

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIRCUIT BENCH AT KOLHAPUR
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.428 OF 2020
WITH
CIVIL APPLICATION NO.725 OF 2019**

1. Bhimashankar Laxman Kore,
Since Deceased Through his Legal
Heirs.
 - 1a) Tarabai Bhimsashankar Kore
Age : 50 Years, Occu.: Household.
 - 1b) Suhas Bhimashankar Kore,
Age : 33 Years, Occu.: Lawyer,
 - 1c) Rajkumar Bhimashankar Kore,
Age : 31 Years, Occu.: Business,
 - 1d) Sanjana Bhimashankar Kore,
Age 35 Years, Occu.: Service,
1(a) to 1(d) R/at 2B, Nirapam Society,
Vijapur Road, Solapur.Appellants
- Vs.
1. Krushnath Yallappa Pullur,
Age : 40 Years, Occu.: Business,
R/o. House No.22/A,
Nira and Palm Housing Society,
Vijapur Road, Solapur.
2. Nira and Palm Housing Society,
(Notice be served on Chairman
Yallappa Vankyyappa Pullur)
3. Chairman, Yallappa Vankyyappa,
Pullur (Since Deceased) Through
His Legal Heirs.

- 3a) Anusayha Yallappa Pullur,
Age : Adult, Occu.: Housewife,
 - 3b) Krushnath Yallappa Pullur,
Age: Adult, Occu.: Business,
 - 3c) Vylenkatappa Yallappa Pullur,
Age: Adult, Occu.: Business,
 - 3d) Shankar Yallappa Pullur,
Age: Adult, Occu.: Business,
 - 3e) Rajkumar Yallappa Pullur,
Age: Adult, Occu.: Business,
All 3a to 3e are R/o. 22A,
Nira and Palm Housing Society,
Solapur.
 - 3f) Annapurna Parmeshwar Chinchole,
Age: Adult, Occu.: Housewife,
 - 3g) Suvarna Ramesh Baitpalli,
Age: Adult, Occu.: Housewife,
All 3f and 3g R/o. At Allegaon,
Post Kanbas, Taluka-South Solapur.
District: Solapur.
- 4. Solapur Municipal Corporation,
Through Commissioner,
Notice to be served on Commissioner,
Indra Bhavan Railway Line, Solapur.
 - 5. Commissioner,
(Solapur Municipal Corporation),
Through Commissioner,
Notice to be served on Commissioner,
Indra Bhavan Railway Line, Solapur,
City Engineer.
 - 6. Assistant Engineer,
Building Permission Department,
Solapur Municipal Corporation, Solapur.

7. Venkatesh Rangappa Chinchol,
Age: 62 Years, Occu.: Agriculturist,
Chairman, Nira and Palm Housing
Society, R/o. Vatvate,
Taluka: Mangalwedha, District: Solapur.Respondents

Mr. R. M. Haridas with Mr. Amol Deshinge, Mr. Amol Kanaki, Mr. Nakul Shukla & Mr. Somnath Thengal, i/b. Mr. Prasad P. Kulkarni, for the Appellants.

Mr. V. S. Talkute with Mr. Pratik Bhojane & Mr. Mahesh Bhosale, for Respondent No.1.

Mr. Suhas Inamdar, for Respondent Nos.4,5 & 6.

CORAM : S. G. CHAPALGAONKAR, J.

DATED : 7th OCTOBER 2025

PC.:-

1. The Appellants/legal heirs of original plaintiff impugn Judgment and Order dated 30th March 2019 passed by District Judge, Solapur in Regular Civil Appeal No.251 of 2014 upholding the Judgment and Decree dated 24th July 2014 passed by Civil Judge, Junior Division, Solapur in Regular Civil Suit No.227 of 2001.

2. The original plaintiff instituted Regular Civil Suit No.227 of 2001 seeking relief of declaration and perpetual injunction. It is contention of plaintiff that Survey No.601/B is owned by Nira Palm Housing Society. A shop No.1 admeasuring 12 x 13 feet from commercial Building No.C1 of Society has been allotted to defendant

No.1. On south-west side of shop of defendant No.1, there is open space. Defendant Nos.1 and 3 being office bearers of Managing Committee of Society prepared false document and depicted that open space abutting to Shop No.1 is also allotted to defendant No.1. According to plaintiff, open space cannot be allotted to defendant No.1, as same is kept open for use of plaintiff and other members of Society. Plaintiff is allotted Block No.2B. He is also member of Society. If defendants raise any construction on open space, plaintiff would suffer irreparable injury and his rights would be infringed.

3. Defendant No.1 filed his written statement and refuted claim of plaintiff. According to defendant No.1, he is entitled to use open space abutting to his shop, however, he has not raised any construction, but secured open space by fencing. Plaintiff wants to create his easementary right, hence *mala fide* filed present suit.

4. The trial Court framed issues based on pleadings of parties, recorded evidence and finally, dismissed suit holding that plaintiff failed to prove that land abutting to shop No.1 is open space as per Layout Plan or defendant No.1 is causing excavation in open space of society.

5. Aggrieved plaintiff filed appeal before District Judge, Solapur vide Regular Civil Appeal No.251 of 2014, who concurred with findings recorded by Trial Court and dismissed the appeal.

6. Mr. R. M. Haridas, learned Advocate appearing for Appellants submits that plaintiff had filed an application for adducing additional evidence. Appellate Court allowed said application vide order passed below Exhibit 90 and permitted plaintiff to lead additional evidence. Resolution No.6 passed by Society and Layout plan has been taken on record and marked as Exhibit Nos.94 and 95. Even defendant No.1 was permitted to lead additional evidence, i.e., order passed in Appeal No.30 of 2013 along with order passed in RTS Second Appeal No.282 of 2015. Those documents were marked as Exhibit Nos.96 and 97. Application for additional evidence was allowed on same day when judgment is pronounced. As such, plaintiff was not provided opportunity to lead his oral evidence in pursuance to additional documents taken on record. He would further submit that Trial Court had recorded negative finding on issue No.3 holding that defendant Nos.1 to 3 failed to prove that open space was allotted to them as per Resolution dated 24th April 1994 passed in Annual

General Meeting of Society. However, said finding has been reversed by Appellate Court while answering point No.3 without there being any cross-objection on behalf of defendants. He would further submit that both Courts have wrongly shifted burden upon plaintiff to prove that construction of defendant No.1 is within open space. Once Layout demonstrates existence of open space, it was for defendant No.1 to show that his construction is within boundaries of shop allotted to him and does not amount to encroachment upon open space of Society.

7. Learned counsel appearing for Respondents supports the Judgment and Decree as passed by trial Court and Appellate Court and further contends that concurrent finding recorded by Courts below does not require interference in Second Appeal or no substantial question of law arises for consideration of Court.

8. Having considered submissions advanced by learned Advocates appearing for respective parties, it can be observed that plaintiff as well as defendant No.1 had filed an application seeking permission to lead additional evidence. Plaintiff had placed on record Resolution No.6 as well as Layout. Both documents are given Exhibit

Nos.94 and 95. Apparently, plaintiff never sought permission to lead additional oral evidence, but wanted to rely upon two documents, those have been admitted in evidence. Even Appellate Court has considered effect of those documents in Judgment. Appellate Court observed about existence of open space as per Layout Plan. Appellate Court has further referred to sanctioned Layouts placed at Exhibit No.123 and 126 and accepted that open space was kept towards western and southern side of Gala No.1, however concluded that plaintiff could not prove nexus between open space and portion of construction initiated by defendant No.1.

9. The second document produced by plaintiff by way of additional evidence is Resolution No.6 of Society. Pertinently, aforesaid Resolution was subject matter in Dispute No.190 of 2002, wherein prayer was made to declare said Resolution to be null and void. Co-operative Appellate Court in Appeal No.30 of 2013 given verdict accepting Resolution to be valid and legal. In light of specific findings recorded by Co-operative Appellate Court, who is competent to deal with validity of Resolution passed by Co-operative Society, Appellate Court preferred to record finding in consonance with

finding recorded in Judgment and order dated 5th December 2014 passed by Co-operative Appellate Court. Thus, Appellate Court has not reverted finding on issue No.3 recorded by Trial Court, but only took cognizance of subsequent event in form of verdict of Co-operative Appellate Court.

10. In light of aforesaid discussion, there is no substance in contention of Appellants that Appellate Court has not granted opportunity to lead oral evidence in pursuance to additional documents taken on record or Appellate Court has illegally reversed finding on issue No.3 without there being any cross-objection on behalf of defendant No.1.

11. The last contention raised on behalf of Appellants is that Courts below wrongly put the burden on plaintiff to prove that construction raised by defendant No.1 is on open space. Pertinently, a Court Commissioner was appointed at the instance of plaintiff, however, even from the report of Commissioner, it could not be gathered that alleged construction raised by defendant No.1 is encroachment on open space as claimed by plaintiff. If plaintiff had raised claim alleging that defendant No.1 has constructed on open space of

Society, certainly, the burden is on plaintiff to bring sufficient evidence in that regard. Plaintiff cannot simply make averment in plaint and expect defendant No.1 to negatively prove that he has not raised construction on open space. Primary burden ought to have been discharged by plaintiff by leading cogent evidence in this regard, then only onus can be shifted upon defendant No.1. In present case, plaintiff has miserably failed to bring on record evidence suggesting that construction of defendant No.1 constitutes encroachment on open space of Society.

12. In light of aforesaid discussion, concurrent findings of facts recorded by Courts below does not require interference, no perversity is discernible in findings so recorded and no substantial question of law arises for consideration in this appeal.

13. Hence, Second Appeal stands dismissed.

14. Civil Application, if any, also stands disposed of.

(S. G. CHAPALGAONKAR, J.)