

Pooja K.

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

SECOND APPEAL NO. 352 OF 2022  
WITH  
CIVIL APPLICATION NO. 8480 OF 2022  
IN  
SECOND APPEAL NO. 352 OF 2022

|                                 |                 |
|---------------------------------|-----------------|
| Sheshrao Bapu Sabale and Ors.   | ... Appellants  |
| <i>Versus</i>                   |                 |
| Bhaurao Patilba Sabale and Ors. | ... Respondents |

...  
Mr. R.V. Gore – Advocate for Appellants  
....

**CORAM : GAURI GODSE, J.**  
**DATE : 3<sup>rd</sup> February, 2023**

**PER COURT :**

1. This Second Appeal is filed by defendant nos.1 and 2 for challenging the concurrent decree for handing over possession of the encroached portion as per joint measurement map at exhibit – 62. Defendant nos.3 and 4 had settled the suit claim with the plaintiff.
2. The respondent no.1 / original plaintiff had filed Regular Civil Suit No.89 of 2010 for possession of encroached portion. By judgment and decree dated 4<sup>th</sup> February, 2019 the learned Joint

Civil Judge, Junior Division, Phulambri decreed the suit thereby directing the appellants / defendant nos.1 and 2 to handover the possession of 08 R encroached portion of the suit property as per map at exhibit - 62. The appellants had preferred Regular Civil Appeal No.60 of 2019. By the judgment and decree dated 24<sup>th</sup> November, 2021, the learned District Judge-11, Aurangabad has dismissed the appeal and confirmed the decree of the Trial Court. Hence, present Second Appeal.

3. Learned counsel for the appellants submitted that, admittedly there is a common Bandh between the properties of the appellants and respondent no.1. Though there is a joint measurement map and the surveyor is also examined, it is not in dispute that, there is a common Bandh between the properties. He, therefore, submitted that when it is not disputed that there is a common Bandh in between the two properties, there was no question of holding that there was encroachment. He submitted that, from last thirty years there is a Bandh in existence between the two properties. In support of his submissions he relied upon the decision of this court in the case of *Gajanan Vs. Bali and*

*Ors.*<sup>1</sup> He submitted that, facts involved in the said decision are similar to the present case. He submitted that in the said case, though there was a measurement map on record, the decree dismissing the suit for removal of encroachment was confirmed, on the point that the existence of Bandh between the two properties would prevail over the measurement map. He therefore submitted that, on such facts and circumstances the Second Appeal involves substantial question of law and the same needs consideration on the question of law as to whether when the parties have admitted the existence of Bandh between the properties, whether the measurement map at exhibit - 62 would prevail over it.

4. In so far as the decision of this court relied upon by the appellants is concerned, in the said case admittedly there was no joint measurement map. However, the question of law framed and decided in the said case was on the basis of admitted facts of that case and there is no absolute proposition of law laid down that a joint measurement map is to be discarded only on the basis of existence of a Bandh between two properties.

<sup>1</sup> 2021 DGLS (Bom) 1706

Therefore, the said decision is of no assistance to the facts of the present case.

5. It is not disputed that father of plaintiff (respondent no.1) and father of defendant nos.1 and 2 (appellants) were real brothers. It is also not in dispute that, there was partition of ancestral properties. The learned Trial Judge has examined the revenue records and held that plaintiff is shown as owner of the suit land. The Trial Court perused the documents on record as well as the evidence of Cadastral Surveyor examined as PW-3 in support of joint measurement map. It is not in dispute that the joint measurement has been done by the Cadastral Surveyor appointed as court commissioner by the Trial Court. Accordingly, measurement map was placed on record at exhibit-62, stating that there was a 1.5 feet Bandh in between the properties. However, the Trial Judge after examining the oral evidence of the surveyor as well as the map at exhibit - 62 has recorded a finding that the map shows that the land holder of block no.57 has made the encroachment on the suit land. It is not in dispute that land bearing block no.57 is belonging to the

appellants. The Trial Court has specifically recorded the findings that the Cadastral Surveyor has negated all the questions put forth to him by the appellants thereby disputing the joint measurement map. The First Appellate Court also by examining all the documentary as well as oral evidence on record has confirmed the findings of the Trial Court about joint measurement and the encroachment made on the suit land.

6. All the submissions made on behalf of appellants are concerning factual aspects of the matter, which will require re-appreciation of the evidence. Re-appreciation and reassessment of the evidence is not permissible under Section 100 of the Code of Civil Procedure. The Second Appeal does not involve any question of law.
7. The Second Appeal is dismissed. There will no order as to costs.
8. In view of the above order, pending Civil Application shall stand dismissed.

**[ GAURI GODSE ]**  
**JUDGE**