

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

**Second Appeal No. 163 of 2015
In
Civil Application No.4405 of 2015**

Poshetti Girmaji Muttepod. .. **Appellant.**

Versus

Girmaji Narsappa Muttepod
And Others. .. **Respondents.**

Shri. Mukul S. Kulkarni, Advocate, for appellant.

Shri. P.R. Katneshwarkar, Advocate, for respondent Nos.2
to 4.

Shri. S.D. Kaldate, Assistant Government Pleader, for
respondent Nos.5 and 6.

CORAM: T.V. NALAWADE, J.

DATE : 8th MARCH 2016

ORDER:

1) The appeal is filed against the judgment and decree of Regular Civil Appeal No.51/2009 and also against the judgment and decree of Regular Civil Suit No.22/2002. The suit was filed by the present appellant for relief of injunction and in the said suit present respondent Girmaji Muttepod had filed counter claim for

recovery of possession of encroached portion. The trial Court dismissed the suit and allowed the counter claim. This decision is confirmed by the first appellate Court, District Judge-1 Biloli, District Nanded. Both the sides are heard.

2) The plaintiff is owner of around 2 hectares and 2 R of land from Gat No.655 situated in village Sagroli, Tahsil, Biloli. Girmaji, defendant No.1, owns around 6 acres 12 gunthas land which is situated at western side of the portion of the plaintiff in the same land. Total area of land Gat No.655 is 7 hectares 99 R and the remaining portion is owned by defendant Nos.2 to 4. The State Government was made party to the suit by the present appellant as the measurement was taken by Taluka Inspector of Land Records (TILR) at the instance of defendant No.1, Girmaji Narsappa. He had given application as he wanted to confirm that plaintiff had made encroachment over 90 R portion of defendant No.1.

3) It is the case of the plaintiff that previous number of this land was Survey No.368/A and it was

admeasuring 11 acres 8 gunthas. It is contended that at that time also there were 5 owners in the land but after implementation of consolidation scheme, all the portions were together given aforesaid Gat number and the certificates were given to the respective owners in respect of the portion owned by them.

4) It is the case of the plaintiff that on 16-4-2001 at the instance of defendant No.1 land was measured by the TILR and it was shown in the measurement that 90R portion of defendant No.1 was in possession of the plaintiff. It is contended that the measurement was not correctly done and it is false that plaintiff is in possession of the portion owned by the defendant No.1. It is contended that after taking measurement, defendant Nos.1 to 4 tried to take forcibly possession of 90 R portion and so the plaintiff approached police and gave report. It is contended that chapter case under section 107 Cr.P.C. was registered but police did not take concrete action. It is contended that on 16-4-2002 the defendants tried to remove the bandh, dhura of land which is present between portion of plaintiff and portion of defendant No.1

and cause of action took place for the suit. He contended that he cannot be forcibly evicted from the disputed portion and he has become owner of that portion as he has been in possession since the year 1966. He prayed for relief of injunction to prevent the defendants from interfering in possession over 2 hectare 2 R portion.

5) Defendant Nos.1 to 4 filed joint written statement. The defendants admitted that plaintiff has purchased 5 acres portion under sale deed and he has right to keep that portion in possession. They admitted that during implementation of the consolidation scheme the previous number was changed and Gat No.655 was given to the entire land owned by these 5 persons. They contended that over the years, the plaintiff made encroachment over the portion of defendant No.1 and this encroachment is confirmed in the measurement taken through TILR. Contention of the plaintiff that measurement was not properly made is denied by the defendants. They denied that plaintiff has been in possession of the disputed portion since the year 1966. They admitted that they had asked the plaintiff to hand

over possession of encroached portion but they denied that they tried to take the possession forcibly. They contended that under the sale deed dated 20-9-1969 defendant No.1 had purchased 6 acres 12 gunthas portion of land Survey No.368/A and this portion is owned by the defendant No.1. They contended that plaintiff has made encroachment over 90R portion and so in respect of that portion no relief can be given to the plaintiff. In the counter claim they claimed the relief of possession of this 90R portion from the plaintiff. State Government also filed reply and it contended that the measurement was correctly taken after following the procedure. The plaintiff filed written statement to the counter claim and he denied the claim of the defendants.

6) The issues were framed on the basis of aforesaid pleadings. Both the sides examined witnesses.

7) The pleadings show that both the sides are not disputing that under different sale deeds plaintiff and defendant No.1 became owners of the respective portions from Survey No.368/A. Sale deed of the plaintiff is of the

year 1966 and the sale deed of defendant No.1 is of the year 1969. The plaintiff has given evidence that he purchased 5 acres portion and he is in possession of only that portion. He denied on oath that he has made encroachment over 90R portion which belongs to defendant No.1. He has not disputed the boundaries, the contention of defendant No.1 that land of defendant No.1 is situated on the western side of the land of the plaintiff. No witness was examined by the plaintiff in support of his case. The record shows that plaintiff had applied for appointment of Court Commissioner and the TILR was appointed as Court Commissioner. Report was also submitted by the TILR. The plaintiff did not show interest to examine the Cadestral Surveyor who made measurement as Court Commissioner and so the record prepared by the Court Commissioner is not proved.

8) Defendant No.1 gave evidence which is as per aforesaid contentions. Shankar, Surveyor, who made the measurement on the basis of application made by defendant No.1 is examined and in his evidence the relevant record including the map of measurement

prepared by him is duly proved. Copy of notice issued to the parties who are owners of different portions of Gat No.655 is produced at Exhibit 72. Copy of revenue map of Gat No.655 is produced at Exhibit 73 and copy of panchanama of measurement done in the presence of panchas and parties is produced at Exhibit 74. The Cadestral Surveyor has given evidence that on the basis of two boundary marks which he found on the northern side of land Gat No.655 he fixed the points and then made measurement of entire Gat No.655. He has given evidence that after taking measurement of entire Gat number he made measurement of the portion of defendant No.1. He has given evidence that during measurement he noticed that the plaintiff has made encroachment over 90R portion from eastern side and the owner of land situated on western side of Gat No.655 has made encroachment over 10 R portion of defendant No.1.

9) Much was argued by learned counsel for the plaintiff, appellant on the circumstance that the Cadestral Surveyor has given admission that he did not take measurement of the portions of other four owners of land

Gat No.655. It was submitted that due to this circumstance the measurement made by the surveyor cannot be relied upon and the counter claim cannot be decreed. On this point reliance was placed on a case reported as **2002 (1) Bom.C.R. 124 (Govind Raoji Katole v. Ganpati Tukaramji Khanke)**. The facts of the reported case were totally different. When there is suit for removal of encroachment facts and circumstances of each and every case are always different. It is a question of fact and on the basis of the evidence given by both sides the Court is expected to decide this point. It is not disputed that land of defendant No.1 is situated on western side of the portion of the plaintiff. This is the extreme western side portion of Gat No.655. There is no reason to disbelieve the Cadestral Surveyor in respect of his evidence that first he measured the entire land Gat No.655 and then he started making measurement of the portion. From the western boundary he measured the portion belonging to defendant No.1. There is no dispute over the title of defendant No.1 which he got under sale deed of the year 1969 and so it was not difficult for the Cadestral Surveyor to take measurement of that area starting from western

side of Gat No.655. Through such measurement he found the encroachment made by the plaintiff.

10) When Cadestral Surveyor makes measurement, he being public officer, in view of provision of Section 114 of the Evidence Act the Court is expected to presume that he followed the procedure laid down under the rules for measurement. When admittedly plaintiff was present at the time of measurement made by this witness and he knew that the Cadestral Surveyor had given report that the plaintiff has made encroachment over 90 R portion of defendant No.1 it was necessary for the plaintiff to challenge this measurement and get the land measured through superior officer. This was not done by the plaintiff but he rushed to the Court for filing suit for relief of injunction. This conduct of the plaintiff cannot be ignored. When the Court had given permission to get measured the land through Court Commissioner again, through TILR, and such measurement was made, plaintiff avoided to examine the said Cadestral Surveyor and prove the measurement made by him. In view of this circumstance, there was no alternative before the trial Court than to

decree the counter claim filed by defendant No.1. The point involved is question of fact and the encroachment is proved by the defendants. There is concurrent finding of the two Courts below. In view of this circumstance, this Court holds that no substantial question of law is involved in the present matter.

11) In the result, the appeal stands dismissed. Civil application stands disposed of. Interim relief, if any, stands vacated.

Sd/-
(T.V. NALAWADE, J.)

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