

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

**74 SECOND APPEAL NO.67 OF 2017
WITH
CA/1301/2017 IN SA/67/2017**

- 1 Chandkhan Faridkhan Patel,
Age 68 yrs., Occ. Agri.,
- 2 Alikhan Faridkhan Patel,
Age 63 yrs., Occ. Agri.,
- 3 Gulabkhan Chandkhan Patel,
Age 34 yrs., Occ. Agri.,
- 4 Nabikhan Chandkhan Patel,
Age 37 yrs., Occ. Agri.,

All are r/o Shivankhed (Kh),
Tq. Ahmedpur, Dist. Latur.

- 5 Walikhan Faridkhan Patel,
Age 60 yrs., Occ. Agri.,
R/o Panchama Nagar, Thodga road,
Ahmedpur, Dist. Latur.

... **Appellants.**

... **Versus** ...

- 1 Mehrunissa Begum w/o Gaffurkhan Patel,
Age 72 yrs., Occ. Household,
- 2 Gaffurkhan Jahankhan Patel,
Age 82 yrs., Occ. Agri.,

Both are r/o Shivankhed (Kh),
Tq. Ahmedpur, Dist. Latur.

... **Respondents.**

...

Mr. B.R. Kedar, Advocate for the appellants

Mr. H.I. Pathan, Advocate for the respondent Nos.1 and 2

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 22nd JULY, 2019

J U D G M E N T :

1 Present appeal has been filed by the original defendants challenging the concurrent findings and decree in R.C.A. No.65/2015 by learned District Judge-1, Ahmedpur, Dist. Latur dated 17.10.2016 and R.C.S. No.69/2009 by Jt. Civil Judge Junior Division, Ahmedpur, Dist. Latur dated 16.10.2015, whereby the suit filed by the present respondents-plaintiffs for removal of encroachment and possession came to be decreed against the present appellants.

2 Original plaintiff No.1 is the owner and possessor of 80 R land from Gat No.377, whereas plaintiff No.2 is the owner and possessor of 1 H 42 R from the same Gat number. Land belonging to plaintiff No.1 is towards north of land belonging to plaintiff No.2. Defendants are the owners of 65 R from Gat No.393 and it stands in the name of defendant Nos.2 and 3. Defendant Nos.1 to 3 are also the owners and possessors of land

admeasuring 1 H 63 R from Gat No.376, though the land stands in the name of defendant No.3. It has been contended by the plaintiffs that defendant No.3 conspired with revenue authorities and got more land mutated to the record of Gat No.376. Land Gat No.393 is towards eastern side of plaintiffs' land, whereas Gat No.376 is towards the north of plaintiffs' land. According to the plaintiffs, defendants have made encroachment to the extent of 9 Gunthas as well as 6 Gunthas in Gat No.377. When they got the measurement done and the encroachment was revealed, they had prayed for possession of the encroached portion from the defendants. As the defendants refused, they filed suit for removal of encroachment and possession.

3 Defendant Nos.1 to 5 resisted the claim of the plaintiffs by filing written statement. They have not denied the boundaries of Gat No.377. However, it was contended that the map attached to the plaint is false. They denied the map drawn by TILR. According to them, the measurement has been done behind their back. So also, it has been denied that the owner of Gat No.394 has given possession of the land to plaintiffs in May, 2002. It was stated that the suit is not within limitation. The *pot hissa* i.e. sub divisions were measured in the year 1968. At that time the lands belonging to the defendants is shown less by 37 Gunthas and therefore, they have filed appeal to the Deputy Director of Land Record, Aurangabad. On these contentions

they prayed for the dismissal of the suit.

4 Taking into consideration the rival contentions and the documents on record, issues came to be framed. Both the parties have adduced oral as well as documentary evidence. Taking into consideration the evidence on record, as aforesaid, the learned Trial Court has decreed the suit. Defendants were directed to hand over the possession of 9 Ares and 6 Ares land shown in red colour in map Exh.53. The said decree was confirmed by the learned First Appellate Court, in addition, the appellants i.e. original defendants were perpetually restrained from causing interference to the peaceful possession of the plaintiffs with land Gat No.377 admeasuring 2 H 22 R situated at village Shivankhed, Tq. Ahmedpur. Hence, this Second Appeal.

5 Heard both sides. The learned Advocate appearing for the appellants has harped upon the fact that the measurement was done prior to the suit and to which notice was not given to the defendants. Under such circumstance, the said map cannot be said to be binding on the appellants. Though the plaintiffs had examined PW 3 Murlidhar Shedolkar, the Cadestral surveyor, it is submitted that he had not produced any such record to show that the notice was received by the defendants. He pointed out the admissions given by PW 3 Murlidhar and submitted that he was not able to

give answers regarding the measurements. He placed reliance on the decision in Ushabai w/o Sharadchandra Bannore vs. Wasudeo Baliramji Mehare and others, 2004(2) Mh.L.J. 594, wherein this Court (Bench at Nagpur) observed that -

“The maps or plans made for the purpose of any cause must be proved to be accurate. The onus of proving that such a map is accurate lies on the party who produces it. The maps must be proved by the person who has prepared them. In case of dispute about an encroachment or dimension of a site, the first essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same. In the absence of such a map, the decree is probably meaningless and execution means virtually starting the case over all again.”

6 Similar view was taken in Niranjanabai Chandrakant Vira vs. Pramilabai Balkrishna Zade and another, 2004(6) Bom. C.R. 829 and Vachhalabai w/o Kundlik Gavane vs. Chinkaji Malhari Jadhav (Second Appeal No.662 of 2011 decided by this Court on 28.03.2012). It was also submitted that there was no joint measurement carried out by the Cadestral Surveyor and therefore Exh.53 which has now been made by the learned Trial Court as part of the decree, cannot be said to be an admitted map. He also submitted that initially the predecessor of the plaintiffs and the defendants had jointly owned Sy.No.40. Appellants were the owners of 8

Acre 3 Gunthas, whereas respondents were owners of 15 Acre 12 Gunthas. Thereafter, as per the case of the defendants, in the implementation of the consolidation scheme their area was reduced by 37 Ares and there was increase in the area of the respondents. The appeal was filed by the defendant No.3 in respect of the said reduction of the area. As per the testimony of the plaintiff he is not aware about the appeal filed by the defendant No.3. It was also submitted that the plaintiffs got the land measured on 23.04.1997. However, no action was taken by them and the suit came to be filed on 24.04.2009. Therefore, he canvassed that they ought to have been a joint measurement or measurement through appointment of Court Commissioner.

7 Per contra, the learned Advocate appearing for the respondents submitted that there are concurrent findings by both the Courts, it was not shown by the defendants, as to why the said map cannot be accepted and read in evidence, it was not shown by them that the said measurement is false, therefore, reliance placed by the learned Trial Court on Exh.53 for proving which the Cadastral Surveyor was examined by the plaintiffs was a sufficient compliance to prove the encroachment. The suit was filed within limitation as it has been held by the First Appellate Court and therefore, no substantial question of law can be said to be arising in this case.

8 It is to be noted that the case of the plaintiffs is centered around the measurement that was carried out on 23.04.1997. Plaintiffs examined the Cadestral Surveyor. The paper book of the First Appellate Court has been made available, which contains the evidence of PW 3 Murlidhar. Perusal of his evidence would show that according to him, he had issued notices to respondent under postal certificate. However, the measurement appears to be restricted to the land owned by plaintiffs. From the cross examination of PW 1 Gafoor Khan, it has been brought on record that the lands belonging to plaintiff as well as defendants were earlier part of Sy.No.40. He was not aware that the measurement of the sub divisions was made in 1968. Thus, it can be seen from the testimony of these two witnesses that the land belonging to the defendants was not measured. The defendant in his testimony has categorically stated that he had not received notice in respect of measurement. It also appears from the cross-examination of PW 1 Gafoor Khan as well as DW Chand Khan that certain portions of the land have been sold out. Taking into consideration all these aspects, in fact, there ought to have been admitted map as contemplated in **Ushabai's** case (supra). There was no attempt on either side to get the Cadestral Surveyor appointed as Court Commissioner during the pendency of the trial or even appeal. In fact, the learned First Appellate Court after considering the points raised in respect of dispute about non issuance of notice to defendants and that the

defendants' land not measured, ought to have appointed the Court Commissioner in appeal also to have an admitted map on record. In the above said catena of judgments of this Court it can be seen, that this Court time and again is harping upon to have an admitted map on record and in case of dispute, if any, to appoint a Court Commissioner and get the land measured that too a joint measurement of the disputed lands. When this fact has not happened in this case, interference is required and directions deserve to be given for a joint measurement by remanding the matter to the Trial Court. Directions deserve to be given for the appointment of Court Commissioner under Order 26 Rule 9 of CPC. This endeavour is required to be made to adjudicate the dispute at once.

9 Since the matter deserves remand, there is no necessity to go into the other merits of the case and rather those points deserve to be kept open. Hence, with these observations, following order is passed.

ORDER

1 The appeal is hereby partly allowed.

2 The Judgment and Decree passed in R.C.S. No.69/2009 by learned Joint Civil Judge Junior Division, Ahmedpur dated 16.10.2015 and Judgment and Decree passed by learned District Judge-1, Ahemdpur in

R.C.A. No.65/2015 dated 17.10.2016 are hereby set aside.

3 R.C.S. No.69/2009 is restored to the File of Civil Judge Junior Division, Ahmedpur with following directions.

A) The Trial Court shall appoint Taluka Inspector of Land Records/(Deputy Superintendent of Land Records) as Court Commissioner under Order 26 Rule 9 of the Code of Civil Procedure, 1908.

B) The Court Commissioner shall take the joint measurement of the land owned by plaintiffs as well as defendants, so also, if necessary, the land in the vicinity/adjoining lands by giving notices to all the concerned parties.

C) The Court Commissioner shall prepare measurement map showing the boundaries of the land and with conclusion as to whether there is any encroachment or not and submit report before the Trial Court within a period of four months, after the order/writ is given to the Commissioner.

4 The Trial Court to decide the suit afresh by giving opportunity to both the parties to lead evidence, if necessary and so advised.

5 Since the suit of 2009 is being restored today to the File of learned Civil Judge Junior Division, Ahmedpur, the Trial Court should give priority to dispose of the suit and to decide the same within a period of 8 months from the receipt of the writ or placing of authentic copy of the order

of this Court before it, whichever is earlier.

6 Both the parties are directed to appear before the learned Trial Court on 05.08.2019.

7 No order as to costs.

8 Civil Application stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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