

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

SECOND APPEAL NO. 400 OF 2022

1) Jayant Sheshrao Belsare,
Age 65 years, Occ. Agriculturist,

2) Anant Sheshrao Belsare,
Age 68 years, Occ. Agriculturist,

3) Gunwant Sheshrao Belsare,
Age 57 years, Occ. Agriculturist,
Appellant nos. 1 to 3 R/o. at Tuljapur,
Tq. Chandur-Rly, Dist. Amravati.

4) Sau. Malini Satishrao Dube,
Age 46 years, Occ. Agriculturist,
R/o. Anjangaon (Kalashi),
Tq. Dhamangaon-Rly, Dist. Amravati.

... Appellants

.. Versus ..

1) Anil Sheshrao Belsare,
Age 44 years, Occ. Agriculturist,

2) Vijay Sheshrao Belsare,
Age 35 years, Occ. Agriculturist,

3) Nitin Sheshrao Belsare,
Age 48 years, Occ. Agriculturist,

4) Sheshrao Gulabrao Belsare,
Age 78 years, Occ. Agriculturist,
Respondent nos. 1 to 4 R/o. at Tuljapur,
Post Shirajgaon, Tq. Chandur-Rly, Dist. Amravati.

5) Smt. Jyoti Wd/o. Sunil Belsare,
Age 41 years, Occ. Agriculturist,

6) Ku. Bhagyashri Sunil Belsare,
Age 30 years, Occ. Student,

7) Ku. Shivani Sunil Belsare,
Age 26 years, Occ. Student,
Respondent nos. 5 to 7 R/o. Shikshan
Colony, Near Haji Kasam Jin,
Chandur-Rly, Tq. Chandur-Rly,
Dist. Amravati.

...Respondents

Shri P. A. Kadu, Advocate for appellants.
Smt. S.W.Deshpande, Advocate for respondent nos. 2 to 4.

CORAM : SMT. M.S. JAWALKAR, J.

DATED : 27/03/2023

ORAL JUDGMENT

Heard finally at the stage of admission by consent of both the parties.

2. The present appeal is filed by the original plaintiffs being aggrieved by the judgment and order dated 29/10/2018 passed by learned District Judge-4, Amravati in R.C.A. No. 136/2013.

3. Learned counsel for the appellants has drawn my attention to the judgment and decree dated 25/07/2013 passed by learned Civil Judge, Junior Division, Chandur-Rly in R.C.S. No. 4/2008. The suit was filed by the appellants for possession and damages.

4. It is the case of the plaintiffs that the plaintiffs are joint owners of Gat No. 154 which consists of survey nos. 45/1, 50/1 and 6/1 admeasuring 8 H. 82 R. situated at Mouje Tuljapur, Tah. Chandur Rly, District Amravati. It is the contention of the plaintiffs that towards eastern side of the suit land, there is Gat No. 160 owned by defendant no. 4 and towards western side, there is Gat No. 153 owned by defendant nos. 1, 2, 3, 5, 6 and 7. Defendant no. 4 started encroachment on eastern side and defendant no. 1, 2, 3, 5, 6 and 7 started encroachment on western side of suit land. In order to ascertain the area of encroachment, the plaintiffs applied for measurement to the Office of Land Record, Chandur Rly. The learned Trial Court dismissed the suit on the count that the measurement report is not acceptable on the version of witness. The Measurer was examined as to whether he has followed the procedure before measuring the land. It was observed by the learned Trial Court that there was no notice to the adjoining land owners. The learned Appellate Court in appeal have recorded the concurrent finding and held that measurement map Exh. 57 could not be acted upon as accurate.

5. My attention also drawn in para 7 of the judgment of learned Appellate Court in R.C.A. No. 136/2013 wherein the

request is made by the appellants to remand the matter back to the Trial Court as it is necessary to appoint the Court Commissioner to find out exact encroachment. However, it appears that learned Appellate Court did not consider their request for remand. In view of these facts, the substantial question of law arise for my determination, which is as follows,

“Whether in the facts and circumstances, it would be appropriate to remand the matter back to the Appellate Court for fresh consideration?”

6. Smt. S.W. Deshpande, learned counsel for respondent nos. 2 to 4 opposed the present appeal. However, she has conceded that there was no notice to the defendants.

7. Learned counsel for the appellants relied on the judgment in the case of ***Jamir Khan S/o. Amir Khan V/s. Dharamchand S/o. Roopchand Sawala [2018(1) Mh.L.J. 174]*** wherein this Court held in para 16 that,

“16. This Court has in its judgment in Vijay S/o. Shrawan Shende and ors. V/s. State of Maharashtra and ors., 2009(5) Mh.L.J. 279 has held that when there is question as to extent of encroachment, it is not a matter to be adjudicated upon oral evidence of any number of witnesses who have witnessed the act of encroachment. The extent of encroachment cannot

be proved in absence of public records and procedure emerging from Section 36 and Section 60 of Evidence Act. Extent of encroachment can be proved only by the person who has measured the land allegedly encroached, with public records relating to the survey numbers. It was further held that the question of encroachment has a direct bearing on the boundaries of the land, which is subjected to land revenue and is measured and marked in the process of public survey on preparation of Land Records under the provisions of Maharashtra Land Revenue Code or law in existence prior thereto, and these records are public documents. It was further held that, it would not be proper to dismiss the suit simply because the Court Commissioner has not adopted a correct procedure of measurement and the exercise of re-measurement, according to rules, will have to be got done through Court Commissioner again and again, if necessary because failures of Cadastral Surveyor are not attributable to parties to the suit.”

8. In the present matter also learned Trial Court as well as learned First Appellate Court have come to a positive finding that the measurement carried out by T.I.L.R., appointed by the plaintiffs/appellants, has not followed the rules and procedure while measuring the land and therefore, refused to rely on the report placed on record by T.I.L.R. However, as observed by this Court in the case cited supra, the learned Appellate Court ought to have appointed T.I.L.R. as a Court Commissioner for

measuring encroachment, if any, on the suit land instead of dismissing the suit arbitrarily. In view of the judgment cited supra, the matter needs to be remanded back for fresh consideration by the learned Appellate Court. Accordingly, I answer the substantial question of law in the affirmative and proceed to pass the following order:-

ORDER

- 1) The Second Appeal is partly allowed.
- 2) The judgment and order dated 29/10/2018 passed by learned Appellate Court i.e. learned District Judge-4, Amravati in R.C.A. No. 136/2013 is hereby quashed and set aside.
- 3) The appeal is hereby remanded back to the learned Appellate Court. The learned Appellate Court is hereby directed to consider the matter in the light of judgment of this Court in ***Jamir Khan S/o. Amir Khan V/s. Dharamchand S/o. Roopchand Sawala*** (supra).
- 4) The parties to appear before learned Appellate Court i.e. learned District Judge, Amravati on 12/04/2023 at 11.00 a.m.

- 5) The learned Appellate Court is at liberty to follow the procedure under Order XLI, Rule 25 of the Code of Civil Procedure, if so desire.
- 6) The appeal stands disposed of.

[SMT. M.S. JAWALKAR, J.]

B.T.Khapekar