

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 364 OF 2012

Ramchandra s/o Bhimrao Sawant,
Age : 76 years, Occu. Agril.,
R/o Wanewadi (Kati), Tq. Tuljapur,
District Osmanabad

**APPELLANT/
ORIG. PLAINTIFF**

VERSUS

Gunabai Bhanudas Sawant,
Age : 66 years, Occu. Household,
R/o Sawantwadi No.1 under Kati
Tq. Tuljapur, Dist. Osmanabad

**RESPONDENT/
ORIG. DEFENDANT**

Mr. Mahendra B. Kolpe, Advocate for the Appellant
Mr. Prashant Deshmukh, Advocate for the Respondent

CORAM : SANGITRAO S. PATIL, J.

DATE : 11th JULY, 2017

ORAL ORDER :

Heard the learned counsel for the parties.

2. The learned counsel for the appellant (original plaintiff) submits that the land of the plaintiff was measured and demarcated by the surveyor wherein it was disclosed that the respondent has encroached upon the area to the extent of 24 Ares from the land of the appellant. The Trial Court decreed the suit considering the map prepared by the surveyor and the oral evidence

of the appellant. However, the First Appellate Court dismissed the suit solely on the ground that the surveyor, who prepared the map, was not examined and as such, the map was not duly proved. In view of these circumstances, the learned counsel for the appellant submits that the appellant should not be made to suffer on the technical ground that the measurement map was not duly proved by examining the surveyor. He prays that the impugned judgment and decree may be set aside and the suit may be remanded for trial afresh so that the parties would get an opportunity to produce the requisite evidence.

3. The learned counsel for the respondent also submits that it was prayed on behalf of the respondent before the First Appellate Court that the matter may be remanded so that the respondent would get an opportunity to contest the suit, but at that time, the learned counsel for the appellant had objected to that contention. He also submits that the suit may be remanded for fresh trial.

4. It is well settled that when there is a dispute in respect of encroachment of agricultural land, it is necessary that there should be positive evidence in

respect of the measurement and demarcation of the disputed land. In the present case, the measurement has already been carried and the measurement map also has been produced before the Court. However, the surveyor was not examined and therefore, the said map was not considered by the Appellate Court. In my view, the map certainly was not liable to be considered in the absence of the evidence of surveyor who prepared it. Therefore, in my view, in order to do substantial justice, it would be necessary to remand the suit to extend the parties an opportunity to put forth and prove their cases in respect of the alleged encroachment. The respondent also has not produced any evidence before the Trial Court. The respondent also will get an opportunity to contest the suit by producing the evidence. Since the suit is being remanded for fresh trial with the consent of the parties, the judgment delivered by the Trial Court in Regular Civil Suit No. 156/2004 and the judgment delivered by the First Appellate Court in Regular Civil Appeal No. 104 of 2005 are liable to be quashed and set aside. Hence the order:-

O R D E R

- (i) The judgments and decrees passed by the Trial Court and the Appellate Court are quashed and set aside.
- (ii) The Suit (R.C.S. No. 156/2004) is remanded to the Trial Court for fresh trial.
- (iii) The Trial Court shall extend both the parties an opportunity to adduce necessary evidence in support of their rival contentions and decide the suit on merit according to law.
- (iv) The parties shall appear before the Trial Court on 11th August, 2017 positively.
- (v) No costs.
- (vi) The record and proceedings be sent to the Trial Court immediately.

**[SANGITRAO S. PATIL]
JUDGE**