



(1)

sa 431.23

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 431 OF 2023

with CIVIL APPLICATION NO. 10236 OF 2023

1. Ashok s/o Bala Barde,
Age- 51 years, Occu: Agriculture,
Fattepur, Tal. Bhokardan,
Dist. Jalna.

2. Kundalik s/o Bala Barde,
Age- 61 years, Occu: Agriculture,
R/o As above

... APPELLANTS

- VERSUS -

1. Shalikrao s/o Bala Barde,
Age- 63 years, Occu: Agriculture,
Fattepur, Tal. Bhokardan,
Dist. Jalna.

2. Shenphadabai w/o Fakirba Barde,
Age- 66 years, Occu: Agriculture,
R/o As above

3. Sanjay s/o Fakirba Barde,
Age- 36 years, Occu: Agriculture,
R/o As above

4. Fakirba s/o Laxman Barde,
Age- 70 years, Occu: Agriculture,
R/o As above

... RESPONDENTS

.....
Mr. Shaikh Mazhar Jahagirdar h/f. V. Y. Patil, Advocate for the Appellants
Mr. D.P. Palodkar, Advocate for the Respondent No.1
.....

CORAM : Y. G. KHOBRAGADE, J.
RESERVED ON : 02.05.2024
PRONOUNCED ON : 10.05.2024

ORDER:

1. Heard at length Mr. Shaikh Mazhar Jahagirdar, the learned counsel appearing for the appellants and Mr. D.P. Palodkar, the learned counsel appearing for the respondent no.1

2. By the present Appeal under Section 100 of Code of Civil Procedure, the appellants have challenged the Judgment and Decree dated 10.04.2023 passed by the learned District Judge-1, Jalna, in first appeal bearing R.C.A. No. 14/2023 arising out of Judgment and Decree dated 24.10.2016 passed by the learned C.J.J.D., Bhokardan in Suit bearing R.C.S. No.150/2012.

3. Present appellant nos. 1 and 2 are the original defendant nos.1 and 2, present respondent no.1 is the original plaintiff and present respondent nos.2 to 4 are the original defendant nos. 3 to 5 in Suit bearing R.C.S. No.150/2012. For the sake of brevity the parties to the present Second Appeal hereinafter be referred in their original nomenclature of the suit.

4. The plaintiff has filed a Suit bearing R.C.S. No. 150/2012 claiming that plaintiff himself and defendant nos.1 and 2 are real brothers. Their father Shri Bala Nanduba Barde was holding ancestral property bearing gut no.178 ad-measuring 2 H. 3 R. at village Fattehpur and in gut no. 47 ad-measuring 8

H. 28 R. at village Jomala, District Jalna. Their father partitioned gut nos. 178 & 47 in the year 1991. Accordingly, the plaintiff got 67 HR, defendant no.1 got 0.67 HR and defendant no.2 got 0.68 HR of land in partition of gut No. 178 of village Fattehpur. The defendant no. 2 has sold 0.15 HR land out of his share of 0.68 HR land, to the defendant no.5 Fakirba Laxman. The defendant no. 3 is the wife and defendant no.4 is son of defendant no.5.

5. In respect of gut no. 47, the plaintiff had submitted that, gut no. 47 is original survey no. 19 and in the year 1965, gut no.47 was partitioned between Shri Bala Nanduba Barde, father of plaintiff and Shri Laxman Barde, the father of defendant No.5. In partition, 8 H 28 R land respectively came in share of Shri Bala Nanduba Barde, the father of plaintiff, defendant nos.1 & 2. Similarly 8 H 28 R land was given in partition to Shri Laxman Barde, the father of defendant No. 5. Thereafter in the year 1991, father of the plaintiff, defendant nos. 1 & 2 had partitioned gut no. 47 between them. In partition 2 H 74 R land came to the share of the plaintiff, whereas, 3 H 6 R land came to the share of defendant no.1 and 2 H 33 R came to the share of defendant no.2.

6. According to the plaintiff, 30 R land each out of share of defendant nos. 1 & 2 and 29 R land out of share of defendant no. 5 was acquired for the purpose of percolation Tank. The defendant nos. 1, 2 & 5 have duly received compensation toward acquisition of their lands. Since, the plaintiff was serving

outstation, therefore, the defendants have taken disadvantage of his absence and encroached upon his 7 R land out of gut no. 178 and 29 R land out of gut no. 47. Therefore, the plaintiff had prayed for Decree as against the defendants for removal of encroached portion of land.

7. The defendant nos. 1 to 5 filed their written statement and thereby resisted the claim of the plaintiff. The defendants nos. 1 & 2 have admitted that there was partition in the year 1991 in respect of gut no.178 of village Fattehpur and gut no. 47 of village Jamola. The defendants nos. 1 to 5 have also admitted about partition between Bala Nanduba Barde, the father of plaintiff, defendant nos. 1 & 2 And Shri Laxman Barde, the father of defendant no.5, but they denied about carrying out measurement of both the gut numbers. According to the defendants, in the year 1985-1986 percolation tank has been constructed and while acquisition of land out of gut no. 47, their family was joint Hindu Family. Since, only $30\text{ R} + 29\text{ R} = 59\text{ R}$ land i.e. Total 1 Acre 19 R land out of gut no. 47 was acquired for the percolation tank from share of defendant nos. 1 and 2, but in 7/12 extract no such entry was made.

8. The defendants further claimed that the land gut no.178 was partitioned between the plaintiff and the defendant nos.1 and 2, however, with consent of the plaintiff 10 R excess land was given to defendant no.1 and defendant no.2, but no such entry has been taken in the 7/12 extract.

According to the defendants, they have not made any encroachment on the land of the plaintiff. Hence prayed for dismissal of the suit.

9. On the basis of rival pleadings of both the sides, the learned trial Court framed Issues at Exh. 15. In order to prove issues the plaintiff had examined himself at Exh.21 and proved 7/12 extracts at Exh. 22 to 24, Mutation Entries in respect of partition at Exh. 26 & 27, 7/12 Extract of gut no. 47 at Exh.28. In order to prove measurement of gut no. 178, the PW-2, Ramesh Kadam, the Cadestral Surveyor was examined at Exh.32. The PW-3 Shri Anil Khadalkar, the Cadestral Surveyor was examined to prove measurement of gut No.47.

10. The defendants have examined DW-1, Fakirba Barde, the defendant no. 5 at Exh.48 and proved 7/12 extract of gut no.47 at Exh. 50, Exh.51 – 7/12 extract of gut no. 178, Mutation entries at Exh.52 and 53, Exh.54 Mutation entry in respect of partition of gut no.47. 7/12 extract and mutation entries of gut no.47 at Exh.55 and 56. The defendants examined DW-2, Uttam Kisan Barde at Exh.57.

11. After the conclusion of trial, on 24.10.2016, the learned trial Court passed Judgment and Decree, holding that, as per evidence of both sides, the plaintiff got share of 0.67 H R land, the defendant no.1 got 0.67 HR land and the defendant no.2 got 0.68 HR land in the partition which was held in the

year 1991. Subsequently, the defendant no.2 sold 0.15 H R land out of his share to the defendant no.5. As per evidence of PW-2, he measured the land gut no. 178 in presence of parties to suit and found encroachment by defendant no.1 on the land of the plaintiff to the extent of 7 R towards eastern side. However, the learned Trial Court held that, the plaintiff failed to prove encroachment on his land bearing gut no. 47 by the defendants, hence, the learned trial court partly decreed the suit and directed the defendant no.1 to remove encroachment made by him and hand over the possession of 7 R land out of gut no. 178 to the plaintiff.

12. Being aggrieved by said Judgment and Decree two separate Appeals were filed. An Appeal bearing R.C.A. No. 192 of 2016 was preferred by original plaintiff/present appellant challenging the decree to the extent of dismissal of suit in respect of gut no. 47. Whereas another appeal bearing R.C.A. No. 14 of 2023 was preferred by defendants nos. 1 & 2 challenging the Judgment and Decree dated 24.10.2016 passed by the learned trial Court to the extent of removal of encroachment of defendant no. 1.

13. No doubt, the learned First Appellate Court could have decided both the appeals by common Judgment, but both the appeals were decided independently on 10.04.2023 as subject matter of two different gut numbers and measurement reports were done separately. While passing Judgment &

Decree dated 10.04.2023 in appeal bearing R.C.A. No. 192 of 2016, the learned First Appellate Court, Jalna, has held that, PW-3, Cadestral Surveyor failed to carry out the measurement as per rules, hence, remanded the matter to the Trial Court for conducting fresh trial for re-measurement of gut no. 47.

14. However, on 10.04.2023, the learned First Appellate Court dismissed the appeal preferred by defendants nos. 1 & 2 in respect of gut no. 178 holding that, the PW-2, Cadestral Surveyor has carried out measurement of land gut no. 178 of village Fattehpur by using E.T.S. machine in presence of the plaintiff and defendants. He also followed all guidelines while measuring the land as provided by the Revenue Office and prepared Map Exh. 38. As per map Exh. 38, the defendant no.1 was found in possession of excess land than shown in 7/12 extract. Therefore, the plaintiff has proved that the defendant no.1 has encroached upon 7 R land of the plaintiff from eastern side. Therefore, being aggrieved by the same the defendants nos. 1 & 2 have instituted present second appeal.

15. Adv. Shaikh Mazhar Jahagirdar, the learned counsel appearing for the appellants canvassed that while passing the impugned judgment and decree, the learned First Appellate Court failed to consider the cause of action shown in the suit because the land which is shown as encroached is in possession of the appellant no. 1 / def. no.1 from the date of partition of the ancestral property

and is under cultivation. Oral testimony of the PW-3, Cadestral Surveyor itself proves that as per Map Exh. 34 he found 29 R excess land in possession of plaintiff than the land shown in 7/12 extract. Therefore, the plaintiff has failed to prove encroachment. However, the learned trial Court as well as the First Appellate Court failed to consider said evidence, hence, findings recorded by both the Courts below are perverse and liable to be quashed and set aside.

16. The learned counsel appearing for the appellants further canvassed that the plaintiffs as well as the defendant nos.1 and 2 have filed two separate appeals i.e. R.C.A. Nos.14/2023 and 192/2016 arising out of judgment and decree dated 24.10.2016 passed by the learned C.J.J.D., Bhokardan in R.C.S. No. 150/2012, however, the learned trial Court remanded the suit in respect of gut no.47 for fresh decision on the same set of facts and as per the evidence available on record the learned First Appellate Court dismissed the appeal of the defendant nos.1 and 2. Therefore, findings recorded by the learned First Appellate Court are perverse.

17. Since, the question of encroachment arises to the extent of 7 R land of the plaintiff's share in gut no. 178, therefore, it will be just and proper to consider the evidence of the PW-2 Ramesh Kadam, Cadestral Surveyor. PW-2 deposed at Exh. 32 that, on 07.03.2014, he received notice for measurement of land gut no.178 of village Fattehpur. Accordingly, he issued notice to the

plaintiff and the defendants. The schedule of measurement was fixed on 21.03.2014. The PW-2 deposed that the plaintiff and defendants were shown in cultivation of their land. He fixed boundaries as per revenue record and measured the land gut no. 178 through E.T.S. machine on 21.03.2014 in presence of plaintiff and defendants. Accordingly, he submitted Panchanama Exh.37 and drawn Map Exh.34. As per the measurement Map Exh. 34 he found the following details:

	Name of the land holder	As per measurement H / R	As per 7/12 extract H / R
1	Shalikrav Bala Barde (Plaintiff)	0.60	0.67
2	Ashok Bala Barde (defendant no.1)	0.81	0.67
3	Pundlik Bala Barde (defendant no.2)	0.41	0.41
4	Fakirba LaxmanBarde (defendant no.5)	0.28	0.27

18. In cross-examination it has been tried to bring on record that other adjacent land owners of gut no.178 were not present and no notices were issued to them. However, nothing has been solicited to show that in gut no.178 other persons than the plaintiff and defendants are holding land. No doubt in last sentence of examination in chief of PW-2 it shows that the PW-2 found that the plaintiff is in possession of 29 R less land than the area mentioned in 7/12 extract. However, on perusal of Map/Report Exh. 34 it is clear that the defendant no.1 was found in possession of 0.81 HR land but as per 7/12 extract he is owner of 0.67 HR out of which he already sold 0.15 HR land to the defendant no. 5 Fakirba. It is also not the case of the plaintiff that the

defendant no.1 encroached upon his land to the extent of 29 R. Therefore, the wrong statement recorded in examination in chief of the PW2 can not override the written report Exh. 34.

19. After going through the findings recorded by the learned First Appellate Court as well as by Trial Court *prima facie* it appears that both the Courts below have rightly recorded the findings that the defendant no.1 has encroached upon 7 R land of the plaintiff from eastern side in gut no. 178. Hence, the findings recorded by both the Courts below does not appear to be perverse and illegal. Therefore, I do not find any substantial question of law is involved in the present appeal. In view of the above discussion, the appeal stands dismissed. Accordingly, civil application no. 10236/2023 is also disposed off. No order as to cost.

[Y. G. KHOBRADE, J.]