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Duration: 10Y-6M-25D

**IN THE COURT OF PRINCIPAL DISTRICT JUDGE,  
AT : BHARUCH**

**Regular Civil Appeal No.7/2016**

**Exh.:-**

**Appellants:**

1. Bhikhabhai Bakorbhai Patel
  2. Natwarbhai Bakorbhai Patel
  3. Arvindbhai Bakorbhai Patel
- All having R/o. Village: Kisnad,  
Ta. Dist. Bharuch.

***Versus***

**Respondent:**

Sanjaybhai Gopalbhai  
R/o. Village: Kishanad,  
Ta. Dist. Bharuch.

**Appearance:-**

Mr. I. B. Bhatti, Ld. Advocate for the appellant.

Mr. M. M. Shah, Ld. Advocate for the respondents.

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***Appeal u/s 96 read with Order XLI of the Code of Civil  
Procedure, 1908.***

**:::JUDGMENT:::**

1. Being aggrieved and dissatisfied with the judgment and decree dated 28.09.2015 passed by learned 9<sup>th</sup> Additional Civil Judge, Bharuch in Regular Civil Suit No.233/2013, the original plaintiffs have preferred this appeal. The appellants are the original plaintiffs and the respondent is the original

defendant and they shall be referred to as their original position in the suit.

2. The brief facts of the case of the plaintiffs are that, plaintiffs are the owner of ancestral property i.e. open plot(Gabhan) bearing Gram Panchayat Assessment Register Property No.328 situated at Village Kishanad, Ta. & Dist. Bharuch (Hereinafter referred to as "Suit Property"). It is the case of the plaintiffs that on 22.05.2012, the defendant without any right, title, interest or permission, encroached upon the suit property and started to construct house without any legal permission on the suit property. It is the case of the plaintiffs that the plaintiffs have informed about encroachment made by the defendant to the Talati-cum-Mantri, Sarpanch and Deputy Sarpanch of Kishanad Gram Panchayat on 22.05.2012, however, no action was taken by them. It is the case of the plaintiffs that the plaintiff lodged complaints on different dates before Palej Police Station, the Superintendent of Police, Bharuch, the District Panchayat authorities, the Collector, Bharuch, and the District Development Officer to take action against the defendant, however, no action was taken by them. It is the case of the plaintiffs that defendant is residing in a house which is illegally constructed on the suit property. It is further case of the plaintiffs that the defendant is attempting to alienate the property by creating third-party rights. Hence, the plaintiffs have filed the suit before the Ld. Trial Court and prayed for declaration that the defendant has encroached upon the suit

property of the ownership of the plaintiffs and illegally made construction and occupied the said suit property. Plaintiffs have also prayed to direct the defendant to demolish the construction on the suit property. Plaintiffs have prayed for permanent injunction restraining the defendant from alienating the suit property. Plaintiffs have also prayed for Rs.5,000/- per month towards mental harassment.

3. The Summon was issued by the learned Trial Court to the defendant. Defendant appeared through Ld. Advocate and filed the written statement at **Exh.13** and denied all the contentions of the plaintiffs. It is stated that there is no open plot bearing Gram Panchayat Assessment Register Property No.328 within the defendant's property. It is stated that neither any illegal encroachment was made nor any unauthorized construction was carried out by the defendant upon the suit property. It is stated that plaintiffs have not provided the exact location, measurements, and boundaries of the suit property. It is stated that defendant has not constructed house on the land of the plaintiffs. It is further stated that the defendant and his ancestors have been residing in the house since last 20 to 30 years. It is stated that the defendant has renovated the house and he is in peaceful, lawful possession of the house. It is stated that defendant is a poor labourer residing in the house since birth, whereas the plaintiff owns several lands and houses. It is stated that plaintiffs have filed a false suit against the

defendant and therefore, prayed to dismiss the present suit.

4. The Ld. Trial Court after going through the pleadings of the parties framed the issues at **Exh.17**.
5. Thereafter, the Ld. Trial Court has recorded the evidence on behalf of the plaintiffs as under:-

**::: ORAL EVIDENCE :::**

| Sr. No. | Description                                | Exh. |
|---------|--------------------------------------------|------|
| 1.      | Arvinbhai Bakorbhai Patel (Plaintiff No.3) | 46   |
| 2.      | Jesangbhai Motibhai Patel                  | 50   |

**::: DOCUMENTARY EVIDENCE :::**

| Sr. No. | Description                                                                      | Exh. |
|---------|----------------------------------------------------------------------------------|------|
| 1.      | Certified copy of application filed before Kishanad Gram Panchayat               | 25   |
| 2.      | Certified copy of assessment certificate of Property No.328 for the year 1992-93 | 26   |
| 3.      | Certified copy of assessment certificate of Property No.328 for the year 2004-05 | 27   |
| 4.      | Certified copy of assessment certificate of Property No.328 for the year 2005-06 | 28   |
| 5.      | Certified copy of assessment certificate of Property No.328 for the year 2009-10 | 29   |
| 6.      | Certified copy of assessment certificate of Property No.328 for the year 2012    | 30   |
| 7.      | Certified copy of assessment certificate of Property No.328 for the year 2012-13 | 31   |
| 8.      | Receipt of tax of Property No.328 for the year 2008-09                           | 32   |
| 9.      | Receipt of tax of Property No.328 for the year 2011-12                           | 33   |
| 10.     | Receipt of tax of Property No.328 for the year 2013-14                           | 34   |

|     |                                                                                                                 |    |
|-----|-----------------------------------------------------------------------------------------------------------------|----|
| 11. | Received copy of application filed before Mamlatdar, Bharuch regarding illegal cutting of tree by the defendant | 35 |
| 12. | Received copy of complaint filed before DDO, Bharuch                                                            | 36 |
| 13. | Received copy of complaint filed before the Collector, Bharuch                                                  | 37 |
| 14. | Received copy of complaint filed before the Collector, Bharuch                                                  | 38 |
| 15. | Reply of the Collector Bharuch                                                                                  | 39 |
| 16. | Copy of letter sent to DDO, Bharuch                                                                             | 40 |
| 17. | Copy of notice given to Deputy Sarpanch through Advocate                                                        | 41 |
| 18. | Reply of Talati-cum-mantri for the application filed under RTI Act.                                             | 42 |
| 19. | Acknowledgment receipt of Deputy Sarpanch                                                                       | 43 |
| 20. | Returned cover of notice sent to defendant                                                                      | 44 |
| 21. | Receipt of tax of Property No.328 for the year 2013-14                                                          | 45 |

6. The Ld. Trial Court has recorded the evidence on behalf of the defendant as under:-

**::: ORAL EVIDENCE :::**

| Sr. No. | Description                       | Exh. |
|---------|-----------------------------------|------|
| 1.      | Sanjaybhai Gopalbhai Patanwadiya  | 57   |
| 2.      | Sureshbhai Chhitabhai Patanwadiya | 61   |

**::: DOCUMENTARY EVIDENCE :::**

| Sr. No. | Description                                                        | Exh. |
|---------|--------------------------------------------------------------------|------|
| 1.      | True copy of death certificate of Gopalbhai Chhitabhai Patanwadiya | 69   |
| 2.      | True copy of Rationa Card of Sanjaybhai and Sureshbhai Patanwadiya | 70   |
| 3.      | True copy of Water ID Card                                         | 71   |
| 4.      | True copy of Water ID Card                                         | 72   |

7. After considering the submission of the parties and oral and documentary evidence on record, Ld. Trial Court has dismissed the suit of the plaintiffs. Being aggrieved and dissatisfied with the judgment and decree of the Ld. Trial Court, the plaintiffs have filed the present appeal.

**Arguments on behalf of the appellants:-**

8. The Ld. Advocate for the appellants/original plaintiffs has filed written arguments at Exh.10 and submitted that Ld. Trial Court has without appreciating the oral and documentary evidence on record dismissed the suit of the plaintiffs. It is further submitted that respondent has not produced any documentary evidence to prove his title or authorized possession over the suit property. It is submitted that respondent has not sought permission of the Panchayat to construct on the suit property which is also admitted in his cross-examination. It is submitted that burden of proof is on the respondent to prove his entitlement over the suit property. It is submitted that documentary evidence on record clearly indicates that there is no property in the name of the respondent in the record of the Village Panchayat. It is submitted that the respondent's mere oral submission that he is in occupation of the suit property since last 30-40 years without any corroborative evidence does not confer any right, title or interest to respondent over the suit property. It is submitted that Ld. Trial Court has erred in not allowing the application filed at Exh.65 seeking appointment of court commissioner to bring on record the

actual position of suit property which would have enabled the Ld. Trial Court to properly determine the dispute involved in the suit. It is submitted that the Ld. Trial Court has erred in not providing fair opportunity to the appellant by rejecting the application at Exh.65. It is further submitted that the findings recorded by the Ld. Trial Court are perverse and contrary to the evidence on record. Therefore, it is submitted that judgment and order of the Ld. Trial Court is required to be quashed and set aside and matter is required to be remanded back for fresh adjudication. Hence, it is submitted to allow the present appeal.

**Arguments on behalf of the respondent:-**

9. None remained present on behalf of the respondent at the time hearing. Hence, the stage of respondent's argument was closed.

**Points for determination :-**

10. Heard Ld. Advocate for the appellant, perused the written arguments of the appellant, evidence on record, and the judgment and decree passed by the Ld. Trial Court. In view of the aforesaid background, the following points for determination arise for the consideration of the present appeal:

**:::POINTS:::**

- 1) Whether the judgment and decree dated 28.09.2015 passed by the Ld. Trial Court in Regular Civil Suit No.233/2013 is illegal, erroneous, contrary to the

established principles of law and requires to be interfered with by this Court?

2) What order?

**:::FINDINGS:::**

11. My findings for the above points are as under:

- 1) In Affirmative
- 2) As per final order

**:::REASONS:::**

**Point Nos.1:-**

12. It is the case of the plaintiffs that they are the owner of the suit property and the defendant has encroached upon the suit property and without any permission constructed the house. It is the case of the defendant that he has not encroached upon the suit property. It is the case of the defendant that the plaintiffs have not provided any exact location, measurement and boundaries of the suit property.

13. Hence, considering the case of the rival parties, the main issue is with respect to the identity of the suit property and the alleged encroachment as well as construction on the suit property. During the pendency of the suit, the plaintiff filed an application to open the stage of evidence at Exh.64 and also filed an application at Exh.65 for local investigation and carrying out the measurement and map of the suit property. However, the Ld. Trial Court has rejected the application at Exh.64 for opening the evidence of plaintiff and also rejected the application at Exh.65 for commission

for local investigation.

14. Considering the rival contentions of the parties, the dispute was whether the respondent had encroached upon the suit property or not. Admittedly, the application was filed under Order XXVI Rule 9 of CPC which was rejected and the stage to reopen the plaintiff's evidence was also rejected on the ground that the stage of the plaintiff's evidence had already been closed. Herein, the provision of Order XXVI Rule 9 of CPC is required to be considered which reads as under:

***Order XXVI Rule 9. Commissions to make local investigations.**—In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:*

*Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.*

15. Herein, it is fruitful to refer the decision of the Hon'ble Apex Court in the case of **Haryana Waqf Board v/s Shanti Sarup reported in 2008 (8) SCC 671**, wherein, it is held in para 4 as under:

*4. Admittedly, in this case, an application was filed under Or. 26 R. 9 of the Code of Civil Procedure which was rejected by the trial court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under Or. 26 R. 9 of the Code of Civil Procedure.*

16. In the present case, the parties have disputed the identity,

location, measurement and boundaries of the suit property. The object of appointment of court commissioner is not to permit the plaintiffs to fill up the lacunae in evidence but to assist the court in determining the principle dispute that is whether the house occupied by the defendant forms part of the suit property. The dispute between the parties regarding identity, location, measurement and boundaries of the suit property and the alleged encroachment could not have effectively adjudicated without local investigation. The report of the court commissioner together with the site plan, measurement, identification and the existing construction would have materially assisted the Ld. Trial Court in appreciating the oral and documentary evidence already available on record. It appears that the Ld. Trial Court has adopted a technical approach by rejecting the application for local investigation of commissioner merely on the ground that the evidence of plaintiffs had been closed. The closure of evidence by itself cannot constitute valid ground to reject the local investigation when the commission is necessary for elucidating the matter in dispute. The power under Order XXVI Rule 9 of CPC exists primarily for assisting the court. Hence, in view of the above, since identity, location, measurement and boundaries of the suit property and the alleged encroachment of the defendant are disputed and determination of this question is necessary for adjudication of the plaintiff's case of encroachment, the application for local investigation under Order XXVI Rule 9 of CPC is important. Had the Ld. Trial Court allowed the application

and obtained the local investigation report with appropriate measurement and site plan of the suit property, the same would have assisted the Ld. Trial Court in determining whether construction made by the defendant falls within the suit property or not and if so, to what extent. Hence, in absence of such determination by way of local investigation report, this court is of the opinion that the dispute between the parties could not be effectively and completely adjudicated on the available record. Hence, the judgment and decree passed by the Ld. Trial Court is required to be set aside and the matter is required to be remanded back for fresh adjudication after proper local investigation of suit property and affording reasonable opportunity to both the parties in accordance with law. Therefore, the judgment and decree passed by Ld. Trial Court is illegal, erroneous, contrary to the established principles of law and require to be interfered with by this Court. Hence, I answer issue No.1 in 'Affirmative' and so far as the Issue No.2 is concerned, the following order is passed:-

### **ORDER**

- 1) The present appeal is hereby partly allowed.
- 2) The judgment and decree dated 28.09.2015 passed by the learned 9<sup>th</sup> Additional Civil Judge, Bharuch in Regular Civil Suit No.233/2013 is hereby quashed and set aside and the suit is remanded back to Learned Trial Court for fresh adjudication after proper local investigation and affording reasonable opportunity to both the parties in accordance

with law.

- 3) The parties shall bear their own costs.
- 4) Decree shall be drawn accordingly.
- 5) R&P of Regular Civil Suit No.233/2013, be sent back to Ld. Trial Court along with the certified copy of this judgment.

Signed & Pronounced in the open Court today on 14<sup>th</sup> August, 2026.

Date: 14/08/2026

**(Rajesh Karmarsinh Desai)**  
**Principal District Judge,**  
**Bharuch**  
**Code No.GJ00912**