment, which the court can determine after examining the rival pleadings and the

evidence. Thus, in the absence of specific pleadings of encroachment, it would not be possible to determine the prayer for removing encroachment. The oral evidence of the Court Commissioner and the map would not satisfy the requirement of providing a specific description as per the parameters under the Bombay Amendment Rule 3 of Order VII of CPC.

19. To examine the submissions made on behalf of the defendant regarding the description of the encroachment being identified based on the oral evidence and the Court Commissioner's map, I have examined the oral evidence as well as the Court Commissioner's map in detail. A perusal of the pleadings and evidence of the defendant indicates that it is the defendant's case that the plaintiff was a tenant of the southern side of CTS No. 1832, and the defendant was a tenant of the northern side of CTS No. 1832. The evidence and findings regarding acquisition relied upon by the learned counsel for the appellants indicate that 5 feet east-west of CTS No. 1832 was acquired for road widening.

20. The defendant's pleadings regarding handing over 5 feet area from his area indicate that part of the northern side was handed over to the plaintiff. The map at Exhibit 44 indicates that the portion shown as no. 2 in possession of the plaintiff is on the southern side

and not towards the northern side of the defendant's property. At the most, the map indicates the area in possession of the plaintiff and defendant. However, the area described in the map would not substantiate the allegations of encroachment. It is not the defendant's case that any portion from the southern side towards the eastern part was at any time in possession of the defendant. Thus, the area shown in green color and marked as no. 2 does not support the defendant's case that there is encroachment by the plaintiff on his portion. In the absence of any pleadings and findings recorded on the area originally in possession of the defendant, it is not possible to examine the allegation of encroachment on his area. Even otherwise, the Court Commissioner's map relied upon by the defendant indicates that the plaintiff is in possession of the southern side. Thus, in the absence of any pleading and supporting evidence, that any part towards the southern side belonged to the defendant, the Court Commissioner's map would not support the defendant's allegation regarding encroachment. Hence, I do not find any substance in the argument raised on behalf of the defendant that the oral evidence and the Court Commissioner's map are sufficient to identify the extent of encroachment.

21. The reasons recorded by the First Appellate Court for

accepting the allegation of encroachment are only based on the oral evidence and the Court Commissioner's map. The Court Commissioner's map and the oral evidence cannot be substituted for the requirement of a clear description of the encroachment as required under the Bombay Amendment to Rule 3 of Order VII of CPC. Thus, the findings recorded by the First Appellate Court, completely ignoring the purpose of Order VII Rule 3, cannot be accepted as a correct finding of fact for accepting the allegation of encroachment.

22. The absence of any supporting pleading to the oral evidence and the Court Commissioner's map relied upon by the defendant, the allegation of encroachment cannot be accepted. As recorded herein above, the Court Commissioner's map and the pleadings in the counterclaim do not support the allegation of encroachment.

23. The First Appellate Court, being the last finding court, is required to record clear findings based on the pleadings and supporting evidence. In the absence of any clear pleading regarding encroachment, the First Appellate Court erred in accepting the case of encroachment by only relying upon oral evidence and the Court Commissioner's map. Even otherwise, the oral evidence and Court Commissioner's map do not support the argument on behalf of the

defendant that there is any encroachment made on his property by the plaintiff.

24. Though it is argued on behalf of the appellants that the Second Appeal also challenges dismissal of the suit, the learned counsel for the appellants was unable to point out that this is a common appeal to challenge both the decrees in the two separate first appeals.

25. The dismissal of the plaintiff's suit was challenged by a separate first appeal. Though the First Appellate Court decided both the appeals by a common judgment, there are two separate decrees. Learned counsel for the appellants was unable to point out that this second appeal also challenges the decree passed dismissing the plaintiff's First Appeal. Even otherwise, learned counsel for the appellants was not able to point out any question of law framed on the appellants' entitlement to a decree for injunction against the defendant. Hence, I do not find any reason to examine the submissions made on behalf of the appellants on their entitlement to a decree of injunction.

26. Therefore, for the reasons recorded above, I am satisfied that the findings recorded by the First Appellate Court are unsustainable

for want of satisfactory compliance as required under the Bombay Amendment to Rule 3 of Order VII of CPC.

27. Hence, the question of law is answered in favour of the appellants. The Second Appeal is allowed by passing the following order :

- (i) Judgment and decree dated 23rd October 1992 passed by the 4th Additional District Judge, Kolhapur, in Regular Civil Appeal No. 314 of 1989 is quashed and set aside, and the Regular Civil Appeal No. 314 of 1989 is dismissed.
- (ii) Judgment and decree dated 16th August 1989 passed by the Second Joint Civil Judge Junior Division, Kolhapur, in the counterclaim filed in Regular Civil Suit No. 415 of 1981, is confirmed.

[GAURI GODSE, J.]