

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

**SECOND APPEAL NO.323 OF 2021
WITH
INTERIM APPLICATION NO.173 OF 2021
WITH
INTERIM APPLICATION NO.750 OF 2022
WITH
INTERIM APPLICATION NO.172 OF 2021**

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Bhausahab Kondiba Tengale
Since deceased through legal heirs
Nitin Kondiba Tengale & Ors. ..Appellants/Defendants
Versus
Vithal Khandu Tengale & Ors. ..Respondents/Plaintiffs

Mr. Ajay A. Joshi, for the Appellants.
Mr. R. M. Haridas a/w Summit Khaire i/by Ghansham Jadhav, for
the Respondent No.1.

CORAM : NITIN W. SAMBRE, J.

DATE : 13th OCTOBER, 2022

PC.

1. Heard Mr. Ajay Joshi, learned counsel for the appellants/defendants. Regular Civil Suit No.20 of 2001 was taken out by the respondent for removal of encroachment to the extent of 12 R and injunction. The suit came to be decreed on 28th February, 2007.

2. The appellants/defendants preferred Regular Civil Appeal No.35 of 2007 which was dismissed vide impugned order dated 16th March, 2020. As such, this second appeal.

3. The facts necessary for deciding the present appeal are as under :-

The appellants claim to be owner of land Gat No.204 admeasuring 1 hector 22 R, whereas respondent/plaintiff is owner of land Gat No.205 admeasuring 1 hector 19 R. In the suit, it is the claim of the respondent/plaintiff that appellants/defendants have encroachment to the extent of 12 R land from the southern side. As such, suit for removal of encroachment. The suit claim was resisted by the appellants through written statement alleging that same is without any lawful basis. It is further claimed that the joint measurement is neither carried out nor proved. That being so, the claim of alleged encroachment is not justified.

4. After the suit was decreed, in appeal, it is claimed by the appellants that they have taken out application under Order XLI Rule 27 of CPC for appointment of Court Commissioner and joint measurement which was illegally rejected. As such, in the present proceedings similar request is taken out by the appellants for appointment of Court Commissioner.

5. Counsel for the appellants/defendants while questioning the findings recorded by both the Courts below would invite attention of this Court to the measurement map drawn by Sunil/PW-3/TILR. According to him, the said witness even if has deposed so as to substantiate the measurement map i.e. Exhs.96

and 97, in the cross-examination the very same witness has given an admission that he has not recorded these area of both the gat numbers, he has not shown existence of old houses and the trees. It is claimed that admission is given that the alternate road available is also not mentioned in the measurement map Exh.96. He would further urge that the *lacunas* which were noticed in 'C' copy of Exh.96 were illegally covered by the said witness in map Exh.97 which was produced during the course of recording of evidence. As such, he would urge that the evidence which is relied on by both the Courts below is full of doubt as same does not establish the issue of alleged encroachment made by the appellants. He would further urge that since the measurement carried out was demonstrated to be defective from the admissions given by the witness of the plaintiff i.e. PW-3 Sunil, the decree for encroachment is not sustainable as the issue of encroachment is not established. In support of his claim for setting aside judgments of both the Courts below on the aforesaid issue, he has drawn support from the judgment of this Court in the matter of ***Govind Raoji Katole Vs. Ganpati Tukaramji Khanke*** reported in ***2002(1) Bom.C.R. 124***.

6. While countering aforesaid submissions, counsel for the respondent/decreed-holder would urge that before the suit was filed there were three measurements carried out by either of the parties. It is also claimed that Exhs.96 and 97 are the measurements which are carried out in the presence of the appellant by PW-3 Sunil. It is further claimed that Exh.97 was drawn and prepared based on

Exh.96 immediately after and in original measurement note neither any shortfalls nor *lacunas* were noticed. As such, it is claimed that from the Exh.97 very encroachment of the appellant is very much established.

7. I have appreciated the aforesaid submissions.

8. In view of the submissions of learned counsel for the appellant Mr. Ajay Joshi, I have perused the evidence PW-3 Sunil, who was a surveyor. Though it is claimed that the said witness was unable to mention about the area of both the Gat Numbers i.e. 204 & 205, the said submissions are based on reading of isolated statement of the witness. If the entire evidence of the said witness is read, it is specifically mentioned that he has measured both the Gut Numbers i.e. 204 and 205 i.e. of appellant and respondent. Even if in the 'C' copy there is no mention about the encroached area, however, the mention about the encroached area is specifically mentioned in the original and final measurement report.

9. The suggestion given by learned counsel for the appellant/defendant of incorrect measurement was also denied by the said witness. He has specifically mentioned that in Exh.97, the measurement map be drawn by him, he has mentioned about area of road, which was not there in Exh.96.

10. The said fact is duly appreciated by both the Court's below. As such, learned counsel for the appellant has tried to impress upon the Court to re-appreciate evidence of the said witness for the 3rd time before this Court which in any case is not permissible. Apart from above, there is no error in appreciation of the evidence of the said witness.

11. The claim put forth that there was no joint measurement of the properties absolutely part away from the truth. PW 2- Prakash, cadastral surveyor who was examined on Exh.69 has proved in his evidence three measurements map Exh.109/153, Exh.110/152 & Exh.111. The said witness was cross examined by learned counsel for the appellant at length, however, the testimony of the said witness could not be demolished.

12. Rather from the appreciation of evidence of all the three witness i.e. PW-1 to PW-3 and the documents which were produced on record, it is in categorical term establish that the appellant from his northern side as encroached to the extent of 12 R of land.

13. In the report of Court Commissioner also it is specifically establish that the from the northern side of the suit property appellant has encroached to the extent of 12 R land.

14. In the aforesaid background, if we appreciate the law laid down by this Court in the matter of *Govind Raoji Katole (cited supra)* what can be noticed is the report of the Court Commissioner viz. Exhs.96, 97, Exh.109/153, Exh.110/152 and Exh.111 were duly proved. The said evidence was considered by both the Courts below so as to understand and appreciate the matter in the dispute and by relying on the same decree came to be passed.

15. As such the evidence on record primarily depicts that the property was not only independently measured but also join measurements were carried out by the Court Commissioner.

16. As such, the attempt on the part of the appellant to again seek measurement of the land vide application Exh.42 and Exh.44 can be viewed as an attempt to collect additional evidence to create contradictions and to prolong the litigations. Rightly so, the first Appellant Court has rejected said prayer moved in the said application.

17. That being so, against the concurrent findings, there is absence of any question of law in the present matter.

18. As such, the appeal fails and stands dismissed.

19. The ad-interim protection ordered by this Court to continue for a period of six weeks

20. For the reasons aforesaid, Interim Application No.173 of 2021 for appointment of Court Commissioner also stands rejected.

21. As regards Interim Application No.750 of 2022 is concerned, in view of the consent extended by learned counsel for non-applicant, delay of 34 days is condoned.

22. In view of above, ad-interim relief no more survives. As such, Interim Application No.172 of 2021 stands rejected.

[NITIN W. SAMBRE, J.]