



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

SECOND APPEAL NO. 307 OF 2025

Hariba Tukaram Mandade
Since deceased through his L.Rs.
Shivkanta @ Shivabai Hariba Mandade
and others .. Appellants

Versus

Gayabai Bhanudas Nagmode and another.. Respondents

Shri Avinash M. Reddy, Advocate for the Appellants.

**CORAM : SHAILESH P. BRAHME, J.
DATE : 18TH AUGUST, 2025.**

FINAL ORDER :

. Heard Mr. Avinash Reddy, learned counsel for the appellants.

2. This second appeal is emanating from concurrent findings of facts recorded by the Courts below in non suiting the appellants for declaration of ownership and possession.

3. Appellants had filed suit contending that land gut No. 233/2/2 belonging to appellants, which was layed into different plots. Out of that plot No. 1 was sold to the respondent No. 1 on 01.06.1973. One more plot was sold by the appellants to Rambhau Sadhu Todkar on 24.11.1972. It was further sold by Mr. Todkar to Baburao Todkar in the year 1985. The respondent

No. 2 purchased the same in the year 1997. It is contended that the respondent No. 1 encroached on 28 feet and the respondent No. 2 encroached on 18 feet which was the cause of action to file suit.

4. Respondents contested the suit stating that they are in possession of the plots transferred by registered sale deeds. Entire area has been converted into residential plots. The appellants themselves were guilty of transferring the plots without preparing layout.

5. A Court Commissioner was appointed when matter was in the Trial Court. He measured the plots and he reported that it was not possible to measure plot Nos. 1 and 2 for want of layout. Trial Court dismissed the suit on 02.01.2016. Being aggrieved appellants preferred R.C.A. No. 43 of 2016. By order dated 04.08.2018 matter was remanded to the Trial Court to have another Court Commissioner and the measurement of the plots in question. After remand Taluka Inspector of Land Records was appointed, who conducted the inspection. His measurement map was marked as Exhibit 144, which showed encroachment of the respondent Nos. 1 and 2. However, Trial Court recorded finding against the appellants and returned the same vide order dated 04.05.2019. Thereafter, Appellate Court dismissed the appeal vide judgment and decree dated 16.11.2024.

6. It is submitted by the learned counsel for the appellants

that there is no proper appreciation of evidence by the Courts below. It is vehemently contended that if the procedure adopted by the Court Commissioner is found to be defective and the Commissioner is found to have failed to measure all dimensions of the property and surrounding area, then lower Appellate Court should have resorted to Order XVI Rule 9 of the Code of Civil Procedure (for the sake of convenience and brevity hereinafter referred as to the 'C.P.C.') for appointing Court Commissioner. It is contended that Court Commissioner – P.W. No. 3 did not follow the directions of the High Court and there was need of appointment of another Court Commissioner. It is further contended that by implication of Sec. 151 of the C. P. C., the Courts below should have appointed further Court Commissioner.

7. I have gone through impugned judgments. It transpires from record that already T.I.L.R. was appointed by the Trial Court, who had conducted the measurement and submitted report. The suit was dismissed. The lower Appellate Court remanded the matter for appointment of further Court Commissioner. After remand Court Commissioner was appointed and measurement map was submitted at Exhibit 144. Thus twice the Commissioners were appointed. The submission that lower Appellate Court should have appointed Court Commissioner cannot be countenanced. The burden is upon the plaintiff to make out a case that there is encroachment. The Court Commissioners cannot be appointed for collection of the evidence.

In the absence of any independent material, appellants are bound to fail in the suit.

8. Both the Courts below have recorded find that the respondents are found to be in possession of excess area, but appellants are denied relief because they themselves are found to be responsible for that. When they alienated plots to the respondent Nos. 1 and to purchaser of respondent No. 2, lay out was not sanctioned. It was a private layout. In absence of specific demarcation of plots, even the Court Commissioner was unable to give any finding regarding encroachment. I do not find that any perversity or illegality in the findings recorded by the Courts below.

9. Lower Appellate Court specifically recorded finding that appellants alienated the plots without fixing the boundaries. Thus there is inherent absurdity created by the appellants themselves. It is further recorded that there are constructions of 40 to 50 years and reappointment of Commissioner would not serve purpose. I find that both the Courts below have rightly refused the relief to the appellants.

10. No substantial question of law is involved in the appeal. Second appeal is dismissed.

[SHAILESH P. BRAHME J.]