

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

**SECOND APPEAL NO.108 OF 2024  
WITH  
INTERIM APPLICATION NO.1657 OF 2024  
IN  
SECOND APPEAL NO.108 OF 2024**

Suresh Shankar Zare ...Appellant  
Versus  
Kashinath Shankar Zare (since  
deceased through its LRs.  
1A. Vimal Kashinath Zare and Ors. ...Respondents

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**Mr. Sandesh D. Patil i/b. Ms Divya A. Pawar** *for the Appellant.*

**Mr. Harshad Bhadbhade** *for the Respondent .*

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**CORAM : SANDEEP V. MARNE, J.**

**Dated : 2 April 2024.**

**P.C. :**

1) By this appeal the Appellant challenges judgment and decree dated 27/04/2023 passed by the learned District Judge, Sangli dismissing Regular Civil Appeal No.315 of 2016 and confirming the decree dated 11/08/2016 passed by the Civil Judge, Junior Division, Miraj in Regular Civil Suit No.155 of 2011.

2) The Plaintiff filed the Regular Civil Suit No.155 of 2011 seeking three reliefs. Firstly, he sought declaration of right of

preemption for purchase of property put up for sale by Defendant No.1. Secondly, he sought an injunction against the Defendants from obstructing Plaintiff's use of toilet located in open land admeasuring 18.75 sq.meters. Thirdly, he sought an order of mandatory injunction for demolition of RCC structure in open space in land admeasuring 18.75 sq.meters.

3) Heard Mr. Patil, learned counsel for the Appellant. So far as the rejection of first prayer for preemption is concerned, Mr. Patil would fairly submit that in view of two concurrent findings of fact recorded by the Trial and the First Appellate Court, he does not wish to press the reliefs relating to the first prayer of preemption. Mr. Patil however, seeks to challenge the decisions of the Trial and the First Appellate Court in respect of denial of prayer clauses (b) and (c) in the plaint. He would submit that both the Trial and the First Appellate Courts have recorded a finding of fact that the land admeasuring 29.29 sq.meters only is allotted to the share of the Defendant No.1 in the partition and that the land admeasuring 18.75 sq.meters is an open space. He would further invite my attention to a specific finding recorded by the First Appellate Court in paragraph No.15 of its

judgment that common toilet constructed in the open space was to be used by all members of the family. Mr. Patil would contend that once this finding was recorded, the First Appellate Court ought to have decreed the suit in terms of prayer clause (b) by injuncting Defendant from obstructing Plaintiff's use of the toilet.

4) Perusal of the findings recorded by the Trial Court and the First Appellate Court would indicate that both the Courts have concurrently held that the Plaintiff could not produce any evidence to demonstrate that the open space admeasuring 18.75 sq.meters was to be used jointly by all the family members, particularly by the Plaintiff. Thus, Plaintiff is neither the owner in respect of the open space admeasuring 18.75 sq.meters nor he could prove, by production of partition deed, that the said open space was left for being used jointly by all the members of Zare family. Thus, Plaintiff could not establish before the Trial Court that he had any right to use the said open space. Admittedly, the toilet has been constructed in that open space by the Defendant No.1 after securing permission from the Municipal Corporation. In absence of demonstration of any right to use the open space admeasuring 18.75 sq.meters, it is uncomprehensible as to how

the Plaintiff could enforce any right to use the toilet constructed by Defendant No.1 in the said open space. Much is sought to be made in respect of the finding recorded by the First Appellate Court in Paragraph No.15 of its judgment wherein the First Appellate Court recorded that *“In the Index 2 extract vide Exh.60 there is mention that in the property in the share of Defendant No.1 there is a toilet and it is to be used by all the members of the family.”* It is on the basis of this findings recorded by the First Appellate Court that Mr. Patil has attempted to contend that the First Appellate Court has upheld the right of the Plaintiff to use the toilet in question. In my view the above finding of the First Appellate Court is applicable only in respect of the family of Defendant No.1 and same does not apply either to the Plaintiff or his family members.

5) Considering the above facts and circumstances, in my view no substantial question of law is involved in the appeal. Second Appeal is accordingly rejected.

**SANDEEP V. MARNE, J.**