

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

**SECOND APPEAL NO.40 OF 2024
WITH
INTERIM APPLICATION NO.646 OF 2024
IN
SECOND APPEAL NO.40 OF 2024**

Tukaram Sukdeo Somwanshi
V/S

....Appellant/Applicant

Sudam Khushal Desale

....Respondent

Mr. Vaibhav V. Ugle *for the Appellant/Applicant.*

**CORAM: SANDEEP V. MARNE, J.
DATE : 26 MARCH 2024.**

P.C.:

1 By this Appeal, the Appellant challenges the judgment and decree dated 28 July 2023 passed by the District Judge-3, Malegaon dismissing Regular Civil Appeal No.93 of 2019 and confirming the decree dated 26 September 2019 passed by 4th Joint Civil Judge Senior Division, Malegaon in Regular Civil Suit No.497 of 2012.

2 I have heard Mr. Ugle, the learned counsel appearing for the Appellant.

3 It must be observed at the very outset that the suit was filed by the Plaintiffs for recovery of possession of land encroached by the Defendant/Appellant. Whether the Appellant committed encroachment or not is a pure question of fact and in ordinary course no question of law can be involved in respect of finding of fact recorded by the Trial and the First Appellate Court that there is an encroachment by the Defendant in the land of the Plaintiffs. Nonetheless I have heard Mr. Ugle and considered his submissions. Mr. Ugle would firstly contend that the Surveyor did not follow the provisions of the Manual of Land Surveying and therefore the survey map prepared by him could not have been taken into consideration by the Trial Court. In support of his contention he would rely upon judgment of this Court in **Deepak Eknath Todkar vs. Dr. Bhanuprakash Bapurao Kadam**, Second Appeal No.755 of 2017, decided on 3 September 2019. He would also place reliance on the Manual of Land Surveying. However the cross-examination of the Surveyor would indicate that no suggestion was given to the Surveyor about non-following any particular provision of Manual of Land Surveying. Thus it was never the case of the Appellate before the Trial Court that the survey was not done as per the Manual of Land Surveying. In Second Appeal, Appellant cannot be permitted to improve upon his case.

4 The next contention of Mr. Ugle is that encroachment can only be proved by oral evidence and that extent of encroachment cannot be proved in absence of public records and procedure emerging from sections 36 and 60 of the Evidence Act. In support of his contention he would rely upon judgment

of this Court in **Vijay Shrawan Shende vs. State of Maharashtra**, 2009 (4) ALL MR 601. However in the present case the Surveyor has been examined as witness and he has given evidence that the Appellant/Defendant No.1 encroached upon Plaintiffs' land to the extent of 40 R. Thus sufficient oral and documentary evidence is produced to prove commission of encroachment by the Appellant in the land of Plaintiffs.

5 In my view therefore no question of law, much less any substantial question of law is involved in the Appeal. The Second Appeal is accordingly rejected. No costs.

6 In view of the disposal of the Second Appeal, nothing would survive in the Interim Application and the same is accordingly disposed of.

(SANDEEP V. MARNE, J.)

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