

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 574 OF 2018
WITH CA/8902/2018 IN SA/574/2018

- 1) Abdul Maruf s/o Abdul Gafur,
Age 40 years, Occ. Business,
R/o. Momin Mohalla, Near Masjid,
Parbhani, District Parbhani.
- 2) Abdul Bari s/o Abdul Gafur,
Age 45 years, Occ. Business,
R/o. Momin Mohalla, Near
Masjid, Parbhani, Dist. Parbhani.
- 3) Bilquishbee s/o Abdul Gafur,
Age 65 years, Occ. Bsiness,
R/o. Momin Mohalla, Near
Masjid, Parbhani, Dist. Parbhani.

... **Appellants.**
(Orig. Defendants)

VERSUS

Mohd. Khalil Mohd. Sk. Habib,
Age 32 years, Occ. Agriculture,
R/o. Waloor, Tq. Sailu, Dist.
Parbhani.

... **Respondent.**
(Orig. Plaintiff)

...

Advocate for the Appellants : Mr. Deshmukh Arvind.
Advocate for the Respondent : Mr. S. S. Jadhavar.

WITH

SECOND APPEAL NO. 575 OF 2018
WITH CA/8903/2018 IN SA/575/2018

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Age 40 years, Occ. Business,
R/o. Momin Mohalla, Near Masjid,
Parbhani, District Parbhani.
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Age 45 years, Occ. Business,

R/o. Momin Mohalla, Near
Masjid, Parbhani, Dist. Parbhani.

- 3) Bilquishbee s/o Abdul Gafur,
Age 65 years, Occ. Bsiness,
R/o. Momin Mohalla, Near
Masjid, Parbhani, Dist. Parbhani.

... **Appellants.**
(Orig. Defendants)

VERSUS

Rukiya w/o Mohammad Shaikh Habib,
Age 32 years, Occ. Agriculture,
R/o. Waloor, Tq. Sailu, Dist.
Parbhani.

... **Respondent.**
(Orig. Plaintiff)

...

Advocate for the Appellants : Mr. Deshmukh Arvind.
Advocate for the Respondent : Mr. S. S. Jadhavar.

CORAM : **MANGESH S. PATIL, J.**
DATE : **07.04.2022.**

PER COURT :

Heard both the sides on the point of admission of both the appeals.

2. The appellants are the original defendant Nos.1 to 3 who have suffered decrees in separate suits filed by the respondents who are husband and wife in their respective suits seeking possession of two different portions purchased by them under two different sale-deeds.

3. The facts are peculiar. The respondents Mohd. Khalil and his wife Rukhiya purchased 1-Hectare 77 Are and 3 Hectare 20 Are portions from land Survey No. 394 by separate sale-deeds of the same date that is 02.04.1993 from the erstwhile owners one Govind Sakharam Chavan and his wife Shashikalabai Govindrao Chavan, individually. By virtue of two mutation entries 4039 and 1586 their names were mutated pursuant to such purchases. They alleged that since the date of purchase

they were in joint possession of the western total area of 4 Hectares 97 Are. They alleged that these appellants who are a family that is two sons and their mother are also the owners of the eastern portion from same land Survey No. 394. A bund intervenes both these portions but the appellants started making encroachment and succeeded in encroaching over 21-Are portion from the land of plaintiff Mohd. Khalil and 35-Are portion from the land of his wife Rukhiya, which was revealed after they got their lands measured. Hence they filed two separate suits for possession of these two separate encroached portions against the appellants.

4. The appellants contested the suit by their written statement. They admitted that one Fatimabee was the original owner of the entire land. She sold the western side portion to plaintiffs' predecessor Govindrao and his wife Shashikalabai and the eastern portion to one Suleman. The respondents purchased their properties from Govindrao and his wife whereas they purchased the land from Suleman about 20 years before the suit. Since long the bund intervening the two portions has been in existence. They have not altered or changed it. They thus denied to have made any encroachment and prayed to dismiss the suit.

5. Firstly, the suits were decided initially in the year 1997 but in an appeal, those were remanded. Those were decided once again in the year 2007 but in appeal the suits were again remanded finding that the measurements were not carried out properly. It was specifically directed that the T.I.L.R. should jointly measure the entire Survey No. 394 and show the boundaries of the land, owned by the plaintiffs and defendants pointing out encroachment if any. Pursuant to such direction, once again the parties went to trial. Pursuant to the direction of the appellate court the land was once again measured by Surveyor Sahane who was examined as a witness, who carried out the survey, prepared the map (Exh. 137) under a panchnama and concluded that the appellants had

encroached over a 64 Are portion over the respondents land shown in blue colour in the map (Exh 137) .

6. Opportunity of leading additional evidence was extended to both the sides and at the end the trial court by a common judgment decreed the suits on the basis of measurement map (Exh. 137). The appellants preferred two separate appeals in both the suits and by the impugned common judgment and order the appeals have been dismissed. Hence these two appeals.

7. Learned advocate Mr. Deshmukh for the appellants vehemently submits that when the respondents-husband and wife had purchased two different portions under two different sale-deeds from two individuals Govindrao and his wife Shashikalabai, the trial court as also the lower appellate court could not have legally tried and decided the suits and the appeals treating them as one individual case merely because the respondents happen to be the husband and wife and the appellants are from the same family. He would submit that it was incumbent on the part of the Surveyor to distinctly demonstrate how much was the encroached portion over the lands owned by the respondents, husband and wife, separately. In stead, he has collectively shown the encroached portion to be 64-Are. This is a serious defect giving rise to a substantial question of law arising from incorrect approach of the courts below.

8. He would point out that the lower appellate court did not undertake independent scrutiny of the facts and readily accepted the conclusions drawn by the trial court. It even incorrectly recorded a negative finding to both the points when the observations and conclusions demonstrate that he was in fact intending to record an affirmative finding. This shows callous approach of the lower appellate court. The second appeal be admitted.

9. Learned advocate Mr. Jadhavar for the respondents submits that there is no dispute about the fact that the predecessor of the respondents were also husband and wife from whom the respondents purchased separate portions by two separate sale-deeds executed on the same day. He further submits that there is no dispute about the fact that even the appellants jointly own and possess the eastern side portion which they have purchased from their predecessor Suleman. If such is the state of affairs, when the property of the appellants is joint and the respondents though have purchased separate portions they are husband and wife who have purchased their respective portions on the same day, and when there is record to show that after consolidation the land Survey No. 394 has been divided in different Gat numbers and the property standing in the name of the respondents has been collectively given Gat No. 324/D, treating the suits jointly and deciding them by a common judgment and order is not illegal. No prejudice has been caused to the appellants. Both the courts below have objectively scanned the evidence and have demonstrated as to how the survey carried out by the Surveyor Sahane reflected in map (Exh. 137) is a reliable piece of evidence and demonstrates the encroached portion. He, therefore, submits that no prejudice is caused to the appellants and the decree can easily be put to execution.

10. I have carefully considered the rival submissions and perused the papers. There is no dispute about the fact that the entire land was originally owned by a single individual who sold western side portion to the predecessors of the respondents and eastern side portion to the predecessor of the appellants. Even the fact of existence of a bund intervening these two portions has been admitted in the written statement. There is also no dispute about the fact that the predecessors of the respondents were husband and wife and the respondents being husband and wife together purchased their property by two different

sale-deeds of the same date. More importantly, while partly allowing the Regular Civil Appeal No. 50/2007 and 51/2007 the lower appellate court while remanding the suit for decision afresh had specifically directed as under :

“1 ...

2 ...

3. *The original plaintiff and defendants in RCS No. 48/95 as well as in RCS No. 45/1995 shall submit a joint application in any one of the suit to appoint TILR as Court Commissioner to get measured the land S. No. 394 which consists of Western portion S. No. 394/C which is owned by plaintiff and Eastern portion 394 which is a remaining portion of land S. No. 394 owned by defendants, in order to get fixed the boundaries of the land of plaintiff and defendants land and to know the actual possession of plaintiff and defendants and to show the encroachment of land found if any.*

4 ...

5. *Plaintiff as well as defendants are at liberty to amend their pleading suitably with object to give correct description of their respective lands.*

6. *Specific directions should be given to TILR to jointly measure the land original S. No. 394 owned by plaintiffs and defendants described in RCS No. 48/1995 and 45/1995, and show the boundaries of land owned by plaintiff and defendants and the actual possession of the parties and encroachment if any.*

7. *Court Commissioner shall submit detail report along with map in one of the suit.*

8 to 11.....”

11. As can be seen, the parties were directed to make a joint application in one of the suits for appointment of T.I.L.R. as a Court

Commissioner and to get the land Gat No. 394 measured. Admittedly, the appellants did not challenge this order of remand with such directions. Meaning thereby that even they were alive to the fact that both the suits were being treated and tried together in peculiar facts and circumstances. It is pursuant to such direction that Surveyor Sahane was appointed, who carried out the measurement in presence of both the sides as per the panchnama (Exh. 138) and prepared the map (Exh. 137). It is in view of such peculiar state of affairs, if he has shown the encroached portion 64-Are as a single piece as indicated in the map, in my considered view, the submission of the appellants' learned advocate that he ought to have distinctly shown separate encroachments over the portions owned by the respondents separately is not sustainable.

12. The anxiety being expressed by the learned advocate Mr. Deshmukh for the appellants that the decree is unexecutable is not tenable, when admittedly the extent of the western side portion purchased by the respondents has been admitted by the appellants and when as a result of the measurement it has been found that they have encroached over 64 Are portion shown in blue colour in map (Exh. 137), coupled with the fact that the property in possession of the respondents has been collectively allotted Gat No. 324/D, I am afraid, it cannot be said that the decree cannot be executed only because the encroachment has been jointly shown over the properties of the respondents who are husband and wife.

13. Perusal of the map (Exh. 137) reveals that the western half and the eastern half is divided in straight line and the encroached portion of 64 Are has been shown as a rectangular portion. The eastern and western side of which are straight and parallel. If that is so, the decree cannot be said to be unexecutable.

14. All in all, both the courts below have recorded a concurrent

finding of fact about appellants having encroached over respondents' properties. This being a pure question of fact, following the decisions in the case of **Narayanan Rajendran And Anr vs Lekshmy Sarojini And Ors** (2009) 5 SCC 264, **Hero Vinoth Vs. Seshammal**; (2006) 5 Supreme Court Cases 545 and **Gurudev Kaur Vs. Kaki**; A.I.R. 2006 Supreme Court, 1975, there are not sufficient grounds and reasons to undertake a further scrutiny of facts and make this court a third fact finding court.

15. No substantial question of law arises in both the appeals. They are dismissed with costs.

16. Pending Civil Applications are disposed of.

(MANGESH S. PATIL, J.)

mkd/-