

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

**APEAL FROM ORDER NO. 5 OF 2017
WITH
CA/650/2017 IN AO/5/2017**

YADAVRAO BAPURAO BHOSLE AND OTHERS
VERSUS
MUNJAJI NIVRUTTI KANDHARE AND OTHERS

...

WITH
AO/6/2017

WITH
CA/652/2017 IN AO/6/2017

...

Advocate for Petitioners : Mr M D Narwadkar
Advocate for Respondents : Mr H A Bajaj For R/1,
Mr A A Mukhedkar For R/2, Mr S H Panchal for R/3.

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CORAM : V.K. JADHAV, J.

Dated: July 13, 2017

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COMMON ORDER :-

1. Heard finally with consent at admission stage.
2. Being aggrieved by the judgment and order dated 7.10.2016 passed by the District Judge-5, Nanded in RCA No.22/13, the original plaintiffs preferred this appeal.
3. Brief facts, giving rise to the present appeals are

aaa/-

as under :-

a] The appellants are the owner in possession of the land gat no.48 admeasuring 4 Hectare 51R situated at Daryapur Tq. and District Nanded. According to the appellants-plaintiffs, defendant no.1 had encroached upon the land admeasuring 34R from the eastern side of the suit land and defendant nos. 2 and 3 encroached on the portion of land admeasuring 8 R land each from western side. The appellants-plaintiffs upon realizing the said encroachment made by the defendants filed an application with the T.I.L.R., Nanded on 3.2.2004 for joint measurement of the land and accordingly, on 12.4.2004 measurement of the land was carried out. It was found in the said measurement that defendant no.1 had encroached upon portion of suit land to the extent of 34R from the eastern side, whereas defendant nos. 2 and 3 made encroachment over the portion of the suit land to the extent of 8R land from western side. Thus, the appellants-plaintiffs constrained to institute the suit for recovery of the possession against the defendants alongwith mesne profits.

aaa/-

b] Defendants no.1 and 2 strongly resisted the claim by filing their separate written statements. Defendant no.3, though duly served, failed to appear before the trial court and as such, hearing of the suit ordered to proceed ex-parte against him.

c] Both the parties lead their oral as well as documentary evidence in support of their rival contentions. The learned 3rd Jt. Civil Judge J.D. Nanded, by its impugned judgment and decree dated 29.11.2012 decreed the suit and accordingly directed the defendants to deliver vacant possession of the encroached portion as detailed in the plaint. Being aggrieved by the same, defendant no.1 has preferred RCA No.19/2013 and defendant no.2 has preferred RCA No.22/2013. The lower appellate court by two separate judgment and orders dated 7.10.2016 partly allowed both the appeals and remanded the matter to the trial court with a direction to measure the entire disputed land Sy.no.17 through T.I.L.R. and further granted liberty to the parties to adduce their evidence after the

land is measured, as directed. Hence, these two appeals, though the appellants-original plaintiffs could have preferred only one appeal.

4. The learned counsel for the appellants-plaintiffs submits that, the trial court in paragraph no.9 of the judgment has observed that, defendant no.1 Uttam was present during the course of the measurement of the year 2004 and defendant no.3 Munjaji was represented by his brother-in-law Narayan Waywade and as such, the measurement was carried out after giving due notices to the defendants. Learned counsel submits that, however, the lower appellate court has not considered the same and unnecessarily remanded the matter to the trial court. Learned counsel submits that, suit land gat no.48 is situated in between the land gat nos.47 and 49. Land gat no.47 is owned and possessed by defendant no.1, whereas land gat no.49 is owned and possessed by defendant nos. 2 and 3. Surveyor has given notices to them and in their presence carried out measurement of land gat no.48. However, the lower

appellate court has not considered the same and remanded the matter by issuing the directions to measure the entire land sy. no. 17.

5. Both the learned counsel for respondents-defendants submits that, the trial court in paragraph no.10 of the judgment has made self contradictory observations. It is an admitted fact that, the land gat no.47, 48 and 49 are the part and parcel of S.No.17 and gat no.52, 53, 54 and 55 are situated towards northern side of suit land gat no.48. Therefore, without measuring all these gut numbers, it is not possible to find out the encroachment in gut no.48. The surveyor Mr. Pawar, PW 2 has also admitted in the cross examination that unless entire survey number is measured, encroachment, if any, cannot be ascertained. Learned counsel submits that, in the backdrop of these facts, the lower appellate court has rightly remanded the matter with certain directions. No interference is required. There is no substance in the appeal and both the appeals are liable to be dismissed.

6. On perusal of the impugned judgment and order passed by the learned District Judge-5, Nanded and judgment and decree passed by the trial court, it appears that, land gat no.47, 48 and 49 are the part and parcel of survey no.17 and gat nos. 52, 53, 54 and 55 are situated towards northern side of the suit land gat no.48. The suit came to be instituted for recovery of the possession of the encroached portion of the suit property. Learned counsel appearing for the appellants-original plaintiffs has repeatedly submitted that, interested persons were duly served by the surveyor and as such, there is no need of measurement of the suit land gat no.48 again. However, it appears that unless entire survey no.17 is measured, encroachment, if any, on the suit land gat no.48 cannot be ascertained. The same has also been admitted by the surveyor P.W. 2. The lower appellate court has rightly given reference to the order passed by this court in the case as detailed in paragraph nos.27 and 28 of the judgment. It is obligatory on the part of the surveyor to measure the entire land after giving notices to all the concerned and

interested persons. It is a part of record that, the surveyor has only measured the suit land gat no.48. Even, the learned Judge of the trial court has observed that since the area of suit land gat no.48 found less, there must be encroachment on the suit land as alleged in the plaint. I do not find any fault in the judgment and order passed by the lower appellate court, remanding the matter to the trial court with certain directions except the directions about the evidence recorded by the trial court prior to the remand order passed by the lower appellate court. The evidence, if any, recorded during the original trial, subject to all just exceptions, be the evidence during the trial after remand, and after carrying out the measurement as directed by the lower appellate court, the appellants as well as defendants are at liberty to adduce the evidence, if any, to the extent of measurement report submitted by the surveyor. With these directions, both these appeals are disposed of. All pending civil applications also stand disposed of.

(V.K. JADHAV, J.)