

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

SECOND APPEAL NO.101 OF 2019

Gajanan s/o Nagoba Zade
Aged about 69 years, Occ. Cultivation,
through Power of Attorney holder
Janardhan Gajanan Zade,
R/o. Nimani, Tah. Korpana,
District Chandrapur

...APPELLANT

VERSUS

1. Bali s/o Nagoba Zade
Aged about 65 years,
Occ. Cultivation,
2. Purushottam d/o Bali Zade,
Aged about 42 years,
Occ. Cultivation,
3. Ratnakar s/o Bali Zade,
Aged about 38 years,
Occ. Cultivation,
4. Tulsabai Zitru Madavi,
Aged about 60 years,
Occ. Cultivation,
5. Devanand Zitru Madavi,
Aged about 40 years,
Occ. Cultivation,

All R/o. Nimni, Tah. Korpana,
District Chandrapur

...RESPONDENTS

Ms. Kirti Satpute, Advocate for the appellant.
Shri A.A. Dhawas, Advocate for respondent Nos.1 to 3.
Shri Madhur Deo, Advocate h/f Shri Rohit Joshi, Advocate
for respondent Nos.4 & 5.

CORAM : ANIL S. KILOR, J.

DATED : OCTOBER 27, 2021.

ORAL JUDGMENT

With the consent of parties heard finally.

2. A challenge has been raised in this appeal to the concurrent findings recorded by both the Courts below while dismissing the suit for possession filed by the plaintiff alleging that the defendants have encroached the land of the plaintiff.

3. The brief facts of the present case are as follows (the parties are referred as per their status before the trial Court) :

The plaintiff filed a suit for possession alleging therein that the defendants have encroached over the land of the plaintiff. It is the case of the plaintiff that the agricultural land Survey No.83 admeasuring 2.38 HR of village Nimani, Tah. Korpana, District

Chandrapur which is a suit property is owned by him whereas the defendant Nos.1 to 3 are the owners of land Survey No.82 admeasuring 2.68 HR situated on the western side of the suit property. It is further the case of the plaintiff that defendant Nos.4 and 5 are the owners of Survey No.86 situated on southern side of the suit property as well as the lands owned by defendants are adjoining to each other.

4. It is the case of the plaintiff that the defendant Nos.1 to 3 encroached the land admeasuring 0.54 HR whereas defendant Nos.4 and 5 have encroached over the suit property to the extent of 0.56 HR and in spite of notice issued to the defendants they failed to remove the encroachment and, therefore, the suit was filed.

5. The suit was based on the Government Surveyor's report however, during the cross-examination many discrepancies have been pointed out to the Surveyor, which have been admitted by the Surveyor and, therefore, the said report was not relied upon by the trial Court and as such, on failure of the plaintiffs to prove that the defendants have encroached over the suit land, the suit came to be dismissed vide judgment and decree dated 19/12/2013.

6. Feeling aggrieved by the same, the plaintiff had preferred an appeal namely Regular Civil Appeal No.09/2014 which came to be dismissed vide impugned judgment and decree dated 17/12/2016.

7. I have heard the learned counsel for respective parties.

8. This Court while issuing notices to the respondents vide order dated 10/06/2019, has framed the following substantial questions of law :

(i) *Whether both the Courts below were right in dismissing the suit for removal of encroachment in absence of joint measurement?*

9. Ms. Satpute, learned counsel appearing for the appellant submits that admittedly in this matter, the joint measurement was not carried out which according to law is mandatory and in absence of any such joint measurement, the findings recorded by both the Courts below that no encroachment has been committed by the defendant is not sustainable in the eyes of law. She has placed reliance on the following judgments:

1. Mr. Bento Antonio Gomes alias Antonio

Bento Gomes Vs. Rosario Salvador Carneiro & ors¹

2. Vasantrao Digambarrao Nalkande Vs. Raghunath Deolal Nalkande²

3. Ramzan Sheikh Chand Sheikh (since deceased) through his L.R's and ors. Vs. Panjab s/o Nathuji Gawande³

4. Raghunath Kashinath Chavan Vs. Sakharam Maroti Chavan & anr.⁴

10. It is further submitted that the Surveyor, who carried out the measurement, has admitted various discrepancies in the measurement in his cross-examination. It is submitted that since the fault in the measurement cannot attributable to the plaintiff, the only way open to the First Appellate Court was to direct re-measurement of the land. However, the lower Appellate Court failed to do that. For this purpose, the learned counsel for appellant has placed reliance upon the judgment in the case *Jamir Khan Vs. Dharamchand s/o Roopchand Sawala & Ors.*⁵

11. Per contra, Shri Deo, learned counsel for respondent Nos.4 and 5 points out that it was the case of the defendants that

1 2014(3) ALL MR 790

2 2016(5) ALL MR 349

3 2014(6) Mh.L.J. 97

4 2019(3) Mh.L.J. 183

5 2018(3) ALL MR 70

since beginning the Dhura in between the agricultural field Survey Nos.86 and 83 is as it is and there is no shifting of any Dhura in between the fields owned by defendant Nos.4 and 5 and the plaintiff. It is therefore, submitted that Dhura will prevail over measurement whenever there is any dispute as regards measurement. The learned counsel for respondent Nos.4 and 5 has relied upon the judgment in the case of ***Girdharilal Dindayal Agarwal & Anr. Vs. M/s. Sarvodaya Builders Pvt. Ltd. & Ors.*** dated 22.02.2017 in First Appeal No.1277 of 2003 delivered by the Single Judge of this Court.

12. Whereas the learned counsel Shri Dhawas appears for defendant Nos.1 to 3, has pointed out that after partition, the plaintiff did not raise any objection for 45 to 50 years and on the basis of false and imaginary map a suit for removal of encroachment and possession had been filed.

13. To consider the rival contentions of the parties, I have carefully perused the record and gone through the relevant judgments.

14. On perusal of the plaint, it is revealed that the pleadings made by the plaintiff as regards encroachment are vague. It is the case

of the plaintiff that the defendants started encroachment since the year 2006-2007 and even after asking by the plaintiff, they failed to remove the encroachment. Whereas, in the written statement of the defendant Nos.4 and 5, they have specifically pleaded that the Dhura in between the agricultural field Survey Nos.86 and 83 is as it is since long many years from the forefathers of the defendant No.4. The record further shows that in the oral evidence of defendant Nos.4 and 5, they had maintained their case about the continuation of Dhura between the suit property and the property owned by defendant Nos.4 and 5. However, on perusal of cross-examination no suggestion about the Dhura was given by the plaintiff to defendant Nos.4 and 5. Thus, in absence of any challenge to the fact that there is Dhura, between the land owned by the plaintiff and the defendants and there is no change in Dhura, I find substance in the arguments of Shri Deo, learned counsel for defendant Nos.4 and 5 that as per settled law Dhura will prevail over measurement.

15. In the case of ***Girdharilal Dindayal Agarwal*** (supra) this Court after relying upon the judgment of the Hon'ble Supreme Court of India in the case of *Sheodhyan Singh & Ors. Vs. Mst. Sanichara*

Kuer & Ors¹ has held that it is boundaries which must prevail, there is no necessity to be drawn into such disputes as regards the area, measurement or for that matter entries in survey records or revenue records.

16. Admittedly in this matter, it is not the case of the plaintiff that there are no Dhuras between the suit property and the properties owned by respondent Nos.3, 4 and 5 and it is also not the case of the plaintiff that Dhuras have been removed or shifted while making the alleged encroachment over the land of the plaintiff. In that view of the matter, the boundaries /Dhuras must prevail in this matter.

17. Admittedly it has come on record that the Government Surveyor has admitted numerous discrepancies pointed out to him in cross-examination as regards the measurement carried out by him in respect of the suit property. Therefore, I do not find any perversity in discarding the evidence of the Surveyor by both the Courts below. Moreover, in view of the above discussed settled law, wherein it has been held that in case of dispute about the measurement, Dhura will prevail over measurement, I do not find any substance in the contention of the learned counsel for the appellant that in absence of

1 AIR 1963 SC 1879

joint measurement dismissal of the suit for possession by holding that the plaintiff has failed to prove encroachment, is not sustainable in law.

18. There is no dispute as regards the law laid down in the case of *Jamir Khan Vs. Dharamchand (supra)*, however, in view of the findings recorded herein above, since Dhura will prevail over measurement, I am of the considered view that this is not a fit case where the direction for re-measurement is warranted.

19. The judgments cited by the learned counsel for the appellant on the point that joint measurement be carried out through Surveyor in case of dispute relating to encroachment, namely in the cases of *Mr. Bento Antonio Gomes alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro & ors (supra)*, *Vasantrao Digambarrao Nalkande Vs. Raghunath Deolal Nalkande (supra)*, *Ramzan Sheikh Chand Sheikh (since deceased) through his L.R's and ors. Vs. Panjab s/o Nathuji Gawande (supra)* and *Raghunath Kashinath Chavan Vs. Sakharam Maroti Chavan & anr.(supra)* are of no help to the appellant in view of above referred findings recorded by this Court as regards existence of Dhuras/boundaries.

20. Accordingly, I answered the substantial question in above terms and pass the following order :

- (i) The second appeal is **dismissed**. No costs.
- (ii) All the pending civil applications stand disposed of.

JUDGE

**DB*