

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

Second Appeal No. 522 of 2012

Abhaykumar s/o Maniksa Kanhed. .. **Appellant.**

Versus

Vithal s/o Seetaram Waghade
And Others. .. **Respondents.**

Shri. K.M. Babhulgaonkar, Advocate, for appellant.
Shri. S.V. Suryawanshi, Advocate, for respondent Nos.1 to
3.

CORAM: T.V. NALAWADE, J.

DATE : 27th AUGUST 2015

ORDER:

1) The appeal is filed to challenge the judgment and order of Regular Civil Appeal No.86 of 2007 which was pending in the Court of the District Judge No.1, Hingoli and also against the judgment and decree of Regular Civil Suit No.159/1999 which was pending in the Court of the Civil Judge, Junior Division, Hingoli. The suit filed by appellant for relief of removal of encroachment and possession of 1R portion of the land is dismissed. Both sides are heard.

2) It is the case of the plaintiff/appellant that, he is owner of the land Gat No.338 admeasuring 4 acres 35 gunthas situated at village Pusegaon, Tahsil Sengaon, District Hingoli. It is contended that in the revenue record, 7/12 extracts, the area of this land is not correctly shown. It is contended that the land of the defendants is situated on eastern side of his land and there is common bandh between the two lands. It is contended that there are two mango trees which are standing near to the common bandh towards the side of the defendants. It is contended that the mango trees belong to the plaintiff and defendants have made encroachment over that portion. It is contended that the defendant No.1 has removed the boundary marks for making encroachment. It is contended that cause of action took place on 31-5-1999. In the suit plaintiff had prayed for removal of the encroachment of 1R portion on the eastern side and for possession of that portion.

3) Defendant Nos. 1 and 2 filed written statement and they contested the matter. They contended that as per the revenue record, area of land Gat No.338 is 1 hectare

19R and the same area was shown in the previous number which was Survey No.46/A. It is the case of the defendants that the area of Survey No.46 was 14 acres 34 gunthas and from this survey number four Gats were formed during implementation of consolidation scheme and they are Gat Nos.337, 338, 339 and 340. It is contended that in the past, the area was 14 acres and 34 gunthas but now the total area of gat numbers is shown as 6 hectares 99 R which is a mistake and the plaintiff is trying to use this mistake for getting possession of the land of the defendants. It is contended that the land of plaintiff viz. old Survey No.46/A was having area of 1 hectare 19 R and Gat number allotted to the plaintiff viz Gat No.338 cannot have more area.

4) It is the case of the defendants that their land was part of survey No.45 and so there was no question of including the area of Survey No.46 in Survey No.45 at the time of implementation of the consolidation scheme. They denied that they have made encroachment. They denied that the two mango trees belong to the plaintiff and they have made encroachment. They have contended that the

plaintiff has filed suit against other persons also and in that suit the plaintiff has contended that area of 2 acres is encroached by the defendants of that case.

5) The issues were framed on the basis of aforesaid pleadings and both the sides gave evidence. The trial Court has held that plaintiff has failed to prove that the defendants have made encroachment over the land of the plaintiff and the mango trees belong to the plaintiff.

6) The submissions made and the record show that before filing suit, plaintiff had not taken measurement of his land and only through Court Commissioner such measurement came to be made. It can be said that in the trial Court there was mistake committed and direction was given to take measurement of only Gat No.338. Evidence of the Cadestral Surveyor, who made the measurement as per the order made by the trial Court, shows that no boundary marks were in existence between the land of the plaintiff and the land of the defendants. Thus, there was nothing with him to fix the points for taking measurement. His evidence shows

that if there is some mistake committed by taking measurement by using plain table method, there can be mistake in drawing the line and so there can be mistake in ascertaining as to whether there was encroachment. The evidence further shows that in view of the order, measurement of only portion of old Survey No.46 was made when as per procedure measurement of the concerned survey numbers like Survey Nos.45 and 46 also need to be made.

7) There is revenue record to show that area of Gat No.338 is 1 hectare 19 gunthas. The 7/12 extract in respect of Survey No.46/A also shows its area as 1 hectare 19R (barren portion of 8 R and so total 1 hectare 27 R).

8) The plaintiff wants to prove that he is owner of the area of 4 acres 35 gunthas though in the revenue record the area is shown as 1 hectare 27 gunthas. There is old revenue record of the suit land which is also not consistent with the case of the plaintiff. Further he has filed suit for removal of encroachment against others also and they are from the same old survey number. In such a

case it was necessary to take measurement of both old survey numbers to find out as to whether the owner of Survey No.45 has made encroachment over Survey No.46. That is not done in the present case. Further the Cadestral Surveyor was expected to take into consideration the record of formation of gat numbers to ascertain as to whether the adjacent owners had made encroachment. That is also not done in the present case and it appears that the Cadestral survey considered the record of the previous measurement made by the plaintiff which is used in other suit.

9) The submissions made show that plaintiff now wants to move the appropriate authority constituted under the provision of the Prevention of Fragmentation and Consolidation of Holdings Act for correcting the area. At present it can be said that the plaintiff is shown as owner of area of only 1 hectare 27 R as mentioned above and so he cannot claim more area. For removal of encroachment in respect of any portion of this area also the procedure needs to be followed which is discussed above. Such procedure was not followed. The aforesaid findings are

questions of facts and no substantial question of law as such is involved. In the result, the appeal stands dismissed.

Sd/-
(T.V. NALAWADE, J.)

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