

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

**SECOND APPEAL NO. 430 OF 2014
WITH
CIVIL APPLICATION NO. 13952 OF 2013**

Santram S/o Vilasrao Sanap,
Age: 53 years, Occ.: Agriculture,
R/o : Sakat, Tq. : Jamkhed,
Dist. : A'nagar.

...Appellant

versus

1. Bhagwan S/o Sahebrao Sanap,
Age: 53 years, Occu. : Agriculture.
2. Baburao S/o Sahebrao Sanap,
Age: 59 years, Occ.: Agriculture.
3. Sushila W/o Baburao Sanap,
Age: 48 years, Occ.: Agriculture.
4. Vikram S/o Appasaheb Sanap
Age: 73 years, Occ.: Agriculture.

All R/o : Sakat, Tq. : Jamkhed,
Dist. : A'nagar.

5. Arun S/o Bapu Warat,
Age: 48 years, Occ.: Agriculture,
R/o : Sakat, Tq. : Jamkhed,
Dist. : A'nagar.

...Respondents

.....

Mr. A. D. Aghav, Advocate for Appellant.
Mr. K. R. Doke, Advocate for Respondent No. 2 to 4.

.....

CORAM : N.W. SAMBRE, J.

DATED : 28TH JANUARY, 2015

ORDER :

. Present second appeal is by original plaintiff No. 1,

who filed suit for removal of encroachment, possession and injunction. In the plaint in para No. 1, it is mentioned by present appellants-plaintiff that, he is owner of land Gut No. 208 area 4 H. 16 R of which defendants have encroached upon the land to the extent of 40 R, as such, he prayed for removal of encroachment.

2. After service of suit summons, defendants appeared before the trial Court and have filed reply and denied the entire claim. It is claimed by the defendants that, they are in possession of the disputed property by way of adverse possession. It is further claimed by the defendants that, they are entitled for compensation of Rs. 20,000/- from the plaintiff.

3. Having regard to the pleadings raised, the learned trial Court framed following issues with finding thereon.

1.	Whether, the suit property is properly defined?	Yes.
2.	Whether, the plaintiff has proved the ownership over the suit property?	Yes.
3.	Whether, encroachment by the defendants is proved by the plaintiff?	Yes.
4.	Whether, the defendants have proved that they are in possession of the suit property by adverse possession?	No.
5.	Whether, possession of encroached portion can be handed over to the plaintiff?	Yes.
6.	What order and decree?	Suit is decreed.

4. Learned trial Court, by its judgment and decree dated 13/04/2007, partly decreed the suit, ordering the defendants to remove the encroachment to the extent of 23 Guntha land of Gothapad (cattle-shed) as shown in Exhibit-51, measurement map from eastern side of the property. It is also ordered that, the defendants are restrained from creating interference with the possession of the plaintiff's land Gut No. 208.

5. The defendants, feeling aggrieved thereby, preferred Regular Civil Appeal No. 129 of 2007 in the Court of Principal District Judge, Ahmednagar. Learned Principal District Judge, vide its judgment and decree dated 16/03/2012 has reversed the decree passed by the learned trial Court. As such, present second appeal.

6. Learned Counsel for the appellant-plaintiff, while questioning the legality and validity of the judgment delivered by Principal District Judge, Ahmednagar, has taken me through the observations made by the learned trial Court and lower appellate Court in relation to the findings recorded. He submits that, learned lower appellate Court has given incorrect findings

as regards the identification of the suit property. According to him, the complete reading of plaint takes the Court to only conclusion that, there was an encroachment from the eastern side in Gut No. 208 and according to him, learned trial Court has rightly decreed the suit, which decree needs to be restored. In support of his contention, he has invited my attention to the measurement map Exhibit-51 so as to demonstrate the encroachment made by the defendants.

7. While countering the above referred submissions, learned Counsel for the respondents-defendants submits that, before filing the suit, the plaintiff has not carried out any measurement of the land owned by plaintiff-appellant and defendants, but has filed the suit based on his presumptions and assumptions. He further urged that, during course of proceedings in the suit, Taluka Inspector of Land Record was appointed as Court Commissioner to measure the land, who has submitted his report at Exhibit-51 and plaint map. He further submits that, T.I.L.R. Mr. Krishna Chaware-P.W-2 was examined at Exhibit-45 and said witness in clear terms has stated that, he can not identify the encroachment made by each of the defendants. According to him, learned lower appellate Court has rightly reversed the decree passed by learned trial Court. He submits that, there is no substantial

question of law involved in the second appeal, as such same is liable to be rejected.

8. In the light of submissions made by learned Counsel for the appellant, he has taken me through the entire observations made by learned trial Court in its judgment dated 13/04/2007. It is required to be noted that the plaintiff has examined himself at Exhibit-41, at Exhibit-45 is the evidence of P. W.2-Krishna Chaware, T. I. L. R., at Exhibit-4 is the extract of Gut No. 208, at Exhibit-6 is Mutation Entry No. 30, at Exhibit-37 is Commissioner's measurement report and letter, at Exhibit-49 the statement of plaintiff and defendants recorded at time of measurement, at Exhibit-47 the notices of measurement sent to plaintiff and defendants and statement recorded at the time of measurement on 30/11/2005 at Exhibit-52 and at Exhibit-51 is the measurement map.

9. Defendants have examined defendant No. 2 as their witness (D.W.1) at Exhibit-54.

10. Learned trial Court, while considering issue No. 1 as regards description of the property, has observed that, the suit property is out of Gut No. 208. It is further observed by

learned trial Court that, upon perusal of boundaries described in the plaint, suit property can not be identified as same is vague as entire Gut No. 208 consists of 4 Hectar 16 Are, whereas encroachment is only to the extent of 40 Are. However, learned trial Court has observed that, upon entire reading of plaint, it could be gathered that the encroachment is made on eastern side of the suit property which is vastipad (residential area). Learned trial Court, while considering the provisions of Order 10 Rule 3 of Code of Civil Procedure, has observed that, it is for the Court to infer as regards the nature of claim/details of property in case, if it is noticed that same is vague, as according to him, there is no express bar/embargo on the powers to be exercised by the Court. Learned trial Court, as such, has noticed that defendants have encroached on the eastern side of Gat No. 208, which inference is drawn by him, based on the pleadings in the suit and measurement map. Learned trial Court has also recorded that, though, the issue of adverse possession is not proved by the defendants as burden is on them, however, has observed that, there was partition in between defendant No. 1 to 3 and plaintiff No. 1 in 1990, as is reflected In Exhibit-6 and further noticed that, the eastern side of land Gat No. 208 has given to the share of plaintiff, which is 2 Hectar 20 Are land and 11 Are potkharaba

land. According to trial Court, total holdings of plaintiff should have been 2 Hectar 34 Are out of which 1 Hectar 20 Are land was sold by plaintiff. Learned trial Court inferred that, defendants are in possession of 1 Hectar 86 Are land based on the measurement report. It is inferred that, since the defendants are in possession of more land than, which they were entitled to, they have encroached on the land of the appellant.

11. Learned lower appellate Court, while dealing with the said issue of encroachment has framed following points with findings thereon:

1.	Whether the plaintiffs prove their ownership and that the defendants encroached upon the suit land?	No.
2.	Whether the defendants prove that they become owner of the suit land by virtue of their adverse possession over it?	No.
3.	Whether the judgment and decree passed by the learned trial Court is legal and proper?	No.
4.	What order?	Appeal is allowed, as per final order

12. Lower appellate Court has noticed that, the description of the suit property is made in para No. 1 of the plaint, same comprises of clauses A and B. The boundaries of

disputed part of property 40 Are land and that of total land 4 Hecter 16 Are in Gat No. 208 are described identically. In my opinion, learned appellate Court was right in inferring that, if the encroachment upon 40 Are land is part of Gat No. 208, then plaintiff must have done enough homework before filing the suit i.e. by carrying out measurement of his own land and land of defendants and then filed the suit. It appears that, the plaintiff has filed suit on presumptions and assumptions without ascertaining the nature of encroachment, details thereof and places of encroachment and its exact dimensions. The plaintiff has rather used Court proceedings in the suit for the purpose of making enquiry, so as to ascertain nature of encroachment, which, in my opinion, is not permissible and is rightly inferred by lower appellate Court. I am also fortified in my view, if same is tested having regard to the deposition of P.W.2-T.I.L.R., who is examined at Exhibit-45. The said witness of the plaintiff in clear terms has admitted that, original map of Gat No. 208 was not with them, when the measurement was carried out and is unable to tell as to who has made encroachment and on which place. The cross-examination of the said witness, based on measurement report, measurement map, his evidence as to which of the defendant, at which place, has made encroachment. If read in entirety, same takes this Court to the

only conclusion that the alleged encroachment is not proved.

13. In that view of the matter, learned lower appellate Court has rightly taken into account the entire holdings of the defendant, documentary evidence and evidence of the respective witnesses so as to infer that the appeal is liable to be allowed.

14. The point/substantial question of law, which is sought to be raised in the present second appeal, in my opinion, lacs merit and does not call for consideration in the form of substantial question of law. As such, present second appeal fails, same stands dismissed.

15. In view of dismissal of the second appeal, civil application does not survive, same stands disposed of.

[N.W. SAMBRE, J.]