

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

**Civil Application No. 15979 of 2015  
In  
Second Appeal No.676 of 2012**

Sarjerao Rama Yadav. **.. Applicant.**

**Versus**

Sahebrao Rama Yadav  
And Two Others. **.. Respondents.**

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Shri. Chaitanya V Dharurkar, Advocate, for applicant.

Shri. N.P. Bangar, Advocate, for respondents.

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**Coram: T.V. NALAWADE, J.**

**Date: 23 November 2017**

**ORDER:**

1) This application is filed for modification of the operative order made by this Court in Second Appeal No.676 of 2012 on 2-5-2014. Both the sides are heard

2) The second appeal was filed against the judgment and decree of Regular Civil Appeal No.108/2008 which was pending in District Court Beed. This first appeal was filed against the judgment and decree of

Regular Civil Suit No.222/2003 which was decided by the Joint Civil Judge Senior Division Beed. The suit was filed by present applicant for various reliefs like removal of encroachment, declaration and perpetual injunction.

3) It is the case of the applicant that he is the owner of land Gat Nos.156 and 159 and he has the right in mango and other trees and also the well. He has sought declaration in respect of his right about the aforesaid things but he was specific about the encroachment made over his lands Gat Nos.156 and 159 by the defendants. The encroachment was found to be on total 4 R portion from the two lands (2 R each from Gat Nos.156 and 159). This decision was challenged in the first appeal but the first appeal was dismissed by the District Court. Then the defendants had filed second appeal in this Court.

4) After hearing both the sides, this Court partly allowed the second appeal. This Court found that there was no record of notice of measurements and it is the right of the adjoining owner against whom there is claim of aforesaid nature to get notice, to get the lands

measured in his presence. As there was no such record the appeal was allowed and the matter was remanded to the first appellate Court. Direction was given to the first appellate Court to see that Court Commissioner, Cadestral Surveyor is appointed and again fresh measurements are taken by the Cadestral Surveyor after following the procedure. It appears that by oversight this Court had not made clear that only to that extent the judgment and decree of the trial Court was set aside by this Court. The submissions made show that the measurement was again made through Cadestral Surveyor and Cadestral Surveyor has given report that there was encroachment of total 3 R portion in the aforesaid two lands. It was submitted that though such finding is given that finding was not incorporated in the decree and decree was not again prepared.

5) It can be said that due to mistake committed by this Court, in the operative order which created a confusion that the entire decree was set aside, the first appellate Court did not incorporate the finding given on the issue of encroachment and the right to get the

possession of the plaintiff of the encroached portion in the original decree. In view of these circumstances, a direction is sought along with modification of the decision given by this Court in second appeal.

6) Due to the aforesaid circumstances this Court holds that the relief sought needs to be given and the operative order of the second appeal needs to be as under:-

(i) The appeal is partly allowed.

(ii) The judgment and decree of Regular Civil Suit No. 222/2003 delivered by the Joint Civil Judge, Senior Division Beed is set aside only to the extent of the finding given on the issue of encroachment and the entitlement of the plaintiff to get possession of the encroached portion (from land Gat Nos.156 and 159).

(iii) These issues are to be again decided by the first appellate Court considering the appellate powers of the first appellate Court and for that the matter is remanded back to the first appellate Court only for allowing the parties to lead evidence on these issues and then giving

findings on these issues. After giving findings on these issues, if required fresh decree is to be prepared by the first appellate Court if the first appellate Court comes to the conclusion that the encroachment is proved. In the fresh decree only the finding given by the District Court on the encroached portion is to be incorporated but the remaining portion of the decree delivered by the trial Court is to be kept in-tact so as to make the decree complete in respect of all the reliefs which were granted by the trial Court.

(iv) Copy of this order is to be sent to the first appellate Court to take steps and for preparing the decree in accordance with the aforesaid directions.

7) The civil application is allowed and disposed of in the aforesaid terms.

Sd/-  
**(T.V. NALAWADE, J.)**

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