

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 70 OF 1994

1. Aba Yamaji Kotkar
Age 58 years, Occ. Agriculture

2. Chhabu Yamaji Kotkar
Age 72 years, Occ. Agriculture

Both R/o. Kedgaon,
Tq. and District Ahmednagar

...Appellants
(Ori. Defendants)

Versus

1. Vithal Bala Chaudhari,
Age 66 years, Occ. Agriculture

2. Kisan Bala Chaudhari,
Age 71 years, Occ. Agriculture

Both R/o. Kedgaon,
Tq. and district Ahmednagar

...Respondents
(Ori. Plaintiffs)

.....
Mr. A.B. Gatne, advocate for the appellants
Mr. D.R. Jayabhar, advocate for respondents
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Judgment : 18.01.2018**

**Date of pronouncing
the Judgment : 31.01.2018**

JUDGMENT :-

1. Being aggrieved by the judgment and order dated 07.12.1993

passed by the learned 4th Additional District Judge, Ahmednagar in Regular Civil Appeal No. 302 of 1986 thereby setting aside the judgment and decree dated 30.04.1986 passed by learned 5th Joint Civil Judge, Junior Division, Ahmednagar in Regular Civil Suit No. 577 of 1982 and further decreed the said suit, the original defendants have preferred this second appeal.

2. Brief facts giving rise to the present second appeal are as follows:-

a) The respondents herein filed Regular Civil Suit No. 577 of 1982 contending therein that they are owners of agricultural land bearing survey No. 97/1 admeasuring 3.76 Hectares situated at Kedgaon, Tq. and district Ahmednagar. Towards southern side of the said land, there is survey No. 93/1 owned and possessed by the appellants-defendants. There is common Bandh between both these lands in east west directions. It has been further pleaded that appellants-defendants have started destructing the said Bandh towards the land of the plaintiffs, thereby making encroachment upon survey No. 97/1 and also obstructed the plaintiffs from enjoyment of trees, standing in their lands. Accordingly, the respondents-plaintiffs had applied to the D.I.L.R. for measurement of survey No. 97/1 and for fixation of boundary marks. The said measurement was effected

by the Cadastral Surveyor and he found that the defendants have made encroachment over 3 Ares portion of land of survey No. 97/1. The respondents-plaintiffs therefore, have filed the suit, as aforesaid, for possession of 3 Ares portion of land and perpetual injunction restraining the defendants from obstructing their enjoyment over the trees.

b) The appellants-defendants have appeared in the suit and resisted the claim of the plaintiffs by filing written statement at Exh. 13 and 15. The appellants did not deny the title however, denied the allegations of destruction of common bandh and the encroachment over the portion of 3 Ares land. They have also denied that there are 7 Nim and 1 tamarind trees within the suit property and contended that the said trees are standing in their lands and they are the owners of the said trees. The common bandh is in existence since their forefathers and thus the contentions raised by the plaintiffs are baseless. It was also contended by the appellants-defendants that so-called measurement was effected behind their back and same is not proper and legal. The appellants-defendants therefore, prayed for dismissal of suit.

c) The learned Judge of the trial court on the basis of pleadings and the evidence produced on record, has framed issues at Exh.24

and upon considering the arguments and evidence led by the parties, dismissed the suit, by judgment and order dated 30.4.1986.

d) Being aggrieved and dissatisfied with the judgment and order passed by the trial court, the respondents-plaintiffs had filed Regular Civil Appeal No. 302 of 1986 in the District Court, Ahmednagar. The learned 4th Additional District Judge, Ahmednagar, allowed the appeal of the plaintiffs and directed the appellants herein to hand over the possession of 3 Are land alleged to have been encroached by the present appellants. Hence, this second appeal.

3. Learned counsel for the appellants submits that the lower appellate court has not correctly appreciated the evidence led by the parties and recoded the findings without any basis. The lower appellate court has not taken into consideration the conduct of the plaintiffs, who flatly denied to produce either agreement of sale, sale deed or rent note on record to show the boundaries of the suit land. Learned counsel submits that the suit is bad for non joinder of necessary parties. The suit is also barred by limitation. The appellants have not received the notices of D.I.L.R. in respect of measurement of the suit land. The appellants-defendants and respondents-plaintiffs are having vahivat up to the bandh and therefore, the appellants have not made any encroachment. The

trees in question are owned and possessed by the appellants. The appellants in the alternate prayed for adverse possession. Learned counsel for the appellants submits that the lower appellate court without considering all these material aspects of the matter has allowed the appeal filed by the respondents-plaintiffs and decreed the suit by setting aside the judgment and order of the trial court.

4. Learned counsel for the respondents-plaintiffs submits that the learned Judge of the trial court did not properly consider the evidence, facts and circumstances on record as well as the relevant provisions of law. The learned Judge of the trial court has erred in holding that the measurement was not properly done by the Cadastral Surveyor and there is no encroachment made by appellants to the extent of 3 Ares. Learned counsel for the respondents submits that there is no error committed by the lower appellate court in allowing the appeal. No interference is called for in the second appeal and prayed for dismissal of second appeal.

5. It is the precise case of the plaintiffs that the defendants encroached upon their land to the extent of 3 Ares and they came to know about the same when their land was measured by the surveyor. On careful perusal of evidence as well as the documents and the judgment and orders passed by both the courts below, it

appears that the trial court has dismissed the suit on the ground that the plaintiffs have admitted that there were no boundary marks on the bandh in between the lands of the parties. Further the surveyor has not issued any notice to defendant No.2 and as such, the suit land is measured in absence of the defendants. The trial court has also observed that at the time of measurement, there were no boundary marks fixed in the land in question. The trial court has thus concluded that the plaintiffs have failed to prove that the defendants had encroached upon their land to the extent of 3 Ares. The trial court has also observed that it is an admitted fact that the trees in question are on common bandh and not in the absolute possession of the plaintiffs.

6. On perusal of evidence of the plaintiff, it appears that the plaintiffs though admitted that there were no stones on the bandh showing the boundary between the lands, however, further stated in his cross examination itself that old boundary marks were present towards northern side of the lands and there were four boundary marks on four corners. In this context, it is necessary to refer the evidence of Cadastral surveyor, witness No.2 viz. Namdeo, for the plaintiffs wherein he has categorically stated that the map has been prepared as per the original scale and at the time of measurement of the land, the map Exh.48 signed by the District Inspector of Land

Records is used for fixation of said land. The witness No.2 Namdeo, the Cadastral Surveyor has deposed that there are 8 trees towards southern side and the said trees are within the boundary line of survey No. 97/1 and as per the map, there is encroachment of about 3 Ares in southern side of land Survey No. 97/1 made by owner of survey No. 93. This encroached portion is shown in red colour in document Exh.49. He has further stated in his cross examination that the land was measured by plain table method. He has further explained that if the plain table method is used, the surveyor has to fix the boundaries by putting white colour stones on the boundaries, which are existing in the said land and then distance between the table on which the map is to be drawn and boundary is to be measured is taken, and then the distance between the table and boundary marks is to be measured. According to him, there are about 12 boundary marks shown in the map. On the backdrop of the independent evidence of Cadastral surveyor, the lower appellate court has rightly observed that the Cadastral surveyor, who is an expert on the point, has not given any sort of admission to the defendants that it was not possible for him to effect the measurement without shifting the table. The lower appellate court has turned down the submissions made on behalf of defendants that since the land of the defendants were not measured, the alleged encroachment cannot be determined. The Cadastral surveyor, P.W.2 Namdeo, has

measured the suit land on the strength of fixed points which were available in the land. The lower appellate court therefore, has rightly held that it is not necessary to measure the adjoining land and the said fixed points are also shown in the map by letters "O" and "F".

7. The defendants are brothers interse and defendant No.1 has examined himself on oath before the Court. The plaintiffs have deposed that the defendants were present at the time of measurement. The same has not been specifically denied. Though P.W.2 Namdeo, Cadastral Surveyor, has admitted that no notice is served on defendant No.2, however, defendant No.1 has not stated specifically in his deposition that he was not present at the time of measurement. The defendant No.2 has not entered into witness box. On the other hand, the defendant No.1 has deposed in the court on behalf of defendant No.2 also. I do not find any substance in the submissions that the plaintiffs did not produce the sale deed or agreement of sale of the said property so as to show the sale of land survey No. 97/1. The defendants have not denied the title of the plaintiffs over the suit land and there is no propriety to produce the sale deed or agreement of sale before the courts below. The 7x12 extract of the suit property as well as the 7x12 extract of the land of the defendants though produced on record, however, the same do not reflect the entries in respect of trees. Consequently, the lower

appellate court has rightly given weightage to the document Exh.60 wherein the concerned Tahsildar has given permission to the plaintiffs to cut the trees. Further, P.W.2 Namdeo, Cadastral Surveyor has specifically deposed before the court that the said trees are within the limits of suit land survey No. 97/1 and not in the land of defendants nor on the common bandh. The question as to who has planted those trees is immaterial since the plaintiffs had acquired the said land by purchasing the same under the provisions of Bombay Tenancy and Agricultural Lands Act.

8. In view of the above discussion, I do not find any substantial question of law involved in this second appeal. The learned Judge of the trial court has recorded the finding contrary to the evidence on record. The lower appellate court has rightly interfered in the same. There is no substance in the appeal. The second appeal is hereby dismissed. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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