

**IN THE HIGH COURT AT BOMBAY  
APPELLATE SIDE, BENCH AT AURANGABAD**

909 SECOND APPEAL NO. 478 OF 2016  
WITH CA/10171/2016 IN SA/478/2016

TEJULAL PRABHUDAS UDASI AND ORS  
VERSUS  
LILAWATI VITTHALRAO MAGRE

...  
Advocate for Appellants : Patil Vijay B.  
Advocate for Respondent : G.A. Nagori h/f. P.P. Dhorde  
...

**CORAM : T.V. NALAWADE, J.**  
**DATED : 20th July, 2016.**

**ORDER :**

1. The appeal is filed against judgment and decree of Special Civil Suit No. 115/2011 (Old R.C.S. No. 144/2010), which was pending in the Court of 5th Jt. Civil Judge, Senior Division, Jalgaon. The appeal is also filed against judgment and decree of Regular Civil Appeal No. 149/2011, which was pending in the Court of District Judge-3, Jalgaon. Heard both the sides.

2. Respondent - Lilawati had filed suit for removal of encroachment made over her plot bearing No. 1, which is a part of Survey No. 521/A/2 situated within local jurisdiction of Municipal Corporation, Jalgaon. Lay out plan was prepared for development of this property and some plots were prepared. It is the case of plaintiff that under registered sale deed dated

8.12.1989 she purchased plot No. 1 for consideration from the owner and she was put in possession of this property. The area of this plot was 481.25 Sq. Mtrs. The length and width of the plot are given in the plaint by plaintiff.

3. It is the case of plaintiff that defendants have purchased plot Nos. 2, 3 and 4 and they are situated on southern side of plot No. 1. Plot No. 2 belongs to defendant Nos. 1 to 3 and it is just adjacent to plot No. 1. Plaintiff is not disputing the area of plots of defendants shown in the lay out plan. It is her case that on 12.4.2000 when she visited her plot as she had intention to start construction, she noticed that defendant Nos. 1 to 3 had started making construction on their plot and they had started making construction towards the side of plot No. 1 towards northern side and they were making encroachment over some portion of plot No. 1. It is her case that the area of 5 x 17.5 Sq. Mtrs. (87.5 Sq. Mtrs.) was already encroached by the defendants and they were making construction over it. It is the case of plaintiff that she requested the defendants not to make the construction over the property, but defendants did not pay heed to her request and so, suit was required to be filed.

4. Defendant Nos. 1 to 3 filed joint written statement

and they denied the case of plaintiff that they have made encroachment over plot No. 1. They denied the description of the property of plaintiff including the area mentioned by the plaintiff. They contended that they were making construction after taking permission of the Local Body and there was no cause of action for the suit. They further contended that due to creation of corporation road, some area was acquired and due to that plaintiff must be feeling that she is having less area.

5. Issues were framed on the basis of aforesaid pleadings. During the pendency of suit, Court Commissioner was appointed and Surveyor made measurement of plot No. 1 to 4 as per the directions given by the Court. Surveyor was examined and both the sides gave evidence which is consistent with their pleadings.

6. In the evidence of Surveyor, the map prepared by him showing encroachment is proved and so, the decree of mandatory injunction is given in favour of plaintiff. It is held that there is encroachment over 34.2 Sq. Mtrs. shown in the map prepared by the Cadestral Surveyor. On this point, there is concurrent finding of the First Appellate Court.

7. The learned counsel for appellant submitted that no argument of counsel of appellant was heard by the First Appellate Court though appeal is decided on merits and so, opportunity needs to be given to the appellants to take the decision of the First Appeal on merits. As the First Appellate Court has considered the entire material and decision is given on merits, this Court asked the learned counsel for appellant to make out the case on merit for admission of second appeal.

8. The evidence of Cadestral Surveyor was made available. The lay out plan and revised lay out plan were also made available to this Court. The map prepared by the Cadestral Surveyor Shri. Sonar was made available. On the basis of this evidence, decision is given by the Courts below as title over respective plots of the parties is not disputed. In the sale deeds of both the sides, the plots as laid down in the approved plan were sold. The evidence of Cadestral Surveyor and his map show that he made the measurement of the plots as per the approved lay out plan. His evidence and the map of measurement show that he considered the circumstance like some portion of plot No. 1 was under national highway. This portion is considered as portion of plaintiff by the Surveyor. He found that owner of plot No. 2 had made encroachment over plot No. 1 by making

construction of compound wall.

9. The aforesaid measurement was taken by the Cadestral Surveyor in the presence of the parties as Court Commissioner. Nothing could be brought on the record to create the probability that Surveyor has committed mistake in taking the measurement. The relevant record was taken to the spot by the Surveyor and the most important record was lay out plan of aforesaid survey number on the basis of which the plots were purchased by both the sides. In view of this evidence, the Court below have given findings in favour of plaintiff. The findings are concurrent and they are on questions of facts. This Court holds that no substantial question of law as such is involved in the matter. In the result, appeal stands dismissed. Civil Application is disposed of.

**[ T.V. NALAWADE, J. ]**

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