

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

SECOND APPEAL NO.272 OF 2015

Prakash s/o Vishwanath Gaikwad,
Age 52 years, Occu. Agri.,
R/o Beed, (N.K. Colony,
Khandeshwari road, Beed)
Taluka and District Beed

..Appellant
(Orig.Plaintiff)

Versus

1. Sojarabai w/o Laxman Salve,
Age 42 years, Occu. Labour
2. Bhagwat s/o Laxman Salve,
Age 40 years, Occu. Labour
3. Sukhdeo s/o Wamanrao Ingale,
Age 39 years, Occu. Labour
4. Manakbai w/o Dagdu Kamble,
Age 50 years, Occu. Labour
5. Radhakishan s/o Dagadu Kamble,
Age 49 years, Occu. Labour
6. Resham w/o Waman Kamble,
Age 48 years, Occu. Labour
7. Malan w/o Gafur Shaikh,
Age 47 years, Occu. Labour
8. Sakharam s/o Maroti Kharsade,
Age 46 years, Occu. Labour
9. Narayan s/o Haribhau Deokate,
Age 45 years, Occu. Labour,
All r/o Anandwadi,
Taluka and District Beed

..Respondents
(Original defendants)

Mr Hajare, Advocate h/f Mr A.B. Kale, Advocate for appellant
Mr S.B. Ghute, Advocate for respondents 3 to 8

CORAM : N.W. SAMBRE, J.

DATE : 6th July 2015

PER COURT

1. Heard learned Counsel for the parties.
2. Present appeal is against the concurrent findings, preferred by the original plaintiff who filed the suit for possession of the encroached portion. The appellant – plaintiff claims that he is owner of Survey No.70-A, area 39 gunthas. He claimed that there was encroachment made by the defendants to the extent of 2 gunthas, as such filed suit for removal of encroachment.
3. It is claimed by the learned Counsel for the appellant that the suit was based on the measurement carried out by one Babasaheb Garkal, PW-1 at Exh.27, who has prepared the plaint map.
4. The suit was resisted by the defendants by filing written statement at Exh.18 and denied the claim.
5. After the issues were framed to the extent of whether encroachment was noticed, the said issue was answered against the present appellant – plaintiff.
6. While answering the said issue, learned trial Court has appreciated the evidence of Babasaheb Garkal, who has measured the land in question and was examined as PW-1. According to him, the measurement was carried out on 19th March 2005 and for the said purpose, notices were sent to the parties.

7. When the said witness was cross-examined, he was unable to depose as regards the extent of encroachment, the details of Gut No.70 as regards the passing of the road and also about the other Pot Hissa held by the appellant.

8. The trial Court noticed that the evidence of the said witness was not sufficient to establish the case of the present appellant i.e. of encroachment and removal of possession and as such, the trial Court dismissed the suit by judgment and order dated 25th November 2008.

9. The appeal at the behest of present appellant vide Regular Civil Appeal No.262 of 2008 before the Principal District Judge, Beed suffered the fate of dismissal on 12th September 2011, as such the present second appeal.

10. Learned Counsel for the appellant though has urged that the evidence of PW-1 Cadastral Surveyor should have been appreciated and with an intention to draw support, has taken me through the appreciation of evidence of the said witness. He would further urge that the Court, if was not satisfied with the evidence of the said Cadastral Surveyor, the Court should have ordered fresh measurement and sought support from the judgment of this Court in the matter of **Ramzan Sheikh Chand Sheikh & Ors., Vs. Panjab Nathuji Gawande**, reported in **2014 (4) Bom. C.R. 857**.

11. If the above referred submissions made by learned Counsel for the appellant are appreciated, it is required to be noted that pursuant to the issues framed, the learned trial Court appreciated the evidence of PW-1 Babasaheb Garkal who was examined at Exh.27. The said witness who was put to cross-examination, was questioned about the procedure to be followed at the time of measurement, as brought on record that he has not taken recourse to the established procedure, i.e. issuance of notice, any complaint as regards encroachment etc. The most important factor that was brought on record was that the present appellant had at no point of time made any complaint about the alleged encroachment.

12. Apart from above, the said witness was unable to answer the details as regards the Survey No.70 and Pot Hissa, particularly as to which property was held by each of the defendants. He was also unable to identify the encroached portion.

13. In view thereof, in my opinion, learned trial Court has rightly appreciated the said evidence and dismissed the suit, as the evidence of the said witness was not sufficient to draw conclusion of encroachment.

14. The learned lower appellate Court, while dealing with the said issue has also given review to the entire case afresh and appreciated the evidence of the said witness and has endorsed the findings of the trial Court by dismissing the appeal.

15. The reliance placed by the present appellant on the judgment of Ramzan Sheikh Vs. Panjab Gawande (cited supra), if looked into, the said case is based on “no measurement”. In case the suit is filed without measurement, this Court has drawn conclusion that it will be always open to the trial Court to get report of measurement from the Cadastral Surveyor, so as to reach to the proper conclusion based on the evidence of said witness.

16. What is noticed in the present case is prior to filing of the suit, the appellant has taken recourse to the measurement from the Cadastral Surveyor and has examined him as own witness who has supported the case of plaintiff. Just because PW-1 Babasaheb Garkal has not supported the case of the plaintiff that does not mean that the Court should have appointed another Cadastral Surveyor.

17. In view of above, in my opinion, the law laid down by this Court in the matter of Ramzan Sheikh Vs. Panjab Gawande (cited supra), will be of hardly any assistance to the appellant. As such, the appeal which is against the concurrent findings fails, stands dismissed.

(N.W. SAMBRE, J.)

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