



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

**APPEAL FROM ORDER NO. 08 OF 2024**

Munwarbi Abdul Gaffar and another .. Appellants

**Versus**

Shabbir Hussain Kikabhai Vhora  
and others .. Respondents

Shri G. R. Syed, Advocate for the Appellants.  
Shri Ruchir Wani, Advocate for the Respondent Nos. 1 to 4.  
Shri N. D. Raje, A.G.P. for the Respondent No. 5.  
Shri Narayan Y. Chavan, Advocate h/f Shri D. S. Bagul,  
Advocate for the Respondent No. 6.

**CORAM : SHAILESH P. BRAHME, J.**  
**DATE : 22ND SEPTEMBER, 2025.**

**FINAL ORDER :**

. Heard both sides.

2. Appeal is directed against the order dated 06.02.2024 rejecting Civil Misc. Appeal No. 13 of 2023. Appellants are original plaintiffs, who are prosecuting R.C.S. No. 13 of 2023 for perpetual and mandatory injunction. Respondents are the original defendants.

3. Appellants are owners and in possession of plot No. 268. Respondents are owners and in possession of plot No. 264. It is located on the back side of plot No. 268. It is alleged in the plaint

that the respondents caused encroachment upon space of seven feet, which is part and parcel of plot No. 268 and started constructing. Application Exhibit 05 filed for temporary injunction was rejected by the Trial Court. Against that Civil Misc. Appeal No. 10 of 2023 was taken out. By order dated 15.06.2023 order passed below Exhibit 05 was quashed and matter was relegated to the Trial Court for appointment of Commissioner and the parties were directed to maintain status quo. Respondents continued with the construction despite the directions which gave rise to Misc. Civil Appeal No. 13 of 2023 under Order XXXIX Rule 2A, under Order XXXIX Rule 11 and under Order XXXVIII of the Code of Civil Procedure (for the sake of brevity and convenience hereinafter referred as to the 'C.P.C.'). By impugned order the application was rejected, hence appellants are before this Court.

4. Learned counsel for the appellants submits that there is blatant violation of directions issued by order dated 15.06.2023 passed in Civil Misc. Appeal No. 10 of 2023. By referring to the photographs filed on record, it is contended that the respondents continued with the construction. It is further submitted that unless the commission is executed and boundaries are fixed the respondents should not have proceeded with the construction, which has caused grave prejudice to the appellants. It is further submitted that till the report of the Commissioner comes, it was not permissible for the respondents to carry out the construction. It is vehemently submitted that the findings recorded in the

impugned order that construction has been made in plot No. 264 belonging to the respondents is *ex-facie* illegal and that too when matter is at interlocutory stage. It is submitted that this is fit case to take strict action U/O XXXIX Rule 2A of the C. P. C.

5. Per contra, learned counsel for the respondents would submit that the prohibition imposed by order dated 15.06.2023 was restricted to plot No. 268 and not the activity of construction being carried out in plot No. 264. It is submitted that the admissions of the appellants' witnesses are rightly appreciated in the impugned order. It is further contended that appellants suppressed order dated 20.07.2022 below Exhibit 88 passed by the Trial Court.

6. I have considered rival submissions of the parties. I have gone through the photographs filed on record with the assistance of both the learned counsels. Appellants are prosecuting R.C.S. No. 113 of 2022, which is still pending with the Trial Court.

7. It would be appropriate to reproduce the order passed by the lower Appellate Court in Civil Misc. Appeal No. 10 of 2023 on 15.06.2023 :

#### **ORDER**

01] Misc. Civil Appeal No.10/2023 stands partly allowed as follows :-

- i) The impugned order dated 05/06/2023, on application of

temporary injunction at Exh.5, in RCS No.113/2022, passed by learned Joint Civil Judge, Senior Division, Nandurbar is quashed and set aside and the said application is remanded back to the Trial Court for fresh hearing, after directing and seeking the Court Commissioner's report, as per actual position on the spot and as per rules and after hearing both the parties, on merit.

ii) The plaintiffs/appellants and respondents/defendants are directed to appear before the Trial Court, on or before 26/06/2023 and the plaintiffs/appellants to apply before the Trial Court and deposit necessary charges of the Court Commissioner, without fail.

iii) If the plaintiffs/appellants failed to comply the order of Court Commissioner's charges, passed by Trial Court, within reasonable period and without sufficient cause, then the Trial Court, may pass appropriate order on their application at Exh.5, as per rules.

iv) Meantime, the defendant No.1/respondent No.1 is directed to maintain status quo of construction of today's position, in suit property and the plaintiffs/appellants are directed to produce on record, the said position, before the Trial Court, with the help of photographs, affidavits etc.

03] A decree, in Misc. Civil Appeal No.10/2023, be drawn up accordingly.

04] Send copy of Judgment and decree to the Trial Court, as per rules.

8. Considering the plaint and application Exhibit 05, the suit property is the plot where it is alleged that respondents are carrying out the construction illegally. It is unequivocally clear from para No. 3 of the plaint that open space of seven feet part of plot No. 268 is the area which is alleged to have been used by the

respondents for carrying out construction. It is clear from clause No. 4 of order dated 26.03.2023 that suit property means plot No. 268.

9. From the photographs, it is clear that the construction activity has been underway. The construction appears to have been progressed from 15.06.2023, till passing of the impugned order. The crucial issue which needs consideration is as to whether construction is made in plot No. 268 belonging to appellants or not.

10. The matter is at interlocutory stage. There was no prohibition for the respondents to carry out construction in their plot i. e. plot No. 264. They come up with a case that they have not flouted any order by carrying out construction in their plot. It is not possible to come to any definite conclusion at this interlocutory stage that in fact the construction is made in plot No. 268. A full fledged trial is required to come to such a conclusion.

11. In pursuance of the order dated 15.06.2023 Court Commissioner was appointed vide order dated 25.07.2023 below Exhibit 117. His measurement report or map need to be taken into account for arriving at a conclusion as to whether the construction is made in plot No. 268 or 264. I am of the considered view that the observations made in the impugned order in para No. 17 that the construction was being made in plot

No. 264 are *prima facie* in nature and cannot be treated to be conclusive proof. It would be open for the parties to address the issues during trial.

12. The submission of the learned counsel for the appellants that no further construction should have been made till the report of the Commissioner comes or till the boundaries are fixed cannot be countenanced. I find that there is no prohibition for carrying out any construction if it is permissible in law and if it is done in plot No. 264 belonging to the respondents. It was not the purport of any interim order to prevent activity of construction blanketly.

13. Impugned order refers to the admissions given by the appellants' witnesses. The witness in clear terms admitted that the construction is in plot No. 264 and initially in plot No. 264 some part was vacant. Those admissions are rightly appreciated for the limited extent of deciding the application. The conclusion arrived at on the basis of admissions cannot be faulted.

14. Appellants had made application Exhibit 88 U/O XXXIX Rule 11 read with Order XXXVIII Rule 2 of the C. P. C. before the Trial Court. It was rejected on 20.07.2022. Present application is predominantly U/O XXXIX Rule 2A of the C.P.C. complaining breach of injunction granted by the self same Appellate Court. Present application and application Exhibit 88 operate in different spheres. Therefore, in the strict sense it

cannot be said that it was not permissible for the appellants to undertake the proceedings U/O XXXIX Rule 2A of the C. P. C.

15. For the reasons stated above, I find that there is no illegality or perversity in the impugned order. Appeal from order is dismissed. Needless to state if the construction is found to be an encroachment, it would be subject to further orders passed by the Trial Court.

**[ SHAILESH P. BRAHME J. ]**

*bsb/Sept. 25*