

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

**SECOND APPEAL NO.562 OF 2005**

Raghunath Kashinath Chavan,  
Age 47 yrs., Occ. Agri.,  
R/o Pimperkhed, Tq. Ashti,  
Dist. Beed.

... **Appellant.**

...**Versus...**

1     Sakharam Maroti Chavan,  
       Age 57 yrs., Occ. Agri.,  
       R/o Pimperkhed, Tq. Ashti,  
       Dist. Beed.  
       (Deleted vide order dtd. 18.12.2008  
       in C.A. No.7575/2008)

2     Gopinath Pandharinath Chavan,  
       Age 32 yrs., Occ. Agri.,  
       R/o Pimperkhed, Tq. Ashti,  
       Dist. Beed.

... **Respondents.**

...

Mr. S.S. Bora, Advocate for the appellant

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**CORAM :    SMT. VIBHA KANKANWADI, J.**

**RESERVED ON :            11<sup>th</sup> JANUARY, 2019**

**PRONOUNCED ON :    29<sup>th</sup> JANUARY 2019**

**JUDGMENT :**

1 Present appeal has been filed by original plaintiff. The appeal was admitted on 08.12.2010 on following substantial questions of law.

- i) When the Cadestral Surveyor has found encroachment and has stated that the encroachment is 1½ gunthas over the share of the plaintiff and his brother each, then whether the decree ought not to have been passed ?
- ii) Whether the lower appellate Court while reversing the finding of the trial Court, has come within the close quarters of the reasonings of the trial Court ?

2 Name of respondent No.1 is deleted as per order of this Court dated 18.12.2018 passed in Civil Application No.7575 of 2008. Respondent No.2 is served, however, nobody has appeared on his behalf. Heard learned Advocate Mr. S.S. Bora for the appellant. Perused the Record and Proceedings. (Parties are addressed by their nomenclature before Trial Court.)

3 Plaintiff has come with the case that he is the owner of 1 Acre 6 Gunthas land from agricultural land Sy.No.109 out of 1 Hectare 99

Ares from village Pimperkhed, Tq. Ashti, Dist. Beed. The property has been more particularly described in para No.1 of the plaint. The said land was belonging to the father of the plaintiff, who has left behind him legal representative - plaintiff and his brothers Bhiwa and Babasaheb. Father Kashinath partitioned the suit property during his lifetime and in that partition plaintiff received the said land admeasuring 1 Acre 6 Gunthas. The eastern side land was kept by Kashinath for himself, then towards western side, the land was allotted to Babasaheb and towards West further the plaintiff's land and towards West of plaintiff's land there was land of Bhiwa. It is stated that 18 Gunthas land out of land of Kashinath was acquired by Government for Dhanora to Hiwara road. Then Kashinath sold 12 Gunthas land on 22.01.1993 and 20 Gunthas land on 16.05.1996 to one Shantabai, who is the wife of plaintiff. Further, he had also sold 10 Gunthas land to one Maroti Raoji. Maruti sold the same land to the plaintiff, Babasaheb and Sindhubai which is adjacent to Dhanora road. Further, Bhiwa sold his 1 Acre 6 Gunthas land to one Anusaya and Anusaya sold said land to defendant No.2. Thus, according to the plaintiff, his land Sy.No.109 is adjacent to Sy.No.108 and Sy.No.108 is towards southern side of Sy.No.109. The land of the

defendants and others is Sy.No.108. It is also stated that the width of the common boundary between the land of the plaintiff and defendants was 5 feet. The defendants are cultivating the land jointly. The defendants have demolished the common boundary mark in March, 1999 while ploughing their land. When plaintiff had obstructed them, they did not listen, therefore, plaintiff applied to Taluka Inspector of Land Records for fixing the boundaries. Accordingly, the land was measured on 16.03.1999. It was revealed that the defendants have encroached upon 3 Gunthas of land of plaintiff and Babasaheb. The Cadestral Surveyor has fixed the boundaries and had also affixed the boundary mark stones. After the measurement the plaintiff had requested the defendants to give possession of his half guntha of land out of 3 Gunthas of land, but they refused on 10.09.1999, therefore, the suit was filed.

4           The Defendants have resisted the claim of the plaintiff by filing written statement at Exh.16. The fact regarding partition of the land by Kashinath, the situation after the partition, sale transactions by Kashinath as well as others as narrated in the plaint have been admitted. They admit the ownership over the suit land but denied the fact of encroachment. They have denied that there was a common boundary of

five feet width between their land and the land of plaintiff. It is stated by them that the land is not measured nor notices regarding the measurement were given to them. It is stated that since the date of partition, which had taken about 40 years ago, the situation is as it is.

5           Taking into consideration the said rival contentions, parties went to trial, evidence has been led, plaintiff has examined himself as well as the Cadestral Surveyor, who had carried out the measurement. Defendants have examined defendant No.1 only. After considering the evidence on record and hearing both sides the learned Trial Court has decreed the suit. Defendants were directed to deliver possession of one and half Guntha of land shown in red colour in the map.

6           Thereafter, defendants filed appeal bearing Regular Civil Appeal No.76/2002 before District Court, Beed. Learned 3<sup>rd</sup> Ad-hoc Additional District Judge, Beed has allowed the said appeal and set aside the decree, that was passed by learned Civil Judge Junior Division, Ashti. Hence, the present Second Appeal.

7           It has been submitted on behalf of the appellant that the learned First Appellate Court failed to consider that the Cadestral

Surveyor was examined before the learned Trial Court and on the basis of his evidence it was held that there is encroachment to the extent of 1½ Guntha of land belonging to the plaintiff. It was observed by the First Appellate Court that as per Exh.27, it was clear that inspite of a fact that the Surveyor had noticed the encroachment made by the owner of Sy.No.108 over the owner of Sy.No.109 to the extent of 3 Gunthas including the share of Babasaheb, he has not segregated the land belonging to plaintiff and land belonging to Babasaheb. As Babasaheb was not party to the proceeding, the learned First Appellate Court reversed the decree, which is totally wrong on his part. It was also fairly pointed out by the learned Advocate for the appellant that the Surveyor had not measured Sy.No.108 which was belonging to the defendants.

8            Though the aforesaid two substantial questions of law have been framed, what is transpiring from the evidence of Cadestral Surveyor on which the plaintiff is heavily relying that he had not carried out the measurement properly. When this question was pointed out to the learned Advocate of the appellant, he fairly submitted that the measurement was carried out prior to institution of the suit. There was no attempt to get any Advocate or TILR appointed as Court

Commissioner to measure the land after the suit was filed. He also submitted that there was no attempt on the part of First Appellate Court to have measurement done even at appellate stage. There should have been proper measures undertaken by both the Courts below to have proper map on record. The parties had come to seek justice and therefore all the powers of Courts ought to have been used. He placed reliance on the decision in Kashinath Ramkrishna Chopade vs. Purushottam Rulshiram Tekade & ors, 2005(6) Bom.C.R., 267, wherein it was observed that, *“It is clear that under Order XXVI Rule 9 of the Code of Civil Procedure, the Court has the discretion to order local inspection or not. The object of the local inspection is not so much to collect evidence which can be taken in Court, but to obtain evidence which from its peculiar nature can only be had on the spot. The cases of boundary disputes and disputes about the identify of lands are instances when a Court should order a local investigation under Order XXVI Rule 9 of CPC. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the area encroached upon”*.

The said decision is later on followed in Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade, deceased, through Pooja @ Poojari

Y. Lakade & ors., 2011(3) Bom.C.R., 807.

9 Further, reliance has been placed on the observations in **Sulemankhan and ors. vs. Bhagirathibai and ors., 2014(4) Mh.L.J., 250**, wherein it is stated that, *“This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit, in which there is a boundary dispute. The Trial Court as well as First Appellate Court, which are Court of facts, are duty bound to ascertain that a map is drawn to the appropriate scale by competent Government official from the office of TILR or DILR, as the case may be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed and boundary dispute is finally settled by producing map in the Court by the plan maker who can prove its genuineness by deposing in support of such plan/map, if it is so necessary in the absence of admission for exhibiting the map”.*

Based on these observations the learned Advocate prayed for remand of the matter with necessary directions.

10 Here, in this case, the plaintiff got the land measured on

16.03.1999 and suit was filed on 23.09.1999. That means prior to the filing of the suit, he had applied to the TILR for fixing boundaries of the land Sy.No.109. The land of the defendants was Sy.No.108. It appears that the TILR measured only Sy.No.109. He did not measure Sy.No.108. Therefore, without fixing of the boundaries, it appears that the said measurement was carried out; which can be said to be a defective measurement, though the suit was decreed earlier. The learned First Appellate Court, first of all, failed to consider that the measurement was not properly done and therefore, he ought to have exercised his jurisdiction to appoint Court Commissioner under Order XXVI Rule 9 of CPC and get the measurement properly done. However, the appeal came to be allowed on the ground that the brother of the plaintiff is not party to the suit and without him proper demarcation has not been done. It was also observed that when the encroachment is stated to have been made to the extent of 3 Gunthas, plaintiff cannot ask for removal of his half share i.e. 1½ Guntha only. Thus, there is substance in the arguments advanced on behalf of the appellant that both the Courts have not exercised their jurisdiction judiciously and had not tried to bring on record an agreeable measurement to resolve the dispute. Following

paragraph in **Sulemankhan's** Judgment is important.

“8. In cases to determine encroachment, it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent. Oral evidence cannot prove such contentious issue conclusively. In a suit where parties are disputing boundaries of property and one of the parties alleges encroachment made by another party to the suit inside suit property. In such case the plaint map as evidence in respect thereof is vital document for to decide real controversy between the parties finally. This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit in which there is a boundary dispute. The Trial Court as well as 1<sup>st</sup> Appellate Court which are Court of Facts, are duty bound to ascertain that a map is drawn to the appropriate scale by competent Government official from the office of TILR or DILR, as the case may be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed and boundary dispute is finally settled by producing map in the Court by the plan maker who can prove its genuineness by deposing in support of such plan/map, if it is so necessary in the absence of admission for exhibiting the map. The Trial Court can certainly raise presumption of accuracy and genuineness of such map in view of Section 83 of the Evidence Act if map is drawn by competent authority. (See : Ram Kishor

*Sen & ors v. Union of India & ors reported in MANU/SC/0052/1965 : AIR 1966 SC 644) Where such vital document is duly produced, proved and established, necessary detailed decree can be follow if there is any encroachment on the suit property. As held by this Court in Vijay Shende's case (supra), in such cases, fact of encroachment may be proved partly by oral evidence although the extent of encroachment cannot be proved in absence of public records without following due procedure emerging from Section 36 and Section 60 of the Evidence Act. In view of this recent judicial precedent referred to above, in the larger interest of justice, when it appears that the trial Court as well as 1<sup>st</sup> Appellate Court failed to follow proper procedure in this regard to ascertain the boundaries of the suit property.”*

11            Therefore, it is not necessary for this Court to consider other facts in this case. Under the said circumstance, there is no necessity to proceed to answer the substantial questions of law framed earlier. In fact, the impugned Judgments and Decree passed by the Courts below have resulted into miscarriage of justice and in such circumstances, there is no alternative except to remand this suit to the Trial Court with directions to appoint the Commissioner/Surveyor from the office of DILR Beed or any such officer nominated by him for the purpose of local investigation under Order 26, Rule 9 of the Code of Civil Procedure. Hence following

order.

### **ORDER**

1. In such circumstances, the appeal is allowed.
2. The judgments and decrees passed by the Courts below are set aside and the suit is remanded to the Trial Court for fresh decision in accordance with law and in the light of the observations made hereinafter.
3. The Trial Court is directed to appoint the Surveyor from the office of DILR Beed or any TILR having jurisdiction over the village in which suit land is situated, for the purpose of local investigation under Order 26, Rule 9 of the Code of Civil Procedure.
4. Parties are directed to remain present before the Trial Court on 11.02.2019. If, defendants fail to appear on that day, Trial Court should issue notice and secure the presence of defendants by serving notice on them.
5. The plaintiff is directed to submit his application

before the Trial Court within two weeks from the date of appearance of both the parties for appointment of Court Commissioner.

6. Such appointed Commissioner shall conduct local investigation in accordance with the provision of Order 26, Rule 9 of the Code of Civil Procedure, after giving due notice to the parties and take the measurements of the property owned by the parties after taking into consideration the title deeds of the parties, if any and shall also demarcate the boundaries of the property by noting down the actual measurements in the joint measurement map itself by showing the precise and concise area under encroachment, if any, and then shall submit the map and report to the trial Court, within a period of two months thereafter.
7. The Trial Court shall decide the matter expeditiously and preferably within six months from the receipt of report of the Court Commissioner.

8. The record and proceedings be sent immediately to the trial Court.
9. If the plaintiff does not submit his application for appointment of the Commissioner within aforesaid period, the suit shall stand dismissed.
10. Parties to act on authenticated copy.

**( Smt. Vibha Kankanwadi, J. )**

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