



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

APPEAL FROM ORDER NO.4 OF 2026

Yuvraj Mallikarjun Patil,
Age : 75 Years, Occu. : Agriculture,
R/o Teachers Colony, Degloor Road,
Udgir, Tq. Udgir, District Latur. ... Appellant.

Versus

Rajkumar Shripatrao Birajdar,
Age : 55 Years, Occu. : Service,
R/o Life Care Hospital, Udgir,
Tq. Udgir, District Latur. ... Respondent.

...
Advocate for Appellant : Mr. Rodge Krishna Pratap.
Advocate for Respondent : Mr. C. D. Biradar.
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CORAM : SHAILESH P. BRAHME, J.
DATE : 30.01.2026

FINAL ORDER :-

1. Heard both sides finally at the admission stage.
2. Being aggrieved by rejection of application Exh.5 in Regular Civil Appeal No.52 of 2025, appellant has preferred this Appeal from Order. He is original plaintiff in Regular Civil Suit No.166 of 2020 preferred for perpetual and mandatory injunction against the respondent. It was dismissed by the Trial Court.

3. The controversy pertains to the open space in between plot Nos.2 and 11 approximately measuring 1000 Sq.Ft. which is common utility open space. Applicant is the owner and in possession of plot No.2. The respondent is owner and in possession of plot No.11. The open space is located on southern side of the appellant's plot which is tried to be encroached by the respondent from his northern side.

4. Trial Court dismissed the suit vide judgment dated 18.11.2025. During the pendency of the suit, injunction was granted restraining the respondent from carrying out the construction over open space which was confirmed upto High Court in Writ Petition No.10822 of 2022. In Regular Civil Appeal No.52 of 2025, application Exh.5 was filed by the appellant which is rejected by the impugned order.

5. Learned counsel for the appellant submits that temporary injunction was in operation during the course of the suit and confirmed upto High Court. The existence of the open space is evident from the pleadings of the parties, sale deeds and the evidence on record. Learned counsel would harp upon the admission in paragraph No.13 of the written statement which is further corroborated by the material on record. It is further submitted that non filing of rough sketch as

contemplated by Order 7 Rule 3 of the CPC is not impediment because of the description of the four boundaries. It is submitted that there is strong *prima facie* case and Lower Appellate Court committed error of jurisdiction in rejecting the claim.

6. Per contra, learned counsel Mr. Biradar repels the submissions of the appellant on the ground that Trial Court dismissed the suit by sound and elaborate reasons. It is submitted that plaintiff himself is a mischief monger who encroached upon road while constructing his plot and cannot seek equity. My attention is adverted to the cross-examination of the plaintiff to show that his construction is without permission. It is submitted that in the absence of any material indicating any encroachment, there is no reason to interfere in the impugned order.

7. Having considered the rival submissions of the parties, what reveals is the existence of the open space in between the plots of the respective parties. The sale deeds, pleadings of the parties and oral evidence would indicate existence of common utility open space meant for the benefit of every member of the society or the plot holders. Respondents have come up with the theory that by oral understanding, the open space in question

has been allotted to him. There is no iota of evidence on record to disclose the allotment of the open space. The further theory that by some memorandum of understanding executed on 11.05.2016 some arrangement was made so as to enable the respondent to utilize the space. The document has not been placed on record. Neither the Trial Court nor the Lower Appellate Court has taken into account this aspect of the matter.

8. In this backdrop, it is relevant to consider paragraph No.13 of the written statement which is as follows :

“That, this defendant submits that, plaintiff has not come before this Hon'ble court with clean hands. Moreover, the area over which the defendant is making construction is common open space owned by 11 persons and the defendant is constructing over that area. The question of application of M.R.T.P Act and Maharashtra Municipalities Act does not arise as admittedly plot of the plaintiff is outside within limits.”

9. It's a candid admission on part of the respondents that he is constructing common space. The Lower appellate court totally overlooked this aspect of the matter and therefore, interference in the impugned order is necessary.

10. I have carefully gone through paragraph Nos.1, 3 and 6 of the plaint which described four boundaries of plot Nos.2 and

11 and the topography of controversial open space is very clear. Considering the nature of the suit, the appellant should have filed rough sketch as is mandated by the local amendment. But in the peculiar circumstances, I find that there is no doubt about existence of the open space and its location. The claim cannot be rejected solely on the ground of non-compliance of Order 7. This aspect of the matter needs to be dealt with at the time of hearing of regular appeal.

11. Much importance is given to the admission given by P.W.2 to find that there was no encroachment made by the respondent. The admission pressed into service is vulnerable and needs to be tested at the time of hearing of the appeal. Respondent has also placed reliance on the admission of the plaintiff having made construction on his own plot without any permission and causing encroachment. This material also can be dealt with during the course of appeal.

12. Learned counsel for the appellant Mr. Rodge has made candid statement on instructions of his client that his client has received notice from the Municipal Council in respect of encroachment and his client is bound to take steps in accordance with law. The alleged encroachment to the extent of 1 ft. would be removed.

13. I find that impugned order is sustainable because vital aspect of the matter has not been dealt with. The Appellate Court has committed patent illegality and therefore, interference is called for. I, therefore, pass following order :

ORDER

- (i) Appeal from Order is allowed.
- (ii) Impugned order passed below Exh.5 in Regular Civil Appeal No.52 of 2025 is quashed and set aside.
- (iii) Application Exh.5 preferred in Regular Civil Appeal No.52 of 2025 is allowed partly to the extent that the respondent, his servants and anybody claiming through him shall be restrained from causing any construction on the common utility open space located in between plot Nos.2 and 11 till final disposal of the appeal.

(SHAILESH P. BRAHME, J.)

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vmk/-