IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 248 OF 2019

The City and Industrial
Development Corporation,
Through its Administrator,
New Aurangabad .. Appellant
(Ori. Defendant No. 2)

VERSUS

1] Anwar Khan S/o Rahim Khan
Age : 61 years, Occu : Business,
Through General Power of Attorney
Holder Shabbir Khan S/o. Rahim Khan

2] Shabbir Khan S/o Rahim Khan,
Age : 56 years, Occu : Business,
Both R/o. Rahim Nagar, Kiradpura,
Aurangabad .. Respondents
(Ori. Plaintiff)

3] State of Maharashtra
through the Collector
Aurangabad

4] The Municipal Corporation,
Aurangabad
Through its Commissioner,
Aurangabad .. Respondents
(Ori. Defendant No. 1 and 3)

AND
SECOND APPEAL NO. 249 OF 2019

The Administrator
The City and Industrial
Development Corporation,
Through its Administrator,
Panjabrao S/o. Shyamrao Chavan
Age : 52 years, Occu. : Service
Off/at : “Udyog Bhavan”,
Jalgaon Road, CIDCO, Aurangabad .. Appellant
(Ori. Defendant No. 2)

VERSUS

1] Anwar Khan S/o Rahim Khan
Age : 61 years, Occu : Business,
Through General Power of Attorney
Holder Shabbir Khan S/o. Rahim Khan

2] Shabbir Khan S/o Rahim Khan,
Age : 56 years, Occu : Business,
Both R/o. Rahim Nagar, Kiradpura,
Aurangabad .. Respondents
(Ori. Plaintiff)

3] State of Maharashtra
through the Collector
Aurangabad

4] The Municipal Corporation,
Aurangabad
Through its Commissioner,
Aurangabad .. Respondents
(Ori. Defendant No. 1 and 3)

AND

CIVIL APPLICATION NO. 8176 OF 2019 IN SA/248/2019
CIVIL APPLICATION NO. 9565 OF 2021 IN SA/248/2019
CIVIL APPLICATION NO. 10433 OF 2021 IN SA/248/2019
CIVIL APPLICATION NO. 11881 OF 2019 IN SA/248/2019
CIVIL APPLICATION NO. 8175 OF 2019 IN SA/249/2019
CIVIL APPLICATION NO. 10434 OF 2021 IN SA/249/2019

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Mr. A.S. Bajaj, Advocate for appellants
Mr. P.S. Paranjape, Advocate and Mr. A.S. Kharosekar,
Advocate for respondents no. 1 and 2
Mr. B.V. Virdhe, AGP for respondent no. 3
Mr. Girish Awale, Advocate for Intervenor

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CORAM : MANGESH S. PATIL, J.

RESERVED ON : 14 JANUARY 2022
PRONOUNCED ON : 31 JANUARY 2022

JUDGMENT :

These are two separate appeals by the original defendant no. 2 (hereinafter “CIDCO”), being aggrieved and dis-satisfied by the dismissal of its Regular Civil Appeal no. 516 of 2012 and allowing Regular Civil Appeal no. 211 of 2013 of the respondents no. 1 and 2 – plaintiffs by the common judgment and order dated 09-10-2018.

2. Respondents no. 1 and 2 claiming to be the exclusive owners of land survey no. 34/1, situated at Jaswantpura, Aurangabad averred about the appellant having encroached over 28 Are portion of their property and claimed declaration of ownership and possession. The trial court decreed the suit partly and directed the appellant to deliver possession of 13 Are portion.

3. Feeling aggrieved, both the sides preferred separate appeals and the appellate court has decided the appeals by common judgment and order under challenge. It dismissed the appeal of the appellant but allowed the appeal of the respondents no. 1 and 2 and modified the decree directing delivery of possession of 28 Are portion. Hence, these two separate appeals.

4. The learned Advocate Mr. Bajaj for the appellant would submit that both the courts below have grossly erred in appreciating the facts, circumstances and evidence. Though the suit property was a part of the entire land survey no. 34 comprising of different parts, without there being clear demarcation of its sub-divisions, no inference could have been logically deduced by the courts below squarely relying upon the measurement carried out by the Deputy Superintendent of Land Records – Bansode (PW 4) who carried out the measurement as per the map Exhibit – 103 on the basis of which he testified about the appellant having encroached over 28 Are portion.

5. Mr. Bajaj would submit that the error committed by Mr. Bansode (PW 4) could have been surfaced, had an opportunity of cross-examining him was extended to the appellant. Irrespective of its lapses at the trial, such a request was made even before the appellate court by moving an application seeking permission to enable it to cross-examine that witness, merely by observing that how the appellant was guilty of lapses and the request was being made belatedly that the request was declined by the appellate court while deciding it along with the appeal itself. This has resulted in a gross miscarriage of justice. The appellant is a statutory body and it could not have any oblique intention to grab the property of anybody. The State Government has acquired the land which has thereafter been allotted to the appellant which is a special planning authority under section 40 of the Maharashtra Regional and Town Planning Act, 1966 (for short "**M.R.T.P. Act**").

6. Mr. Bajaj would then submit that even without there being cross-examination of Mr. Bansode (PW 4), a bare look at the measurement carried out by him would clearly demonstrate that he had not taken pains to find out the permanent boundary marks which were so important, particularly when the total survey no. 34 is a land which does not have regular boundaries and is irregular in shape. In the absence of such permanent boundary marks, the entire exercise of carrying out measurement by him becomes faulty.

7. Mr. Bajaj would also submit that admittedly, even before filing the suit, the respondents no. 1 and 2 had filed writ petition no. 123 of 1991. By the order dated 05-02-1991, the Division Bench of this Court had allowed the writ petition and directed the District Inspector of Land Records, Aurangabad who was the respondent no. 6, to carry out measurement of the entire land survey no. 34 and to distinctly show as to which of the portion was acquired for the purpose of the present appellant and also another portion acquired for the purpose of respondent no. 4 herein, which is Aurangabad Municipal Corporation. It was specifically expected that the measurement to be carried out by giving notice to all the concerned.

8. He would, therefore, submit that inspite of such specific directions, the Survey Office had failed to carry out measurement strictly in accordance with the directions and, therefore, the trial court at the fag end, had passed an order directing re-measurement to be carried out by observing that the measurement that was carried out by Surveyor – Palkar (PW 1) was not strictly in accordance with the directions of this Court. It is thereafter that Mr. Bansode (PW 4) undertook the fresh measurement which is now being relied upon by the courts below.

9. Inspite of such state-of-affairs, no care has been taken to firstly find out the permanent boundary marks then to mark the sub-divisions of survey no. 34 and then to demonstrate distinctly as to how

much area is in possession of the appellant and how much area is acquired by the respondent no. 4 Corporation. It also does not distinctly demonstrate as to how he could arrive at a conclusion that the entire encroached portion of 28 Are is from the suit property which is described by the respondents no. 1 and 2 as survey no. 34/1.

10. He would therefore submit that all these errors and shortcomings could very well be brought on record only if the appellant is extended an opportunity to cross-examine Bansode (PW 4). The appellate court has grossly erred in rejecting the request on sheer technicalities. He would submit that even these errors should have been noted by the courts below. Had they carefully appreciated this, they would have reached a different conclusion. The measurement carried out by Mr. Bansode (PW 4) was without recourse to the original record from his office and simply carried out the measurement on the basis of the earlier measurement carried out by Mr. Palkar (PW 1) which shows that he did not carry out the measurement as was expected of him by this Court.

11. Mr. Bajaj would therefore submit that though the findings of facts of the courts below are concurrent and there are well settled parameters limiting the powers of this Court to cause interference, the present case is one of the exception where this Court should interfere and remand the matter to the trial court with a further direction to undertake a detail scrutiny on the above lines.

12. Mr. Bajaj would submit that the appellant is a special planning authority under the M.R.T.P. Act and consequently, the suit itself was not maintainable and was beyond the limitation in view of the provisions of section 159 of that Act read with schedule I clause 9. Mr. Bajaj would also submit that assuming that appellant is in possession of some more portion than what has been actually acquired under the land acquisition award, the appropriate remedy for the respondents no. 1 and 2 would have been to make a reference under section 18 of the Land Acquisition Act, 1894. Therefore, even for these two reasons, the suit was not maintainable.

13. He would therefore submit that substantial questions of law, as mentioned in the appeal memo arise for determination of this Court and if the matter is not to be remanded right now, the appeals be admitted and the execution and operation of the judgment and decree under challenge be stayed till the decision of the second appeals.

14. Learned Advocate Mr. Paranjape for the respondents no. 1 and 2 would submit that the courts below have arrived at a conclusion in respect of the fact of encroachment though there is a bit variance in respect of the extent of such encroachment. They have rightly relied upon the measurement carried out by Mr. Bansode (PW 4). Inspite of having given sufficient opportunity by the trial court, the appellant had failed to cross-examine the witness, it even failed to make a request to the appellate court promptly immediately filing after the appeal. The

request was made after five years of filing of the appeal. Having considered all these aspects and gross negligence, the appellate court was compelled to reject the request. No error is committed by it. No substantial question of law arises for the determination of this Court in these Second Appeals and these may be dismissed in limine.

15. The Appeals are admitted on the following substantial questions of law:

(I) Whether the courts below have committed gross error in appreciating the evidence that was available before them while reaching a conclusion that there was encroachment inspite of the lapses on the part of the surveyor Mr. Bansode (PW 4) ?

(II) Whether the courts below have committed gross error in appreciating the fact that without there being sufficient permanent boundary marks, and without there being original record Mr. Bansode (PW 4) could have undertaken the measurement ?

(III) Whether the courts below have grossly erred in overlooking the aspect of maintainability of the suit and limitation in view of the provision of section 159 read with schedule 1 clause 9 of the MRTP Act ?

(IV) Whether the appellate court has erred in appreciating the facts, circumstances and denying an opportunity to the appellant to contest the suit by undertaking cross-examination of Bansode (PW 4), inspite of being a statutory body having no individual interest involved ?

16. I have considered the rival submissions and perused the record. There cannot be any dispute about the fact that the appellant is the special planning authority under the M.R.T.P. Act. As can be seen from the copy of the award – Exhibit – 70 which was available before the courts below, in-fact, a total area of 17 Acrs 34 Guntha equivalent to 7 Hectare 24 Are out of different portions from land survey no. 34 was notified for acquisition for the purpose of appellant and out of that a portion admeasuring 3 Acre 19 Guntha equivalent to 1 Hectare 41 Are from survey no. 34/2 was acquired and the respondents no. 1 and 2's predecessor being the owner, the award was passed in his favour and the amount of compensation was apportioned amongst all his heirs.

17. The thing to be noted is that the respondents no. 1 and 2 all the while have been describing the suit property as survey no. 34/1 whereas this award demonstrates that, in-fact, it is survey no. 34/2. Assuming that it is a genuine error, this award further demonstrates that as many as six portions from survey no. 34 were acquired of which the areas under acquisition differ.

18. I am pointing out this precisely to demonstrate that if at all survey no. 34 was totally admeasuring more than 25 Acres and 38 Guntha and out of which 17 Acres and 34 Guntha was acquired from different parts, one cannot comprehend as to how, without actually demarcating such division, a measurement could have been carried out precisely pointing out as to how much is the encroached portion and from which of those various parts.

19. A bare look at the map Exhibit – 103 prepared by Mr. Bansode would demonstrate that the alleged encroachment is said to be in two parts though placed lineally. It is shown to be a triangular shape having a fencing to the East. There is a road to the West and apparently, this portion allotted to the appellant under the award ends upto the fence or nearby. If this is so, one cannot understand as to how could there be a portion left open in between these two pieces of encroachment.

20. Again, as is pointed out by learned Advocate Mr. Bajaj, Mr. Bansode (PW 4) does not seem to have carried out the measurement on the basis of either any permanent record of his office or with reference to permanent boundary marks. As can be noticed from this map – Exhibit 103, he could find only one permanent mark. If such is the state-of-affairs, I am afraid, how any conclusion could have been drawn about the encroachment stated to have been carried out

by the appellant and pointed out by this witness in the map – Exhibit – 103.

21. Assuming for the sake of arguments that the appellant was guilty of lapses during trial as also before the appellate court, it was expected of the courts below to have been on guard, particularly when the appellant is a statutory body and there could have been no case of any mala fides on its part since individual interests were not involved. Since it was a matter of removal of encroachment by a statutory body like appellant, the courts below ought to have been careful in insisting for concrete and reliable proof regarding encroachment.

22. The observations and the conclusion of the courts below would clearly demonstrate that they got swayed away by the fact that there was no cross-examination of Bansode (PW 4) on behalf of the appellant. Even in the absence of such cross-examination, when afore-mentioned facts can be easily noticed, the courts below would have not fallen in error had they carefully considered the material on record as discussed herein-above. More importantly they have not made any endeavour to find out asto if the measurement carried out by Bansode (PW 4) was strictly in accordance to the directions of this Court particularly when the trial court had specifically directed to undertake fresh measurements and thereafter he had undertaken that task.

23. It is pertinent to note that though belatedly, the appellant had made a request before the appellate court seeking permission to cross-examine Bansode (PW 4). Though no fault can be found with the observations of the appellate court that the appellant was guilty of lapses not only during trial but even at the stage of appeal, it should be borne in mind that the appellant was a statutory body and no individual interest were involved. Even if it was guilty of lapses, it could be either of the Advocate representing it or its officers. Since it is a statutory body, in-fact, it is expected to protect the public interest. If really there is some encroachment, indeed, there cannot be any objection for its removal. However, the fact will have to be squarely established.

24. The afore-mentioned circumstances do not indicate that the fact of encroachment has been brought on record by leading cogent and reliable evidence. It is in the teeth of such state-of-affairs, the appellate court could have permitted the appellant to cross-examine the witness Bansode (PW 4) by remanding the matter for decision afresh.

25. Apart from the above state-of-affairs, it is important to note that being a special planning authority the interests of the CIDCO are protected by the special provisions contained in the MRTP Act. Though the pleadings were vague and not precise, a specific ground was raised before the appellate court touching the aspect of maintainability of the suit in the light of section 159 read with schedule

1 clause 9 of the MRTP Act still the appellate court has not at all adverted to and considered the ground which ex facie goes to the root of the jurisdiction of the trial court. This, therefore, would be an additional ground to remand the matter for decision afresh by framing appropriate issue.

26. It is in view of such state-of-affairs, I allow the Appeals, by answering the afore-mentioned questions in the affirmative but only partly, with the hope that the trial court would now proceed with the suit in the light of the observations made herein-above.

27. The Second Appeals are partly allowed.

28. The judgments of both the courts and decree under challenge are quashed and set aside.

29. The matter is remanded back to the trial court. It shall now decide the suit afresh by framing additional issue in the light of the observation herein-above and by extending an opportunity to the appellant to cross-examine the witness Bansode (PW 4). The respondents no. 1 and 2 would be at liberty to lead additional evidence, if they so desire, including by making a further request to carry out the measurement in the light of the observations made herein-above.

30. The parties shall appear before the trial court on 4 March 2022 and there shall be no need for it to issue fresh notice/summons to them.

31. Considering the fact that the suit is grand old, the trial court shall make every endeavour to decide it expeditiously. It is made clear that all the points are kept open.

32. All pending civil applications are disposed of.

[MANGESH S. PATIL]
JUDGE

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