

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

**SECOND APPEAL NO. 334 of 2012**

- 1 Rajasaheb Sayyed Kashim Fikir  
age 63 years occupation agriculture  
(Abated as per order dt. 18/08/2017)
- 2 Tamjbee W/o Rajesaheb Sayyed,  
age 60 years occup. household & Agri.

Both R/o Utka Taluka Ausa Dist. Latur **...Appellants**  
(Orig. defendants)

**Versus**

Chandar S/o Sadashiv Barse (DIED)  
through legal representatives:

- 1 Pandit S/o Sadashiv Barse,  
age 48 years, occupation agriculture
- 2 Dhondiram S/o Sadashiv Barse, age  
38 years occupation agriculture

Both R/o Utka Tal. Ausa Dist. Latur **...Respondents**  
(Orig. plaintiffs)

*Mr. M.L. Dharashive, Advocate for appellants.*  
*Mr. V.C. Solshe, Advocate for respondents.*

**CORAM : AVINASH G. GHAROTE, J.**

**Date : 30<sup>th</sup> September, 2019**

**ORAL JUDGMENT:**

1. For the sake of convenience, the parties are being referred to as they were before the Trial Court.

2. The plaintiffs claim to have a share of 3.88 hectares in the land of Gat No. 91, which admeasures 7.77 hectares, situated at Mauje Utka Taluka AUSA, of which they claim to be in cultivating possession as common cultivators, which is their ancestral property. As against this, the defendants are said to have purchased the property to the South side of the land of the plaintiffs, from and out of the land Gat No. 92. In between the two properties, there is one "Tal", running East-West, having length of 8 to 10 feet and a width of  $3\frac{1}{3}$ <sup>rd</sup>. It is claimed that said "Tal" is the property of the plaintiffs, by the South of which, the villagers have made a scheme for discharge of rain water. The defendants are claimed to have broken the stream and were also trying to break the "Tal" and encroach upon the "Tal", to restrain which the plaintiffs filed the suit for declaration of title and perpetual injunction, which was opposed by original defendant No.1. Defendant No.2 also opposed the plea of the plaintiffs and raised the counter claim contending that Gat No. 92 was having area of 4.72 hectares, out of which he was the owner of 2.80 hectares, from which the plaintiffs had encroached over an area admeasuring 0.4R. It is further contended that measurement regarding the encroachment was made on 30/03/2003 and the factum of encroachment by the plaintiffs having been established in the measurement, the plaintiffs had

handed-over the possession to defendant No.2. However, again in April 2003, they grabbed the possession. Defendant No.2, therefore, claimed the decree of possession by way of counter claim in respect of 0.4 R area.

3. During the course of the trial, a measurement was done by the T.I.L.R. as well as the report was prepared by the Court Commissioner. The learned Trial Court relying upon the T.I.L.R. report, dismissed the suit and allowed the counter claim by passing a decree directing the plaintiffs to handover possession of the area of 0.4R, as encroached by them to defendant No.2, within a month from the date of the judgment. The map at Exh. 104 for the purposes of ascertaining the dimensions of encroachment was made a part and parcel of the decree, which is dated 25/09/2009.

4. Being aggrieved by the judgment and decree of the Trial Court, the original plaintiffs preferred a common appeal challenging the dismissal of the suit as well as the decree as passed in the counter claim. The learned Appellate Court by its judgment dated 24/01/2012, allowed the appeal, set aside the judgment in counter claim and decreed the suit as filed by the plaintiffs declaring that they are the owners and possessors of the disputed "Tal", shown in the plaint map and further restrained

the defendants or any person on their behalf from disturbing the possession or from destructing or demolishing the disputed "*Tal*" in any way.

5. Being aggrieved by the judgment of the Appellate Court, the present appeal has been filed. Mr. M.L. Dharashive, learned Counsel for the appellants/original defendants, contends that the judgment of the Appellate Court is perverse inasmuch as the Appellate Court has ignored the measurement map, as prepared by the T.I.L.R., which constitutes a piece of evidence, failure to consider which in its proper perspective, vitiates the judgment of the Appellate Court. He further submits that the reliance placed upon the Commissioner's report by the Appellate Court, is also unwarranted and the Appellate Court has, thus, ignored the material evidence on record and considered unsubstantiated evidence, for which reason the impugned judgment of the First Appellate Court needs to be set aside. Per contra, Mr. Vinesh Solshe, learned Counsel for the respondents/plaintiffs, submits that the judgment of the first Appellate Court is well reasoned one and reliance has rightly been placed upon the Commissioner's report, as the report of the T.I.L.R could not have been relied upon, as it was done behind the back of the plaintiffs without any notice to them and did not

measure the adjacent areas.

6. Having considered the rival contentions, I do not find any infirmity in the judgment of the learned first Appellate Court. Admittedly, the land owned by the plaintiffs, is an ancestral one and the evidence on record demonstrates that the "*Tal*" is in existence since 1972 and is in use and possession of the plaintiffs. Defendant No.2 is a recent entrant on the scene having purchased a portion of land Gat No. 92, 3 years prior to filing of the suit from one Tanaji Warkar. That apart, there is a height difference between the land of Gat No. 91 and Gat No. 92, which is to the extent of 4½ feet. The land of plaintiffs is at a level, which is more than 4½ feet than the level of the land Gat No. 92, over a portion of which defendant No.2 claims title. It is in between this that the disputed "*Tal*" lies. The report of the Commissioner at Exh. 42 is clear and explicit in this regard, which also states that some portion of "*Tal*" is constructed in stones. Thus, the difference in the level of the two properties i.e. Gat No. 91 & Gat No. 92, itself would demonstrate that defendant No.2 would have nothing to do with the "*Tal*", which is at a lower height of 4½ feet than the level of her field, which is the part of Gat No. 92. The learned Trial Court clearly did not consider this position, as is apparent from a perusal of its

judgment.

7. The learned Trial Court had framed issue No.1 as to whether the plaintiffs are owners in joint possession of the suit land, which was the "*Tal*", and while answering the same in para 9, had held that the names of the plaintiffs came to be entered in the 7/12 extract as owners for the "*Tal*" area and had, thus, answered it accordingly. While answering issue No.2, the learned Trial Court adverts to admission in the written statement of the defendants to the effect that there is one East-West "*Tal*" running between the property of the plaintiffs and the defendants. Once having held that the "*Tal*" is recorded in the 7/12 extract in the names of the plaintiffs, the learned Trial Court ought not to have relied upon the T.I.L.R. report to dismiss the suit of the plaintiffs. The learned first Appellate Court has rightly found that the T.I.L.R. report and the evidence of the T.I.L.R., Shaikh Mubarak, was not reliable for the reason that the T.I.L.R. had carried out the measurement of only the field of defendant No.2 at her instance, in absence of the plaintiffs. This being the position, in the absence of a comparative measurement of the lands of Gat No. 91 & 92, the issue of encroachment could not have been determined by the T.I.L.R. Another reason, which weighed with the learned first Appellate Court and in my opinion rightly so, was

that the sale deed by which the defendants claim to have purchased the land, was not produced on the record and neither the predecessor-in-title of the defendants was examined. This being so, no fault can be found with the reasonings of the learned first Appellate Court, which has rightly allowed the appeal.

8. The learned first Appellate Court has considered the measurement map, as prepared by the T.I.L.R., in its proper perspective, and has also rightly relied upon the Commissioner report. So also, all material evidence on record has been considered by the learned first Appellate Court in its correct perspective. I do not find any question of law arises, much less a substantial question of law, in light of arguments advanced or the grounds as raised in the memo of appeal, all of which relate to the factual position, which have been rightly considered by the learned first Appellate Court. In the result, the appeal fails and is accordingly dismissed, with no order as to costs.

**( AVINASH G. GHAROTE, J. )**