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

APPEAL FROM ORDER NO. 859 OF 2024

Revati Moreshwar Bhandari & Anr.

...Appellants

Versus

Yogesh Anant Sawant

...Respondent

Ms Shweta Rathod a/w. Ms Geetanjali Datta i/b. Elixir Legal Services for the Appellants.

Mr. Rajiv Narula a/w. Ms Mehek Chowdhary, Mr. Tarang Jagtiani i/b. Jhangiani, Narula & Associates for the Respondent.

CORAM : M. M. SATHAYE, J.

DATED : 2nd DECEMBER 2024

P.C.:

1. Heard learned Counsel for the Appellants/Plaintiffs and learned Counsel for the Respondent/Defendant. The appeal is filed challenging the impugned Order dated 19.09.2024 passed in Notice of Motion No. 1767/2023.

2. The suit is filed seeking declaration that the Defendant has no right of encroaching upon the suit property admeasuring 4.36 Guntha of Village Kandivali, Taluka Borivali, Mumbai Suburban District. In that suit, the said motion was taken out for restraining the Respondent from carrying out construction activity upon the alleged encroached portion on Survey Nos. 91/2/1 admeasuring 4.36 Guntha.

3. Learned Counsel for the Appellants relied upon the application given by them for measurement of Survey Nos. 91/2/1 and 91/2/2. It is

contended that from the letter dated 03/10/2022 of the City Survey Officer, that apparently, these two Survey Numbers are different. She contends that without going into the details of the property numbers or its boundaries, learned Trial Judge has rejected the motion. It is submitted that there are contrary statements about sketch relied upon by the Appellants showing approximately the extent of encroachment of the Respondent.

4. Learned Counsel for the Respondent, on the other hand, contended that there is no sufficient material on record for properly identifying the position of the suit property. It is submitted that the Survey Numbers relied upon by the Appellants are long converted into City Survey Numbers. According to the Respondent, Survey No. 91/2 is long ago converted into C.T.S. Nos 621 & 623, on which the Respondent is constructing under the SRA scheme. It is contended that in the written statement, detailed defense is taken and no interference is necessary in the impugned order.

5. I have considered the submissions and perused the record.

6. Perusal of the impugned order would show that primarily what has weighed with the Trial Court is that Appellants have not pleaded about the City Survey Number of the suit property and that the copy of the slum notification of 05/05/2014 reflects the property bearing City Survey Nos. 621 & 623 on which the construction is going on. Perusal of the Plaint's paragraph no. 4 would show that the case of the Appellants is that the suit property is Survey No. 91/2/1 and according to the Appellants, 4.36 Guntha out of said survey number is being encroached.

7. The impugned order does not indicate an effort for asserting the position of the suit property as claimed by the Appellants or even an effort to

indicate that CTS No. 621 and 623 are the same survey number claimed by the Appellants. In a suit seeking injunction not to encroach upon the suit property, location of the suit property is the cardinal consideration, which is found lacking in the impugned order.

8. In that view of the matter, I find it appropriate to direct the Trial Court to re-consider the Motion by advertng to the documents produced on record by both sides.

9. Hence, the Appeal from order and pending interim application are disposed of by the following order:

(a) Appeal from order is allowed and the impugned order dated 19/09/2024 is set aside. The Notice of Motion No. 1767/2023 is restored to the file.

(b) Learned Trial Court is directed to decide the said motion afresh, on its own merits in accordance with law, without being influenced by the observations in the impugned order as well as the present order.

(c) All the rival contentions of both the sides on merits, are kept open.

(M. M. SATHAYE, J.)