

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO. 388 OF 2021
AND
CIVIL APPLICATION NO. 10107 OF 2021 IN SA/388/2021**

Chandrashekhar S/o Manmathappa Chavanda,
Age : 60 years, Occu. Agriculturist,
R/o Ambajogai Road, Ahmedpur,
Tq. Ahmedpur, Dist. Latur

.. Appellant
(Orig. Defendant)

VERSUS

1] Abdul Mujib S/o Abdul Rauf Jagirdar,
Age : 64 years, Occu. Pensioner and Agril.,
R/o Ahmedpur, Tq. Ahmedpur,
District : Latur

2] Abdul Latif S/o Abdul Rauf Jagirdar,
Age : 53 years, Occu. Agriculturist,
R/o Kalegaon, Tal. Ahmedpur

.. Respondents
(Orig. Plaintiffs)

...
Mr. B.R. Sontakke Patil, Advocate for appellant-applicant
Mr. J.R. Patil, Advocate for respondents
...

**CORAM : MANGESH S. PATIL, J.
DATE : 27 JANUARY 2022**

ORAL ORDER :

I have heard both the sides on the point of admission.

2. The respondents are the original plaintiffs who filed the suit for declaration of ownership and possession alleging encroachment over their property to the extent of 4 Are by the present appellant. The suit was dismissed. They preferred appeal before the District Court which reversed the judgment and order of the trial court and decreed the suit by the judgment and order under challenge in the second appeal.

3. After hearing both the sides, following substantial question of law arises for determination by this Court :

When the plaintiffs described the properties owned by the plaintiffs no.1 and 2 separately but from the same survey no.1/2 and the measurement carried out by the surveyor Mr. Rajesh Korde (PW 2) did not specifically demonstrate whether the alleged encroachment of 4 Are found by him was on the property owned by the plaintiff no. 1 or the plaintiff no.2 or may be the remaining 7 Are portion purchased by the wife of the plaintiff no. 1, the appellate court was justified in reversing the judgment and order of the trial court ?

4. I have heard the learned Advocates of both the sides on the afore-mentioned point.

5. It is necessary to appreciate the averments in the plaint. In the plaint, the respondents have specifically mentioned that the respondent no.1 was the owner of 6 Are portion from land survey no. 1 Hissa no. 2 whereas respondent no. 2 was owner in possession of land admeasuring 5 Are from the same land, namely, survey no. 1 Hissa no. 2, *albeit*, they have given separate boundaries for both these pieces of lands. It was specifically averred that in-fact, the respondent no. 1 had purchased a total portion admeasuring 13 Are from the erstwhile owner M/s. Bharat Manohar Reddy and Pravin Manohar Reddy. It was

also averred that later-on he sold 7 Are portion from this 14 Are land to his wife by a registered sale deed.

6. If such was the state-of-affairs, since it was a matter of encroachment, it was expected to have a concrete evidence so as to enable the court decreeing the suit to distinctly demarcate such encroached portion. Admittedly, in a suit bearing Regular Civil Suit no.31 of 2001 filed by the present appellant against the respondents, a court commissioner was appointed to undertake measurement on 17-05-2006, admittedly, the said suit was sought to be withdrawn by the appellant unconditionally but since the request was rejected, he has challenged that order by filing a writ petition which is pending before this court.

7. Admittedly, the person who had carried out that measurement was none other than witness Rajesh Korde (PW 2) who was examined by the respondents in the present suit. Obviously, an attempt was made to get the measurement carried out by him established on the record in view of the provisions of section 83 of the Indian Evidence Act. Ex facie, he did not seem to have taken pains to distinctly demarcate the portion owned by the respondent no. 1 and one owned by the respondent no.2. Similarly, he has also not considered and distinctly pointed out the 7 Are portion which was sold by the respondent no. 1 to his wife. In the absence of such internal division demarcating the portions of land owned by the respondent no. 1, respondent no. 2 and the wife of the respondent no. 1, simply relying

upon this measurement and the map Exhibit – 74 it is indeed doubtful as to if whatever encroachment that was noticed by the surveyor - Rajesh Korde (PW 2) was entirely on the portion exclusively owned by the respondent no. 1. Pertinently, during his cross-examination in paragraph no. 5 he was unable to tell as to how much encroachment noticed by him was on the property of the respondent no.1 and how much was it on the property of the respondent no. 2.

8. If such is the state-of-affairs, it was indeed the material circumstance rather infirmity in the measurement carried out by him. Precisely for this very reason the trial court had refused to rely upon such measurement and had dismissed the suit. Ignoring such reasoning, the appellate court even without appreciating the aforementioned facts and circumstances, has readily accepted this measurement, even without precisely meeting the reasoning given by the trial court.

9. Needless to state that if the dispute is about some encroachment, there has to be a concrete evidence available for the trial court so as to pass effective decree for possession. Suffice for the purpose to refer to the decision in Sulemankhan Mumtajkhan and others Vs. Smt. Bhagirathibai wd/o. Digamber Asalmol and another; 2014 (5) ALL MR 552 and the judgments referred to therein. The appellate court has miserably failed to appreciate the matter in controversy and has grossly erred in reversing the judgment and order passed by the trial court.

10. In view of such peculiar state-of-affairs, in my considered view, the judgment and order of the appellate court is liable to be quashed and set aside as also that of the judgment of the trial court and suit needs to be remanded with a direction to appoint a court commissioner and to undertake the exercise of measurement by giving notice to all the interested parties and even the owners of the adjoining properties and with reference to permanent boundary marks which alone can enable the courts to impart justice.

11. I, therefore, answer the point in the negative, allow the Second Appeal, quash and set aside the judgments and orders of both the courts below and remand the suit to the trial court for decision afresh.

12. The trial court shall now pass order appointing the Taluka Inspector of Land Records / District Inspector of Land Records as a court commissioner for carrying out the measurement in the light of the above observations and then examine the surveyor as a witness.

13. Needless to state that the parties shall be at liberty to either admit the report of the court commissioner or undertake his cross-examination. Based on the outcome the trial court shall decide the suit afresh as early as possible.

14. The parties shall appear before the trial court on 21-02-2022 and there shall be no need for it to inform them independently.

15. Pending Civil Applications are disposed of.

[MANGESH S. PATIL]
JUDGE

arp/