

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 365 OF 2015
WITH
CIVIL APPLICATION NO. 8827 OF 2015

Alishabai Kamaloddin

**....Appellant
(Ori. Defendant)**

Versus

Sk. Salim Sk. Shafi

**....Respondent.
(Ori. Plaintiff)**

Mr. Shaikh Mujta Gulam Mustafa, Advocate for appellant.

Mr. N.R. Shaikh, Advocate for respondent.

CORAM : T.V. NALAWADE, J.

DATED : 27th October, 2015.

ORDER :

1. The appeal is filed against judgment and decree of Regular Civil Suit No. 74/2007, which was pending in the Court of Civil Judge, Junior Division, Yawal, District Jalgaon. The suit was filed by present respondent Shaikh Salim for removal of encroachment and possession of encroached portion and the suit is decided in his favour. Regular Civil Appeal No. 306/2014 (Old No. 145/2011) is dismissed by the first appellate Court and so, defendant has filed the present proceeding. Heard both the side.

2. The suit was filed in respect of portion of 30 R. of

land from Block No. 2149 (having area 3 Hectar 15 R.) situated at village Yawal, Tahsil Yawal, District Jalgaon. On the south of this land, there is land Block No. 2148, which belongs to defendant. The area of this land is 80 R. and it is the case of plaintiff that defendant has encroached over his land bearing Block No. 2149 from the southern side by causing damage to the *bandh*. It is the case of plaintiff that he got measured his land through Tahsil Inspector of Land Records on 13th and 14th of April 2001 and the surveyor confirmed that there was encroachment to the extent of 30 R. portion. It is contended that he approached the defendant and requested the defendant to hand over the possession of encroached portion. It is contended that defendant avoided to hand over the possession under one or other pretext and even after giving notice dated 30.7.2007, defendant has not returned the possession. It is contended that false reply is given to the notice issued by the plaintiff.

3. The defendant filed written statement and contested the suit. She has denied that by causing damage to common *bandh* she has made encroachment over the land of plaintiff. She has denied that the measurement was made by Cadestral Surveyor and the notice of measurement was given to her. It is her case that her land is situated at higher level and difference

of level is 15 to 20 ft. and in between the lands of plaintiff and defendant, there is a streamlet (Nala) and due to that it is not possible that defendant has made encroachment. It is her case that on her *bandh*, there are trees which are 30 to 40 years old and so, the case of plaintiff is false.

4. Both the sides gave evidence. The defendant examined her power of attorney holder. The main evidence is the evidence of Cadestral Surveyor. He has given evidence that after giving notices to adjacent land holders like the owners of lands Block Nos. 2149, 2162 and 2148, he made measurement. He has described the method by which measurement was made by him. The original record was brought by him to the Court showing that notice of the measurement was given to the owners of these three lands by post and he has produced postal receipt in that regard. He has given evidence that plaintiff and other owner Girdhar Rane remained present, but other owner remained absent. He has given evidence that there was the encroachment of 30 R. portion made by the owner of Gat No 2148 and this encroachment was on the land Block No. 2149. The cross examination of this witness shows that nothing could be brought on the record to create probability that the measurement was not correctly made. The map of measurement

prepared by him is duly proved as Exh. 49.

5. The power of attorney holder of defendant has given evidence in rebuttal and he has stated that no notice of measurement was given. However, the evidence does not show that steps were taken to challenge this measurement when there is the record that notice was given by Cadestral Suveyor to the defendant. Defendant could have opted for getting measurement from superior authority as provided in the rules of Maharashtra Land Revenue Code.

6. It appears that at the instance of defendant one advocate was appointed as Court Commissioner to ascertain as to whether there were marks of boundary. He found some boundary marks. This Court has no hesitation to observe that such exercise was unwarranted. In any case, this report of Court Commissioner could not help the defendant in any way.

7. The evidence on the record shows that one streamlet flows through the land of plaintiff and his land is situated at lower level. Due to streamlet, the level of the land of defendant is somewhat higher. The evidence shows that beyond the streamlet also there is portion of Block No. 2149. When there is

such streamlet, due to the water flow, the difference in the level increases. It is clear that the defendant wants to prove that she owns the entire portion which is beyond the streamlet when as per the revenue record and the measurement, beyond the streamlet also there is portion of land Gat No. 2149. It appears that plaintiff was not cultivating the land, it was barren and this circumstance is being misused. Though the plaintiff has admitted that this position was there even when he purchased the land few years back, this admission cannot help defendant in any way. The cause of action took place when the measurement was made by the Cadestral Surveyor.

8. The finding given by the trial Court and the first appellate Court is finding on the fact and there is concurrent finding. In view of nature of evidence and the nature of defence taken by the defendant, this Court holds that it is not possible to interfere in the finding given by the Courts below.

9. The learned counsel for appellant placed reliance on the case reported as **2015 (3) ALL MR 412 (S.C.) [Smt. Leela Krishnarao Pansare & Ors. Vs. Babasaheb Bhanudas Ithape & Ors.]**. He submitted that the first appellate Court did not consider the relevant points and the reasoning is not

exhaustive and on that point, the substantial question of law can be formulated and the matter can be remanded back to the first appellate Court. This Court has carefully gone through the judgment delivered by the first appellate Court. There is no force at all in the submissions made by the learned counsel for appellant. The first appellate Court has considered aforesaid relevant material and clear finding is given on the dispute and with regard to the encroachment. The title of the plaintiff over the land Gat No. 2149 is not disputed by the defendant. The learned counsel for appellant cited one case reported as **(2013) 15 Supreme Court Cases 161 [Sebastiao Luis Fernandes (Dead) Through L.Rs. and Ors. Vs. K.V.P. Shastri (Dead) Through L.Rs. and Ors.]**. In this case, the Apex Court has laid down that even when there is concurrent findings of the Courts below, when the finding is based on wrong assumption of facts in appreciation of pleadings and evidence on record and wrong placement of burden of proof on defendant, instead of on the plaintiff, the substantial question of law can be formulated on this circumstance under section 100 of Civil Procedure Code. There cannot be dispute over this proposition. This Court has considered the relevant material and this material is considered by both the Courts below. It is not possible in the present matter to formulate substantial question of law on any point in view of

the discussion already made.

10. In the result, the appeal stands dismissed. Civil Application stands disposed of. The decision on the amount which is deposited by the appellant is to be taken by the executing Court when there will be question of determination of mesne profit.

[T.V. NALAWADE, J.]

ssc/