

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

**Second Appeal No. 0590 of 2014**

District : Hingoli

1. Chinkaji s/o. Malhari Jadhav,  
Age : 62 years,  
Occupation : Agriculture,  
R/o. Kankarwadi,  
Taluka Risod,  
District Washim.
2. Vithal Chinkaji Jadhav,  
Age : 41 years,  
Occupation : Agriculture,  
R/o. as above.
3. Sakharam s/o. Chinkaji Jadhav,  
Age : 38 years,  
Occupation : Agriculture,  
R/o. as above.
4. Kundlik Chinkaji Jadhav,  
Age : 36 years,  
Occupation : Agriculture,  
R/o. as above.
5. Atmaram s/o. Chinkaji Jadhav,  
Age : 37 years,  
Occupation : Agriculture,  
R/o. as above.

.. Appellants  
(Original  
appellants/  
defendants)

**versus**

1. Wachalabai w/o. Kundlik Gavane  
(Died on 23.10.2010).
2. Santosh Kundlik Gavane,  
Age : 33 years,  
Occupation : Agriculture,  
R/o. Weltura,  
Taluka Sengaon,  
District Hingoli.

3. Arun s/o. Kundlik Gavane,  
Age : 32 years,  
Occupation : Agriculture,  
R/o. as above.

.. Respondents  
(Original  
plaintiffs/  
respondents)

4. Ganesh s/o. Kundlik Gavane,  
Age : 30 years,  
Occupation : Agriculture,  
R/o. as above.

.....

*Mr. P.S. Agrawal, Advocate, for the appellants.*

*Respondent no.01 died.*

*Mr. S.S. Londhe, Advocate, for respondents no.02 & 03.*

*Mr. Vivek M. Lomte, Advocate, for respondent no.04.*

.....

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

**Date of reserving  
the order : 26th February 2019.**

**Date of pronouncing  
the order : 12th April 2019.**

**ORDER :**

01. Present appeal has been filed by the original defendants. Present respondents had filed Regular Civil Suit No. 179 of 2004 before Civil Judge (Senior Division), Hingoli, for recovery of possession of the encroached portion and injunction. Plaintiffs had come with a case that they are the owners of land admeasuring 01 hectare 80 R out of Gut no.105 situated at Weltura. In the revenue record, name of Kundlik Sampatrao is shown as owner.

However, plaintiffs are in actual possession of the same. Kundlik Sampatrao Gavane was the husband of plaintiff no.01 and father of plaintiffs no.02 to 04. His whereabouts are not known since many years. Plaintiff no.04 was cultivating the land. He felt that the area has reduced and, therefore, he got the land measured by Taluka Inspector of Land Record [hereinafter referred to as "**TILR**"]. After the measurement was done, it was found that the defendant no.01 possess 01 acre 20 gunthas excess land belonging to the plaintiffs. It was also found that 10 gunthas land from the ownership of plaintiffs is in possession of one Pralhad Deoba Jaibhaye. Said Pralhad Jaibhaye delivered possession of the encroached portion to the plaintiffs. Plaintiffs requested defendants no.02 to 05 to hand over possession of the encroached portion. However, they refused and, therefore, the suit has been filed. (Parties are referred as per their nomenclature before the trial Court.)

02. The defendants resisted the claim of the plaintiffs by filing written statement. They admitted para 01 of the plaint to the extent that the parties are resident of Weltura; however, contentions in the plaint are denied. It is denied that the plaintiffs are owners of 01 hectare 80 R and out of same, 01 acre 20 gunthas has been encroached upon by them. It is stated that there is boundary i.e. *Dhura*

running south north since time immemorable between the lands belonging to the plaintiffs and defendants. There is big old acacia (*Babhul*) tree on *Dhura* since last more than 40 years. Therefore, it was not possible for anybody to encroach upon each others land. It is denied that a measurement has been carried out at the request of the plaintiffs and in that measurement, it was found that the defendants have made encroachment. It is stated that since they are possessing the land since immemorable, the suit that has been filed is beyond the period of limitation. It is stated that they have developed the land by digging a bore well and taking electric connection. They have taken 250 orange trees in the said land and, therefore, the plaintiffs intend to grab the same.

03. Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, learned trial Court has partly decreed the suit. Defendants were directed to hand over possession of 01 acre 20 gunthas land out of Gut no.105 to the plaintiffs leaving their own land to the extent of 01 hectare 80 R. The consequential prayer of injunction has also been granted. The said decree was passed on 27-02-2006.

04. The defendants had challenged the said judgment and decree in Regular Civil Appeal No. 20 of 2006 before learned District Judge-1, Hingoli. It will not be out of place to mention here, that earlier the said appeal was allowed by judgment and decree dated 14-12-2009, thereby the judgment and decree passed by the trial Court was set aside and, therefore, the original plaintiffs had filed Second Appeal No. 662 of 2011 before this Court. The second appeal came to be allowed and Regular Civil Appeal No. 20 of 2006 was restored to its original file with direction to appoint court commissioner, either TILR or DILR, for joint measurement of the land of the appellants and respondents i.e. plaintiffs and defendants. Accordingly, the joint measurement has been carried out and the evidence has been led before the first appellate Court. After considering the evidence before trial Court as well as before it, learned first appellate Court has partly allowed the appeal and modified the judgment and decree passed by the learned trial Court. The defendants were directed to hand over vacant possession of 44 R land out of Gut no.105 to the plaintiffs instead of 01 acre 20 gunthas. Rest of the terms of the judgment and decree passed by the trial Court were maintained. Hence, the defendants have filed this second appeal.

05. Heard learned Advocate Mr. P.S. Agrawal appearing for the appellants and learned Advocate Mr.

V.M. Lomte appearing for respondent no.04. Learned Advocates have made available the paper-book of the first appellate Court in order to consider the evidence.

06. It has been vehemently argued on behalf of the appellants that the plaintiffs were not the owners of Gut no.105 and, therefore, their ownership was specifically challenged by the defendants. Admittedly, the lands stand in the name of husband of plaintiff no.01 and father of plaintiffs no.02 to 04. Only a statement has been made that whereabouts of husband of plaintiff no.01 are not known since last many years. There was no proceedings taken by the plaintiffs to declare him civilly dead. Plaintiffs were not entitled to file an application for measurement and, therefore, whatever measurement was carried out on the basis of their application is wrong and illegal. Both the Courts below have failed to take note of the measurement that was carried out at the instance of defendants in the year 2005. DW 02 Bharat Mohare, Cadestral Surveyor, has specifically stated that he had issued notices to the adjacent owners and carried out measurement on 07-01-2005. He did not find any encroachment at the instance of defendants on the land belonging to the plaintiffs. Both the Courts below have not considered that there is old *Bandh* in between both the lands, so also, there are big trees on the *Bandh*.

Therefore, the geographical area was not conducive for making encroachment. Learned first appellate Court relied on the measurement that was carried out after remand but then it was not considered that the measurement was not properly done and whatever measurement was done was not supporting the contention of the plaintiffs. It was submitted by the court commissioner, that encroachment is to the extent of 44 R only. For the first time, it has come on record, that the appellants possess 45 R land belonging to one Prabhu Bonde who has not filed any suit for recovery of possession. Therefore, such map ought not to have been relied by the first appellate Court. Substantial question of law is arising in respect of the joint measurement and, therefore, he prayed for admitting the second appeal.

07. Per contra, learned Advocate appearing for the respondents supported the reasons given by the first appellate Court and submitted that though no steps were taken by the plaintiffs to get the declaration in respect of civil death of husband of plaintiff no.01, that does not preclude the plaintiffs from protecting their right over the suit property. They can still maintain suit for possession.

08. Plaintiffs have come with a specific case, that whereabouts of Kundlik are not traced out since

last more than 10 to 12 years. However, they have clearly stated that since Kundlik went missing, they possess the suit land and they were cultivating it. However, since about 08 years prior to the suit, the plaintiffs felt that their area is reduced and, therefore, they had made application for measurement. Definitely, then they were in possession of the property. They were justified in measurement of the land. Such mere technicalities cannot be allowed to override the substantial rights of a party. Therefore, no fault can be found in the suit regarding its maintainability.

09. Plaintiffs had got the land measured prior to the suit i.e. in 2001, whereas though the defendants got the land measured in 2005 i.e. during the pendency of the suit, yet, it appears that he had not taken help of provisions of Order XXVI Rule 10(3) of the Code of Civil Procedure, 1908, to get the land measured. Though the Cadestral Surveyor Bharat Mohare was examined and he has stated that he had measured the land on 07-01-2005, he has only produced *Goshwara* of the show cause notice served on the adjacent owners of the measurement. Further, in the cross, he had given some admissions which were in favour of plaintiff. He admitted that he has not shown big trees, *Bandhara*, orange trees, etc in the map. That means, his measurement was also faulty and, therefore, it appears that when this Court

remanded the matter by passing specific order in Second Appeal No. 662 of 2011, directions were given to have joint measurement. After remand of the appeal, joint measurement was done and map was produced at Exhibit 53 before the first appellate Court. Evidence was taken by the first appellate Court itself, wherein witness Anand Kurhe was the Cadestral Surveyor examined. Definitely, his evidence would be of more importance and we will have to discard the measurements got done prior to the remand of the matter by this Court. In the said joint measurement, it was found that the present appellant has encroached upon the land of the respondents to the extent of 44 R and to the extent of 45 R of ownership of Prabhu Bonde. We are not concerned with the land owned by Prabhu Bonde but then, when it is restricted to the plaintiffs' rights, it is only 44 R which is the encroached area.

10. There was every opportunity available to the present appellants to challenge the joint measurement got done after remand. When the map was produced, the appellants could have resorted to Order XXVI Rule 10(3) of the C.P.C., which provides, where the Court is for any reason dissatisfied with the proceedings of the commissioner, it may direct such further enquiry to be made as it shall think fit. It ought to have been brought to the notice of the first appellate Court, that there would be reasons for

dissatisfaction of the Court in respect of the measurement. It is not only that *suo motu* powers are given to the Court, to be exercised under Order XXVI Rule 10(3) of C.P.C. It can be at the behest of any of the parties to the proceedings also. It would be the duty of those parties to bring to the notice of the Court, that there would be points for dissatisfaction and which can be got corrected by making further enquiry, so that such report is produced before the Court which would give a clear picture without resorting to the available mode. It does not simply beneficial to the appellant to point out only the alleged defects. It can be seen that nothing contradictory has been transpired in the evidence of Cadestral Surveyor Anand Kurhe. Therefore, to the extent of ownership of plaintiffs, when it was found that the defendants have encroached to the extent of 44 R, the decree has been modified to that extent. Therefore, there is no illegality or error committed by the Courts below, especially the learned first appellate Court, pointing out any substantial question of law.

11. In the light of above, the second appeal is disposed of as '**not admitted**'.

( Smt. Vibha Kankanwadi )  
JUDGE

.....