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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

***SECOND APPEAL NO. 421 OF 2015
with
CIVIL APPLICATION NO. 936 OF 2015***

Mr. Kashinathdas Shrichandradas. ... Appellant/Applicant.

V/s.

Mr. Baburao Laxman Sankhe & Ors. ..Respondents.

Mr. Sachin Punde for the Appellant/Applicant.

Mr. V.A. Gangal a/w. Anup Deshmukh for Respondents 1/1 to 1/7,
2/1 to 2/5 and 3/1 to 3/3.

CORAM : N.M. Jamdar, J.

27 June, 2016.

Oral Order :-

The Appellant challenges the concurrent Judgment and Order passed by the Civil Judge, Junior Division, Palghar dated 31 July 2009 and Judgment and Order passed by the learned District Judge, Palghar dated 30 October 2014. The learned Civil Judge had decreed the Suit filed by the Respondents – Plaintiffs for recovery of possession encroached by the Appellant and the learned District Judge dismissed the Appeal filed by the Appellant.

2. The learned Counsel for the Appellant submitted that in Civil Suit No. 104 of 1992 the learned Civil Judge in respect of some other Defendants relating to the same boundary land and pertaining to the same measurement, had dismissed the Suit. The learned Counsel submitted that in view of this position, the Judgment and Decree passed by the Courts is wrong in law. He submitted that in written statement, a statement was made by the Respondents that all the Suits must be tried together.

3. Firstly, merely by making a statement in the written statement is not enough. No efforts were made by the Appellant to seek appropriate orders to get all the Suits together. In the circumstances, the learned Civil Judge proceeded to consider the matter on merits. Furthermore, that the position in Suit No.104 of 1994 which was rendered before the Civil Appeal was decided was not placed before the learned District Judge neither this point has been urged before the learned District Judge. In the circumstances, the submissions advanced by the learned Counsel for the Appellant cannot be permitted to be advanced for the first time in the Second Appeal even assuming it can be so advanced.

4. As regard the merits of the present proceedings, the Court had appointed a Court Commissioner who measured the land, parties examined witnesses as well as the Court Commissioner was

cross-examined. The learned Judge has relied upon the report of the Court Commissioner as well as the evidence adduced. The contention of the learned Counsel for the Appellant that the report should not be considered as the Appellant was not present at the time of the measurement cannot be considered as finding of fact that notices were served on the Appellant. The Appellant after receipt of notice has not chosen to remain present. Even otherwise opportunity was given to cross-examine the Court Commissioner.

5. In the circumstances, the concurrent findings of fact regarding encroachment cannot be interfered with in the limited jurisdiction under Section 100 of the Code of Civil Procedure. The Appeal is dismissed. The Civil Application is disposed of accordingly.

(N.M. Jamdar, J.)