

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

**SECOND APPEAL NO.563 OF 2014
with
CIVIL APPLICATION NO. 1383 OF 2014**

Maruti Sopan Gaund & Anr. .. Appellants
Vs.
Mangal Sadashiv Gavade & Anr. .. Respondents

**ALONG WITH
SECOND APPEAL NO.562 OF 2014
with
CIVIL APPLICATION NO. 1384 OF 2014**

Nivrutti Tatya Nale .. Appellant
Vs.
Mangal Sadashiv Gavade & Anr. .. Respondents

Mr.V.S. Talkute for the Appellants.
Mr.Shrikant Yadav for the Respondents.

CORAM : R.D. DHANUKA, J.
DATE : 25th October 2016

P.C.

. Second Appeal No.562 of 2014 along with Civil Application No.1384 of 2014 is not on board, taken on board. By consent of the parties, both the second appeals are heard together and disposed of by a common order.

2. By these second appeals filed under Section 100 of the Code of Civil Procedure, 1908, the appellants in Second Appeal No.563 of 2014 (original defendant nos.1 and 2) and the appellant in Second

Appeal No.562 of 2014 (original defendant no.3) have impugned the judgment and decree passed by the learned Ad-hoc District Judge-2, Satara in Regular Civil Appeal No.94 of 2012 as well as in Regular Civil Appeal No.90 of 2012 dismissing both these appeals and upholding the judgment and decree dated 31st January 2012 passed in Regular Civil Suit No.24 of 2007.

2. The appellants in Second Appeal No.563 of 2014 and the appellant in Second Appeal No.562 of 2014 were the original defendant nos.1, 2 and 3 respectively whereas the respondent no.1 in both the second appeals was the original plaintiff in the proceedings before the trial Court. Both the parties have agreed that the facts in both the matters are identical. I am summarizing the facts in Second Appeal No.563 of 2014.

3. It was the case of the plaintiff that she was the owner of land bearing Gat No.981, admeasuring 45 R, situated at Village Gunaware, Taluka Phaltan, District Satara which she had purchased from its original owner Viraj Santosh Doshi vide Sale Deed dated 23rd June 2003. It was the case of the plaintiff that on 14th February 2005, the plaintiff got measured her land in which it was revealed that the defendants had encroached over 19 R land. The said alleged encroached 19 R land was shown by letters "A B C D" in the rough sketch along with the plaint. The plaintiff accordingly filed Regular Civil Suit No.110 of 2003 for perpetual injunction. The defendants resisted the suit by filing their written statement. It was the case of the defendants that the land of the plaintiff bearing Gat No.981 area 45 R had been divided by

Barad-Gokhali-Road. The defendants had denied the alleged encroachment by questioning the correctness of the alleged measurement made by the plaintiff. Learned trial Judge framed six issues and after considering the oral and documentary evidence decreed the said suit.

4. Being aggrieved by the judgment and decree dated 31st January 2012, the defendant nos.1 and 2 filed Regular Civil Appeal No.90 of 2012 and the defendant no.3 filed Regular Civil Appeal No.94 of 2012 in the Court of District Judge, Satara.

5. Learned District Judge, Satara decided both the appeals together and by a common judgment and decree dated 20th February 2014 dismissed both the appeals and confirmed the judgment and decree passed by the learned trial Judge. The first appellate Court formulated five points for determination including the point whether the plaintiff had proved her ownership over the land Gat No.981, area 45 R and whether the defendants had made encroachment upon her land.

6. Both the Courts have rendered various findings on the issues that the defendants had made encroachment upon the land of the plaintiff and more particularly the area admeasuring 45 R.

7. Mr.Talkute, learned counsel appearing for the defendants invited my attention to the cross-examination of the witness examined by the plaintiff and would submit that the witness examined by the plaintiff in his cross-examination had admitted that the government map prepared by the Court Commissioner did not find any fault. He submits that such

admission on the part of the witness who had taken measurement of the suit plot and was appointed by the Court Commissioner has not been considered by the two Courts below at all. Reliance is placed on Section 83 of the Indian Evidence Act, 1872 in support of the submission that the plaintiff had relied upon the map prepared by the Court Commissioner unless such map was proved to be accurate, the same could not be relied upon in evidence. He submits that none of the Courts below have rendered any finding that the map prepared by the Court Commissioner and measurement taken by him were accurate. He submits that the findings recorded by two Courts below are totally perverse and thus can be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

8. Mr.Yadav, learned counsel appearing for the original plaintiff, on the other hand, placed reliance on the findings recorded by the two Courts below to the effect that the defendants had encroached upon the portion of the land owned by the plaintiff. He also placed reliance on the findings of the two Courts below holding that the defendants could not point out any material aspects by which the measurement and conclusion of the Court Commissioner could be discarded.

9. There is no dispute that during the pendency of the suit, the suit land was measured through Court Commissioner Nimtanadar P.W. No.2 Sunil Sahebrao Ghorpade who was examined as a witness by the plaintiff.

10. A perusal of the judgment and decree passed by the two Courts below indicates that both the Courts have held that the measurement was prepared by Mr.Sunil Ghorpade which made it clear that there was encroachment over 9 R land by the defendant nos.1 and 2 and 7 R land by the defendant no.3 from western side. Both the Courts have held that there was thus encroachment upon the 16 R land of the plaintiff.

11. A perusal of the judgment and decree dated 20th February 2014 passed by the first appellate Court indicates that the first appellate Court has also rendered a finding that the measurement effected by the said Court Commissioner has not been challenged by the defendants before Superior Measurement Authority. It is held that though the measurement was disputed by the defendants by cross examining the PW-2 Mr.Sunil Ghorpade, the evidence of the said witness could not be disturbed or could not be disbelieved. It is held that the defendants could not bring any material evidence on record by which the measurement carried out by the Court Commissioner could be doubted or could be stated to be erroneous or false. It is held by the first appellate Court that the defendants could not point out any material aspects by which the measurement and conclusion of the Court Commissioner could be discarded. I am thus not inclined to accept the submission of Mr.Talkute, learned counsel for the defendants that no finding is recorded by the two Courts below that the measurement prepared by the said Court Commissioner was not accurate.

12. The oral evidence including the cross-examination of the said PW-2 is properly appreciated by the two Courts below and finding

is recorded that there was encroachment on the plot of the plaintiff by the defendants to the extent of 16 R land. In my view, the findings recorded by the two Courts below are rendered after considering the oral and documentary evidence led by both the parties are not perverse and cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

13. In so far as the submission of the learned counsel for the defendants on the basis of Section 83 of the Indian Evidence Act, 1872 is concerned, in my view, since both the Courts after considering the map and measurement taken by the Court Commissioner have held that the said measurement cannot be discarded and the defendants having failed to prove that the same is inaccurate, both the Courts have placed reliance on the said map and measurement taken by the Court Commissioner and have rightly taken the same into consideration in evidence under Section 83 of the Indian Evidence Act, 1872. In my view, there is thus no merit in the submission of the learned counsel for the defendants.

14. Both the appeals are devoid of merit. No substantial question of law arises in these appeals. Appeals are dismissed. In view of dismissal of the appeals, civil applications do not survive and are accordingly dismissed. No order as to costs.

15. Mr. Talkute, learned counsel for the defendants seeks continuation of the statement made by the learned counsel for the plaintiff before this Court. Learned counsel for the plaintiff does not agree to continue the statement made before this Court. The respondent (plaintiff)

is directed not to execute the decree of the two Courts below for a period of four weeks from today.

R.D. DHANUKA, J.