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

SECOND APPEAL NO. 420 OF 2005

Dr. Raosaheb s/o Jijaba Anbhule,
Age: 62 years, Occu: Medical
Practitioner and Agriculture,
R/o. Burudgalli, Juna Bazar,
Ahmednagar – 431 001

..APPELLANT
(orig.def.)

VERSUS

Navalmal Shobhachand Gandhi,
deceased, thr. his L.Rs.

1. Smt. Sonabai Navalmal Ganadhi,
Age: 78 years, Occu: Household,
2. Dr. Mithulal Navalmal Gandhi,
Age: 62 years, Occu: Nil,

(Both dismissed vide Court's
order dtd. 13/04/2010)

3. Prakash Navalmal Gandhi,
Age: 67 years, Occu: Medical
Practitioner
4. Subhash Navalmal Gandhi,
Age: 55 years, Occu: Business
5. Dr. Rajkumar Navalmal Gandhi,
Age: 50 years, Occu: Medical
Practitioner
6. Sau. Shashikala Hukumchand Chopade
@ Shashikala Navalmal Gandhi,
Age: 51 years, Occu: Household,

Respondent Nos. 1 to 5,
R/o. Dalmandi,
Ahmednagar – 431 001
Respondent No.6, R/o. Model
Colony, Shivajinagar, Pune

..RESPONDENTS
(Orig.plaintiffs)

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Mr S. D. Kulkarni, Advocate for appellant;
Mr V. S. Bedre, Advocate for respondent Nos. 2A and 2B

CORAM : NITIN W. SAMBRE, J.

DATE : 2nd August, 2017

ORAL ORDER

Present appellant is the defendant in Regular Civil Suit No.821 of 1981, filed by the respondents-plaintiffs, before the learned 5th Joint Civil Judge Junior Division, Ahmednagar.

2. The said suit was for permanent injunction and removal of encroachment with prayer for possession of the encroached portion.

3. The predecessors-in-title of plaintiffs-respondents are the owners of land Survey No. 74/1B/1/4, admeasuring 1 H 50 Are land, situated at Village Savedi, Tq. & Dist. Ahmednagar. It is claimed by the respondents – plaintiffs that, on the western side of their property, 10 feet open space was left, which was used as a way for entering the field and also for transportation. It is claimed that present appellant-original defendant encroached on the said way. As such, suit in question.

4. The claim of the present respondents-plaintiffs was denied by the appellant-defendant. According to him, no partition of land Survey No. 74 was effected by virtue of which he is in possession and as such, it cannot be inferred that encroachment by the appellant-defendant is caused. Apart therefrom, complete claim put forth by the plaintiffs-respondents was denied by the appellant.

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5. According to learned Counsel appearing on behalf of appellant, before purchase of the property, the appellant has carried out measurement of the land on 20th March, 1981, based on map Exh. 142 and another map vide Exh.150 is at the behest of earlier owner. So as to substantiate his contention, he would rely upon evidence of D.W.2 Ajay Gandhi and D.W.4 Mirza Latif Baig.

6. There were two more measurements carried out prior to aforesaid measurements i.e. at Exh. 142 and another at Exh. 150, as could be evident from the evidence of P.W.2 - Nathu Bhikaji Kulal, Surveyor, who is examined at Exh.105. According to him, he has carried out measurement of the suit property pursuant to the order of the Court, passed in present suit, on 21st December, 2000, in which he has noticed that the appellant is in possession of 9 Are excess land. It is also brought in the evidence of appellant-defendant that the Surveyor has neither issued notices nor has measured the lands of the adjoining owners. As such, submission is made that the measurements carried out by P.W.2 – Nathu, is illegal.

7. In the aforesaid background, learned Counsel appearing on behalf of the appellant would urge that the appeal needs consideration on the following substantial questions of law:-

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(a) Whether the testimony of P.W.2 - Nathu, Cadestral Surveyor is rightly accepted and analysed by both the Courts below, when he has admitted about non-measurement of lands of adjoining owners, to whom notices were not served ?

(b) In absence of partition of the properties, particularly of survey No. 74, which was subsequently re-numbered as Survey No. 79, based on the measurement, whether proper measurement could be carried out and it could be inferred that the appellant has encroached on the land of the plaintiffs ?

(c) Whether the maps Exhs.142 and 150 (measurement maps) based on the testimony of the D.W.2 and D.W.4 are rightly discarded, where no encroachment is certified ?

8. Considered rival submission.

9. Perused the original record including map Exh.112, which was drawn by P.W.2 – Nathu, upon measurement carried out on 21st December, 2000, pursuant to the order of the Court passed to that effect.

10. From the record of both the Courts below, it is noted that the suit property was not subjected to partition was first time raised by the appellant on 21st December, 2000, though the suit was filed in 1981. Apart from above, fact remains that the measurements carried out, as is depicted in map

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at Exhs. 142 and 150, at the behest of the present appellant – defendant, the position was the same viz. alleged non-partition of the property. In spite of the said fact, the present appellant has carried out measurement of the suit property and placed reliance on the measurements drawn on map at Exhs.142 and 150. While carrying on such measurements, the issue of encroachment or non-partition was not before the authority and as such, measurements were by virtue of request made by the predecessor-in-title of the present appellant and that of original defendant may for the purpose of effecting sale deed.

11. It is then required to be noted that the earlier measurements vide Exhs. 142 and 150, though do not speak of any encroachment by the present appellant-defendant, yet the measurement was carried out, based on the existing position on the spot, without any complaint of encroachment.

12. The measurement at Exh. 112 is by virtue of the Court's order and P.W.2 - Nathu was examined in detail, who in categorical terms stated that the appellant-defendant was found to be in holding of excess land to the extent of 9 Are.

13. In the aforesaid eventuality, if the claim of the appellant is analysed, he has failed to prove as to how he is in possession of 9 Are excess land, contrary to his title to such property. It is also not brought on record that

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though he remained in possession of 9 Are excess land as could be inferred from the testimony of P.W.2 - Nathu, Cadestral Surveyor and Exh.112 - map drawn to that effect, holding of the respondents-plaintiffs is not reduced to that extent.

14. So far as evidence of D.W.2 - Ajay and D.W.4 - Mirza , who are examined by appellant is concerned, these witnesses have deposed based on the record available in their possession and they are not party to the measurements, as such, their evidence cannot be read down to mean and infer that the appellant has not made any encroachment. Said measurements are not in the background of cause of action alleged in the suit.

15. In the aforesaid background, having regard to the evidence of P.W.1 - plaintiff and P.W.2 – Nathu, Cadestral Surveyor, it was established beyond doubt that the present appellant – defendant has encroached to the extent of 9 Are and as such, both the Courts below, in my opinion, have rightly decreed the suit of the respondents-plaintiffs.

16. Though the issue is sought to be raised that while measuring the land, notices were not served to the adjoining land owners, which fact is admitted by P.W.2 - Nathu in his cross-examination, still, it is to be noted that, it is present appellant, who has to explain as to how he came in possession of 9

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Are excess land, which further corresponds with that of the claim of encroachment, alleged by respondents-plaintiffs.

17. Though the appeal remained pending since 2005, the appellant has not taken any steps within time to serve and to bring legal representatives of respondent Nos. 1 and 2 on record, however, this Court has allowed the prayer of the appellant to that effect in the interest of justice and proceeded to hear the matter.

18. In the aforesaid background, the present second appeal, which is against concurrent findings, in my opinion, is devoid of merits and deserves to be dismissed and as such, same is dismissed. In view of dismissal of second appeal, all pending civil applications are disposed of.

19. Since the appeal was not admitted, no substantial question of law was framed by this Court. The appellant, as such, argued on the grounds raised in the appeal, in the form of substantial questions of law and such those grounds are dealt with by this Court.

(NITIN W. SAMBRE, J.)

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