

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 64 OF 2024
WITH
INTERIM APPLICATION NO. 876 OF 2024**

Hiralal Popatlal Shaha & Ors.

...Appellants

V/s.

1. Smt. Anusaya Krishna Deshpande
(Dead) & Ors.

...Respondents

Mr. Pratik B. Rahade a/w. Mr. K.S. Patil, *for the Appellants.*
None for the Respondents.

CORAM : SANDEEP V. MARNE, J.

Dated : 1 February 2024.

P.C. :

1. By this Appeal, the Appellants challenge Judgment and Decree dated 8 September 2023 passed by the District Judge-2, Kolhapur dismissing Regular Civil Appeal No. 54/2013 and confirming the Decree dated 7 December 2012 passed by the Civil Judge Junior Division, Peth, Vadgaon in Regular Civil Suit No. 114 of 1995.

2. Plaintiffs instituted Regular Civil Suit No. 114 of 1995 seeking permanent injunction against the Defendants from interfering with their possession of suit property admeasuring area of 13 Ares out of Survey No.47 in Village-Kasbavadgaon, Taluka-Hatkalangale. In the plaint, it was Appellants' case that the suit property was owned and possessed by them for several years. Upon service of suit summons, the Defendants appeared and in addition to filing Written

Statement opposing the Suit, they also filed a counter-claim claiming that Plaintiffs have encroached upon the land admeasuring 13 Ares in Survey No.47 and prayed for removal of encroachment and handing over of possession of the suit property.

3. The Trial Court framed the issue of ownership of the suit property, possession thereof by Plaintiffs and encroachment on suit property by Plaintiffs.

4. It is the case of the Defendants that entire land bearing Survey No.47 was allotted to Defendant No.1-Anusaya by the Government. In cross-examination, Plaintiffs' witness gave a specific admission that the entire land admeasuring 13 Ares Survey No.47 was in the ownership of the Defendant No.1-Anusaya. On account of this specific admission, Plaintiffs' claim of ownership of suit property admeasuring 13 Ares got demolished. It also got proved that Defendant No.1 is the owner of entire Survey No.47 including the area of 13 Ares.

5. So far as possession is concerned, it is an undoubted position that as on the date of filing of the suit, the land admeasuring 13 Ares out of Survey No.47 was in possession of Plaintiffs. It appears that measurement was conducted at the behest of Defendants on 29 March 1995 in respect of the land bearing Survey No.47. It is an admitted position that the said measurement was conducted in the presence of the Plaintiff Nos.2 and 4. In that measurement, it was revealed that Plaintiffs were occupying the land admeasuring 13 Ares

out of Survey No.47. It appears that immediately after the conduct of the said measurement on 29 March 1995, Plaintiffs filed pre-emptory suit on 18 October 1995 seeking permanent injunction against the Defendants before the Defendants could file their suit for removal of encroachment and recovery of possession based on the measurement conducted on 29 March 1995.

6. Perusal of the findings recorded by the Trial Court and the first Appellate Court by considering evidence on record would indicate that Defendants have proved their ownership in respect of the suit property admeasuring 13 Ares which is encroached upon by the Plaintiffs. The measurement has been conducted in presence of Plaintiff Nos.2 and 4. Therefore, the submission of Mr. Rahade about impermissibility to decree the suit for removal of encroachment in absence of joint measurement cannot be accepted. The measurement conducted in respect of Survey No.47 in presence of Plaintiff Nos.2 and 4 has conclusively proved encroachment of area admeasuring 13 Ares by Plaintiffs in Survey No.47. No purpose would have been served by measuring land of Plaintiffs. No mathematical formula can be applied that in every case of encroachment, measurement of lands of Plaintiffs and Defendants is mandatory. It depends on facts and circumstances of each case. It is only when a party comes up with a specific case that after removal of encroachment committed by him, his area is likely to be reduced as compared to revenue records that measurement of both lands may be required. It is not the case of the Plaintiffs that they are

possessing lesser area in the adjoining land than the one reflected in revenue records.

7. After considering the overall conspectus of the case, it is seen that no error is committed by the Trial Court or the first Appellate Court while passing the impugned Judgments and Decrees. No substantial question of law is involved in the Appeal. The Appeal is accordingly **rejected**. The Interim Application also stands disposed of.

NEETA
SHAILESH
SAWANT

SANDEEP V. MARNE, J.

Digitally signed by
NEETA SHAILESH
SAWANT

Date: 2024.02.02
11:48:11 +0530