

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIRCUIT BENCH AT KOLHAPUR
SECOND APPEAL NO.372 OF 2022
WITH
INTERIM APPLICATION NO.2613 OF 2022**

Sambhajirao @ Balasaheb Dattatraya Desai
Since deceased through his legal heirs:

1A. Rajendra Sambhajirao Desai,
Age 67 Years, Occupation: Advocate
Resident of Bajar Peth, Ajara,
Taluka Ajara, District Kolhapur

1B. Sandip Sambhajirao Desai,
Age 57 Years,
Resident of Gajanan Nivas,
Shalini Palace Area, Kolhapur

..Appellants
(Org. Deft. Nos.1&2)

Versus

1. Kishor Kashinath Bhusari,
Age 50 years, Occ. Agriculturist,
Resident of Ajara, Tal. Ajara,
District Kolhapur
2. Baliram Dattatraya Desai
Since deceased through his legal heirs
 - (a) Mukund Baliram Desai,
Age 68 Years,
C/o. K.D.C.C. Bank, Branch Ajara
Taluka Ajara, District Kolhapur
 - (b) Fattesingh Baliram Desai,
Age 66 Years,
C/o. K.D.C.C. Bank, Branch Ajara,
Taluka Ajara, District Kolhapur
 - (c) Jaysing Baliram Desai,
Age 64 Years,
C/o. Janata Co-op. Bank Ltd. Ajara,
Taluka Ajara, District Kolhapur
 - (d) Vijay Baliram Desai,
Age 62 Years, Resident of M.A.C.
Quarter, Kagal, Tal. Kagal, Dist. Kolhapur

(e) Smt.Mangal Baliram Desai,
Age 64 Years, Resident of Bajar Peth,
Ajara, Taluka Ajara, District Kolhapur

(f) Dattaguru Baliram Desai,
Age 64 Years, Resident of Bajar Peth,
Ajara, Taluka Ajara, District Kolhapur

..Respondents
[Resp. No.1-Org. Plff.,
Resp. Nos.2(a) to 2(f) Org.
Def. No.2(1) to 2(6)]

...
Mr. Pradeep D. Dalvi a/w Mr. Rahul Kasbekar, Advocate for Appellants.
Mr. Suryajeet Chavan i/by Mr. Tejas Hilge, Advocate for Respondent.

...
CORAM : S. G. CHAPALGAONKAR, J.
DATED : 20th NOVEMBER, 2025.

JUDGMENT:-

1. The appellants/original defendant nos.1 and 2 takes exception to judgment and decree dated 21.12.2021 passed by District Judge, Gadhinglaj in Regular Civil Appeal No.39/2013, thereby upholding judgment and decree dated 03.05.2013 passed by Civil Judge Junior Division, Ajara in Regular Civil Suit No.25/2002.

2. The respondent no.1/plaintiff filed Regular Civil Suit No.25/2002 seeking relief of declaration, perpetual and mandatory injunction and recovery of possession. According to plaintiff, he is owner of land Gut No.467 (old Survey Nos.373-A and 373-B). The plaintiff's name is entered in record of rights as well as in possession column of suit property. The defendants made an attempt to encroach over plaintiff's property. Hence, he caused measurement and found that defendants have encroached upon Survey No.373-A and constructed RCC building and W.C. toilet.

3. The defendants refuted plaintiff's claim contending that originally Survey No.373 was owned by Ravloji Desai. The defendants are claiming title through him. According to defendants, Northern side of Survey No.373-B is in their possession from last 50 to 60 years and they have become owners of land situated on East and North side of Survey No.373-B by adverse possession. They constructed W.C. toilet in year 1993 and dug Well in year 2002.

4. The Trial Court framed issues based on pleading of parties and recorded evidence. Since issue of encroachment and dispute as to boundaries crept in between parties, Court Commissioner was appointed. The Cadastral Surveyor Mr. Patil caused measurement and acted as Court Commissioner. He submitted report of measurement and showed encroachment of defendants over suit property. Accordingly, Trial Court concluded that plaintiff is owner of suit property and defendants have encroached same from Northern side. Accordingly, passed decree against defendants directing them to deliver vacant possession of 6.1 R land of suit property with further direction to remove construction and perpetually restrained defendants from obstructing lawful possession of plaintiff. Aggrieved defendants filed Regular Civil Appeal No.39/2013 before District Court at Gadhinglaj, which came to be dismissed.

5. Mr. Pradeep Dalvi, learned Advocate appearing for appellants submits that Courts have erroneously recorded finding of

encroachment against defendants and entertained prayer for grant of mandatory injunction. According to him, construction of defendants is existing in suit property since long. The plaintiffs' suit is barred by limitation.

6. Per contra, Mr. Suryajeet Chavan, learned Advocate appearing for respondents supports impugned judgment and decree.

7. Having considered submissions advanced by learned Advocates appearing for respective parties and after going through reasoning adopted by Courts below in impugned orders, it can be observed that in pursuance to decree passed in Regular Civil Suit No.56/2000, suit property was allotted to plaintiff. The 7/12 extract of Survey Nos.373-A and 373-B shows ownership and possession of plaintiff. The plaintiff appears to have inherited property from Kashinath. Although defendants disputed ownership of plaintiff and claimed that their predecessor Ravloji Desai was owner of property, they could not bring any evidence to that effect. In this backdrop, both Courts have concurrently held that plaintiff is owner of property.

8. The Cadastral Surveyor-PW2 was appointed as Court Commissioner. He measured suit property as per possession of each party. He fixed boundaries of Gut Nos.466 and 447 on the basis of survey map. In measurement he recorded encroachment of 6.1 R in Gut No.463, Hissa No.1 and 30.5 sq. mtrs. on Hissa No.2. The RCC

construction with W.C. toilet was found in Hissa No.1 by defendants. The said witness was thoroughly cross-examined, however nothing could be extracted. His report and map is placed at Exhibit-213, which has been duly proved. Both Courts on appreciation of evidence of Court Commissioner recorded finding that defendants have encroached on land Gut No.467, Hissa Nos.1 and 2 owned by plaintiff.

9. Although defendants endeavours to contend that they are in possession of suit property Gut No.467, Hissa No.1 for more than 60 years, they did not specifically pleaded, since when their possession became hostile to plaintiff. On one hand they contend that their predecessor Ravloji Desai was owner and they derived title from him. On other hand they are taking plea of adverse possession. The law on this point is fairly settled that self destructive/inconsistent pleas cannot be permitted. The defendants cannot assert ownership and adverse possession simultaneously. It can be observed that defendants have raised construction of house in year 2002. The defendants have recorded evidence of DW2 on point of construction permission. The aforesaid fact clearly shows that just before institution of suit, defendants have erected construction by making encroachment on land of plaintiff. The suit is immediately instituted, which appears to be well within limitation. Both Courts on appreciation of pleading and evidence on record rightly concluded that defendants have raised unauthorized construction by encroaching upon suit property and

passed decree of possession with mandatory injunction to remove construction. Hence, no substantial question of law arises for consideration in this Appeal. In result, Second Appeal stands dismissed.

10. In view of dismissal of Second Appeal, present Interim Application also stands disposed of.

(S. G. CHAPALGAONKAR)
JUDGE