



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

**APPEAL FROM ORDER NO.19 OF 2024
WITH
CIVIL APPLICATION NO.4802 OF 2021**

1. Ram s/o Dnyanoba Somwanshi
Since deceased Through his L.Rs.
- 1A. Sonabai w/o Ram Somwanshi,
Age : 76 years, Occu.: Household,
and Agriculture,
R/o.: Village Wanwada, Taluka,
District : Latur
- 1B. Balbhim s/o Ram Somwanshi,
Age : 51 years, Occu.: Agriculture,
R/o.: As above.
- 1C. Limbraj s/o Ram Somwanshi,
Age: 46 years, Occu.: Agriculture,
R/o.: As above.
- 1D. Dhanraj s/o Ram Somwanshi,
Age : 39 years, Occu.: Agriculture,
R/o.: As above.
- 1E. Bhagyashala w/o Balu Suryawanshi,
Age : 43 years, Occu.: Household,
R/o.: Village Dhanuri, Taluka : Lohara,
District : Osmanabad
- 1F. Kewalbai w/o Balaji Surywanshi,
Age : 41 yeas, Occu.
R/o.: AS above.
2. Sonabai w/o Ram Somvanshi,
Age : 69 years, Occu.: Household,
R/o.: As above.
3. Limbraj s/o Ram Somvanshi,
Age : 39 years, Occu.: Agriculture,
R/o.: As above.

..... **APPELLANTS**

VERSUS

1. Hariba s/o Gangaram Somwanshi,
Since deceased
- 1A. Vijaybai w/o Hariba Somwanshi,
Age : 61 years, Occu.: Agriculture,
and household,
R/o.: Village Wanwada, Taluka : Ausa,
District : Latur
- 1B. Sharad s/o Hariba Somwanshi,
Age : 39 years, Occu.: Agriculture,
R/o.: As above.
- 1C. Balwant s/o Hariba Somwanshi,
Age : 36 yeas, Occu.: Agriculture,
R/o.: As above.
2. Sindubai w/o Angadrao Somwanshi,
Age : 55 years, Occu.: Household & Agriculture
R/o.: As above.
3. Vijaybai w/o Hariba Somwanshi,
Age : 65 years, Occu.: Household & Agriculture,
R/o.: As above.
4. Mukind s/o Vitthal Somvanshi,
Age : 55 years, Occu.: Agriculture,
R/o.: As above.
5. Arvind s/o Vitthal Somvanshi,
Age : 50 years, Occu.: Agriculture,
R/o.: As above.
6. Suklal s/o Gangaram Somvanshi,
Age : 55 years, Occu.: Agriculture,
R/o.: As above.

..... RESPONDENTS

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Mr. Shriram V. Deshmukh mentioning for Mr. Rajendra Deshmukh,
Senior Advocate, for the Appellants

Mr. B. N. Patil, Advocate for respondent No.2

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CORAM : SANDIPKUMAR C. MORE, J.**RESERVED ON : 22/08/2024****PRONOUNCED ON : 25/10/2024*****JUDGMENT :***

1. The present appeal is directed against the impugned judgment and order dated 19/04/2019 passed by the learned District Judge-4, Latur, i.e. the learned first appellate court in Regular Civil Appeal No.4 of 2011. The appellants are the original defendant Nos.1 to 3 in Regular Civil Suit No.286 of 2010. Under the impugned judgment and order the learned first appellate court has set aside the judgment and decree dated 26/11/2010 passed by the learned trial court i.e. 2nd Joint Civil Judge (Junior Division), Ausa in the aforesaid suit and directed remand of the proceeding for fresh trial.

2. Background facts are as under :

The present respondent Nos.1 to 3 / plaintiffs filed the aforesaid suit for recovery of possession, mandatory injunction, perpetual induction and mesne profits by contending that they are the owners of Gut No.219 at Mouje Wanwada, Taluka Ausa, totally

admeasuring 3 H. 74 R. According to them, plaintiff No.1 is having 1 H 53 R area, plaintiff No.2 is having 1 H 52 R area whereas plaintiff No.3 is having 69 R area. Further, according to them, the original defendants were trying to obstruct their possession and therefore, the suit land was got measured through TILR, wherein it was found that defendants made an encroachment on the area of plaintiffs' to the extent of 91 R and therefore, the plaintiffs were constrained to ask for recovery of possession of the said area as per the measurement map dated 18/02/2008.

The original defendant Nos.1 to 4 resisted the suit by denying all the adverse allegations against them. According to them, the consolidation scheme was not properly implemented and therefore, proceeding for correction of areas held by the concerned parties in Gut Nos.218, 219 and 220 is pending before the concerned authority at Aurangabad. They also denied ownership and possession of the plaintiffs over the suit property. The learned trial court after conducting the trial, dismissed the suit of the respondent Nos.1 to 3 / plaintiffs. Then the plaintiffs approached the learned first appellate court by way of Regular Civil Appeal No.4 of 2011 and then the learned first appellate court by setting aside the decree of the learned trial court, directed remand of the matter for fresh trial. Hence, this appeal.

3. The learned counsel for the appellants submits that the learned first appellate court has unnecessarily remanded the matter back to the trial court by ignoring the fact that the plaintiffs could not establish their case either of encroachment or possession. According to him, sufficient evidence was already on record and therefore, the learned first appellate court could have decided the matter on merit on the basis of such evidence. In support of his contention he has relied on following judgment.

***Sirajudhee vs. Zeenath and others, reported in
2023 sCC OnLine SC 196.***

4. On the contrary, the learned counsel for the respondents / plaintiffs supported the judgment of the learned first appellate court and contended that the surveyor had not carried out the measurement properly and prepared an erroneous map and therefore, since it is a dispute in respect of boundary, the learned first appellate court has rightly remanded back the matter to the learned trial court with direction to carry out the joint measurement of land of the plaintiffs as well as Gut No.220 by locating the specific lands of the plaintiff Nos.1 to 3 and specific areas of encroachment, if any.

5. Heard rival submissions. Also perused the documents on record alongwith the impugned judgment.

6. Admittedly, the learned trial court has dismissed the suit of the plaintiffs by observing that the plaintiffs failed to prove the alleged encroachment and plaintiff Nos.2 & 3 also failed in proving their title over their respective areas in the suit property. The learned trial court has found lacuna in the map drawn by the concerned surveyor and observed that encroachment in the lands of each plaintiff is not properly shown. Therefore, the learned first appellate court has observed that how the court commissioner i.e. surveyor was appointed only to show in the map whether there is a common bandh in between land Gut Nos.219 and 220 at Wanwada. It is significant to note that the case of the plaintiffs was of encroachment at the hands of the defendants over the suit property and therefore, the court commissioner should have been appointed for measurement of both the lands and to show the exact location of the encroached portion in the respective areas of the plaintiffs in the suit property.

7. It is already settled that whenever there is a dispute over the boundary, a joint measurement is the best solution. Here in this

matter the surveyor has not shown proper area of encroachment in the respective areas of the plaintiffs in the suit property. Moreover, to determine the encroachment, the lands of the plaintiffs as well as defendants, are required to be measured. Thus, the observation of the learned first appellate court for directing the surveyor for measurement of the suit property as well as Gut No.220 at the expenses of the plaintiffs for proper adjudication of the controversy between the parties, is definitely appropriate. Further, the direction given by the learned first appellate court for the plaintiff Nos.2 and 3 to produce their respective registered sale deeds in respect of their area in the suit property also appears correct so as to determine exact location of their areas in the suit property. As such, no perversity is found in the judgment and order of the learned first appellate court, whereby the matter is remanded back for fresh trial with certain direction. Thus, considering all these aspects, no substance is found in the appeal and the same stands dismissed alongwith pending Civil Application No.4802 of 2021.

(SANDIPKUMAR C. MORE, J.)