



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

SECOND APPEAL NO. 510 OF 2019

1) Kailash Pralhad Chavan,

Aged about 50 years, Occu: Agriculturist
and business,

R/o. Lakh Khind Tq. Darwha, Distt. Yavatmal

Now R/o. Ambika Nagar, Darwha, Tq. Darwha,
Distt. Yavatmal

**... Appellant
(Ori. defendant)**

.. Versus ..

Shrirang Gobra Jadhao,

Aged about - 65 years, Occu: Agriculturist,

R/o. Lakh Khind, Tq. Darwha,

Distt. Yavatmal

**...Respondent
(Ori. Plaintiff)**

Shri A.S.Deshpande, Advocate for appellant.

Shri A.R.Chavhan, Advocate for respondent.

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

DATED : 04/12/2023

ORAL JUDGMENT

Heard the learned counsel for both the parties.

2. The present appeal is filed by the appellant challenging the impugned judgment and decree dated 31/07/2018 passed by learned lower Appellate Court (i.e. District Judge, Darwha) in R.C.A. No. 23/2016 whereby the learned lower Appellate Court dismissed the appeal preferred by the appellant and uphold the judgment and decree dated 07/01/2016 passed by learned Trial Court (i.e. Civil Judge, Junior Division, Darwha) in R.C.S. No. 81/2012.

3. The facts in dispute in brief are as under:-

The plaintiff had filed R.C.S. No. 81/2012 before learned Trial Court for possession of 1.73 H.R. portion of agriculture land situated at South side of his field Gat No. 186 of Mouza Lakh Khind, Tah. Darwha. The plaintiff alleged that the defendant Kailash Chavan is holding South side field Gat No. 174 and has encroached upon the above suit portion area of 1.73 H.R. of the plaintiff as per surveyor measurement dated 12/05/2011. The plaintiff further submitted that he has acquired area of 4.15 H.R. agricultural land of Gat No. 186 out of total area of 5.80 H.R. as per

order dated 31/12/2004 of Sub Divisional Officer, Darwha. As per said order, the registered exchange deed dated 19/05/2010 was executed in between the plaintiff on one side and Pande family on the other side and thereby the plaintiff acquired the possession and title of above area of 4.15 H.R. of Gat No. 186. As the plaintiff was however suspicious about making encroachment by the defendant, he has taken measurement of his field Gat No. 186 on 12/05/2011 through TILR and found that the defendant has made encroachment on 1.73 H.R. land portion of the plaintiff.

4. Both the parties have admitted that no independent Commissioner was appointed after filing of the suit. As such, no notice to the defendant was there in respect of measurement of land. In view of this backdrop, the learned lower Appellate Court ought to have remanded the matter back for appointment of Commissioner for measuring of land.

5. The learned counsel for the appellant relied on the following authority/citation:-

***Haryana Waqf Board V/s. Shanti Sarup and ors.
[(2008) 8 SCC 671]***

6. The learned counsel for the appellant relied on ***Haryana Waqf Board*** (supra) wherein in para 4, it is held as under:-

“4. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial Court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 CPC.”

7. The learned counsel for the respondent has no objection to remand the matter back. As such, the impugned

judgment and order dated 31/07/2018 passed by learned lower Appellate Court (i.e. District Judge, Darwha) in R.C.A. No. 23/2016 is hereby quashed and set aside.

8. The matter is remitted back to the learned First Appellate Court i.e. District Judge, Darwha for further remand under Order 41 Rule 28, if necessary or First Appellate Court may appoint Court Commissioner to measure the land in dispute after following due procedure of law.

9. Liberty is granted to the respondent to move an application for amendment, if so desires, for correction in the plaint and measuring the boundaries of the land in dispute.

10. The parties are at liberty to adduce the additional evidence after the land is measured through the Court Commissioner.

11. The parties to appear before learned First Appellate Court on 03/01/2024.

Accordingly, the Second Appeal stands disposed of.

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

B.T.Khapekar