



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

SECOND APPEAL NO. 174 OF 1994

Apparao Kashinath Mangire and others
VERSUS
Dattatraya s/o. Apparao Mangire and others

Mr. S. B. Bhosale, Advocate for respondent Nos.1A to 1D

CORAM

: R. M. JOSHI, J.

Date

: 21st January, 2025

PER COURT :-

1. This motion is moved for speaking to minutes of judgment dated 15.01.2025 to correct the name of the advocate for respondent Nos. 1A to 1D as Mr. S. B. Bhosale instead of Mr. S. Y. Mahajan.
2. This being inadvertent error, motion is allowed. Necessary corrections be carried out.

(R. M. JOSHI, J.)

bsj

(This judgment is corrected pursuant to speaking to minutes order dated 21.01.2025)

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

SECOND APPEAL NO. 174 OF 1994

1. Apparao Kashinath Mangire,
Age : 72 years, Occu: Agri.
R/o. Peth Bhoom,
Dist : Osmanabad.
(Died on 16-7-2003) through his legal heirs :-
- 1A) Dattatraya s/o. Apparao Mangire,
(Deceased)
- 1A-1 Vijaya w/o Dattatraya Mangire,
Age : 68 years, Occu: Agri.
R/o. Peth Bhoom, Tq-Bhoom
Dist : Osmanabad.
- 1A-2 Mahesh s/o Dattatraya Mangire,
Age : 47 years, Occu: Agri.
R/o. Peth Bhoom, Tq-Bhoom
Dist : Osmanabad.
- 1A-3 Umesh s/o Dattatrya Mangire
Age : 43 years, Occu: Agri
R/o. Peth Bhoom, Tq-Bhoom
Dist : Osmanabad.
- 1A-4 Varsha w/o Anil Kolhe
Age : 40 years, Occu: Agri
R/o. Daghe Mala, Kurwadi Road,
Barshi, Dist-Solapur
- 1A-5 Sonali w/o Umesh Kolhe
Age : 36 years, Occu: Agri
R/o. Daghe Mala, Kurwadi Road,
Barshi, Dist-Solapur
- 1B) Abhaykumar s/o. Apparao Mangire,
Age : 34 years, Occu: Agri
R/o. Yermala, Tq-Kalamb

- Dist : Osmanabad.
- 1C) Padminibai w/o. Apparao Mangire,
(Deleted by Courts order dated 20.02.2024).
- 1D) Saw. Alka w/o Somnath Baraskar,
Age : 37 years, Occu: Household
R/o. Yermala, Tq-Kalamb
Dist : Osmanabad.

VERSUS

1. Dattatraya Bapurao Holkar,
(deceased)
- 1A) Manmath Dattatrata Holkar
Age: 49 years, Occu : Agri
R/o : Bhoom, Tq: Bhoom
Dist : Osmanabad
- 1B) Ravindra Dattatrata Holkar
Age: 46 years, Occu : Agri
R/o : Bhoom, Tq: Bhoom
Dist : Osmanabad
- 1C) Shital Vasantrao Waskar
Age: 64 years, Occu : Household
R/o : Aasthi, Tq: Aasthi
Dist : Beed
- 1D) Nirmala Chandrakant Shete
Age: 61 years, Occu : Household
R/o : Ganpati chowk, Sangali
Dist : Sangali
2. Ramling s/o Bapurao Holkar,
(Died)
- 2A) Smt. Yamunabai w/o Ramling Holkar,
Aged : Major Occu : Household,
At post : Bhoom Tq: Bhoom,
Dist : Osmanabad.
- 2B) Shanling s/o. Ramling Holkar,
Age: 55 years, Occu : Agri

R/o : Bhoom Tq: Bhoom
Dist : Osmanabad.

- 2C) Smt. Babita Ganpat Sadawarte,
Age: 40 years, Occu : Household,
At post Uplai (Dhonge)
Tq: Barshi Dist : Sholapur.
- 2D) Smt. Kusum @ Shobha w/o. Dattatraya
Waskar, Aged : 42 years.
Occu : household, R/o. Kranti Nagar,
Tq : Patoda, Dist : Beed
- 2E) Smt. Nanda w/o. Vilas Sadavarte,
Age : 35 years Occu : Household,
At post Tal. Barshi
Dist : Sholapur.
- 2F) Smt. Kaveri w/o. Ashokrao Shendge,
Age 34 years. Occu : Household
At post Tq. Saswad, Dist : Pune.
3. Utreshwar s/o. Bapurao Holkar,
(Died)
- 3A) Smt. Vijaya w/o. Ashok Sonawane,
Age : 45 years. Occu : Household
R/o: Kolar Tq: Shrirampur,
Dist : Ahmednagar
- 3B) Smt. Asha w/o. Ravikant Khadke,
Age : 42 years, Occu : Household,
R/o : Malegaon Road, Hanuman Nagar, Near
Maruti Ganpati Temple, Mukkam post Baramati
Dist : Pune.
4. Bhagwan s/o. Bapurao Holkar,
Age : 61 years, Occu : Agri.
R/o : Bhoom.
5. Shivaji Bapurao Holkar,
Age : 51 years, occu : Agri.
All are residing at Bhoom,

Dist : Osmanabad.

Mr. P. R. Katneshwarkar, Senior Counsel I/b Mr. K. R. Doke, Advocate for appellant

Mr. S. B. Bhosale, Advocate for respondent Nos.1A to 1D

CORAM : R. M. JOSHI, J.

RESERVED ON : 10th January, 2025

PRONOUNCED ON : 15th January, 2025;

JUDGMENT :-

1. This Second Appeal takes exception to the judgment and decree passed in Regular Civil Appeal No. 33/1985 dated 03.03.1994 whereby the First Appellate Court has reversed the judgment and decree passed by the trial Court in Regular Civil Suit No. 108/1974.

2. This Court, by order dated 28.03.2024, has framed following substantial questions of law after hearing learned counsel for both sides :-

(i) Whether the learned Second Addl. District Judge, Osmanabad was justified in framing an issue regarding limitation for the first time in an Appeal ?

(ii) Whether the appellate court was justified in allowing the Appeal on the ground that the suit filed by the appellant was beyond limitation even in the absence of any mention in the written statement filed by the original defendants (i.e. present respondent) ?

(iii) Whether the entries in the revenue record such as 7/12 extract and the recitals in the registered sale deeds

supported by other documentary evidence, such as, report and map prepared by the cadastral surveyor could have been discarded by the first Appellate Court ?

2. Facts which led to the filing of this appeal need to be considered for the sake of proper understanding and decision of the questions of law involved in this appeal. Parties are referred to as plaintiff and defendant.

3. Plaintiff filed suit against defendants on the basis of title in respect of the suit property in which he is the owner of half share of survey No. 31/B from southern side. It is claimed that he purchased area admeasuring 8 Acre and 18 R on 04.05.1972 pursuant to the registered sale deed executed by the original owner Bhujang. The boundaries described of suit property are like this i.e., towards East of the land there is land of one Amir Baig Hamja Baig and towards North, land of defendant No. 1 There is a public road to south side. It is the case of plaintiff that by removing boundary marks, defendants have encroached on the land of plaintiff to the extent of 1 Acre & 4 R. He, therefore, sought possession of the encroached portion from defendants.

4. Defendant Nos. 2 to 5 are brothers of defendant No. 1. Since they are from same family, they were made as party defendants to the suit. Defendants resisted the claim of the plaintiff by filing written

statement. There is no dispute about the fact that the plaintiff has purchased equal portion from the Southern side of Survey No. 31/B. It is however, denied that he had purchased area admeasuring 8 Acres & 18 R. So also, possession of the plaintiff over the said portion of land is disputed. It is claimed that Bhujang was not possessing 8 Acre & 18 R and, therefore, plaintiff could not get the possession of the same. Defendants also denied the allegations against them of removal of boundary marks and encroachment upon the land of the plaintiff.

5. Learned trial Court framed issues. Both sides led evidence. Plaintiff examined himself and also led evidence of cadastral surveyor. Defendants also led oral evidence to support their contentions.

6. Learned trial Court decreed the suit and directed the defendants to hand over possession of the land admeasuring 1 Acre & 26 R to the plaintiff by judgment and decree dated 31.12.1994. Defendants being aggrieved by the said judgment preferred first appeal bearing RCA 33/1985. The Learned First Appellate Court reversed the findings recorded by the trial Court and dismissed the suit. Hence this appeal.

7. Heard submissions of learned counsels appearing on both sides at length.

8. It is the contention of the learned senior counsel appearing

on behalf of the appellant/plaintiff that the First Appellate Court has committed error in framing the issue of limitation though, no plea of bar of limitation was raised in the written statement by the defendants. He drew attention of the Court to the findings recorded by the First Appellate Court to the effect that the issue of limitation is question of law and, therefore, the issue was framed for determination for the first time before the Appellate Court. It is submitted by learned Senior Counsel that it is a settled position of law that the issue of limitation is not a pure question of law but mixed question of law and fact. Thus, it is his submission that the findings recorded by the learned First Appellate Court with regard to the suit being barred by limitation is perverse.

9. On merit, it is his submission that the plaintiff has examined cadastral surveyor and the survey report and map made at Exhibit. 76 and 77 were duly proved. He drew attention of the Court to the findings recorded by the Trial Court with regard to the encroachment being found to have been done by the defendants over the land belonging to the plaintiff. It is his submission that admittedly towards southern side of the land of the plaintiff there is public road, towards northern side land of defendants is situated and towards northern side of defendants land of some third party is situated. It is his submission that in such circumstances, findings recorded by the trial Court on the basis of these

admitted facts as well as the report of the additional surveyor are in consonance with the evidence on record and which ought not to have been interfered with by the First Appellate Court. He drew attention of the Court to the judgment of the First Appellate Court, more particularly, paragraph 12 to 16 thereof. According to him, the First Appellate Court has not only failed to take into consideration the evidence of additional surveyor in proper perspective but has recorded findings on assumptions and surmises which is not permissible in law. It is his submission that the findings recorded by the First Appellate Court that the plaintiff has failed to prove that he has purchased area admeasuring 8 Acres and 18 R is incorrect and perverse as the plaintiff has proved by sale deed Exhibit 72 that he purchased area of 8 Acre and 18 R. Thus, it is his contention that the findings recorded by the First Appellate Court are contrary to the evidence on record and hence perverse.

10. Learned counsel for the respondent/original defendant submitted that since there is no dispute about the fact that the vendors of plaintiff and defendants were holding 8 Annas share in subject property i.e., Survey No. 31/B, both plaintiffs and defendants can be said to have held the very same property after purchase of the same. It is his submission that the case of plaintiff is not supported by the material evidence on record. He has drawn attention of the Court to the sketch

annexed to the plaint as well as written statement. Is is his submission by referring to the same as well as the evidence on record that the sketch shown by the plaintiff is apparently incorrect. He submits that the existence of common wealth in Survey No. 31/B shows that there is no substance in the contention of the plaintiff. He also argued that the presence of water stream between the two lands is more than sufficient to indicate that the same was the boundary between the two lands. Without prejudice to his submissions, he contents that in any case the trial Court could not have decreed the suit to the extent of removal of encroachment and delivery of possession by the plaintiff to the defendant to the extent of area admeasuring 1 Acre and 26 R. It is his submission that the said relief granted by the trial Court is beyond the pleadings and prayers in the plaint. It is his submission that the defendants were not given an opportunity to meet with the said case of plaintiff and as such in any case a modification is required in the judgment and decree passed by the trial Court.

11. Learned senior counsel appearing on behalf of plaintiff oppose the said submission by contending that in the suit for removal of encroachment, there is no certainty of the area encroached when the suit is filed. It is his submission that in such circumstances on the basis of evidence on record, it is open for the Court to mold relief and as such

there is no perversity in the decree passed by the trial Court. It is his submission that there is no total embargo for molding the relief depending upon the subsequent developments. To support his submission he placed reliance on following judgments :-

i) Nabbobai w/o Ghansiram and another v. Hasan Gani Abdul Gani and others AIR 1954 MADHYA BHARAT 181.

ii) Jai Prakash Gupta (D) Thr. L.Rs v. Riyaz Ahamad and Anr 2010 AIR SCW 225.

iii) Harikishan and others v. Krishna Dhanaji Sheiki and another AIR 1977 BOMBAY 330.

12. There is no dispute about the fact that the plaintiff as well as defendants purchased the portion of land from Survey No. 31/B from their vendors who were initially the joint owners of the said entire land 31/B. This land later on came to be partitioned between vendors equally.

13. As far as plaintiff's case is concerned, he has placed reliance on the registered sale deed Exhibit 72 executed by erstwhile owner in his favour to substantiate his contention about the purchase of land admeasuring 8 Acre 18 R. There cannot be any other apt evidence to establish title over the suit property than the registered sale deed. The said document shows that it was put into the possession of purchased

property. Similar is case with defendants' title. As far as the case of the plaintiff about encroachment being done by the defendants in the suit property is concerned, he examined cadastral surveyor Anant Mahamuni Exhibit No. 75. This witness has deposed about the measurement being carried out of the respective lands and having arrived at conclusion of encroachment being done by the defendant to the extent of 1 Acre & 26 R land belonging to the plaintiff. It is also observed that there is encroachment on Survey No. 31/B by adjoining owner of northern side of defendants land. It is pertinent to note that the defendants have not challenged the correctness of the survey report submitted by this witness. It has been rightly held so by learned trial Court in the judgment more particularly in Paragraph 13. It is thus clear that at no point of time, there was any dispute made by the defendants with regard to the correctness of the measurements carried out. As stated here in above, there is no dispute about the fact that towards northern side, the land of the defendants is situated and towards the southern side, there is public road. These findings recorded by the trial Court with regard to the defendants encroached upon the portion of the land belonging to the plaintiff cannot be faulted with.

14. As against this, learned first appellate Court has proceeded to hold that there is possibility that the predecessors in title of plaintiff and

defendants were holding land equally, possibly of equal land being possessed by plaintiff and defendants exists. In order to record such findings neither there is case of defendants to that effect nor any evidence is led in this regard. The learned First appellate Court also proceeds on the footing that since there exists the water canal and it was treated as boundary. The observations made by the First Appellate Court are required to be reproduced. In paragraph 15, it is observed that "I think though they denied the watercourse was treated as boundary, denial has not much importance towards vendor has specifically stated that to the western side to watercourse, there is land of defendants". This finding recorded by the learned First Appellate Court is wholly on surmises. Apart from this, there is no specific defence taken in the written statement by the defendants that the watercourse or water canal was a boundary between the lands nor it so appears from the sale deeds of both sides. Once, no such specific defence is taken, it was not open for the First Appellate Court to hold so. It is thus clear that the findings recorded by the First Appellate Court are contrary to the pleadings and evidence on record. Thus, substantial question of law framed by this Court with regard to the appreciation of the evidence of additional surveyor deserves to be answered in affirmative.

15. With regard to the point of limitation determined by the First

Appellate Court is concerned, admittedly in the written statement, defendants have not raised issue of maintainability of suit on the ground of limitation. It is settled position of law that the issue of limitation is not a pure question of law but mixed question of fact and law and as such same cannot be raised unless specific defence is taken by the defendants in the Court at first instance. No doubt, it may be open for the Court to decide the said issue of limitation if the same even could be ascertained from the contentions of the plaint. Perusal of the plaint does not show that on the face of it, suit is barred by limitation. First Appellate Court, therefore, has committed error in framing issue of limitation for first time in appeal and that too without any issue being raised by defendants in its written statement. The findings recorded by Appellate Court on issue of limitation is perverse since not in consonance with law and hence deserve interference. As a result of the above discussion, substantial questions of law framed above are answered in negative.

16. Since during the course of arguments, submission was made as a learned counsel for the defendants that the trial Court has exceeded its jurisdiction in granting the relief which was not prayed by the plaintiff, following substantial question of law is framed and the learned counsels were heard on the same :-

“Whether the decree passed by the trial Court beyond the

prayer made in the plaint is sustainable and whether the First Appellate Court has committed error in not considering the same”.

17. Record indicates that plaintiff filed suit with following specific prayer :-

वादीस मौजे आरसूली येथील स.न.३१/ब मधील प्र.वादीने
अतिक्रमण केलेले क्षेत्र १ एकर ४ गुंठा चा ज्याचा तपशिल
लाल रंगाने परीशिष्ट (अ) मधील नकाशात दाखविला त्याचा
प्रत्यक्ष ताबा प्र.वादीच्या ताब्यातून देण्यात यावा.

18. Apart from this pleadings of the plaintiff also indicate that plaintiff has asked possession of encroached area of 1 Acre and 4 R from Survey No. 31/B from defendant and since the same was not handed over, it has become a cause of action for the plaintiff to file the suit. The law on the point of jurisdiction of the Court to grant decree to the extent of pleadings and reliefs prayed by the plaintiff is fairly settled. Court does not have authority/jurisdiction to pass any decree/order which was neither pleaded nor prayed. The reason behind this is that the defendant/other side is deprived of an opportunity of meeting the said relief and prejudice and irreparable loss would cause to such party. In an instant case, plaintiff did not plead and pray specifically about the relief which is granted by the trial Court for the relief is granted by learned trial Court. Even if it is accepted for the sake of argument that in case of

suit for removal of encroachment, there is no certainty and it is open for the Court to mould the relief, the basic principle of the pleadings and prayers cannot be given complete go by. It was always open for plaintiff to amend the plaint before trial Court and to incorporate prayer for recovery of the possession of land admeasuring 1 Acre and 26 R, once, plaintiff found on record evidence to that effect. Admittedly, in spite of examining cadastral surveyor and in spite of there being evidence of encroachment being done on the suit land by defendants and knowing its exact extent, plaintiff chose not to amend the plaint and to make the prayer for possession of area of 1 Acre and 26 R. Thus, the defendants are deprived of meeting with the said prayer and which has eventually led to the miscarriage of justice.

19. It would be relevant to refer to the judgment (cited supra) on behalf of appellant/plaintiff. In case of Nabbobai (supra) Full Bench of Madhya Bharat High Court it was held that ordinarily when a suit is brought by the plaintiff on the basis of right inuring to him on the date of the suit, the determination of the suit ordinarily involves determination of such rights as they exists in the parties on the date of the suit. And any molding in the relief which the plaintiff might be required to resort go can some time appropriately be regarded as the one relating to execution and satisfaction of those rights thus determined. An illustration

is given that in case suit is filed for recovery of the dues by sale of the mortgaged property on the date of suit and the property is acquired by the Government, his right to get money remains intact. In such or similar eventualities, the moulding of relief would be permissible. In case of Jai Prakash Gupta (supra), the Hon'ble Supreme Court has also taken into consideration the proposition of law that subsequent developments of fact or law which have a material bearing on the entitlement of the parties to relief or on aspect which bear on the moulding of the relief occur, the Court, even at any stage of the proceeding, is not precluded from taking a cautious cognizance of the subsequent developments of fact and law to mould the relief. Similarly, in case of Harikishan (supra) Full Bench of this Court has held that according to the procedural law in India, subsequent developments, even after the order, shall have to be taken into account and that this doctrine is an exception to the ordinary general rule that rights of the litigants should be decided by reference to facts existing on the date of the institution of proceedings.

20. There cannot be any quarrel with regard to the proposition of law laid down by the judgments cited supra. The question arises as to whether any subsequent development has occurred post decision of suit in order to exercise such discretion of moulding relief. As already observed herein above, it was known to the plaintiff on the basis of

evidence of cadastral surveyor that he was entitled to seek recovery of land more than prayed in the plaint that made it obligatory for him to amend pleadings in this regard. Such amendment to pleadings is absolutely essential in order to enable the defendant to meet with the same. Here, in this case what has occurred is that without giving an opportunity of meeting the case of the plaintiff to the extent of recovery of the suit land as decreed, order came to be passed to that effect. This has certainly led to the miscarriage of justice. This aspect was ought to have been considered by the learned First Appellate Court which admittedly has not been taken cognizance of.

21. Before proceeding to pass further order it is necessary to record that the suit is filed on 24.10.1974, it was decided on 31.12.1984, first appeal is decided in 1994. Now after 50 years of initiation of the original proceedings. This Court, therefore, is not inclined remit the matter back to the trial Court for correcting the said error. Instead finds it appropriate to correct the same herein.

22. As a result of above discussion, appeal stands partly allowed. The judgment and decree passed by the First Appellate Court is set aside. Judgment and decree passed trial Court in RCS No. 108/1974 stands restored to the extent of the suit property admeasuring 1 Acre 4 R from Survey No. 31/B for possession of defendant to the plaintiffs as

This Order is Speaking to Minutes order of order dated //

shown in the map at Annexure A to the plaint. Parties to bear their own costs.

(R. M. JOSHI, J.)

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