



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

7 SECOND APPEAL NO. 303 OF 2023
with CIVIL APPLICATION NO. 7218 OF 2023

**RAJARAM BHAGWANRAO MORE AND ANOTHER
VERSUS
RADHESHYAM RAGHUNATH MOHITE DECEASED THROUGH HIS
LRS RAVINDRA RADHESHYAM MOHITE AND OTHERS**

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Advocate for Appellant : S/Shri Vinayak M. Kagne and Patil Bipinchandra K.
Advocate for Respondents : Mr. Shashikant S. Londhe
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CORAM : Y. G. KHOBRAGADE, J.
DATE : 26.03.2024

ORDER :-

1. With consent of both the sides heard finally at the stage of admission.
2. Present appeal directed against the judgment and decree dated 02.01.2023 passed in appeal R.C.A. No. 28/2008, whereby the learned First Appellate Court partly allowed the suit and reversed the findings recorded by the trial Court in civil suit bearing R.C.S. No.110/2004.
3. The Appellants are the original defendant nos.1 and 2 and the Respondents are the legal heirs of the original plaintiff in civil suit bearing R.C.S. No.110/2004. For the sake of brevity parties to present second appeal

would be referred in their original capacity as plaintiff and defendants. The plaintiff instituted a suit bearing R.C.S. No.110/2004 and thereby prayed for decree of removal of encroachment and possession of land admeasuring 24 R from eastern side of his field against the defendants.

4. The plaintiff's case is that, on 11.05.2001, he purchased the land bearing Gut No.23 admeasuring 0.82 R from one Shri Vilas Shinde vide registered sale-deed. Though, said sale-deed was executed in respect of 0.82 R land, but 11 R excess area of land shown in the sale Deed i.e. $(0.82+11=$ total 0.93 R). Subsequently, he purchased ad-measuring 1 H 23 R land out of Gut No.23 from Ramdas Shinde and Maroti More by registered sale-deed No.243/2002. According to the plaintiff, the vendors delivered him the possession of land of 1 H 0.85 R out of gut no.23 and since, then he is in possession. Subsequently, he measured the land privately and it was noticed that the defendant no.1 made encroachment upon his land by breaking the eastern side bund by wooden plough.

5. On joint application for measurement of the land, on 15.09.2004, the Surveyor measured land and found that, the defendants have made encroachment on the plaintiff's land to the extent of 0.24 R. Thereafter, he asked the defendants to remove encroachment, however, they refused to remove the encroachment. Therefore, the plaintiff filed a suit and prayed for

decree of removal of encroachment and prayed for inquiry into *mesne-profit*.

6. The defendant nos.1 and 2 filed their written statement at Exh.11 and denied the claim of the plaintiff. The defendants have not denied about execution of sale-deed and delivery of possession as well as private measurement of the suit property. The defendants denied possession of the plaintiffs over 1 H. 85 R. out of Gut no.23. According to the defendants, on 13.05.2004, the defendant no.1 purchased 0.55 R land from Kanbarao Shinde and they have not encroached upon land of the plaintiff. The defendants further contended that, the plaintiff has not made it clear that the land of defendant no.2 in Gut No. 24 situated on southern side of the land of the defendant no.1 in Gut No. 24. The defendants further denied for conducting joint measurement. According to the defendants, the Surveyor Clerk asked him to sign the panchanama being a adjacent owner of field gut no.23. The Surveyor has not carried proper measurement of plaintiff's land and their land not been measured. Further, they have not made encroachment upon the land of the plaintiff, hence prayed for dismissal of the suit.

7. On the basis of rival pleadings of both the sides, the learned trial Court framed issues at Exh.12 which reads as follows:

1. Does plaintiff prove that he is owner of the suit property ?
2. Does plaintiff prove that defendants encroach upon the suit property to

the extent of 24 R. ?

3. Whether plaintiff is entitled for the recovery of possession as prayed ?
4. What order and decree ?

8. In order to prove the issues the plaintiff examined himself and three other witnesses i.e. PW2-Bandu Raghunath Appa Panchlinge, PW3-Vilas Govindrao Shinde at Exh.23 and PW4-Uttam Ramaji Murmure, the Surveyor/Measurer. The defendants examined DW1-Rajaram Bhagwanrao More and DW2-Pundlik Mukundrao Shinde.

9. On 12.02.2008, the learned trial Court passed the judgment and thereby dismissed the suit of the plaintiff on the ground that evidence of PW-4 Surveyor does not reveals that on what basis he conducted measurement of gut no.23, so also, at the time or purchase of the land who had conducted the measurement or whether the measurement was done or not has not been made clear. Further no boundary mark shown while carrying the measurement. Therefore, the plaintiff failed to prove defendants have encroached on his 24 Guntha land.

10. Being aggrieved by said Judgment & Decree, the plaintiff preferred an appeal bearing R.C.A. No.28/2008. On 02.01.2023, the learned First Appellate Court reversed the findings of the learned trial Court and

decreed the suit holding that the defendants made encroachment on the land of the plaintiff to the extent of 0.24 R land out of 1 H 85 R from gut no.23, so also, 10 Guntha land are found less from 1 H arising out of gut no.23 and directed the defendants to remove their encroachment over 0.24 R land shown in measurement map Exh.33.

11. The learned counsel appearing for the appellants canvassed that as per the evidence of PW-4 only land gut no.23 was measured and the land gut no.24 was never measured. Therefore, when specific pleadings are made about encroachment upon certain portion of the land by the defendants, in such circumstances, unless the surveyor measured the entire Gut Nos. 23 and 24 of the plaintiff and defendants, no encroachment can be ascertained.

12. In support of these submissions the learned counsel appearing for the appellant/defendants placed reliance on the case of **Harsing Kewala Rathod V/s. Ramji Hemla; 2009 (2) All M.R. 169**, wherein it has been held that, unless both the survey numbers are measured in case of encroachment of the land, it would not be possible to come to the conclusion that there is encroachment by the defendants over the plaintiff's land.

13. Per contra, the learned counsel appearing for the

respondents/plaintiff vehemently canvassed that, the Surveyor PW-4 issued notices for joint measurement of survey no. 23. The defendant no.1 was personally present at the spot while measuring the suit land and he put signature being a adjacent owner of the land. Further, the defendants have not raised objections during course of measurement or subsequent to measurement of the land, because the PW4-Surveyor measured the land as per revenue record as well as after fixation of boundaries. The learned trial Court considered the evidence and dismissed the suit, however, the learned First Appellate Court reversed the findings without considering the evidence of PW-4.

14. Needless to say that the plaintiff specifically pleaded that his land was encroached by the defendants. The entire case of the plaintiffs based on the joint measurement carried out by PW-4. On perusal of the evidence of the PW4-Uttam Murmure (Surveyor) it appears that, on 15.09.2004, his office received an application for measurement of the gut no.23. Thereafter, he issue notices to the plaintiff and the defendants. Thereafter he measured Gut No.23 and found 24 Guntha land less in share of plaintiff on the eastern side of gut no. 23. Further, he (PW4) found 10 Guntha less land in respect of share of the defendant no.1 from eastern side. The defendant no.1 having 0.55 R land and the defendant no.2 having 0.60 R land in Gut no.24. There is no dispute

that, Gut no.24 is standing on eastern side of gut no. 23. It is an admitted fact that the Surveyor PW-4 has not measured gut no.24. Therefore, it cannot be ascertained what was the area of gut no.24 including share of defendant nos.1 and 3 and how the shortfall in land of the plaintiff and defendant no.1.

15. It is trite well settled principle of law that, when the plaintiff made averments in the plaint about encroachment upon his land by the defendant and the defendant denied said fact in that event the joint measurement is required to be done. Not only this, but even the Court can appoint the Court Commissioner under Order 26 Rule 9 of the C.P.C. In the case in hand, though, the PW-4 measured the land of the gut no.23 of the plaintiff, however, the Surveyor did not measure the land gut no.24.

16. In the case of **Harsing Kewala Rathod** cited (supra) it has been observed as under:

“12. The fourth point i.e. without measuring both the Survey Numbers whether inference can be drawn on the basis of the measurement of only plaintiffs land that the defendant has made encroachment, in my considered view, the Surveyor/ D.I.L.R. should have measured both the Survey Numbers i.e. Survey No. 74 and Survey No. 75. Unless both the Survey Numbers are measured, it is not possible to come to the conclusion that there is encroachment by defendant over the plaintiffs land. The D.I.L.R. should have measured Survey No. 74 and 75 and after measurement of both Survey

Numbers, should have submitted report to the Court and on the basis of measurement of both the Survey Numbers belonging to plaintiff and defendant, the Court should have adjudicated the point in issue.”

17. In the case in hand, since the PW-4 did not measure gut no.23 and only measured gut no.24 which does not appear to be proper for ascertaining the encroachment over the land of the plaintiff by the defendants. Therefore, to my judicious conscious, the judgment and decree passed by both the Courts below are required to be quashed and set aside and it is necessary to remand the matter to the trial Court for fresh decision after appointing the Court Commissioner under Order 26 Rule 9 of C.P.C..

18. The learned trial Court should appoint the Court Commissioner i.e. Revenue Surveyor for joint measurement of gut Nos. 23 and 24. The plaintiff and defendants shall deposit the required fees of the Court Commissioner. The Surveyor shall carry out the measurement within a period of six weeks from the order of the learned Court and shall submit the report within period of 2 weeks therefrom. Thereafter, the learned Trial Court shall record evidence of the Revenue Surveyor/Court Commissioner to prove its Report as per guide lines laid down in case of ***Vijay Shrawn Shende & ors.,-V- State of Maharashtra & Ors., 2009 (5) Mh.L.J. 279.***

19. The trial Court shall decide the matter on its own merits within a

period of one year from the date receipt of Court Commissioner's Report. Both the plaintiff and defendants shall appear before the learned trial Court on 22.04.2024. In view of the above, present appeal is allowed. The Judgment and Decree passed by the First Appellate Court as well as Trial Court is hereby quashed and set aside.

20. No Order as to costs. Parties to bear their own costs.

21. Pending civil application, if any, also stand disposed of.

[Y. G. KHOBRADE, J.]