



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

SECOND APPEAL NO. 928 OF 2016

Kantrao Baburao Kakade
VERSUS
Asara Manikrao Bhandwale

Mr. Vivek Dhage h/f Mr. H. V. Tungar, Advocate for Appellant

CORAM : R. M. JOSHI, J.

DATE : 01st August, 2025

PER COURT :-

1. This appeal filed under Section 100 of the Code of Civil Procedure taking exception to the concurrent findings recorded by the Trial Court in Regular Civil Suit No. 406/2001 and confirmed in Regular Civil Appeal No. 82/2008 by the First Appellate Court.

2. The facts which appear from the record are narrated in brief as under :-

Indirabai, mother of Defendant was the owner of land Sy. No. 23/A/2 admeasuring 3 Acre 13 R situated at Beed Taraf Balgujar. She sold the land approximately admeasuring 10R to the plaintiff from the survey No. 23/A/2 under the registered sale deed dated 09.11.1987. Thereafter, Indirabai died. Plaintiff claimed himself to be in possession of the suit property sold to

him. When defendant, son of Indirabai, started causing obstruction to the possession of the plaintiff and started carrying out construction, suit came to be filed in Regular Civil Suit No. 406/2011 for declaration and perpetual injunction against defendant in respect of the suit property.

3. Defendant filed written statement as well as counter claim. It is a case of the defendant that the plaintiff is in possession of land more than sold to the plaintiff by the mother of defendant. There is specific allegation to the encroachment being carried out by the plaintiff over the excess portion.

4. The parties led evidence before the Trial Court. Trial Court dismissed the suit as well as counter claim. Plaintiff as well as defendant challenged the judgment and decree passed by the Trial Court before the First Appellate Court unsuccessfully. Defendant has not taken further exception to the judgment and decree passed by the First Appellate Court, whereas plaintiff challenges the same in this appeal.

5. Learned counsel for the appellant submits that the Trial Court as well as First Appellate Court have committed error in not considering the settled position of law that in case a dispute in respect of the measurement and the boundaries shall prevail. To support his submissions, he placed reliance on the judgment of Co-ordinate Bench of this Court in case of ***Vishnu Anant***

Dessai and others Vs. Govind Vithal Sawant and others 2020 (5) AII.M.R. 496 and in case of ***Nahalchand Laloochand Private Limited Vs. Panchamrut CHS Limited in Writ Petition No. 2222 of 2025***. According to him in the plaint boundaries are clearly shown and reflected from sale deed. According to him in view of the fact that towards northern side road exists, question of encroachment does not arise. It is his further submission that once the counter claim of the defendant is dismissed, it was obligatory for the Courts below to decree the suit and to give declaration and injunction against the defendant.

6. Needless to say that unless substantial question of law is involved, this Court could not get any jurisdiction to entertain second appeal. It would be therefore, necessary to consider the plea of both sides before the Trial Court and evidence led for the limited purpose.

7. Though, there cannot be any dispute made with regard to the submissions ought to have been canvassed by the learned counsel for appellant that in case a dispute with regard to the measurement and boundaries in respect of any property, boundaries shall prevail over the measurements recorded in the document. Even accepting this proposition of law, question arises about its application to the present case. The suit property is described in the plaint is 10 R land from Sy. No. 23/A/2 situated at Village Beed Taraf Balgujar, Tq. Beed,

Dist. Beed though the boundaries are mentioned by the plaintiff in Paragraph No. 1. It is however specifically pleaded in Paragraph No. 3 that 10 R land was in given possession of the plaintiff on sale thereof. Thus, it is not the case of plaintiff that though there is mention of approximate 10 R land in the sale deed between the parties, the plaintiff himself does not claim that the land which is bounded by the boundaries mentioned in the suit property was handed over into his possession. Conversely, he specifically claims that 10 R land given in his possession. Thus, the dispute is not in respect of the boundaries or the measurement of suit land as sought to be canvassed.

8. There is finding recorded by the fact that the plaintiff is found to be in possession of more than 10 R land. Now question arises that, if plaintiff is in possession of more than 10 R land and it is his claim that the suit property is of 10 R only, which portion of land in his possession could be declared as the owner of the suit property. In the peculiar facts of the case the burden is on the plaintiff to show which portion of land occupied by him is sold to him. He, therefore, is required to raise specific plea by giving details and also must substantiate it by leading evidence. This exercise has not been done by plaintiff. Merely because counter claim of the defendant is dismissed, that would not automatically lead to given any right to the plaintiff to claim the title over the Land more than 10 R. Moreover, it is not even the case of the plaintiff

that the Land is over and above 10 R land, is claimed to be owned by way of adverse possession.

9. In absence of any such case sought to be made out by the plaintiff, it was not open for the Trial Court to give declaration of title of plaintiff over any particular portion of the suit property and no fact can be found in rejection of the decree to the plaintiff.

10. Thus, this appeal does not involve any substantial question of law. Hence, second appeal stands dismissed.

(R. M. JOSHI, J.)

bsj