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

**SECOND APPEAL NO.363 OF 2015
WITH
CIVIL APPLICATION NO.8806 OF 2015
WITH
CIVIL APPLICATION NO.5764 OF 2017
IN
SECOND APPEAL NO.363 OF 2015**

Tukaram s/o Balaji Kadam,
Age: 65 years, Occ: Agri.,
R/o. Warud, Tal. Jafrabad,
Dist. Jalna.

..APPELLANT

VERSUS

1. Anil s/o Shankarrao Satav,
Age: 34 years, Occ: Agri.,
R/o. Warud, Tal. Jafrabad,
Dist. Jalna.
2. Sau. Gangasagar w/o Anil
Satav, Age: 29 years,
Occ: Agri., R/o. As above.
3. Vinayak s/o Anil Satav
(Under guardian of father)
Anil Satav Age 11 years,
Occ: As above.
4. Vivek s/o Abuk Satavm
(Under guardian of father)
Anil Satav, Age -05 years,
Occ: Nil, R/o. As above.

..RESPONDENTS

Mr S.S. Pawar, Advocate for appellant;
Mr J.C. Badve, Advocate for respondents

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CORAM : N.W. SAMBRE, J.**DATE : 28th JUNE, 2017****ORAL ORDER :**

Heard Mr. Pawar, learned Counsel for the appellant and Mr. Badve, learned Counsel for respondent Nos. 1 to 4.

2. The suit of the respondents-plaintiffs being Regular Civil Suit No. 53 of 2009 seeking declaration and possession of 15 Are land, which was encroached by the defendant came to be decreed by the judgment and order dated 19th January, 2013 passed by Civil Judge, Junior Division, Jafrabad, which was further confirmed in appeal being Regular Civil Appeal No. 27 of 2013 by learned District Judge, Jalna by judgment and order dated 14th January, 2015. As such, this second appeal.

3. Mr. Pawar, learned Counsel for the appellant while inviting attention of this Court to the evidence of PW-2 Appasaheb Bankar-Cadestral

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Surveyor, who was examined at Exhibit-38 would demonstrate that the encroachment by the present appellant to the extent of 15 Are land was not at all proved from his evidence and his evidence was read so as to infer certain admissions. According to him, in view thereof, judgments of both the Courts below are not sustainable.

4. Per contra, Mr. Badve, learned Counsel for the respondents would invite attention of this Court to the evidence of PW-2 and also findings recorded by the Courts below based on cross examination of the defendant wherein he has admitted about encroachment to the extent of 17 Are land in the Measurement Case No. 3/2006.

5. According to him, once measurement is admitted, the only inference that could be drawn is that the appellant has encroached on the land of the plaintiff.

6. Upon reading of evidence of PW-2 Cadestral

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Surveyor, I hardly see any material to infer that encroachment made by the appellant-original defendant was proved beyond reasonable doubt. Though Cadestral Surveyor PW-2 measured land Gat Nos. 376 and 377, however, admittedly has not issued notice to all the part owners but has issued notice for measurement only to the parties to the suit in question. Apart from above, in absence of exact measurement and detail drawing as regards land held by each of the party to the suit and without further determining exact measurement and place therein cannot be inferred from the report of PW-2.

7. As such, both the Counsel consent for remand of the matter to the learned trial Court by setting aside the judgment of both the Courts below.

8. The suit stands restored, after quashing the judgment and order dated 19th January, 2013, to the file of Civil Judge, Junior Division, Jafrabad,

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before whom, parties agree that they shall appear on 15th July, 2017 and further assure this Court that they shall extend all co-operation in expeditious disposal of the suit. The trial Court shall commence the suit proceedings from the stage of appointment of Cadestral Surveyor, fresh measurement and thereafter may proceed for recording evidence of Cadestral Surveyor and deliver fresh judgment in the matter.

9. It is directed that the suit be decided within one year from the appearance of the parties. Consequently, pending civil applications stand disposed of.

10. As a consequences of quashing of judgment and decree passed by the trial Court even judgment and order passed by the lower appellate Court in Regular Civil Appeal No. 27 of 2013 no more survives. As such, second appeal is partly allowed in above terms.

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11. The amount deposited in this Court be transferred to the proceedings in the Civil Court and the Civil Court shall deal with the same subject to outcome of the suit.

(N.W. SAMBRE, J.)

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