



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.615 OF 2021
WITH
CIVIL APPLICATION NO.13519 OF 2021 IN SA No.615 of 2021

Sopan Yeshwant Chaudhari,
age 65 years, Occ. Agri,
R/o DHP Nagar, Backside,
Balmukutangan School, Nasik,
Tq. & District Nasik.

Appellant
(Orig. defendant.)

Versus

Shantabai Govardhan Borole,
age 74 years, Occ. Agri,
At Post Kolwad, Near Swaminarayan Mandir,
Yawal, Tq. Yawal, Dist. Jalgaon.

Respondent.
(orig. plaintiff)

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Advocate for Appellant : Mr. A. M. Gholap
Advocate for Respondents : Mr. V B. Patil
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CORAM : S. G. CHAPALGAONKAR, J.
Reserved on : December 04, 2024
Pronounced on : January 09, 2025

FINAL ORDER :-

1. The appellant/original defendant impugns the judgment and decree dated 3.05.2021 passed in R.C.A. No.7 of 2017 by the District Judge-2, Bhusawal, thereby upholding the judgment and decree dated 7.12.2016 passed by the Civil Judge, Junior Division, Yawal in R.C.S. No.46 of 2013. (For the

sake of brevity, parties hereinafter are referred to as per their original status in the suit).

2. The respondent/Plaintiff filed R.C.S. No.46 of 2013 claiming relief of possession and mesne profit of 12R land out of Gat No.459 situated at Kolwad, Taluka Yawal. Plaintiff contends that land gat No.459 was jointly cultivated by its holders. Lateron, they mutually decided to partition their holdings. Eventually, they applied to the Tahsildar, Yawal for approval of partition under Section 85 of the Maharashtra Land Revenue Code (for short 'the Code'). They shown approximate area of respective sub-division while recording the partition. Tahsildar approved their request vide order dated 1.7.1999. Since then, land was divided in four parts i.e 459/1/2/3 & 4. The sub-division held by the plaintiff's vendor was allotted gat No.459/3 admeasuring 2H-23R. Plaintiff purchased same under registered sale-deed dated 20.8.2003.

3. On 3.6.2010 joint measurement of the land was carried by T.I.L.R. Mr. Suhas Jagdish Saraf for fixation of boundaries. It was revealed that defendant, who is owner of gat no.459/4 is in possession of 2H 94R land as against ownership of 2H 83R, whereas, plaintiff was found in

possession of 2H-11R as against ownership of 2H 23R. Plaintiff requested defendant to hand over possession of excess land to him, but defendant avoided to do so. Plaintiff, therefore, addressed legal notice dated 26.3.2011 through Advocate Kawadiwale calling upon defendant to handover possession of excess area. But defendant failed to do so. However, on 3.5.2011 all sub-division holders from gat no.459 executed a consent deed on bond paper of Rs.100/- and mutually agreed to measure entire gat no.459 and fix the boundaries of respective area as per 7/12 extract and continue ownership and possession.

4. On 6.3.2012 a joint application was made to surveyor for measurement and fixation of boundaries of respective sub-divisions. Consequently, on 4.6.2012 measurement was carried and boundaries of sub-divisions were demarcated as per area shown in the 7/12 extract. The defendant was found in possession of excess 12R land out of plaintiff's land in gat no.459/3. Plaintiff asked for handing over possession; but defendant avoided to do so. Plaintiff again addressed legal notice dated 1.6.2013 to defendant through Advocate Mr.Gholap, which has been falsely replied by

defendant on 11.6.2013. Taking this as a cause of action, the suit has been instituted seeking possession of 12R land and mesne profit.

5. Although, defendant refuted plaintiff's claim, admitted averments in paragraphs no.1 to 3 of the plaint by which plaintiff asserted his ownership of land gat no.459/3 admeasuring 2H 23R and ownership of defendant over land gat no.459/4 admeasuring 2H 83R so also fact that original land holders in gat no.459 have partitioned land by metes and bounds, mutated tentative area of lands in respective division and applied for approval of such partition to Tahsildar Yawal, which has been ultimately sanctioned vide order dated 1.7.1999. Eventually, land gat no.459/3 admeasuring 2H 23R was recorded in the name of predecessor-in-title of the plaintiff and land admeasuring 2H 83R was recorded in the name of defendant and his wife.

6. Defendant further contends that his possession over the land is continue since his forefathers. No encroachment is made by him. In fact, plaintiff removed a cement concrete pole, which was in existence for last forty

years on Northern bandh of defendant's field and raised false claim based on collusive measurement.

7. The Trial Court framed issues, recorded evidence of the parties and finally, decreed suit directing defendant to hand over possession of 12R land, as claimed, further directed inquiry as to mesne profit. Aggrieved defendant filed R.C.A.No.7 of 2017 before the District Judge, Bhusawal which came to be dismissed upholding the decree passed by the Trial Court. Hence this second appeal.

8. This Court upon hearing respective parties, framed following substantial questions of law vide order dated 15.2.2024. Substantial question of law reads thus :-

- i) Whether the Trial Court and First Appellate Court committed error in decreeing the suit without considering the pleadings of the plaintiff and admitted fact that it is not the case of encroachment of the suit land but pursuant to the arrangement between the erstwhile joint owners of the entire land, the possession was held by said respective parties approximately ?
- ii) Whether both the Courts have committed error in ignoring the admission of plaintiff that she is in possession of the same land since the time of purchase till date of recording evidence ?

9. On 26.3.2024 this Court (Coram:Y.G.Khobragade, J.) directed that second appeal to be placed for final hearing at

the stage of admission. Thereafter, vide order dated 15.7.2024 this Court (Coram : Sandipkumar C. More, J.) admitted appeal on aforesaid substantial questions of law and posted the same for final hearing. On 4.12.2024, learned advocates appearing for respective parties advanced oral submissions and later on tendered written notes of arguments.

10. Mr. Gholap, learned advocate appearing for the appellant submits that impugned decrees are perverse. Plaintiff admitted during cross-examination that her possession is continued as she received at the time of sale-deed, so also defendant is possessing same land as he possessed on date of sale-deed. According to him, possession of the parties continued as owners as per partition in the year 1999 hence it is not the case of encroachment. According to Mr. Gholap, all sub-division holders from gat no.459 continued their possession as it was existing even prior to the partition. The area of holding was tentatively mentioned at the time of partition without actually measuring land. Tahsildar approved sub-division/partition on the basis of approximate area. Consequently, entries were effected in Record of Rights against subdivisions, therefore, on the basis of mutation entry,

ownership never transferred. If subsequent measurement depicts variation in the area possessed by the respective land holders and recorded in the 7/12 extract there cannot be a case of removal of encroachment and restoration of possession, but it would be a case for correction of record in tune with area possessed by land holders. However, Courts below relying upon report of faulty measurement, passed the decree. Mr. Gholap, would further submit that 7/12 extract or so-called consent deed Exhibit 28 are not documents of title and does not confer the right to seek possession in favour of the plaintiff. According to him, measurement map at Exhibit 62 is unreliable. The defendant was not served with notice of measurement nor were adjoining land holders noticed. The T.I.L.R. has given vital admissions during cross examination that shaken sanctity of measurement report and map.

11. Per contra, Mr. Patil, learned advocate appearing for the respondent/plaintiff would urge that defendant alongwith land holders of gat no.459 had agreed for joint measurement of land and fixing boundaries of respective subdivisions as per the area shown in the 7/12 extract. Consequently, joint measurement is carried by the T.I.L.R. Shri

S.J. Saraf. The defendant found in possession of 2H 94R area as against 2H 83R recorded in the 7/12 extract. Plaintiff's area is found less by 12R as against the area of 2H 23R as recorded in the 7/12 extract. Decree passed by the Trial Court and confirmed by the Appellate Court is in consonance with pleadings and evidence pressed into service. No substantial question of law emerges in this appeal. Hence, he urges to dismiss the appeal.

12. Having considered submissions advanced by the learned advocates appearing for the respective parties, it can be observed that land gat no.459 was jointly cultivated by the respective land holders. In the year 1999, they subdivided it into four parts and applied for mutating partition effected by metes and bounds showing approximate area within ownership and continued the cultivation. Learned Tahsildar approved sub-division of the land vide his order dated 1.7.1999. Consequently, gat no.459 has been divided into four parts. The area of particular part has been recorded in 7/12 extract, however, the boundaries were to be fixed after the measurement.

13. In the year 2010, measurement was carried under order of Tahsildar. Mr. S.J. Saraf was T.I.L.R. In his report, defendant was shown in possession of excess area than recorded in his name. It appears that parties did not act upon his report dated 3.6.2010 and finally arrived at consensus to cause re-measurement and fix boundaries in tune with area recorded in 7/12 extract. Copy of consent-deed is at Exhibit 28. It has been duly proved. Defendant was one of the signatory. His signature and photograph appears on the said document. Even, oral evidence of the plaintiff's witness, who are also signatories to document proves its contents. Although, defendant endeavors to deny the document, both the Courts upon appreciation of evidence concurrently held that the defendant was party to consent deed.

14. In deference to the consent-deed Exhibit-28, a joint application for measurement was made. Mr. Sonar PW-3 was appointed as surveyor. He issued notices to respective land holders from gat no.459 and carried measurement on 4.6.2012 by plain table method. Defendant's wife was present at measurement with other land holders. The report of measurement alongwith map at exhibit-62 confirms possession

of excess area of 12R with the defendant and commensurate deficit area in possession of the plaintiff.

15. In this backdrop, first of all it would be necessary to find out whether plaintiff proves his title over the suit property i.e. gat no.459/3 admeasuring 02H 23R. A glance to pleadings particularly clause nos.1 to 3 of plaint, alongwith written statement shows that the defendant has accepted assertions in the plaint as regards to plaintiffs ownership of 2H 23R land in gat no.459/3. The defendant has also accepted that area to the extent of 2H 23R was recorded in the name of plaintiff's vendor as per partition by metes and bounds and the same has been purchased by the plaintiff under registered sale-deed. It is, therefore, evident that there was partition by metes and bounds. All four sub-division holders applied for mutation of the area of respective sub-division and got it sanctioned under order of Tahsildar vide Section 85 of the Code. The respective land holders derived ownership of land as per mutually determined area by them. In that view of the matter, there cannot be dispute that respective sub-division holders acquired ownership by mutual agreement for mutated area of respective sub-division. Hence, contention of Mr. Gholap that

title of respective land holder was passed only for area possessed by respective land holders at the time of partition cannot be countenanced. From pleading and evidence on record, it is evident that ownership and area of respective sub-division was mutually agreed and fixation of boundaries was left for survey measurement.

16. What was remained was fixation of boundaries of sub-divisions and for that purpose, re-measurement was to be carried. First such attempt was made through the measurement carried by PW-2 Mr. Saraf under the directions of Tahsildar. Second measurement was carried by Mr. Sonar PW-3 on joint application of sub-division holders in pursuance to the consent-deed dated 3.5.2011. Consent-deed has been recorded before the Executive Magistrate, Yawal. All Sub-division holders have specifically agreed to fix boundaries as per area shown in the 7/12 extract. Defendant is signatory to said agreement. In deference to such agreement, measurement is carried by PW-3 Mr. Sonar, which depicts 12R excess area in possession of the defendant.

17. Mr. Gholap attacked measurement map Exhibit 62 so also evidence of PW 3 Mr. Sonar contending that defendant

was not present at the time of measurement. The fact remains that notice of measurement was issued to the defendant. His wife presented herself at the time of measurement giving reason that defendant was unwell. The fact remains that Mr. Sonar carried measurement as per joint application of the parties. He measured entire gat no.459 and fixed boundaries of respective sub-divisions as per area of each sub-division. The area in possession of the respective sub-division holders as well as the area as per 7/12 extract has been separately indicated in the map. It clearly depicts that defendant has possessed 12R area which is from sub-division i.e. gat no.459/3 owned by the plaintiff.

18. Although, certain admissions in the cross examination of PW 3 are relied, those are of no consequence so as to discard report/measurement map or evidence of PW-3. Both Courts accepted measurement report to be proper. No serious infirmity is brought on record to disturb opinion of Courts. Corollary of the aforesaid discussion is that, defendant is in unauthorized possession of 12R land from ownership of the plaintiff. In absence of plea of adverse possession, defendant is not entitle to claim any right over suit land even

assuming his continuous possession. The fact remains that plaintiff came to know about excess area possessed by the defendant only upon measurement and fixation of boundaries done in the year 2010, then, immediately asserted his right against the defendant.

19. In the result, substantial questions of law framed deserves to be answered in the negative. Appeal sans merit, hence, **dismissed**. No costs. Pending civil application, if any, also stands **disposed off**.

20. At this stage, Mr. Navandar h/f Mr. Gholap, learned advocate for the appellant submits that there was interim protection during pendency of the second appeal. The appellant may take his chance before the Supreme Court. He, therefore, seeks continuation of interim protection for a further period of eight (8) weeks from today.

21. Considering the controversy involved, interim protection to continue for a period of eight (8) weeks from today.

(S. G. CHAPALGAONKAR)
JUDGE

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