

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

**APPEAL FROM ORDER NO. 2 OF 2020
AND
CIVIL APPLICATION NO. 13289 OF 2019
IN
APPEAL FROM ORDER NO. 2 OF 2020**

Pratap Ramkrushna Patil and Others ..APPELLANTS

VERSUS

Krushna Nathu Patil ..RESPONDENT

....

Mr. B.K. Patil, Advocate for appellants

Mr. S.G. Chapalgaonkar, Advocate for respondent

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**CORAM : R.G. AVACHAT, J.
DATED : 20th AUGUST, 2021**

PER COURT :

1. Heard.

2. The challenge in this Appeal from Order is to the judgment and order dated 23rd September, 2019 passed by District Judge-3, Jalgaon in regular Civil Appeal No. 142 of 2013. By the impugned judgment and order, the appeal preferred by the plaintiff, respondent herein, came to be allowed remanding the suit back with direction to the trial Court to appoint T.I.L.R. or any other competent expert to measure suit property, Block No. 175 and 176 situated at village Kekatnimbhore, Tal. Jamner, Dist. Jalgaon at the cost of

plaintiff and to furnish report along with map disclosing encroachment, if any, with all necessary explanatory notes. The original defendants have, therefore, preferred the present appeal.

3. It is a suit for removal of encroachment and possession. The trial Court dismissed the suit mainly for the following reason :-

“The plaintiff is seeking the possession of encroached area on the basis of map. Admittedly, the measurer has not measured Gat No.176 and he has not shown actual encroachment in Gat No. 175. It shows that the map is not accurate. However, unless it is proved that the owners of Gat No. 176 have possessed an excess area than their title area, the plaintiff cannot claim possession of encroached area. The plaintiff has failed to prove the accuracy of map u/s. 83 of the Indian Evidence Act. The plaintiff has also failed to prove an encroachment in the suit property at the hands of defendants.”

The respondent/plaintiff, therefore, preferred the appeal. On hearing the parties to the appeal, the appellate Court remanded the suit as stated above.

4. Mr. Patil, learned counsel for the appellants would submit that the surveyor was examined in the trial Court. The surveyor failed to prove the measurement map drawn by him and as such, the case of encroachment has

not been proved. Learned counsel took me through the entire judgment of the trial Court to submit the same to be just and deserves to be maintained. According to him, the appellate Court could have appointed a surveyor for measurement of the concerned lands in appeal itself. Learned counsel would further submit that Sakharabai, original Defendant No.4/Respondent No.5, passed away pending the appeal. The appeal, therefore, stood abated in its entirety since all her legal representatives were not brought on record. In support of his contentions, learned counsel has placed reliance on the judgments in *Budh Ram and Ors. Vs. Bansi and Ors.*, 2010 AIR SCW 5071 and *Yashwant Hari Parit (since deceased through legal heir) Vs. Sunita Ashok Bhandare and Ors.*, Second Appeal No. 488 of 2017 dated 09th August, 2019 (Coram: Smt. Anuja Prabhudessai, J.) of Bombay High Court.

5. Mr. Chapalgaonkar, learned counsel for the respondent/plaintiff would, on the other hand, submit that in a suit for removal of encroachment and/or for possession of the land encroached, appointment of surveyor/Court Commissioner is a must. Same has been done by the first appellate Court. On the question of abatement of appeal due to death of Respondent No.5, he would submit that Respondent No.4, husband of Sakharabai was very much on record in appeal and as such, there is no question of the appeal being abated either in its entirety or as against deceased – Sakharabai.

6. Considered the rival submissions. Perused the judgment of the trial Court and the impugned order as well. It is a suit for removal of encroachment made on agricultural land and for its possession. As stated above, the trial Court discarded the evidence of the surveyor, and therefore, the suit was dismissed. In the case of suit for removal of encroachment, the measurement of the land is a must. The appellate Court is, therefore, justified in passing the impugned order remanding the suit back to the trial Court with direction as stated above. I do not find any reason to interfere therewith.

7. On the question of abatement of appeal on the ground of failure to bring on record the legal representatives of Respondent No.5 – Sakharabai is concerned, it is to be stated that her husband was very much on record of the appeal when the appeal was heard, and as such, Sakharabai's interest can be said to have been duly represented. Moreover, Sakharabai's son was also on record in the capacity as Power of Attorney. True, on the demise of Sakharabai he no longer remained to be her Power of Attorney.

8. The fact however remained that one of the legal representatives of deceased – Sakharabai was before the appellate Court and as such, there is no question of the appeal being abated, either in its entirety or against deceased – Sakharabai. There can be no two views over the proposition advanced by

learned counsel for the appellant relying on the judgment of Apex Court in Budh Ram (supra). Moreover, the facts of the judgment in Yashwant Hari Parit (supra) indicate that none of the legal representatives of deceased Defendant Nos. 4, 8 and 9 were on record of the appeal. The facts of the case in hand are altogether different. It is reiterated that Madhav, husband of Sakharabai, was very much before the appellate Court in his individual capacity and on demise of his wife, as her legal representative.

9. As such, the appeal is sans merit. Same is, therefore, dismissed. In view of dismissal of Appeal from Order, application therein does not survive. Same stands disposed of accordingly.

(R.G. AVACHAT, J.)

SSD