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D. Pandit

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 595 OF 2016
ALONGWITH
CIVIL APPLICATION NO.1194 OF 2016
IN
SECOND APPEAL NO. 595 OF 2016**

Shri Anna Aba Atole (since deceased)
through his heirs

Shri Chhaba @ Aba Anna Atole and Ors. Applicants.

V/s

Dattu Tatya Atole
(Since deceased through L/Rs)

1.A Shri Shivaji Dattu Atole and Ors. Respondents.

Mr. Prasad Kulkarni i/b Mr. Ganesh Bhujbal for the Appellant.
Mrs. Savita Prabhune for Respondent Nos. 2 to 5.

CORAM : NITIN W. SAMBRE, J.

DATE : JANUARY 07, 2020

P.C.:

1] Suit for removal of encroachments came to be dismissed, which decree was reversed in First Appeal. Reversal of decree is based on the plaint map which is based on measurement carried by Taluka Inspector of

Land Record (“TILR”). Measurement of Gat No. 356 (Old Gat No.551) owned by the Plaintiffs, claimed to have been carried on 18/10/2006 which was witnessed by Defendant No.1 i.e. Appellant No.1 herein.

2] In the aforesaid backdrop, question of law which is sought to be agitated is, “whether in the absence of joint measurement of land of the Appellants/Defendants and Respondents/Plaintiffs, the Court below committed an error in decreeing the suit?”

3] Fact remains that the suit brought in action by Respondents/Plaintiffs is based on Exhibit-3 i.e. report of the measurement dated 18/10/2006 submitted by TILR to which Defendant No.1 i.e. Appellant No.1 herein is a witness. Appellants never objected to such measurement or report of TILR either before the court below or revenue authorities.

4] Apart from above, Appellants while establishing their defence have never applied to the Trial Court or First Appellate Court to carry out the

measurement of the land or joint measurement of the land of the parties to the suit. As such, Appellants/Defendants are trying to take advantage of their own default of not applying for joint measurement. The onus to prove, in the backdrop of above evidence is on Appellants that they have not encroached.

5] It is also brought to the notice of this Court by the Counsel for the parties that decree is already executed. This Court is also required to take note of the same.

6] In the aforesaid backdrop, claim put-forth in the form of question of law that Exhibit-3 i.e. measurement report ought not to have been relied upon by the lower appellate court while deciding the appeal, does not appear to be sustainable. No case for interference is made out. Second Appeal stands dismissed. In view of disposal of Second Appeal, Civil Application No.1194 of 2016 taken out therein does not survive and the same is also disposed of.

(NITIN W. SAMBRE, J.)