



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO.347/2001

APPELLANT : Govardhan s/o Ganaji Yerne,
(Original Aged 36 years, Occ. Barber,
Defendant r/o Barwah, Post Barwah, Tah. Lakhandur,
on R.A.) Dist. Bhandara.

...VERSUS...

RESPONDENTS : 1. Yashoda wd/o Tikaram Pagote,
aged 68 years

L.Rs. of original [Deleted as per Court's order dated 22/3/07]
plaintiff on R.A.

2. Chintaman s/o Tikaram Pagote
aged 41 years.

3. Damodar s/o Tikaram Pagote,
aged 36 years.
Dead through L.Rs.

All cultivators r/o Barwah, Thaisil
Barwah, District Bhandara.

3A. Sau. Jagruti w/o Moreshwar Matale,
r/o Hardoli, post Hardoli, Tah. Lakhandur,
Dist. Bhandara.

3B. Padma w/o Vasanta Khotele
R/o C/o Ganesh Mahadeo Thakur
Room No.103, Bank of Baroda Building,
near Gram Panchayat office, Doisar Marg,
Sarawali, Tah. And Dist. Palghar, Mumbai,
Maharashtra – 401 501.

3C. Bali w/o Sanjay Brahmanekar,
R/o Lakhandur road, near water tank,
Sakoli, Tah. Sakoli, Dist. Bhandara.

3D. Dyaneshwari d/o Damodar Pagote,
r/o Barwah, Tah. Lakhandur, Dist. Bhandara.

3E. Prashant s/o Damodar Pagote,
r/o Barwah, Tah. Lakhandur, Dist. Bhandara.

(Amended as per order of Hon'ble
Registrar, J dated 12/12/2024 and 3/4/25).

4. Smt. Kanta w/o Mahadeorao Kore,
aged 53 years, Occ. Household r/o
at & PO Palasgaon, Tahsil Sakoli,
District Bhandara.

5. Smt. Dipika w/o Ramchandra Bokde,
aged 49 years, Occ. Household r/o at
& PO Parastola, Tah. Sakoli, Dist. Bhandara.

6. ~~Smt. Sushila w/o Shaligram Chute,~~
aged 46 years, Occ. Household, r/o Nalo,
Tah. Sadak Arjuni, District Bhandara.

(Dead) through L.Rs. brought on record
as per order dt. 9/12/20)

6. Smt. Sushila w/o Shaligram Chute (Dead)
thr. LR's.

6A. Amar Sakharam Chute

6B. Sushma Sakharam Chute

Both aged major r/o Plot No.8/C (duplex),
Supare Nagar, New Yerkheda, Kalmana Road,
Kamptee, In front of Ranala Gram Panchayat
Office, Kamptee, Dist. Nagpur.

(Amended and brought on record
as per Hon'ble Court's order dt. 9/12/2020)

Mr. N.A. Vyawahare, Advocate for appellant

Mr. O.W. Gupta and Ms Aparna Satheesan, Advocates for respondent Nos.1 to 5

CORAM : ROHIT W. JOSHI, J.

DATE : 06/11/2025

ORAL JUDGMENT :

1. The present appeal is filed by the original defendant. The respondent/plaintiff has filed the suit for possession against the appellant/defendant, which was decreed by the learned trial Court vide judgment and decree dated 24/02/1998.

2. It is the case of the plaintiff that he is owner of land bearing Chalta No.67/1, which is subsequently renumbered as Survey No.338. The suit property comprises of a small portion of land admeasuring 3 X 3 sq. meters. Whereas it is the contention of the plaintiff that this 3 X 3 sq. meters portion of land along with kiosk installed thereon, which is in occupation of the defendant, is situated within the land of the plaintiff bearing Chalta No.67/1, the case of the defendant is that the suit property is situated within land bearing Chalta No.67/2, which is Gram Panchayat land. It is the case of the defendant that he was in occupation of portion admeasuring 3 X 3 sq. meters in land bearing Chalta No.67/1 owned by the plaintiff as tenant of the plaintiff, however, somewhere in the year 1972 the defendant had removed himself from the property owned by the plaintiff and had set

up his kiosk in land bearing Chalta No.67/2 owned by the Gram Panchayat. Land bearing Chalta No.67/1 and 67/2 are adjoining to each other.

3. The suit was initially dismissed by the learned trial Court vide judgment and decree dated 30/11/1991. The plaintiff challenged the said decree by filing an appeal being Regular Civil Appeal No.11/1992. The said appeal was partly allowed vide judgment and order dated 23/08/1993. The decree passed by the learned trial Court was set aside and the suit was remanded to the learned trial Court with directions to appoint a Court Commissioner for joint measurement of Chalta Nos.67/1 and 67/2 and decide the suit afresh. This order of remand is not challenged by either parties and has attained finality. Both the parties appeared before the learned trial Court after the remand. The learned trial Court appointed a Court Commissioner, as directed by the learned first Appellate Court and after the evidence of Surveyor was recorded as a Court Commissioner, the learned trial Court decided the suit afresh and dismissed the same vide judgment and decree dated 24/02/1998. By referring to the Commissioner's report, the learned trial Court has held that the kiosk of the defendant was not located within Chalta No.67/1 owned by the plaintiff. The learned trial Court also referred to list of encroachers maintained by the Gram Panchayat, in which the name of the defendant appeared at Serial No.4.

In view of said evidence, the learned trial Court dismissed the suit holding that the plaintiff had failed to prove that the kiosk of the defendant was within the property owned by him.

4. Aggrieved by the said decree, the plaintiff preferred appeal being Regular Civil Appeal No.59/1998. The said appeal is allowed vide judgment and decree dated 01/08/2001. The learned first Appellate Court has recorded a finding that the suit property located within the property owned by the plaintiff bearing Chalta No.67/1. The defendant has preferred the present second appeal challenging the said decree for possession.

5. The second appeal came to be admitted vide order dated 24/08/2005 on the following substantial questions of law :-

“1. Whether the Appellate Court could have allowed the plaintiff to fill up the lacunae in his case and by appointing a Court Commissioner at the appellate stage and taking into consideration the evidence of Court Commissioner without the consent of the respondent therein (appellant in the second appeal) ?

2. Whether the Appellate court could have relied on the report of the Court Commissioner when the Court Commissioner had not measured Chalta No.67/2 in which the respondent was claiming to have his thela ?

3. Whether the judgment of the lower Appellate Court is perverse ?”

6. **Substantial question of law No.1** :- The learned Advocate for the respondent contends that the order of appointing a Court Commissioner was passed in the first round of litigation by the learned first Appellate Court and that the said order of remand for the purpose of appointment of Court Commissioner and adjudication of the suit afresh was not challenged by the appellant/defendant. The learned Advocate contends that both parties had participated in the trial of the suit after the remand and therefore, it is not open for the appellant/defendant now to question the correctness of the order of remand. The said contention deserves to be accepted and accordingly the substantial question of law No.1 is answered in favour of the respondent/plaintiff.

7. **Substantial question of Law No.2** :- It is well settled by catena of judgments of this Court that in case of boundary disputes, both the adjoining lands are required to be measured. In the present case the dispute is pertaining to location of the kiosk of the defendant. The defendant contends that the kiosk is located in the Gram Panchayat land, whereas the plaintiff contends that the kiosk is located within adjoining land owned by him. Thus, the location of boundary of the two adjoining properties is subject matter of dispute. It is well settled that joint measurement of adjoining properties is essential to resolve a boundary dispute. Legal position in this regard is no longer *res integra* and is

settled by catena of judgments of this Court. More importantly, the learned first Appellate Court had, in the first round of litigation, directed that the Court Commissioner be appointed for joint measurement of both the properties. The evidence of Surveyor clearly indicates that such joint measurement is not carried out. The Surveyor has merely measured Chalta No.67/1 owned by the plaintiff.

8. In view of the above, substantial question of law No.2 deserves to be answered in favour of the appellant/defendant.

9. Since the judgment passed by the learned first Appellate Court allowing the suit for possession is based on such Commissioner report, the decree passed on the basis of such judgment is clearly unsustainable and will have to be quashed and set aside. However, at the same time, it is also relevant to state that in boundary disputes unless there is a map drawn by measurement of both adjoining lands is duly proved, boundary dispute cannot be decided. In that view of the matter, although the decree is required to be quashed and set aside, it will be necessary to remand the matter to the learned trial Court with direction to appoint Court Commissioner for joint measurement of both the properties. It will be pertinent to state that the order of remand in the earlier round of litigation was accepted by both parties. However, the Court Commissioner has not measured the property in compliance with the directions issued by the learned first Appellate Court. In that view of

the matter, the suit deserves to be remanded to the learned trial Court to ensure that directions issued to the Court Commissioner are properly observed and followed by joint measurement of both the properties. The plaintiff cannot be made to suffer only because the Court Commissioner has failed to carry out joint measurement of both properties, as directed by the learned first Appellate Court, particularly when the said order of remand is not challenged by the defendant.

10. **Substantial question of law No.3** : - In view of the aforesaid findings on substantial question of law No.2, it is not necessary to decide substantial question of law No.3.

11. In view of the aforesaid, second appeal is allowed. The judgment and decree dated 01/08/2001 and 24/02/1998 passed by the learned 1st Ad hoc District Judge, Bhandara in Regular Civil Appeal No.51/1998 and the learned Civil Judge Junior Division, Sakoli in Regular Civil Suit No.151/1990 respectively are quashed and set aside. Regular Civil Suit No.151/1990 is restored to file. The learned Civil Judge, Junior Division, Sakoli is directed to appoint Cadastral Surveyor from the office Tahsil Inspector of Land Records as Court Commissioner for joint measurement of land bearing Chalta Nos.67/1 and 67/2 and to decide the suit afresh in the light of the measurement report. The parties shall appear before the learned trial Court on 15/12/2025. The parties to note that separate notice/summons for appearance will not be issued.

Since the suit pertains to the year 1990, the learned trial Court is directed to decide the suit as expeditiously as possible and in any case on or before 30/06/2026.

12. No order as to costs.

(ROHIT W. JOSHI, J.)

Wadkar