

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

SECOND APPEAL NO.251 OF 2016

Shri. Balasaheb Shankar Salokhe and Ors.

....Appellants

Versus

Shri. Keshavaji Madhavji Patel And Ors.

....Respondents

Mr. Surel S. Shah a/w. Mr. Ishaan Kapse for the Appellants.

Mr. Avirat A. Sonawane i/b Mr. Umesh Chandra Yadav for Respondent
Nos.1 and 2.

Mr. Chetan Patil for Respondent No.3.

CORAM : SHARMILA U. DESHMUKH, J.

DATED : 6th MARCH, 2024.

P. C. :

1. Being dissatisfied by the judgment dated 7th October 2015 passed by the Appellate Court in Regular Civil Appeal No.117/2013 dismissing the appeal thereby upholding the judgment of the trial Court dated 4th February 2013 passed in Regular Civil Suit No.135/2006, the original plaintiff is before this Court.

2. The facts of the case are that the suit simplicitor for perpetual injunction came to be filed in respect of the area described as 950 sq. meters out of Gat No.921. The case of the plaintiff was that under the provisions of Urban Land (Ceiling and Regulation) Act 1976 initially 17,292.04 square meters was shown as excess land and the plaintiffs were

entitled to retain 6000 sq. meters of the property. Subsequently by order dated 27/8/2004 additional 6000 square meters was declared as retainable land or free hold land and as such the area of excess area of the land was reduced from 17,292.04 sq. meters to 11,292.04 sq. meters. A development agreement was executed by the plaintiffs in favour of defendant No.3 on 24th April 1992 and as per the development agreement the defendant No.3 was assigned the development rights for construction over the excess land i.e. 17,292.04 sq. meters. In the interregnum 950 sq. meters was acquired by the State for D. P. Road. However the said proposal was subsequently cancelled and possession of 950 square meters was handed back to the plaintiffs. The case of the plaintiff was that no development agreement was executed in respect of this portion of 950 sq. meters which was returned to the plaintiff by the State and as such defendant No.3 had no authority to alienate the said suit land. However despite thereof defendant No.3 has executed a sale deed in favour of defendant Nos.1 and 2 on 8th September 2005. The suit was filed seeking protection of the possession of the plaintiff by passing decree of perpetual injunction.

3. Suit came to be resisted by the defendants contending that the development rights were assigned in respect of excess land of

17,292.04 square meters. It was contended that as per the sanctioned scheme 950 square meters was to be surrendered to Government which was surrendered by the defendants. It was contended that as there was no approach road to the surrendered area of 950 square meters, defendants had surrendered another 950 square meters out of excess land situated on northern side of Survey No.921. It was contended that the area of the excess land has been reduced to 11,292.04 sq. meters and as defendant No.3 has surrendered 950 square meters out of excess area, the defendant No.3 had the authority to alienate it as per the development agreement.

4. The parties went to trial and the Trial Court on the basis of evidence held that the development agreement has been executed in respect of the excess land and despite reduction in excess land there is no change in the area under the development agreement. The Trial Court further held that as per the lay out plan which is not disputed by the plaintiffs, it appears that area of 749.50 square meters was shown as D. P. road and apart from D.P. road an area of 960 square meters was to be surrendered to Government. The Trial Court held that the two areas are different. The Trial Court observed that the excess land is shown on southern and northern portion. The Trial Court held that the suit land was acquired out of excess land and entire consideration had been paid by

defendant No.3 for the excess land i.e. 17,292.04 square meters.

5. Considering that the suit property was part and parcel of the excess land for which consideration was paid by defendant No.3 and development rights were assigned to defendant No.3 upon the return of the suit property it was defendant No.3 who was assigned the development right by the authority to alienate the same. The Trial Court held that for seeking a relief of perpetual injunction the plaintiffs must establish the apprehended breach of an obligation in their favour and that the plaintiffs have failed to prove that they have surrendered 950 square meters suit property out of retainable portion and as such there is no breach of obligation on the part of defendant No.3. The Appellate Court after re-appreciation of evidence has upheld the findings of the Trial Court and dismissed the appeal.

6. Heard Mr. Surel S. Shah, learned counsel for the appellants, Mr. Avirat A. Sonawane, learned counsel for Respondent Nos.1 and 2 and Mr. Chetan Patil, learned counsel for Respondent No.3.

7. Mr. Shah, learned counsel appearing for the appellants would submit that substantial question of law arises as there is perversity in the findings of the Appellate Court and the Trial Court as the Courts have

misread the evidence on record and have held that the suit property which was surrendered was not surrendered out of the retainable portion. He would further submit that as it was the plaintiffs being the land owner who had surrendered the suit property, defendant No.3 had no right to alienate the suit property in favour of defendant Nos.1 and 2.

8. Considered the submissions and perused the record.

9. The execution of the development agreement in respect of the area excess land of 17,292.04 square meters has not been disputed and neither the lay out plan produced by the defendants. Upon perusal of the lay out plan, the Trial Court has observed that area of 749.50 square meters have been shown for DP road and apart from the DP road an area of 960 square meters was required to be surrendered to the Government. The lay out plan being admitted by the plaintiffs, the Trial Court has rightly held that area of DP Road and area which was surrendered to the Government are altogether different from each other. As it was the plaintiff's case that the area of 960 sq. meters was surrendered out of retainable area the burden was upon the plaintiff to prove the same. Documentary evidence which has been produced on record was rightly appreciated by the Trial Court and on the basis of evidence the Trial

Court have rightly held that the plaintiffs have failed to prove that the suit property i.e. 960 square meters was out of retainable portion.

10. On the basis of admitted lay out the Trial Court has held that the suit property formed part of the excess land in respect of which consideration was paid by defendant No.3 and development rights were assigned. On re-appreciation of evidence the Appellate Court has come to the same findings.

11. Considering the concurrent findings and in the absence of any perversity being demonstrated the appeal is without merits and stands dismissed.

(SHARMILA U. DESHMUKH, J.)