

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

SECOND APPEAL NO.271 OF 2015
WITH
CIVIL APPLICATION NO.7065 OF 2015

1. Arjun Vitthal Kesbhat
Age 50 years, Occu.Aгри.,
2. Ankush Vitthal Kesbhat
Age 42 years, Occu. Agri.,
3. Sau. Nandabai Ankush Kesbhat,
Age 40 years, Occu. Agri.,
4. Bhimrao Vitthal Kesbhat – died
Age 70 years, Occu.Aгри.,
5. Balu Bhimrao Kesbhat,
Age 40 years, Occu. Agri.,
6. Uttam Bhimrao Kesbhat,
Age 43 years, Occu. Agri.,
7. Sau. Kantabai Bhimrao Kesbhat,
Age 55 years, Occu. Agri.

All R/o Gaikwad – Jalgaon,
Taluka Shevgaon,
District Ahmednagar

.. Appellants
(Orig.Defendants)

Versus

Sau.Dropadabai Namdeo Supekar
(deceased) through her legal heirs

- 1A. Namdeo Rambhau Supekar,
Age 75 years, Occu. Agri.,
- 1B. Dwarka Namdev Supekar,
Age 59 years, Occu. Household
- 1C. Nagesh Namdev Supekar,
Age 35 years, Occu. Agri.,
- 1D. Ashok Namdev Supekar,
Age 28 years, Occu. Education
- 1E. Sau. Swati Sharad Shinde,
Age 32 years, Occu. Household

1F. Kum.Sushma Namdev Supekar,
Age 28 years, Occu. Education

Respondents No.1A to 1D & 1F
R/o Gaikwad-Jalgaon,
Taluka Shevgaon,
District Ahmednagar and
Respondent No.1E R/o Dahiphal,
Taluka Shevgaon,
District Ahmednagar

..Respondents
(L.Rs. Of orig. plaintiff)

Mr L.B. Palod, Advocate for appellants

CORAM : N.W. SAMBRE, J.

DATE : 6th July 2015

PER COURT

1. Heard Mr Palod, learned Counsel for the appellant – original defendant.

2. The respondent – original plaintiff filed suit bearing Regular Civil Suit No.150 of 1999 for possession which came to be decreed by learned trial Court vide judgment and decree dated 1st March 2006.

3. An appeal by the present appellants to the Court of learned District Judge-1, Ahmednagar vide Regular Civil Appeal No.136 of 2007 had suffered a fate of dismissal by judgment and order dated 22nd April 2015. As such, the present second appeal.

4. Mr Palod, learned Counsel for the appellants, while questioning the legality and validity of the findings recorded by both the Courts below would urge that the substantial question of law that is required to be appreciated as to whether the Court below so also the appellate

Court were right in appreciating the evidence of the witness viz. Kalyan Shingade – Surveyor, who was examined at Exh.86. According to him, since the said witness who was a Cadastral Surveyor has given an admission that while carrying out the measurement of the disputed portion, he had not issued notices to all the defendant. In support of his contention, learned Counsel for the appellants has taken me through the cross-examination of the said witness so as to demonstrate that the said witness, in categorical terms has given admission that he has issued notices only to four of the defendants.

5. So as to analyse the said submission, with the assistance I have gone through the map prepared by the Cadastral Surveyor at Exh.43, which was prepared pursuant to the measurement dated 28th November 2000. It is required to be noted that while bringing the claim in action by the plaintiff, the plaintiff has specifically relied upon the oral and documentary evidence. The plaintiff has examined her power of attorney holder PW-1 Namdeo Supekar at Exh.36 and relied upon the witness Kalyan Shingade PW-2, who was examined at Exh.86, Vijay Bharaskar PW-3 who was examined at Exh.87.

6. In rebuttal, the present appellants – defendants have examined DW-1 Ankush at Exh.91, DW-2 Arjun at Exh.93 and they have closed their evidence.

7. The documentary evidence consisting 7/12 extracts Exhs.37 to 40, the mutation entry Exh.42, the Court Commissioner's report

Exh.43, the mutation entry Exh.84 and the sale deed Exh.88 was taken into account.

8. So far as the measurement is concerned, learned trial Court, while dealing with the evidence of said witness PW-2 Kalyan Shengade has appreciated the entire set of evidence. According to learned trial Court, the evidence as was brought on record was sufficient enough to give finding as regards the encroachment carried out by defendants No.4 to 7 on the area to the extent of 31-R.

9. It is required to be noted that the evidence of PW-2 Kalyan Shengade, the Cadastral Surveyor reflects that he has given notices to four of the defendants.

10. In view thereof and having regard to the evidence, as is brought on record when a query was made to the learned Counsel for the appellants, as to which of the defendants were served with the notice and which were not, there was no explanation to the said query. As such, the ground raised is too vague.

11. Apart from above, the learned lower appellate Court, while dealing with the evidence of Cadastral Surveyor has taken note of the fact as regards preparation of map regarding encroachment and proving of the same. Rather, it was the duty of the present appellants, during cross-examination of the said witness to bring on record as to which of the defendants were not served with

notices, as the burden on the plaintiff as regards service of notice was duly discharged.

12. In view of above, the findings recorded by both the Courts below are just and proper.

13. As such, no case for interference is made out. The Second Appeal, which is devoid of merit, stands dismissed.

14. In view of dismissal of appeal, Civil Application does not survive and same stands disposed of.

(N.W. SAMBRE, J.)

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