

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

36 SECOND APPEAL NO. 661 OF 2015
WITH CA/15124/2015 IN SA/661/2015

BHIMA NARAYAN DIGHE LRS SAHEBRAO AND OTHERS
VERSUS
VAIJINATH PRAYAG KANKUBJI LRS DEVIPRASAD AND OTHERS

...
Advocate for Appellants : Shinde C. K.
Advocate for Respondent 1E : S.S. Kulkarni
...

CORAM : T.V. NALAWADE, J.
DATED : 25th April, 2016.

ORDER :

1. The appeal is filed against the judgment and decree of Regular Civil Suit No. 288/1980, which was pending in the Court of Civil Judge, Junior Division, Kopargaon and also against the judgment and decree of Regular Civil Appeal No. 60/2002, which was pending in the Court of District Judge-1, Kopargaon, District Ahmednagar. The suit filed by present respondent - Vaijinath Kankubji for relief of possession, permanent injunction and mesne profit is decided in his favour. Both the sides are heard.

2. The suit was filed for possession of portion of 1 Hecter 29 R. which is part and parcel of land Survey No. 430/2 situated at Kokamthan, Tahsil Kopargaon. Defendants are owners of Survey No. 430/3 which is situated on the southern side of

Survey No. 430/2. It is contended that area of Survey No. 430/2 is 10 Acres and this portion is allotted to the plaintiff for cultivation by Government. It is contended that the portion which was subsequently given number as Survey No. 430/3 was allotted to defendants by the Government at the same time. It is contended that over the years, the defendants made encroachment over portion of Survey No. 430/2 from southern side of Survey No. 430/2 and the extent of encroachment is around 1 Hectore 29 R.

3. Defendants filed joint written statement and denied the contentions of the plaintiffs that the defendants have made encroachment over the portion of 1 Hectore 29 R. It is contended that the alleged encroached portion of 1 Hectore 29 R. was never in possession of plaintiff and from prior to year 1966, this portion has been in possession of defendants and they have been cultivating this portion as the owners. It is contended that the disputed property was never allotted to plaintiff by the Government. It is contended that the defendants are in possession for more than 33 years and they have developed this land.

4. It is also contention of the defendants that when it

was noticed that the area which was in possession of plaintiff was less than the area of 10 Acres shown in the order of allotment, some more portion which was allotted previously to one Shri. Aware was allotted to plaintiff and so, the case of plaintiff is false.

5. On the basis of aforesaid pleadings, issues were framed. Both the sides gave evidence. In the present proceeding, the learned counsel for defendants, appellants produced some record like copy of order of allotment made by the Government in favour of plaintiff and defendants. Some record like measurement made of Pot-Hissas in the year 1972 is also produced and copy of notes prepared at that time is also produced. This Court has considered the record produced in present proceeding also.

6. The record of allotment shows that in the year 1966 area of 10 Acres was allotted to plaintiff from Survey No. 430. In the same order, the area of 5 Acres was allotted to defendants from the same survey number. The Cadestral Surveyor was appointed as Court Commissioner. Shri. Georg has given evidence to prove the measurement made by him in the year 1998 of Pot-Hissas of Survey No. 430. His evidence shows that

he found that the portion of 1 Hectar 29 R. from Survey No. 430/2 belonging to plaintiff was found in possession of defendants. The map prepared by him is duly proved and in the map, the encroachment is shown. The evidence of Surveyor shows that notices were given to both the sides and in presence of both the sides, measurement was made.

7. The learned counsel for appellants submitted that notices ought to have been given to the owners of other Pot-Hissas also and as no such notices were given, the evidence on measurement given by Shri. George cannot be used. This submission is not at all acceptable. The record shows that prior to the date of measurement taken by the Court Commissioner, Pot-Hissas were prepared and they were there atleast in the year 1972. As per the record produced in the present proceeding, in the year 1972 the Surveyor who made measurement did not find such encroachment and he noticed that 10 Acres portion was in possession of plaintiff. Considering the location of both the Pot-Hissas, which are strips from north to south, it can be said that it was sufficient for Surveyor to take measurement of Pot-Hissas owned by plaintiff and at the most it could have been accepted that he takes measurement of Pot-Hissa of defendants also. This was done. The measurement of Pot-Hissas was made by the

Court Commissioner. In view of the location of Pot-Hissas, it cannot be said that notices to owners of other Pot-Hissas was necessary. The defendants did not go for superior measurement. It appears that in the District Court, he applied for measurement, but order made in his favour was set aside by this Court. In any case, when the measurement was made by Shri. George in presence of both sides and the defendants admit that they are in possession of such portion, no fresh measurement was necessary and defendants cannot contend that they have not made the encroachment. The defendants wanted to prove that the portion which is in their possession like 1 Hecter 29 R. was there with them since the year 1966 and by mistake the revenue authority had shown that 10 Acres portion was allotted to the share of plaintiff. The order of measurement was never challenged by the defendants. Record prepared subsequently, which is produced in this appeal, can be of no help to the defendants as this record shows that more portion like portion of 71 R. which was in possession of one Shri. Gaware from Hissa Nos. 6 and 7 was separated and it was allotted to the share of plaintiffs. This portion is not adjacent to either the portion belonging to defendants or portion belonging to plaintiffs. This record does not show that this new allotment was made because plaintiffs were in possession of portion less than shown to be

alloted in the year 1966. At this time also, in the year 1972 plaintiffs were found in possession of 10 Acres which was given Pot-Hissa No. 2.

8. The learned counsel for appellants placed reliance on the case reported as **2004 BCI 40 (BOMBAY HIGH COURT) [Ushabai w/o. Sharadchandra Bannore Vs. Wasudeo s/o. Baliramji Mehare and Ors.]**. In this case, this Court has discussed the manner in which the measurement made at the instance of one party can be proved. There cannot be any dispute over the observations made by this Court. In the present matter, the Cadestral Surveyor is examined and the relevant material is already discussed.

9. The findings given by the Courts below are on questions of facts and they are concurrent findings. This Court sees no reason to interfere in those findings. No substantial question of law as such is involved in the matter for which appeal can be admitted. In the result, the appeal stands dismissed. Civil Application is disposed of.

[T.V. NALAWADE, J.]

ssc/