

(2011) 12 BOM CK 0027

In the Bombay High Court

Case No : Writ Petition No. 9790 of 2011

Shivaji Bhau Kondhare

APPELLANT

Vs

Rohidas Tanaji Kondhare

RESPONDENT

Date of Decision : 15-12-2011

Acts Referred:

Citation : (2012) 5 BomCR 204 : (2012) 2 MhLj 432

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : N.P. Mule, for the Appellant; Jayashri Avhad, for the Respondent

Judgement

R.M. Savant, J.—Rule. With the consent of the parties made returnable forthwith and heard.

2. The above Petition takes exception to the order dated 21102011 passed by the Learned District Judge, Pune, by which Order, the Misc Civil Appeal No. 227 of 2011 filed by the Respondent herein, came to be allowed and resultantly the Order dated 172011 granting temporary injunction to the Petitioner in Regular Civil Suit No. 788 of 2011, came to be set aside.

3. Shorn of unnecessary details, the few facts can be stated thus: The Petitioner is the owner of the suit property being Grampanchayat No. 2089 which is in the gaothan of the village Ambegaon Budruk. The Respondent is in occupation of the property bearing No. 1320 in the same survey No. 13 of the said village. The Petitioner herein filed the suit for permanent injunction in respect of the said property No. 2089 to the effect that the Respondent herein who is the Defendant to the said suit should not encroach upon his property. In the said suit, the Petitioner filed an application for temporary injunction as the Defendant/ Respondent was proceeding with the construction on site. In so far as the said application for temporary injunction is concerned, the parties relied upon the documents of the grampanchayat in support of their respective cases. The said documents are in the form of Village Form No. 8 which is issued by the Village

panchayat. The Plaintiff also relied upon a hand drawn sketch showing the plot of the plaintiff as well as the Defendant.

4. The Trial Court heard the said application Exhibit5 and by its order dated 172011 allowed the said application and injuncted the Defendant from interfering with the possession of the plaintiff as also from carrying out encroachment till the disposal of the suit.

5. Aggrieved by the said Order dated 172011 passed by the Trial Court, the Respondent herein filed an Appeal being Misc Civil Appeal No. 227 of 2011. The said Appeal as mentioned herein above came to be allowed by the impugned order dated 21102011 and consequently the Order passed by the Trial Court on 172011 granting temporary injunction to the Plaintiff came to be set aside. A reading of the Order passed by the First Appellate Court discloses that the First Appellate Court recorded a finding that there is no prima facie evidence to support the Plaintiff's contention that is property No. 2089 is adjacent to the Property No. 1320 of the Defendant on the south side and he is making construction by encroaching upon the property No. 2089. The First Appellate Court has observed that the Plaintiff has not placed on record a map showing actual location of his property No. 2089 situated at the gaathan in the said Ambegaon Budruk. The Order discloses that though the Village Form No. 8 has been referred to by the First Appellate Court, the First Appellate Court nevertheless has reached to a conclusion that the property of the Plaintiff was not adjacent to the property of the Defendant.

6. I have heard the Learned Counsel for the parties at some length and have also gone through the material which was placed before the Courts below. In so far as, the Village Form No. 8 of the Defendant is concerned, it exfacie discloses the name of the occupant as Kondhare Rohidas Tanaji (Padwal Vatsalabai Baban). The Form No. 8 on which reliance is placed by the Plaintiff shows that in so far as the land bearing No. 2089 is concerned, it is in the gaathan and to the north is the property of Koditkar and Padwal. It is an undisputed position that the Respondent/Defendant has purchased the property from Padwal. The Plaintiff has also filed an Affidavit of a Villager which is in the paper book of the Petitioner, who has mentioned that the land of the Plaintiff and the Defendant are adjacent to each other. In the teeth of the documents issued by the grampanchayat, which documents in my view, have not been properly appreciated by the First Appellate Court whilst reaching to a conclusion that the two properties of the Plaintiff and the Defendant are not side by side. On what basis the First Appellate Court has reached such a conclusion is not clear from the impugned Order. In the facts of the case wherein the Trial Court has observed that the boundaries of the plot of the Defendant are ambiguous. It was required for the First Appellate Court to get a report in respect of the position on site by appointing a Court Commissioner. The said report would have crystalised in a way the dispute between the parties and would have made things clear. Such a course of action is required to be followed in view of the fact that the Defendant is putting up RCC construction

and once the said construction is complete, the position would become irreversible. The Trial Court on an appreciation of the material on record had reached a conclusion that the Plaintiff was entitled to the said discretionary relief. For the First Appellate Court to set aside the said Order, a strong case as regards perversity in the findings of the Trial Court ought to have been made out. Just because a different view is possible, on the basis of the same set of facts it was not open for the First Appellate Court to set aside the order of the Trial Court without there being good grounds for the same.

7. Considering the nature of the dispute that is involved, in my view, the interest of justice would be served if the impugned order passed by the First Appellate Court is set aside and the following directions are issued.

(i) Misc Civil Appeal filed by the Defendant, in view of the setting aside of the impugned order, is remanded back to the First Appellate Court for a de novo consideration.

(ii) The First Appellate Court is directed to appoint a Court Commissioner preferably the TILR of the Taluka in question to survey the two properties and submit a report to the Court as regards the position on site.

(iii) On the said report being submitted, the parties would be entitled to a copy of the same and would thereafter be also entitled to file their objections if any in respect of the said report.

(iv) The First Appellate Court would thereafter take up the Appeal for hearing and after giving proper opportunities to the parties including the opportunity to produce additional material on record, dispose of the same by 31/3/2012.

(v) In the meantime, the order passed by the Trial Court dated 17/2/2011 would continue to operate till the disposal of the said Appeal by the First Appellate Court. It is made clear that no further construction should be carried out by the Defendant.

8. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs.