



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

SECOND APPEAL NO.366 OF 2023

Appellants : : 1) Balkrishna Goma Zanzad,
 (Original Defendants on
 R.A.) Aged 67 years, Occu. Labour.

2) Subhash Goma Zanzad
 Aged 62 years, Occu. Labour.

3) Ramchandra Kisan Zanzad,
 Aged 47 years, Occu. Labour.

All r/o Laweshwar, Tah. & Distt. Bhandara.
 – Versus –

Respondents : : 1) Kailash Shivnandan Dube,
 (Original Plaintiffs on
 R.A.) Aged 82 years, Occu : Nil.

2) Laxmibai Kailash Dube,
 Aged 76 Years, Occ. Household.

All r/o Laweshwar, Tah. & Distt. Bhandara.

 Mr. R.L. Alone, Advocate for the Appellants.
 Mr. N.B. Kalwaghe, Advocate for the Respondents.

CORAM : **M.W. CHANDWANI, J.**
RESERVED ON : **5th FEBRUARY, 2025.**
PRONOUNCED ON : **24th FEBRUARY, 2025.**

JUDGMENT :

Heard the learned Counsel appearing for the parties. With the consent of the parties, the matter is taken up for final hearing.

02. **Admit.**

03. The appeal challenges the judgment and decree passed by the learned Civil Judge Junior Division, Bhandara in R.C.S. No.34/2013 thereby decreeing the suit of the respondents by directing to remove the construction from the disputed area. The said order came to be confirmed by the learned District Judge, Bhandara in R.C.A. No.40/2021.

04. The facts giving rise to the case in a nutshell are as under :

The respondents, neighbours of the appellants, filed a suit against the appellants for removal of encroachment. The plaint depicts that appellants constructed steps/stairs of the house upon the respondents' land and also tried to make a construction measuring six feet on the land of the respondents. The trial Court appointed Surveyor Shri Aasaram Shahare (PW-2) as Court Commissioner; by relying on his evidence and his report, decreed the suit of the respondents directing the appellants to remove the construction made by them over the suit plot and restraining them from obstructing peaceful possession of the respondents over the disputed lands. The appellants made an unsuccessful attempt before the learned District Judge. Feeling aggrieved with the dismissal of the first appeal, this second appeal is filed.

05. The following substantial question of law was framed:

- ◆ *Whether the Courts below were right in holding that the appellants encroached upon the land of the respondents on the strength of the measurement report of the land of the appellants without there being measurement of the land of the respondents?*

06. Having heard the learned Counsel for the respective parties and having gone through the impugned judgment, plaint and the deposition of the Surveyor, it appears that the trial Court has relied on the version of Surveyor Shri Aasaram Shahare (PW-2) and has given the findings regarding encroachment upon the land of the respondents. Surveyor Shri Aasaram Shahare found discrepancy in the actual constructed area of the appellants and the constructed area mentioned in the sale-deed. According to him, the construction made by the appellants on the land is in excess in comparison to the land shown in the sale-deed and therefore, opined that the appellants have encroached upon the land of the respondents. It is apparent from his evidence that, by relying on the area mentioned in the sale-deed of the respondents, he measured the land of the appellants. Just because the construction of the appellants was in excess of the area mentioned in the sale-deed, it cannot be said that the appellants have encroached upon the land of the respondents. If the respondents' case is that the appellants have encroached upon their land, the land of the respondents ought to have been measured to see whether there is any encroachment upon the land of the

respondents by the appellants, but that was not done. That apart, there is no evidence regarding the boundary marks on the basis of which the said survey was done. Therefore, the findings of the trial Court as well as the appellate Court do not stand to the reasons and the same are required to be set aside

07. At this stage, both the learned Counsel submitted that joint measurement of the plots of the appellants as well as the respondents needs to be done to determine the exact situation on the spot by appointment of a Commissioner. Both the parties submit that they will approach the trial court in that regard.

08. In view of the aforesaid reasons and facts, the matter is required to be remanded to the learned trial Court for deciding the issue of encroachment afresh. If an application is made by any of the parties before the trial Court, it shall be considered on its own merits.

09. With these observations, the appeal succeeds. Hence, the judgment and decree passed by the learned Civil Judge Junior Division, Bhandara in R.C.S. No.34/2013 and affirmed by the learned District Judge Bhandara in R.C.A. No.40/21 is hereby set aside. The appeal is remanded to the trial Court for deciding the issue of encroachment afresh. The appeal is disposed of accordingly with no order as to costs.

(M.W. CHANDWANI, J.)