



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

SECOND APPEAL NO.647 OF 2005

APPELLANT :- Ganpat Kisan Nagare, (dead)
aged 54 Years,
Occupation-Agriculturist,
R/o. Khalegaon, Tq. Lonar, District,
Buldhana.

Amendment carried out as
per Court order dt.16.06.09

1. Legal Heirs of Appellant
Haribhau Ganpat Nagare,
Aged about 58 years,
Occ.: Agriculturist,
2. Ramdas Ganpat Nagare,
Aged about 54 years,
Occ.: Agriculturist,

Both resident of khadegaon,
Tah. Lonar, Distt. Buldhana.

Amendment as per Court's
order dt.16.06.09

..VERSUS..

RESPONDENT :- Pandhari Narayan Sanap,
Aged 56 Years,
Occupation – Agriculturist,
R/o. Khalegaon, Tq. Lonar, District-
Buldhana
Dead thr. LR's

1. Smt. Manjulabai Wd/o Pandhari
Sanap, Aged about 75 years,
Occupation: Agriculturist (widow),
2. Samadhan S/o Pandhari Sanap, Aged
about 32 years, Occupation :

Agriculturist (son)

3. Shivkanya Samadhan Sanap, aged about 35 years, Occupation: Agriculturist (daughter-in-law), All R/o. Khalegaon, Tah. Lonar, District-Buldhana.
4. Sau. Sheela W/o Pandhari Sangale, Aged about 47 years, Occupation : Agriculturist (daughter) R/o. Talegaon, Tah. Sindkhed Raja, District – Buldhana.
5. Sau. Sangeeta W/o Ganesh Ghuge, Aged about 38 years, Occupation : Household, R/o. Amrad Deshmukh, Tah. Sindkhed Raja, District- Buldhan.

Mr. G. N. Khanzode, Advocate a/w. Ms. R. P. Gosavi, Advocate for Appellant.

Mr A. J. Thakkar, Advocate for the Respondents.

CORAM : ROHIT W. JOSHI, J.

DATE : 12.11.2025

ORAL JUDGMENT :

1) Heard finally with consent of learned counsel for the respective parties.

2) The present second appeal came to be admitted vide order dated 23.01.2008 on the following substantial questions of law:-

“1) *Whether the first appellate Court’s finding that the plaintiff was the owner of the field, was perverse on account of the fact that the evidence that was led with regard to ownership was not in accordance with the pleadings of the plaintiff and was, therefore, not accepted ?*

2) *Was the measurement made by the Surveyor vitiated on account of the fact that the defendant was absent at the time of measurement?”*

3) The respondent is the original plaintiff. The appellant is the original defendant. Parties will be hereinafter referred to as ‘plaintiff’ and ‘defendant’.

4) The plaintiff had filed a suit bearing Regular Civil Suit No.510 of 1994, *inter alia* claiming possession of the suit property by removal of encroachment, the description whereof read as under:-

“0.22 H.R., land out of land bearing Gat No.381 (old Survey Nos.75/3 and 75/4) of Village Khadegaon, Tah. Lonar, Dist. Buldhana.”

5) It is the contention of the plaintiff that the defendant had committed encroachment over the suit

property. According to the plaintiff, the total area of Gat No.381 is 0.97 H.R. The plaintiff claims that the suit property was purchased before the year 1968 from one Kadtai and accordingly mutation with respect to the suit property was carried out. The defendant entered appearance in the suit upon being served with the suit summons and filed written statement. The defendant claimed ownership over land bearing Gat No.356 (old Survey No.75/5). The defendant denied having committed encroachment over the property of the plaintiff. The learned Trial Court dismissed the suit holding that the plaintiff had failed to prove his title over the suit property. Likewise, the measurement report, which is the foundation of the suit for removal of encroachment, is also discarded by the learned Trial Court on the ground that the measurement was carried out without notice to the defendant.

6) Being aggrieved by dismissal of the suit, the plaintiff filed first appeal, being Regular Civil Appeal No. 85 of 1998, which came to be allowed by the learned First Appellate Court vide judgment dated 02.07.2005. The

learned First Appellate Court has held that plaintiff had become owner of the suit property by virtue of oral sale transaction in favour of his grandfather. This finding is recorded on the basis of evidence of the plaintiff and P.W.4, who is an elderly person in whose presence the alleged oral sale transaction has taken place. As regards the measurement, the learned First Appellate Court has found that there was no evidence to suggest that such measurement was carried out without notice to the defendant. The learned First Appellate Court has accepted the measurement report and has accordingly decreed the suit.

7) As regards the first substantial question of law, with respect to title of the plaintiff, Mr. Khanzode, the learned Advocate for the appellant/defendant, strenuously argues that the plaintiff cannot assume title over the suit property on the strength of alleged oral sale transaction. He further contends that, as per the plaint averments, the plaintiff claims that the said oral transaction was in his favour, whereas the evidence brought on record by the plaintiff is to the effect that the alleged transaction was in favour of grand-

father of the plaintiff.

8) The contention of Mr. Khanzode, the learned Advocate for the appellant deserves acceptance. However, it must also be stated that the suit is a suit for removal of encroachment. The plaintiff contends that the defendant has encroached over land bearing Gat No.381 to the extent of 0.22 H.R. Possession of the plaintiff over land bearing Gat No.381 is not in dispute. Perusal of the written statement will demonstrate that the defendant has stated that he has not encroached over the land of the plaintiff. It is well settled that a person who is in settled possession of the property can protect his possession and also maintain a suit for recovery of possession, if possession of property over which he has possessory title is wrongly taken from him by a person who does not have better title. So far as, possessory title of the plaintiff is concerned, reliance can be placed on the consolidation sheet pertaining to land bearing Gat No.381 which is at Exh.48, according to which, the land bearing Gat No.381 is in possession of the plaintiff and the extent of the said land is mentioned as 0.97 H.R.

9) In view of the above, although it can be said that the plaintiff has failed to prove his ownership over the suit property, the plaintiff has certainly proved his possessory title over the same. The possession of the plaintiff over land bearing Gat No.381 is not in dispute. In the considered opinion of this Court, the suit for removal of encroachment on the basis of possessory title is maintainable. Therefore, the substantial question of law framed at Sr. No.1 is not relevant so far as, ownership of the plaintiff is concerned. The question has to be answered in the light of controversy between the parties which pertains to possession of adjoining lands. In the considered opinion of this Court, the plaintiff has proved the possessory title which is sufficient to maintain suit for removal of encroachment. Substantial question of law No.1 is answered accordingly.

10) As regards substantial question of law no.2 it is apparent from perusal of measurement report at Exh.52, which is the foundation for the decree passed in favour of the plaintiff, that the defendant was not present at the time of

measurement. Perusal of deposition of the surveyor will demonstrate that he has not specifically stated in his examination-in-chief that notice of measurement was served on the defendant. The defendant has stated in his examination-in-chief that he was not aware about the measurement carried out pursuant to which measurement report at Exh. 52 is prepared. Perusal of his cross-examination will further indicate that the statement made in the examination in chief is not challenged. In that view of the matter, the finding recorded by the learned First Appellate Court that measurement was carried out after service of notice to the defendant and the defendant remained absent despite receipt of notice, is absolutely without any evidence and rather contrary to the undisputed factual position on record. The finding recorded in this regard is perverse and warrants interference even within the limited scope of Section 100. Substantial question of law no. 2 is therefore, answered in favour of the defendant.

11) In view of the above, the matter will have to be remitted to the learned First Appellate Court with directions

to appoint Cadastral Surveyor from the office of the concerned Tahsil Inspector for carrying out measurement of land bearing Gat No.381 and Gat No.356 of Village Khadegaon, Tah. Lonar, Dist. Buldhana. Parties will be at liberty to lead further evidence, after receipt of the measurement report, so also to conduct cross-examination of the surveyor. The learned First Appellate Court may either record the evidence itself or direct the learned Trial Court to record evidence and return the same along with its findings to the learned First Appellate Court. In case, the learned First Appellate Court remits the matter to the learned Trial Court for the aforesaid exercise the parties will be at liberty to raise objections to the findings recorded by the learned Trial Court before the learned First Appellate Court. Parties shall appear before the learned First Appellate Court on 08.12.2025. Parties to note that separate notice for appearance will not be issued in the appeal. Since the suit is filed in the year 1994, the learned First Appellate Court is requested to decide the appeal at the earliest and in any case, before **30.11.2026**.

(ROHIT W. JOSHI, J.)