

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

Second Appeal No. 0820 of 2018

District : Jalna

1. Tukaram s/o. Bala Koli,
Age : 55 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
2. Rukhmanbai w/o. Damu Padle,
Died.
3. Fakira s/o. Damu Padle,
Age : 35 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
4. Vatsalabai w/o. Rama Koli,
Age : 45 years,
Occupation : Household,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
5. Anusayabai w/o. Raghav Koli,
Age : 47 years,
Occupation : Household,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
6. Dnyaneshwar s/o. Raghu Koli,
Age : 33 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.

7. Govinda s/o. Raghu Koli,
Age : 31 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
8. Indal s/o. Asaram Rajput,
Died through his L.Rs.,
 - 8/1. Tarabai w/o. Indal Rajput,
Age : 56 years,
Occupation : Household,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
 - 8/2. Jaipal s/o. Indal Rajput,
Age : 45 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
 - 8/3. Bhagatsingh s/o. Indal Rajput,
Age : 40 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
9. Kasabai w/o. Babu Sonwane,
Age : 55 years,
Occupation : Household,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
10. Sakharam s/o. Babu Sonwane,
Age : 35 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
11. Santosh s/o. Babu Sonwane,
Age : 31 years,
Occupation : Agriculture,

R/o. Wadhona,
Taluka Bhokardan,
District Jalna.

12. Narayan s/o. Hari Koli,
Age : 61 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.

13. Namdeo s/o. Vithoba Sonwane,
Age : 55 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.

14. Salubha s/o. Ananda Dhanwai,
Age : 61 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.

15. Laxman s/o. Bala Koli,
Died through his L.Rs.:

15/1. Gayabai w/o. Laxman Koli,
Age : 60 years,
Occupation : Household,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.

15/2. Arjun s/o. Laxman Koli,
Age : 50 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.

15/3. Rahul s/o. Laxman Koli,
Age : 35 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.

.. Appellants
(Original
defendants)

versus

1. Hiralal s/o. Ramchandra Mahore,
Age : 61 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
 2. Pashu Shah s/o. Sandu Shah,
Age : 48 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
District Jalna.
 3. Husen Fakira Tadvi,
Age : 43 years,
Occupation : Agriculture,
R/o. Wadhona,
Taluka Bhokardan,
- .. Respondents
(No.01 -
Original
plaintiff
&
Nos.03 & 04
- Original
defendants)

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*Mr. N.S. Shah & Mr. P.R. Gaikwad, Advocates, for
the appellants.*

*Mr. S.M. Gunjal, Advocate, holding for
Mr. J.C. Badve, Advocate, for respondent no.01.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 03RD APRIL 2019

ORAL ORDER :

01. Present appeal has been filed by original defendants no.01 to 13, challenging the judgment and decree passed by learned Ad hoc District Judge-1, Jalna, in Regular Civil Appeal No. 174 of 2012, dated 24-08-2017, whereby their appeal came to be

dismissed. In the said appeal, they had challenged the judgment and decree passed in Regular Civil Suit No. 10 of 2003 filed by present respondent no.01 before Joint Civil Judge (Junior Division), Bhokardan, District Jalna, dated 09-04-2012. The said suit was filed by the plaintiff for possession and it was decreed. (Parties are hereinafter referred by their nomenclature before trial Court).

02. Original plaintiff has come with case, that he is owner and possessor of 02 hectares 88 R land from Gut no.211 situated at village Wadhona, Taluka Bhokardan, District Jalna. While implementing the Consolidation Scheme, the Consolidation Officer has given transfer certificate to the plaintiff. A road passes through his land and because of which is land has been divided into two parts. One and half acres land remains toward northern side of Ajintha-Buldhana road and rest is towards south. It has been contended that the defendants have encroached on the land of the plaintiff about 08 years prior to the suit and they have taken in possession about 14 R land situated on the northern side of the road. The four boundaries of the said 14 R land have been described by giving boundaries and it has been referred as suit property. It has been contended by the plaintiff that he had requested the defendants several times to remove the encroachment and hand over possession, however, they denied. Under those

circumstances, the plaintiff applied on 22-05-1995 to Taluka Inspector of Land Record, Bhokardan, for measurement of land. Measurement was done on 27-06-1995. Ultimately, the defendants denied to remove the encroachment on 01-01-2003. Hence, suit for possession has been filed.

03. The defendants filed their written statement contesting the matter. However, during the course of the suit, defendants no.02, 05 and 07 expired. Their legal representatives have been brought on record and those legal representatives have also submitted their written statement. They have denied ownership of the plaintiff over Gut No.211 to the extent of 02 hectares 88 R. According to them, government had acquired portion of Gut no.211 in 1975-76 and then had constructed houses. The government had handed over those houses to the defendants and accordingly they are in possession. They have challenged the measurement and map prepared by TILR.

04. After issues came to be framed, both the parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, learned trial Court has decreed the suit. The defendants were directed to hand over 14 R land, described as suit property, to the plaintiff within three months from the date of decree.

05. As aforesaid, the said judgment and decree passed by the trial Court was challenged in Regular Civil Appeal No. 174 of 2012 which came to be dismissed on merits. Hence, this second appeal.

06. Heard learned Advocate Mr. N.S. Shah appearing for the appellants and learned Advocate Mr. J.C. Badve appearing for respondent no.01.

07. Learned Advocate for the appellants has vehemently submitted that both the Courts below have misread and misinterpreted the evidence on record. It was not considered by both the Courts that though the map drawn by TILR was produced on record, it was not proved properly by examining the Cadestral Surveyor who had carried out the measurement. In fact, when the Courts had come to a conclusion that there was an encroachment, then there ought to have been appointment of a surveyor for fresh joint measurement and both the Courts ought not to have believed the map which was prepared on the basis of measurement that was carried out on 27-06-1995 when the suit, in fact, came to be filed on 17-01-2003. Both the Courts have not taken into consideration that the Government had allotted the houses which were constructed by the government under a scheme called "Gharkul Yojana". The admissions given by the plaintiff himself and his witness have not been considered properly and, therefore, when the finding

is perverse, substantial question of law arises.

08. Per contra, learned Advocate for the respondent supported the reasons given by both the Courts below and it was submitted that the defendants have not led any evidence to show that they got the property through government.

09. At the outset, it can be said that unless the appellants point out substantial question of law as contemplated under Section 100 of C.P.C., the second appeal cannot be admitted and, therefore, it is now required to be seen as to whether any substantial question of law has been pointed out by the defendants or not, when there is concurrent findings by both the Courts below.

10. In order to support his claim, the plaintiff had produced 7/12 extract of Gut no.211 at Exhibit 72 which showed that he is owner and possessor to the extent of 02 hectares 88 R. Though the defendants have contended that portion from Gut no.211 was acquired by government, they have not produced any documentary evidence to show that such a portion was acquired by government. They were not sure and have not pleaded as to how much land was acquired by the government from the plaintiff. On the contrary, it appears that a transfer certificate was produced at Exhibit 73 which was issued by the Consolidation

Officer showing that the plaintiff is owner of 03 hectares 48 R land from Gut no.211 but then the plaintiff has explained that he had sold out 60 R land to his wife and, therefore, his holding has been reduced to 02 hectares 88 R. Taking into consideration the defence that has been raised by the defendants, it can be contended that defendants intended to say that the houses on which they are residing are on the land bearing Gut no.211. It was their categorical defence in their written statement that the said portion was acquired by the government and even a prayer was made that the acquisition file should be called from Tahsil office. However, it appears that when the matter went to trial, no such application was made by the defendants nor defendants had examined any witness by calling the file from Tahsil office. Therefore, when it is certain that the defendants occupy portion of Gut no.211, then onus shifted on the defendants to prove as to how they got possession of the respective pieces of land or the house.

11. DW 01 Tukaram, who was the only person examined on behalf of all the defendants, in his cross examination, has denied that government had given land to them but it was his specific case that the house was given to them. According to him, the houses were given to 12 persons but then he further says that those houses are in the village. He

produced certain documents at Exhibits 104 to 106, but then he admitted that those documents are in respect of those houses which are in village. Therefore, except the bare statement of DW 01 Tukaram, that the defendants got houses from government, there is nothing on record.

12. Much stress has been led in respect of measurement by TILR, *panchanama* that was carried out by TILR and examination of the *panch* witness. However, all this evidence even if we brush it aside, will not give any kind of advantage to the defendants for the reason that they themselves have come with a case that the house which they are occupying are on Gut no.211. Therefore, it was for them to prove that their entry in the said house was lawful. At the cost of repetition, it can be said that it was for the defendants to prove that they got the respective houses from government under a particular scheme. It appears that there was some confusion as regards words '*encroachment and trespasser*'. Defendants do not have any land adjacent to the land of plaintiff. Appropriate word would have been '*trespasser*'. Now, the defendants have tried to contend that they are in possession of the suit property since 1980 onwards. According to them, the land was acquired in 1975-76 and thereafter the houses were constructed. Taking into consideration this aspect, even an issue in respect of limitation was also framed. In spite of

this fact, defendants did not lead evidence as to when the government had allegedly handed over them constructed houses. Plaintiff has specifically contended that the encroachment has been made by the defendants around 1995 and then he got the land measured. This contention of the plaintiff appears to be convincing and in order to support the said contention, he has led evidence. When the defendants wanted to contend that the suit is not within limitation and they are in possession of the property since 1980 onwards and, therefore, the suit filed in the year 2003 is time barred, there was onus on the defendants to prove the said contention. Except bare words and the documents Exhibits 104 to 106 which is in respect of some property, which according to the cross examination of the defendant himself, is in respect of houses which are in the village, there is nothing on record.

13. Taking into consideration all these aspects, both the Courts below have appreciated the evidence properly, so also, the law involved in the same. No substantial question of law has been pointed out. Hence, the second appeal is disposed of as '**not admitted**'.

(Smt. Vibha Kankanwadi)
JUDGE

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