



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

**SECOND APPEAL NO. 68 OF 2024
WITH
CIVIL APPLICATION NO. 3538 OF 2024**

1. Baban Keshav Bhosale,
Age : 68 Years, Occ. Agriculture,
R/o. Darodi, Taluka Parner,
District Ahmednagar
.. Appellant
(Orig. Defendant No.1)

VERSUS

1. Gulab Bala Bhosale,
Age : 82 Years, Occ. Agriculture,
R/o. Darodi Taluka Parner,
District Ahmednagar
Respondent
(Orig. Plaintiff)
2. Sakharam Bala Bhosale,
Age : 86 Years, Occ. Agriculture,
R/o. As above.
Respondent
(Original defendant No.2)

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Mr. Satyajit s. Bora Advocate for the Appellant.
Mr. Mahesh K. Bhosale, Advocate for the Respondent No.1

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CORAM : SANDIPKUMAR C. MORE, J.

DATED : 19th April 2024

ORDER:-

1. Heard rival submissions at admission.
2. The present Second Appeal is directed against concurrent findings of both the learned Courts below. The present respondent No.1 i.e. original plaintiff filed a Regular Civil Suit No. 506 of 2006 before the learned trial Court i.e. 2nd Joint Civil Judge, Junior Division, Parner, District Ahmednagar, for

perpetual injunction and recovery of possession of encroached portion of 7 R land along with the mesne profits against the appellant as well as respondent No.2, who are the original defendants, vide judgment and decree dated 07.04.2022. The learned trial Court decreed the aforesaid civil suit and directed the present appellant to deliver possession of encroached 7 R area as shown by the blue colour in measurement map Exh. 47/48 to the respondent No.1 from land Gut No. 1276.

3. The appellant then preferred appeal against the said judgment and decree before the learned First Appellate Court i.e. learned District Judge-3 Ahmednagar bearing Regular Civil Appeal No. 116 of 2022. However, by judgment and order dated 21.07.2022 the learned First Appellate Court has dismissed the said appeal.

4. The learned counsel for the appellant submits that the only substantial question of law involved in this appeal is that both the learned Courts below failed to consider evidence of Cadastral Surveyor in proper manner. According to him, unless the adjoining lands to the Gut No. 1276 owned by respondent No.1/plaintiff, are measured, the encroachment cannot be properly ascertained. In short, both the learned

Courts below relied too much on the evidence of Cadastral Surveyor and ignored the fact that no other land except suit land was measured to ascertain alleged encroachment properly. In support of his submissions he relied on the following judgments :-

- (I) ***Vijay and Others Versus State of Maharashtra and Others, in Second Appeal No. 97 of 2009 decided on 4.5.2009.***
- (II) ***Raghunath Kashinath Chavan Versus Sakharam Maroti Chavan and another in Second Appeal No. 562 of 2005 decided on 29th January, 2019.***

5. On the contrary, the learned counsel for respondent No.1 strongly supported the judgments of both the learned Courts below and pointed out that there were two measurements of the suit land and in both the measurements it was revealed that, the appellant had encroached upon the land of respondent No.1/plaintiff to the extent of 7 R area from eastern side. He specifically pointed out that there was no need to measure the adjoining lands to determine the encroachment portion properly, since the appellant had not raised any objection at the time of said measurement. Moreover, the order of the learned trial Court was specific for the measurement of suit land Gut No. 1276 only. As such, he

prayed for dismissal of appeal at admission stage.

6. Heard rival submissions and also perused documents on record along with the impugned judgments.

7. It is significant to note that both the learned Courts below have concurred in holding that the appellant has made encroachment over the land of respondent No.1/plaintiff i.e. Gut No. 1276 from eastern side to the extent of 7 R area. The learned counsel for the appellant heavily relied on the judgments mentioned above. On going through the judgment of this Court in case of ***Vijay and others Vs. State of Maharashtra and others*** (supra), it is evident that this Court remanded matter back to the Trial Court for appointment of a qualified Surveyor as a Commissioner, afresh from the Office of the District Inspector of Land Records, or Taluka Inspector of Land Records, who shall secure public record relating to the survey numbers, subject-matter, ascertain undisputed or settled boundaries, measure both, and, if necessary, surrounding survey numbers and decide as to whether plea of encroachment made by the plaintiffs is factually correct.

8. The learned counsel for the appellant relying upon the aforesaid observations strongly submitted that in the instant matter, the alleged encroachment observed by both the learned Courts below is apparently erroneous, since only land Gut No. 1276 was measured and unless the surrounding survey numbers are not measured, the exact portion under encroachment cannot be ascertained. He also placed reliance on the judgment of this Court in Second Appeal No.562 of 2005 where this Court remanded the matter back to the Trial Court with direction to appoint the Surveyor from the office of the D.I.L.R or any T.I.L.R for the purpose of local investigation and measurement to ascertain the area under encroachment. However, in the first judgment, this Court had given direction to measure surrounding survey numbers, only if necessary. Further, in the second judgment, it appears that there was no such measurement carried out either during the pendency of the suit or during the pendency of the appeal and hence the joint measurement was directed.

9. It is extremely important to note that in the instant matter, the trial Court has specifically ordered to measure the land Gut No. 1276 belonging to the respondent No.1/plaintiff to ascertain the encroachment. Admittedly, when there is

dispute regarding boundaries or any portion under encroachment, joint measurement is the best solution. In the instant case, it appears that measurement of disputed portion of Gut No. 1276 was done on two occasions and on both the occasions it was found that 7 R land from eastern side was encroached upon by the appellant. It is not in dispute that land Gut No. 1275 belongs to appellant and same is situated towards eastern side of Gut No. 1276 i.e. land of respondent No.1/plaintiff. Though the learned counsel for the appellant insisted for measurement of land Gut No. 1276 along with surroundings lands, but from the evidence of both the Cadastral Surveyors it is evident that the land Gut No. 1276 was measured in presence of rival parties. It is extremely important to note that it has come in the evidence of Surveyor Raykar i.e. P.W. No.3 that the learned trial Court had directed him to measure land Gut No. 1276 and accordingly when he went there for measurement, he measured the land as per the boundary marks shown by the present appellant and respondent No.1/plaintiff. At that time, certain other persons were also present and in their presence he recorded the statements of appellant as well as respondent No.1 in respect of the said measurement and carried out *panchnama* to that effect. He also prepared the map Exh. 47 wherein it was found

that 7 R land from Gut No. 1276 was encroached by the land owner of Gut No. 1275 i.e. present appellant.

10. It is also important to note that in the cross-examination also this witness reiterated the fact that the plaintiff and defendant No.2 had in fact shown their manner of cultivation in suit land Gut No. 1276. Thus, it appears that at the time of said measurement, the appellant/defendant No.1 did not raise any objection about the manner of cultivation in Gut No. 1276. He also did not raise any objection as to whether the starting point for measurement considered by the Cadastral Surveyor was not in existence on the spot. On the contrary, it has come on record by the observation of both the Courts below that boundary mark of British Era was present in Gut No. 1276 and the Cadastral Surveyor by treating it as a starting point or boundary mark carried out the measurement without any objection from the appellant. Thus, it appears that, when the appellant himself had consented to measure the land treating the aforesaid boundary mark of British Era as a starting point, he cannot raise objection to the said measurement at this point of time to show that the said measurement was illegal in absence of measurement of surrounding Gut numbers. Once he admits the starting point

which was present in suit land Gut No.1276, then he is estopped from saying that the encroachment shown by the Surveyor was inappropriate. As such, no substantial question of law appears to be involved as raised by the appellant and in view of the concurrent findings by both the Courts below, it has been established that the appellant has made encroachment over the land of respondent No.1/plaintiff to the extent of 7 R area from Eastern side as per the map at Exh.47 and 48. As such, the Second Appeal stands dismissed at admission stage along with pending Civil Application.

(SANDIPKUMAR C. MORE, J.)

Y.S. Kulkarni