

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

**SECOND APPEAL NO.1378 OF 2005
WITH
CIVIL APPLICATION NO.8807 OF 2005**

1. Salim Bin Khamis **..Appellants**
Age-___ years, Occu-Business,
R/o. Juna Bazar, Aurangabad
Taluka and District Aurangabad
Through GPA Appellant No.2
2. Ayub Khan S/o. Haji Khan,
Age- ___ years, Occu-Business,
R/o. Buddi Lane, Aurangabad
Taluka and District Aurangabad

VERSUS

1. Marathwada Agriculture University **..Respondents**
Parbhani,
Through its Registrar
2. The Officer In Charge of
Himayat Bagh Fruit Research Centre,
Dr. N.D.Budukar,
Age-___ years, Occu-Service,
C/o. Department of Horticulture,
Himayat Bagh, Delhi Gate,
Aurangabad
Taluka and District Aurangabad
3. The Block in Charge of Himayat Bagh,
Fruit and Research Centre,
C.G.Puri,
Age-___ years, Occu- Service,
R/o. As above

4. The Horticulturist,
Himayat Bagh Fruit Research Centre,
Shri. Rajput,
Age- ____ Years, Occu-Service,
R/o. As above

Mr. R.S.Deshmukh, Advocate for the appellants
Mr.P.S.Patil, AGP for the respondent/State
Mr. E.P.Sawant, Advocate for respondent Nos. 1 to 4

CORAM : A.V.NIRGUDE, J
RESERVED ON : 18.04.2016
PRONOUNCED ON : 22.07.2016

J U D G M E N T [PER : A.V. NIRGUDE, J]

1. This Second Appeal challenges judgment and decree dated 27.06.2005 passed by the learned First Ad-hoc Additional District Judge, Aurangabad in Regular Civil Appeal No.203 of 2004 allowing the same and setting aside the judgment and decree passed by the trial Court i.e. Civil Judge, Junior Division, Aurangabad (fourth Court) in Regular Civil Suit No.216 of 2000.

2. The appellants were the plaintiffs. The suit was filed for recovery of possession of portion of land which was said to be encroached by respondents/defendants. At initial stage following substantial question of law was framed on 04.07.2007 which is as under:-

"Whether in the facts and circumstances of the present case, the first appellate Court rendered a perverse finding to the effect that there was no encroachment made on the plaintiffs' land survey No.33 by the defendants from the side of the survey No.3 and erroneously considered the map (Exh.4/2) though it was not the case of the defendants that there was encroachment made by the plaintiffs to the extent of 53 Ares land over the river bed bunding from another side and that the impugned judgment is, therefore, required to be interfered with?"

3. The facts leading to this litigation, in short can be narrated as under:-

4. On 22.11.1991 the appellants/plaintiffs purchased the piece of land survey No.33 4-Acres 37-Guntha, Aurangabad from Vishvanath Kokane and Nagnath Vishwanath Kokane.

5. On 19.02.2000 land was subjected to measurements through the Government Surveyor. The appellants / plaintiffs then by fixing boundary stones asserted their possession of the land.

6. On 24.02.2000 defendants removed the stones that were fixed earlier by the appellants/plaintiffs and encroached over the suit land. The appellants/plaintiffs

made a complaint to the police authorities, but in vain. The appellants/plaintiffs therefore filed a Regular Civil Suit No.216 of 2000 for recovery of possession of suit property admeasuring 20-Guntha and for perpetual injunction and *mesne profit*. During pendency of the suit on 08.05.2002 the Court directed to measure the suit property. After the measurement it was revealed that the defendants had encroached the suit land to the extent of 49-Guntha. Appellants/plaintiffs then amended their plaint and sought possession for 49-Guntha land. On the other hand defendants took up a stand of denial and asserted that in 1976, land survey No.3 of Himayatnagar, Aurangabad was acquired for them i.e. Marathwada University Parbhani through the Collector. The defendants also alleged that there could be collusion between the appellants/plaintiffs and Officers of the City Survey Office.

7. In 2001 the trial Court reached the stage of recording evidence and the appellants/ plaintiffs recorded the depositions of two witnesses, one of them was Abdul Latif, who was a Survey Officer of the T.I.L.R. Office. This witness stated that upon receipt of the plaintiffs' application for measurement of the land a notice of measurement was given to the parties. On 08.05.2002 in the presence of both the parties

measurements were taken. It was found that defendants had encroached 49-Guntha land from the suit land. From respondents/ defendants' side four witnesses were examined.

8. In view of the evidence that came on record, learned Judge of the trial Court decreed the suit on 19.07.2004 holding that the appellants/plaintiffs could prove the case of encroachment to the extent of 49-Guntha. The learned Judge of the trial Court mainly placed reliance on map dated 08.05.2002. Thereafter, Regular Civil Appeal was filed before the District Judge. At this stage learned Judge of the Appellate Court placed reliance on a map that was not proved properly. Thereafter Second Appeal came before us and as said above substantial question of law was framed.

9. On 21.11.2014 during the course of arguments on Second Appeal by consent of the parties I directed that the land in question i.e. Survey No.33 and survey No.3, Aurangabad should be jointly measured once again. This measurement should be undertaken by Taluka Inspector of Land Record of Aurangabad and report should be filed before the Court.

10. On 09.03.2015 the Deputy Superintendent of Land

Record, Aurangabad submitted a new map which was prepared pursuant to the order dated 21.11.2014. This map clearly indicates that there is an encroachment by respondents/defendants to the extent of 20-Guntha on land Survey No.33.

11. On perusal of the judgment of the Lower Appellate Court I noticed that learned Judge disbelieved the evidence of star witness of the plaintiffs-Abdul Latif- who acted as Court Commissioner and who was also Cadestral Surveyor. The learned Additional District Judge in para No.10 of the judgment discussed the contents of the plaint and contents of a map which was annexed to the plaint. This map was referred to as "Exhibit-4/2". This map was not proved by the appellants/plaintiffs. For the sake of appreciation of the reasoning of Lower appellate court I too perused it. I found that it showed that land survey No.33 was encroached to the extent of 20-Guntha. The map revealed that the appellants/ plaintiffs themselves had made encroachment on 'bundling of river' to the extent of 52-Guntha. Having noted contents of this map at Exhibit-4/2 the learned Judge of the lower appellate Court expected witness Abdul Latif to show in his map drawn after taking measurement-Exhibit-75- that the Surveyor encroachment made by the appellants /plaintiffs over the river bed. The learned Judge

observed that such encroachment has not been shown in map at Exhibit-75. The learned Judge then observed that part of the land survey No.33 which was used for construction of houses etc. was not subjected to measurement by Surveyor Abdul Latif. For this reasons learned District Judge discarded the deposition of Abdul Latif, and the map he had prepared.

12. Lower Appellate Court could not have used as evidence, the map which was annexed to the plaint. Map was indeed part of pleading and was not part of evidence. The map was submitted on record in order to elaborate cause of action. It was necessary then for the appellants/plaintiffs to prove their case by giving cogent evidence. They recorded certain evidence but did not try to prove the map which they used initially as annexure to the plaint. They had such choice.

13. Learned Additional District Judge apparently committed an error by referring to the part of pleading for disbelieving appellants/plaintiffs' witness. In other words the learned Judge of the Lower Appellate Court rejected the evidence of the appellants/plaintiffs mainly because the measurements were not properly taken. When this was pointed out to me at the time of arguments, I thought that it could be appropriate to give a fresh

opportunity to both the parties to bring on record the correct state of affairs. Therefore measurements were ordered once again. This time a fresh map has come on record. Both the parties accepted correctness of the map and therefore it is accepted and used as evidence. This map has proved the appellants/plaintiffs case partly to the extent of 20-Guntha.

14. The Second Appeal therefore, partly succeeds.

15. The impugned judgment of learned District Judge is set aside. The suit is decreed to the extent of 20-Guntha as shown in the map which is prepared at this court level.

16. Mesne profit is permitted to claim in a separate proceeding. In the facts and circumstances there shall be no order as to costs.

17. In view of disposal of Second Appeal No.1378 of 2005 the Civil Application No.8807 of 2005 does not survive and disposed of.

[A.V.NIRGUDE,J.]