

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

**916 SECOND APPEAL NO. 200 OF 2016
WITH
CA/2916/2016
IN
SA/200/2016**

SITARAM MARUTI ANKUSH

VERSUS

PRABHU NARHARI HARALE AND ORS.

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Mr. S.S.Choudhary, Advocate for Appellant.

Mr. R.R.Shaikh h/f Mr. S.P.Harale,
Advocate for R – 1.

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CORAM : T.V.NALAWADE, J.

DATE : 11th AUGUST, 2016

ORDER :-

. The Appeal is filed against the Judgment and Decree of R.C.S. No. 30/1998 which was pending in the Court of the Civil Judge [Jr.Division], Osmanabad and also against the Judgment and Decree of R.C.A. No. 376/2012 which was pending in the Court of the Principal District Judge, Osmanabad. Heard both sides.

2. The Suit was filed by present respondent No. 1 Prabhu for removal of encroachment of 21 R. portion made on his land G.No. 441 situated at Ghatangri, Tahsil and district Osmanabad. It is the case of the plaintiff that under sale deed dated 12/07/1988, he purchased 41 R. portion land from G.No. 441 from defendant Nos. 2 and 3 and this portion is eastern portion of G.No. 441. It is contended that subsequently defendant No. 1 purchased the remaining portion of 49 R. from G.No. 441 from defendant Nos. 2 and 3 and this portion is adjacent to G.Nos. 439 and 440. It is contended that portions from G.Nos. 439 and 440, which are adjacent to the portion of G.No. 441 purchased by defendant No. 1, were also purchased under the same sale deed by defendant No. 1.

3. It is the case of the plaintiff that as he had suspicion that defendant No. 1 had made encroachment over portion of plaintiff from G.No. 441, he got the land measured from Taluka Inspector of Land Record [for short, 'T.I.L.R.']. It is contended that notice of measurement was sent to defendant No. 1 and in the presence of defendant No. 1, measurement was carried out. It is contended that it revealed in the measurement that defendant No. 1 had made

encroachment over 21 gunthas portion of plaintiff. It is contended that plaintiff requested defendant to hand over encroached portion, but he refused to do so and so cause of action took place for the Suit.

4. Defendant No. 1 filed Written Statement and contested the matter. He denied that he has made encroachment over portion belonging to the plaintiff from G.No. 441. He has not disputed the title of the plaintiff over the portion purchased from defendant Nos. 2 and 3. He denied that notice of measurement was given to him and the measurement was made by Cadestral Surveyor in his presence.

5. Defendant Nos. 2 and 3 did not appear in the proceeding. Issues were framed on the basis of aforesaid pleadings in the plaint and Written Statement. Only the plaintiff gave evidence. It appears that nobody turned up for cross examination of plaintiff and his witness Cadestral Surveyor and so the Suit came to be decided on the basis of un rebutted evidence of the plaintiff and Cadestral Surveyor.

6. The trial Court has given the decree on the basis

of measurement made by the Cadastral Surveyor. It appears that in the First Appeal prayer was made for defendant No. 1/appellant to set aside the decision of the trial Court and remand the matter for giving opportunity to defendant No. 1 to cross examine plaintiff and his witness viz. Cadastral Surveyor. After considering the relevant circumstances, the District Court has held that such remand is not possible. In the present Appeal also submission was made by the learned counsel for the appellant to remand the matter to give opportunity to defendant No. 1 to cross examine the plaintiff and his witness. It was submitted that even cost can be imposed but in the interest of justice, the matter needs to be remanded back for giving such opportunity.

7. The evidence given by plaintiff is consistent with the pleadings in the plaint. At Exh. 56, there is revenue map of land G.Nos. 440,439 and 441, etc. This map shows that the area of G.No. 441 is spread on both sides of G.Nos. 440 and 439. G.Nos. 440 and 439 belong to defendant No. 1 and he is also the owner of 49 R. of G.No. 441.

8. In the sale deed executed in favour of the plaintiff [Exh. 57], it is shown that the land sold to the

plaintiff is situated on the eastern side of land G.Nos. 439 and 440 and also G.No. 441. It shows that the portion which is adjacent to G.Nos. 439 and 440 and which is part of G.No. 441 was kept with the owner, defendant Nos. 2 and 3 and this entire portion was sold to defendant No. 1 in subsequent sale deed. One thing is clear from the sale deed that the eastern portion of G.Nos. 439 and 440 is sold to plaintiff. From revenue map at Exh. 56, it can be said that on eastern side of G.No. 441, there is G.No. 437 and so the area of the property of the plaintiff needs to be measured starting from the boundary of G.No. 437. It appears that the Cadestral Surveyor has done the same thing.

9. The evidence of the Cadestral Surveyor [P.W.2] shows that before taking measurement, he had given notices to the parties concerned including the defendants and defendants were present on the spot when he made the measurement. The original record was produced before the trial Court in the evidence of Cadestral Surveyor and that record contains the record of notice sent under certificate of posting to the defendants and plaintiff. There is also postal acknowledgement receipt in respect of notice sent to the plaintiff. There is panchanama prepared at the time of

measurement and this document [Exh. 93] shows that there are thumb impressions of Sitaram – present appellant, defendant No. 1 and that of plaintiff Prabhu Harale. One Govind Harale was also present and he had put his thumb impression on the panchanama.

10. The measurement map prepared by the surveyor is proved as Exh. 94. Though it can be said that the portion marked as 'encroachment' may create confusion if only this map is seen, but there is also the revenue map at Exh. 56 showing that G.No. 441 is on 3 sides of G.No. 440 and 2 sides of G.No. 439. At the time of measurement, which will be made if the possession is handed over to the plaintiff as per the decree, the measurement of his portion will be made from the side of G.No. 437 and from that line the plaintiff will get the area of 41 R. portion purchased by him. The remaining portion is to be left with defendant No. 1. This measurement was not challenged by applying for superior measurement, to the superior authority. As notice of the measurement was given to defendant No. 1 and he remained present at the time of measurement, this measurement is binding on him. Nothing can be achieved by remanding the matter. Such tactics are generally played when encroachment is there. The

record of the trial Court shows that sufficient opportunity was given to defendant No. 1. As defendant No. 1 avoided to turn up to contest the matter. Probably he was looking for getting opportunity of remand to protract the things and so this Court holds that such opportunity can not be given by remanding the matter. Both the Courts below have not committed error and it appears that the contentions of the defendants are considered by the trial Court. No substantial question of law as such is involved in the present matter.

11. In the result, Second Appeal stands dismissed. In view of dismissal of Appeal, C.A. No. 2916 of 2016 stands disposed of. Amount, if any, deposited in this Court be sent to the executing Court for its consideration, if proceeding is filed for mesne profit.

[T.V.NALAWADE, J.]