

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.486 OF 2014
WITH
CIVIL APPLICATION NO.1135 OF 2014

Dattatrya Babu Kadam ... Appellant
Vs.
Bhagwat Shankar Kadam (decd) through legal heirs
Pandurang B. Kadam and others ... Respondents

Mr. Drupad S. Patil for Appellant.
Mr. Vishwanath S. Talkute for Respondents.

CORAM : R. G. KETKAR, J.
DATE : 10TH APRIL, 2015

P.C. :

Heard Mr. Patil, learned Counsel for appellant and Mr. Talkute, learned Counsel for respondents.

2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908, the original defendant has challenged the judgment and decree dated 20.12.2013 passed by the learned District Judge-1, Malshiras in Civil Appeal No.27 of 2006. By that order, the learned District Judge allowed the Appeal preferred by the appellant. Order of the learned trial Judge granting Rs.4,500/- mesne profit for the past 3 years previous to Suit was quashed and set aside. The rest of the judgment and decree dated 29.04.2006 passed by the learned 2nd Joint Civil Judge, Junior Division, Malshiras in Regular Civil Suit No.495 of 2002 was confirmed. Respondent Bhagwat Shankar Kadam, since deceased, had instituted Suit for removal of encroachment and injunction against the present appellant. The learned trial Judge decreed the Suit with costs and held that the respondent-plaintiff is entitled to removal of encroachment of 15 Ares land. The appellant-defendant was ordered to

handover the open and vacant possession of 15 Ares land as per map at exhibit-24. If he failed, the plaintiff was at liberty to recover encroached portion of land by following due process of law.

3. It is common ground that during the pendency of the Appeal, the appellant herein submitted map along with the application at exhibit-65. Copy of the measurement map was produced at exhibit 65-B. In paragraph 13, the learned District Judge observed thus,

“13. Above all during argument of this appeal, learned advocate for appellant / defendant submitted one map alongwith application at Exh.65. He submitted that after decision of suit and during pendency of this appeal, defendant got measured their land bearing Gat No.894 on 22.06.2010. Not only this but they have got fixed boundaries of their land bearing Gat No.894 on 21.07.2010. A copy of that measurement is produced at Exh.65-B. Most important thing is that learned advocate for defendants admitted at Bar that such measurement was carried by defendants of their land and the map which is produced by plaintiffs on record is map of that measurement. Not only this but relying on this map, it is submitted by learned advocate for plaintiffs that land which is shown as encroachment in the map of plaintiffs is shown as barren land in this map at Exh.65-B. It means that defendants also admitting the fact that during pendency of this appeal they measured their land Gat No.894, got prepared map and got fixed boundaries of their land Gat No.894. Now I can compare map at Exh.24 in original civil suit with the map at Exh.65-B produced in this appeal. Those two maps match each other perfectly. The only difference in these maps is that in map at Exh.24 encroached portion is shown in red colour, whereas the same encroached portion is shown as barren land in map at Exh.65-B. Above all even if we consider map at Ex.65 which is prepared at the time of measurement at the request of defendants, then their own map disclose the fact that disputed 15R land is in their possession and not in possession of plaintiffs. This map at Exh.65 undoubtedly demonstrate that defendants are in possession of some land beyond their Western boundary. Definitely that excess land which is in possession of defendants is part and parcel of plaintiffs Gat No.896. Thus map at Exh.65 which is prepared at the instance of defendants also prove the case of plaintiffs that there is encroachment of defendants on the land of plaintiffs Gat No.896 to the extent of 15R. No further proof is required at all. This map at Exh.65 strongly supports and corroborates case of plaintiff. And therefore there should not have been any hesitation in accepting contention of plaintiffs. Thus not only by his own

evidence but even by document on which defendant relied, it is proved that defendants have encroached on the land of plaintiffs to the extent of 15R. Pertinent to note that the area of barren land which is shown in map at Exh.65-A is not specifically given. But area of encroachment shown in red colour in map at Exh.24 in original suit is given as 15R. Both these portions match with each other with boundary to boundary and therefore, there is no hurdle to hold that the encroached area is 15R.”

4. Thus, the learned trial Judge passed the decree in terms of map at exhibit-24. During the course of hearing of this Appeal on previous occasion, I suggested to Mr. Talkute as to whether respondent-original plaintiff is agreeable for passing decree as per map at exhibit 65-B. Upon taking instructions from legal representatives of the original plaintiff, Mr. Talkute is agreeable for passing decree in terms of map at exhibit 65-B. At the instance of Mr. Patil, the matter was adjourned till today. Mr. Patil, upon instructions from the appellant is also agreeable for passing decree in terms of map at exhibit 65-B.

5. In view thereof, by consent of the parties, the decree passed by the appellate Court is confirmed subject to the modification that map at exhibit 65-B shall form part of the decree and the decree shall be drawn accordingly. The Second Appeal is disposed of in the aforesaid terms. In the circumstances, however, there shall be no order as to costs.

6. In view of the disposal of the Second Appeal, nothing survives in Civil Application No. 1135 of 2014 for stay and the same is disposed of as such.

(R. G. KETKAR, J.)