

Judgment
MHND19-000530-2013

(1)

R.C.S. No.123 of 2013
Narayan & ors Vs. Govind & ors

MHND190005302013



Received on : 07 08 2012
Registered on : 07 08 2012
Decided on : 30 03 2019
Duration : D M Y
23 07 06

IN THE COURT OF JOINT CIVIL JUDGE JUNIOR
DIVISION, LOHA, DIST. NANDED.

(Presided over by P.B. Taur)

Regular Civil Suit No. 123 of 2013

Exh. No. ()

1.	Narayan s/o Datta Ladge, Age - 63 yrs. Occ: Agri., R/o: Golegaon (P.U.), Tq. Loha Dist. Nanded.	
2.	Durgads s/o Narayan Ladge, Age-35 yrs. Occ: Agri., R/o: Golegaon (P.U.), Tq. Loha Dist. Nanded<i>Plaintiffs</i>
- <u>VERSUS</u> -		
1.	Govind s/o Ramji Dhale Age- 40 yrs Occ: Agri,	

	R/o : Golegaon (P.U), Tq. Loha Dist. Nanded.	
2.	Kashinath s/o Govind Dhale, Age - 22 yrs Occ: Agri, R/o : Golegaon (P.U), Tq. Loha Dist. Nanded.	
3.	Shivaji s/o Digambar Lokare Age 42 yrs Occ: Agri, R/o : Golegaon (P.U.) Tq. Loha Dist. Nanded.	
4.	Yadhoji s/o Digambar Lokare Age- 35 yrs, Occ: Agri R/o : Golegaon (U.P.), Tq. Loha Dist. Nanded.	<i>.... Defendants.</i>

Suit for Recovery of Possession and Mesne Profits

Appearance :-

Mr. V.D.KolNo.rkar, Ld. Advocate, for the Plaintiffs
Mr. G.B.Hande, Ld. Advocate, for defendants No. 1 & 2.
Mr. H.G.Panchal, Ld. Advocate, for defendants No.3 & 4.

J U D G M E N T

(Delivered on this 30th March, 2019)

This is suit for recovery of possession and mesne profits. An agricultural land bearing Survey No.56/02 adm. 02 H. 27 R. situated at Mauje Golegaon, Tq. Loha, Dist. Nanded

which is more particularly described in the plaint paragraph No.02, is the subject matter of the instant suit. It is to be referred hereinafter as "Suit Land" for the sake of brevity.

02. The brief facts of the plaintiffs' case are as under :

Plaintiff No.1 is the father of plaintiff No.2. Plaintiff No.1 purchased suit land from Sakharam Hausaji, Baba Manika, Sambhaji Nagoji, Shankar No.oji, Datta Mahadji, Maroti Sambha, Dhondiba Motiram and Jalba Nagoji on 26/04/1978 for consideration of Rs.4000/-. Jalba Nagoji could not attend the office of Sub-Registrar. Plaintiffs purchased his share orally. Plaintiffs became owner of the suit land and they mutated their names in respects of record of rights. Since then they are in possession of suit land.

03. Defendants No.1 and 3 are having No.concern with suit land. However, in January 2011, they encroached suit land. Hence, measurement of the suit land was carried out in which agricultural land to the extent of 80 R. and 26 R. came to be found in possession of defendant No.1 Govind Ramji Dhale and defendant No. 3 Shivaji Digambar Lokare respectively. Consequently, on 25/05/2012 plaintiffs demanded the possession of said encroached land towards defendants,

however, defendants denied doing so. Hence, plaintiffs were constrained to file suit for recovery of possession alongwith mesne profit.

04. In response to the suit summons, all defendants appeared. Defendants No.1 and 2 filed their written statements at Exh. 22 and 28 respectively whereas defendants No.3 and 4 file their joint written statement at Exh. 32.

05. Defendant No.1 denied all adverse contentions raised by plaintiffs against him. According to him, plaintiffs are No. owner and possessor of suit land. They never encroached suit land. Instant suit is barred by principle of Res-judicata. Plaintiffs have filed said suit with ill will to extract money from them. Hence, he prayed to dismiss suit by imposing compensatory cost of Rs. 10,000/-. Defendant No.2 filed his W.S. in tune with contentions of defendant No.1.

06. Whereas defendant No.3 and 4 denied all adverse contentions of the plaintiffs and they further contend that, boundaries of the said land are false. Plaintiffs never purchased land from one Jalba Nagoji. Jalba Nagoji is necessary party of the suit and thus suit is liable to be dismissed. They have never encroached upon the suit land. Measurement is not done in their presence. The plaintiffs have

never asked defendant No.3 and 4 for the possession of any land. Hence, in view of above contentions, defendant No.3 and 4 also prayed to dismiss suit.

07. On 20-03-2015, my learned predecessor has framed issues below Exh. 34. The same are reproduced for determination. I record my findings along-with reasons thereon as under.

Sr.No.	ISSUES	FINDINGS
1.	Whether the suit is barred by Res-judicata ?	...No.
2.	Whether the suit is bad for non-joinder of necessary party ?	...Yes.
3.	Do the plaintiffs prove that, defendants No.1 and 2 have encroached over 80 R. land owned by plaintiffs in survey No.56/2 situated at Golegoan, Tq. Loha, Dist. Nanded as alleged.	...No.
4.	Do the plaintiffs prove that, defendants No.3 and 4 have encroached over 26 R. land owned by plaintiffs in survey No.56/2 situated at Golegoan, Tq. Loha, Dist. Nanded as alleged.	...No.
5.	Whether the plaintiffs are entitled to recovery of possession as prayed ?	...No.
6.	Whether the plaintiffs are entitled	...No.

to mesne profits as prayed ?

7. What order as to mesne profits ? ...No.
8. What order and decree ? Suit dismissed with costs.

08. In order to succeed in claim of the plaintiffs, they have examined plaintiff No.1 Durgadas Narayan Ladage as (PW1) at Exh.42, Plaintiffs witness No.2 Manika Rupaji Dhale as (PW2) at Exh.61, Plaintiff witness No.3 Prashant Shankarrao Wadewale as (PW3) at Exh.64. The plaintiffs have also filed documetary evidence on record which is described in table as follows :-

Sr.No.	Evidence - Documentary	Exhs. No.
1.	7/12 extract of Survey No.56/2	6
2.	7/12 extract of Survey No.56/1/1	7
3.	7/12 extract of Survey No.56/1/4	8
4.	7/12 extract of Survey No.56/1/3	9
5.	No.ice issued by Dy. L.R. at Loha.	65
6.	Copy of 'C' Sheet i.e. Map	66
7.	Certified copy of sale deed bearing No.1875/1978 dated 26/04/1978.	73

09. Defendants No.1 and 2 examined defendant No.2 Kashinath Govind Dhale as (DW1) at Exh.90. They filed

documentary evidence which is as follows : -

Sr.No.	Name of Document	Exhs. No.
1.	7/12 extract of survey No.56/1/1 for year 1977-78 to 1992-93.	97
2.	7/12 extract of survey No.56/1/1 for year 2013-2014 to 2015-2016.	98
3.	7/12 extract of survey No.56/1/4 for year 1977-78 to 1992-93.	99
4.	7/12 extract of survey No.56/1/4 for year 2013-2014 to 2015-2016.	100

10. By order at Exh.1 Evidence of defendants was closed on 23/01/2019. Heard Ld. Advocate for the plaintiffs, Ld. Advocate for the defendants No.01 and 02. Ld. Advocate for the defendants No.03 and 04 failed to argue when called. Plaintiffs and defendants No.01,02 and defendants no. 03 and 04 also filed their respective written No.es of arguments at Exh.s 111, 112 and 113. I have given thoughtful consideration to aforementioned written notes of arguments.

REASONS

AS TO ISSUE No. 01 :

11. It is urged by the learned Advocate for the defendant that, the suit is hit by principle of Res-Judicata.

Similar dispute in respect of suit land in which defendants and plaintiffs are impleaded as party to the case was pending in the revenue authority i.e. before Tahsildar, Loha. Said matter bears No.2012/A/Jama/ROR/CR Narayan Vs. Shivaji and same was decided on 04/10/2012.

12. Per contra, learned advocate for the plaintiffs urged that, said authority has not any power to decide title of the party. Hence, it can not be said that, principle of Res-Judicata can come into play.

13. It is also pertinent to note here that, said matter has been decided by revenue authority is admitted by both the parties. The provisions of Section 11 of the Code of Civil Procedure, 1908 are not exhaustive with respect to an earlier decision operating as Res-Judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of Res-Judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it will operate as Res-Judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly must be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-

matter. The nature of the former proceeding is immaterial.

14. At this juncture it will be useful to examine the relevant statutory provisions, thus -

15. Section 11 Civil P. C. to be attracted in a case where a Revenue Court decision was followed by a civil suit dealing with the same questions of title. This Section 11 the Civil Procedure Code is applicable only to cases where both the earlier proceeding and the later proceeding and which is said to be barred by the earlier one are civil suits, whereas in other cases, in which neither of two proceedings or only one of them is a civil suit, the general doctrine of Res-Judicata, shorn of the limitations imposed by Section 11, is to be applied. The Code was dealing with procedure of the Civil Courts only and had therefore not to consider what would be the effect on the trial of suits in view of the provisions of other enactments or of general principles of Res-Judicata or of any other kind. It had to restrict its provision about Res-Judicata to the effect of decisions in a civil suit on a subsequent civil suit and therefore enacted Section 11. It made one of the conditions for the application of a previous decision to operate as Res-Judicata to be that the previous decision is made not only by a Court competent to make it but by a Court which may be competent to try the subsequent suit, this condition must have been

considered necessary on account of the hierarchy of Courts under the various Acts constituting Courts of Civil Judicature and it could have been felt that a decision by a Court which is not competent to decide the subsequent suit be not treated of a binding nature. Such an exceptional procedure seems to have been provided as a matter of precaution as the Court not competent to try the subsequent suit must necessarily be a Court of inferior jurisdiction and therefore more liable to go wrong. Whatever the reason may be, the provisions of Section 11 will govern a previous decision in a suit barring a subsequent suit with respect to the same matter in controversy and general principle of Res-Judicata in such particular circumstances will neither be available to bar a subsequent suit nor will be needed.

16. Applying the rule enunciated above to the facts of the present case, I find that Section 11 the Civil Procedure Code is not applicable and that the case is governed by the general doctrine of Res-Judicata. The decision of a Revenue Courts in a revenue suit are courts of special limited jurisdiction, belonging to an entirely separate hierarchy and Courts are courts of special limited jurisdiction, cannot be equated with Civil Courts; and only made applicable to revenue suits. Therefore, Section 11 the Civil Procedure Code

is concerned solely with the effect of decisions in a civil suit on a subsequent civil suit, it cannot govern the effect of the decision in a civil suit on a subsequent revenue court decision.

It also held by the Hon'ble Supreme Court in the case of the *Bhagwan Dayal v. Mst. Reoti Devi, (AIR 1962 SC 287)* that a revenue Court decision on a question of title did not operate as Res-Judicata in a subsequent civil suit, because the conditions required by Section 11 the Civil Procedure Code (viz. that the court trying the earlier suit should be competent to try subsequent suit) were not satisfied; and the general principles of Res-Judicata were not permitted to be invoked. Hence, I answer to issue no.1 in the negative.

AS TO ISSUE No.02 :-

17. Defendant No.. 3 and 4 in the written statement (Exh.32) stated that the suit is bad for Non-joinder of necessary party. Furthermore, learned Advocate for defendant No. 1 and 2 urged that, one Shivaji Ramji Lokare, the adjacent land owner has encroached upon 26 Ares land out of the suit property. Therefore, Shivaji Ramji Lokare is the necessary party to the suit and he is not impleaded as defendant in the suit. The plaintiff has filed suit for recovery of possession in respect of the suit property on the basis of

title. The plaintiff produced Map (Exh.66) in order to prove alleged encroachment, wherein it mentioned that one Shivaji Ramji Lokare encroached upon 26 Ares land. Plaintiff No.1 also admitted in his cross-examination that one Shivaji Ramji Lokare has encroached upon the suit property to the extent of 20 Aress land. However, the plaintiffs did not implead him as party to the suit.

18. The plaintiffs pleaded that plaintiff No.1 also purchased share of one Jaba Nagoji Dhale from the suit property by oral transfer. This fact is challenged by defendant No. 3 and 4 in the written statement (Exh.32) and submitted that the oral transfer of immovable property can not be permitted in the eye of law. The plaintiffs have not impleaded Jaba Nagoji Dhale as party to the suit. Thenceforth, the suit is also bad for non-joinder Jaba Nagoji Dhale as party to the suit.

19. Undisputedly, the plaintiffs have filed the suit for recovery of possession of the suit property on the basis of title under section 6 of the Specific Relief Act, 1963. In this context, the plaintiffs cannot claim ownership on the share of Jaba Nagoji Dhale on oral transfer. As per mandatory provision of the Transfer of Property Act, particulary section 54 read with Section 17 of the Registration Act immovable property valued

more than Hundred rupees required to be transferred by registered instrument. In the case at hand, the plaintiff is claiming share of one Jaba Nagoji Dhale on the basis of oral transfer. Therefore, Jaba Nagoji Dhale is the necessary and proper party. In the absence of abovementioned persons the Court cannot grant relief claimed against them. For the said reason, the suit is bad for non-joinder of necessary and also proper parties to the suit. Hence, I answer issue No.2 in the affirmative.

AS TO ISSUES No.03 AND 04 :-

20. The evidence on these issues is interconnected. Hence, they are taken up together for consideration.

21. Plaintiff No.2 i.e Durgadas (PW-1) reproduced all the averments in the plaint in the form of evidence at Exh.42. According to him his father i.e. defendant No.1 purchased suit land from Sakharam Hausaji, Baba Manika, Sambhaji Nagoji, Shankar Nagoji, Datta Mahadaji, Maroti Sambha, Dhonidba Motiram and Jalba Nagoji on 26/04/1978 for consideration of Rs.4000/- by registered sale deed. However, one Jalba Nagoji did not appear before the Sub-Registrar for execution of sale-deed. Thereafter, they purchased his land by oral transaction and got mutated their names in the revenue record.

22. Learned Advocate for defendants No.1 and 2 cross examined said witness thoroughly. He admitted that, his father had purchased 2 H. 2 R. agricultural land from survey No.56/2/A on 26/01/1978. He further admitted that, survey No.56/2/A is admeasuring 5 Acre. He also admitted that, they do not possess any registered document regarding ownership of 2 H. 27 R. agricultural land in survey No.56/2. He also admitted that, he does not hold 7/12 extract showing his ownership and possession in survey No.56/2.

23. Defendant No.2 Kashinath (DW-1) reproduced all the averments of their contention in written statement in evidence affidavit (Exh. 90). According to him, plaintiffs are not owner and possessor of suit land. During his cross examination, he deposed that survey No. 56/2 is purchased by the plaintiffs. He admitted that he has no objection to the fact that survey No. 56/2 is mutated in the name of Narayan. He also admitted that, agricultural land bearing survey No. 56/2 comprises an agricultural land bearing survey No. 56/2/A purchased by Narayan and his ancestral land.

24. The plaintiffs have proved sale deed (Exh. 73) through Manikrao (PW2). He deposed that suit land bearing survey No. 56/2/A admeasuring 5 acres out of total area 5

acres 24 R is purchased by plaintiffs from Sakharam Housaji Ladge, Baba Manika Ladge , Sambhaji Nagoji Ladge, Shankar Nagoji Ladge, Datta Mahadaji Ladge, Maroti Sambha Ladge, Dhonidba Motiram Ladge on 26/04/1978 for consideration of rupees 4000/-. Its four boundaries are as to the East agricultural land of Ramaji Vyankoba, to the West agricultural land of Jalba Nagoji, to the South agricultural lands of Anusayabai Baba and Bhujanga Kondiba and to the North agricultural lands of Abaji Kerba and Ramchandra Jayram. It is situated at Golegaon Tq. Loha Dist. Nanded.

25. During his cross examination conducted by Ld. Advocate for defendants No.3 and 4 he admitted that, his father purchased 2 H. 2 R. agricultural land by sale deed No.1875/1978 from survey No.56/2. He further admitted that, four boundaries existing at the time of sale deed were mentioned in the sale deed. He further admitted that, said four boundaries are correct. He also admitted that, they had purchased said agricultural land from Sakharam Hausaji, Baba Manika Ladage, Sambhaji Nagoji, Shankar Nagoji, Datta Mahadaji, Maroti Sambha and Dhondiba Motiram.

26. The plaintiffs have claimed recovery of encroached land from the defendants on the basis of title in respect of suit

land. Therefore, it is necessary to scrutiny the contention of the plaintiffs in the light of recitals of sale deed (Exh. 73). I have carefully gone through sale deed (Exh. 73). It is reveals that agricultural land mentioned in the same is survey No. 56/2/A admeasuring 5 acres out of 5 acres 24 R which is situated at mouje Golegaon, patti Usmannagar and Dist. Nanded. It bears four boundaries as follows :

- To the East : Agricultural land of Ramaji Vyankoba
- To the West : Agricultural land of Jalba Nagoji
- To the South : Agricultural lands of Anusayabai Baba and
Bhujanga Kondiba
- To the No.th: Agricultural lands of Abaji Kerba and
Ramchandra Jayram.

27. While comparing the total area of the agricultural land in the sale-deed (Exh. 73) with suit land, it goes to show that there is difference of 24 R. Hence, it can No. be said that said properties are one and same as far as their total areas are concerned. Further, both the properties have different kind of four boundaries. It is not the case of the plaintiffs that, with the passage of time, the four boundaries of the agricultural land mentioned in sale deed (Exh. 73) are changed. On the contrary, Durgadas (PW1) deposed in his cross examination that four boundaries of the agricultural land mentioned in the

sale deed (Exh. 73) are correct. Now the plaintiffs are claiming ownership over survey No. 56/2, however, description of the suit land and agricultural land mentioned in sale deed (Exh. 73) are not identical. During cross examination, Plaintiff No.2 Durgadas (PW1) deposed that they do not possess any registered document showing their ownership over survey No. 56/2 to the extent of 2H 27R. He also admitted that they do not hold 7/12 extract showing that they are owner and possessor of survey No. 56/2. In view of above admissions of the Durgadas (PW-1) and different description of the land mentioned in sale deed (Exh. 73), it cannot be inferred that the plaintiffs are owner of the suit land.

28. It is the case of the plaintiffs that, they are owners of suit land. However, sale deed (Exh. 73) talks about survey No. 56/2/A. Further, it is also submitted by the plaintiffs that Jalba Nagoji failed to attend Sub-Registrar office, they later on purchased his agricultural land orally and mutated whole survey No. 56/2 in their names. However, no such mutation entry is placed on record in support of their contention. It is also submitted by the plaintiffs that they are cultivating suit land since 1978. However, no such document except 7/12 extract (Exh. 06) is placed on record to show that plaintiffs are cultivating suit land. Perusal of 7/12 extract (Exh. 06) reveals

that there is mention of gut No. and not of survey No. Further, there is no mention of agricultural years. Hence, it is highly unsafe to infer from 7/12 extract Exh. 06 that plaintiffs are cultivating suit land since 1978.

29. In the cross-examination, Kashinath (DW-1) has given couple admissions in favour plaintiffs, they will not be much helpful to the plaintiffs as I have already held that it cannot be inferred that the plaintiffs are owner of the suit land.

30. In order to prove encroachment, plaintiffs have relied on testimony of Shri. Wadewale (PW-1) at Exh. 64. During evidence of the plaintiffs, they alleged that defendants No. 1 and 2 have encroached their land to the extent of 80R from eastern side of suit land whereas defendants No. 3 and 4 have encroached suit land from eastern side to the extent of 26 R. Said propositions are flatly denied by defendants during their oral evidence. Hence, in order to decide issue relating to encroachment, the oral testimonies of both sides will not be of much help. Instead, the testimony of the cadastral surveyor Shri. Wadewale (PW3) will be best piece of evidence.

31. Shri. Wadewale (PW3) deposed that on 16/07/2011, measurement application in respect of survey No. 56/2 was

received and it was entered into measurement registered at entry No. 807. Deputy Inspector issued order of measurement of survey No. 56/2 in his name. Hence, he issued notices to plaintiffs and defendants according to rule. Said notice is at Exh. 65. As per said notice, date of measurement was scheduled on 28/07/2012. He went to measure survey No. 56/2 on 28/04/2012 alongwith plaintiffs and defendants. He inspected said survey number according to cultivation and possession and marked boundaries with lime and erected bamboo-flags. He carried out measurement by Plane-Table method. He had carried survey tipan, pot hissa, village map. After measurement, he found that suit land is encroached by Govind Ramji Dhale to the extent of 80 R which is shown by red colour whereas Shivaji Digambar Lokare encroached suit land to the extent of 26 R which is shown by blue colour. Accordingly he demarked new marks after super imposing original tipan. Thereafter he prepared measurement panchanama on the spot in presence of panchas namely Ananta Kapale, Balaji Bapurao Shinde, Sahebrao Ganpati Kapale, Sambhaji Raosaheb Shinde, Ramesh Champati Dhale and also recorded statement of applicant. Defendants denied to sign said panchanama. He prepared map of survey No. 56/2 as per panchanama and record and also prepared A,B,C sheets

of the map. C sheet is proved by said witness. It is at Exh. 66.

32. In his cross examination, he admitted that as per simple measurement, measurement is carried out by inspecting 7/12 extract and possession of applicant is recorded in the map. He further admitted that possession of plaintiff Narayan is not mentioned in map (Exh. 66) in respect of survey No. 56/2. He further admitted that he did not inquire about 7/12 extracts of the agricultural land owners adjacent to survey No. 56/2 till preparation of map (Exh. 66). He also admitted that he had not issued notice to defendant No. 2 Govind Dhale before preparation of map (Exh. 66). He further denied that notices issued to adjacent agricultural land owners before 15 days of preparation of map (Exh. 66), is not in the record brought by him. He admitted that, he neither issued notice to Kashinath or Govind Dhale nor said notice is in the record brought by him. He further admitted that map (Exh.66) is not according to measurement application dated 16/07/2011. He also admitted that there are not notices in the record brought by him as per date 16/07/2011. He further admitted that survey No. 56/1 is situated at eastern side of survey No. 56/2 as per map (Exh. 66). He also admitted that he did not inquire as to sub shares in survey No. 56/1 before preparing map. He further admitted that survey No. 58 is

situated at western side of survey No. 56/2, survey No. 57 is situated at southern side of survey No. 56/2, survey No. 55/2 and survey No. 56/1 is situated at western side of survey No. 56/2 as per map (Exh. 66). He further admitted that he neither issued notices to aforesaid owners of survey numbers nor conducted measurement. He also admitted that original tippan of survey 56/2 is prepared by Chain Method whereas he has carried measurement of survey No. 56/2 as per Plane-Table method. He admitted that an agricultural land to the extent of 26 R in survey No. 56/2 is found to be in possession of Shivaji Ramaji Lokare. He also admitted that he has not submitted map showing possession of Shivaji Ramaji Lokare to the extent of 26 R in the court. He further admitted that he did not record that defendants denied to sign on the panchnama. He also admitted that he did not ensure while conducting measurement, as to which side the agricultural land of defendant No. 2 is situated.

33. It is the contention of the defendants that said measurements was not joint measurement. Therefore, it is necessary to go through relevant provisions. Section 80 of the Maharashtra Land Revenue Code, 1966 provides that, it shall be lawful for a survey officer deputed to conduct or take part in any such survey or a survey under section 86 or 87 to require

by general notice or by summons the attendance of holders of land and of all persons interested therein, in person or by legally constituted agent duly instructed and able to answer all material questions, and the presence of taluka and village officers, who in their several stations and capacities are legally or by usage, bound to perform service in virtue of their respective offices and to require from them such assistance in the operations of the survey and such service in connection therewith, as may not be inconsistent with the position of the individual so called on. Section 81 of the said Act also provides that, it shall be lawful for a survey officer, while conducting surveys mentioned in the preceding section to call upon all holders of land and other persons interested therein to assist in the measurement or classification of the lands to which the survey extends by furnishing flag-holders; and in the event of a necessity for employing hired labour for this or other similar object incidental to survey operations, it shall be lawful to assess the cost thereof, with all contingent expenses on the land surveyed, for collection as a revenue demand.

34. The conjoint reading of both sections points out that there must be joint measurement of the land holders who are involved in the dispute. It also denotes that all the adjacent land holders should be given notice. As per evidence of Shri.

Wadewale (PW3), he has issued notice to all the land holders adjacent to suit land including defendants. Durgadas (PW1) also supports his version. He further deposes that defendants were present when measurement was being carried out. However, Shri. Wadewale (PW3) admitted in his cross examination that, he neither issued notices to adjacent owners of survey numbers of suit land nor conducted measurement of their lands. He has admitted that he did not inquire about 7/12 extracts of the agricultural land owners adjacent to survey No. 56/2 till preparation of map (Exh. 66). He also admitted that he had not issued notice to defendant No. 2 Govind Dhale before preparation of map (Exh. 66). He further denied that notices issued to adjacent agricultural land owners before 15 days of preparation of map (Exh. 66), are not in the record brought by him. He admitted that, he neither issued notice to Kashinath or Govind Dhale nor said notice is in the record brought by him. Above all admissions of Shri. Wadewale (PW3) goes to show that he had not issued notices to the defendants before so called measurement is carried out. It is also admitted by Shri. Wadewale (PW3) that, he did not record that defendants denied to sign on the panchnama. Defendants, on the contrary, denied that they were present at the time of measurement. If notices are not issued to

defendants, it is but natural that they will No. be present at the time of measurement. It further can be inferred that said measurement was not done in the presence of all land holders. Thus it can be said that there was not any joint measurement. If there was no joint measurement, there is doubt as to fair opportunity provided to the defendants to be heard while carrying measurement. Thus it can not be said that, map (Exh. 66) is an agreed map in between both plaintiffs and defendants. Hence, said map can not relied upon to determine question of encroachment.

35. Learned Advocate for the plaintiffs argued that defendants have never disputed the correctness of the said map. As per section 83 of the Indian Evidence Act, the Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government] were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate. Hence, encroachment is proved. Though it is provided that court can draw presumption about the accuracy of such map in evidence, the competent surveyor is required to take appropriate legal steps to carry out the measurement of the disputed land. In this scenario, **Sahebrao S/o Rama Yadav and others V. Sarjerao S/o Rama Yadav, ALL MR**

2016 (1) 348 will come to the help of the defendants. It was held by the Honourable Bombay High Court, Bench at Aurangabad that, the evidence given by Cadastral Surveyor cannot form basis for giving decree to plaintiff as it is No. proved that notice was issued to defendants to enable to them to witness the measurement done on the basis of application given by the plaintiff. I have already inferred that cadastral surveyor had neither issued notice to the defendants nor carried out joint measurement. The presumption about accuracy of said map lacks fulfilment of legal aspects, hence, cannot come to the help of the plaintiffs.

36. Further the defendants placed reliance on **Laxman Wamanrao Nagapure V. Shankar Haribhau Adhau and aNo.her, ALL MR 2014 (6) 635** to substantiate the contention that the plaintiff must be careful to describe the property by its boundaries, Survey Number/Gat Number with area mentioning the boundaries on North, East, West and South of the suit property. Without such description, the trial Court may not be assisted properly by the plaintiff to pass an effective decree if it is passed for the removal of encroachment from the suit land/property in such cases. However, in the case at hand, the plaintiffs have described the suit property as per the Order VII Rule 3 of the Code of Civil Procedure, in the

plaint paragraph No.02. Thus, said authority will No. be called in the aid of the defendants No. 01 and 02.

37. Thus considering above discussion, I come to the conclusion that, plaintiffs failed to prove that defendants No. 1 and 2 encroached suit land to the extent of 80 R and defendants No. 3 and 4 encroached suit land to extent of 26 R. Hence, I answered issues No. 3 and 4 in the negative.

AS TO ISSUES No.05 :

38. As stated above, the plaintiffs failed to prove their ownership over the suit property. Therefore, they are No. entitled to get possession of the suit property. Hence, I answer issue No. 5 in the negative.

AS TO ISSUE No. 06 AND 07 :

39. As held above, the plaintiffs have failed to prove their ownership over the suit property and alleged encroachment at the hands of the defendants. Consequently, they are No. entitled to claim mesne-profits. Hence, I answer issue No. 6 and 7 in the negative.

AS TO ISSUE No.08 :

40. In the result, the plaintiffs are not entitled relief for

recovery of possession and mesne profits as claimed. The plaintiffs will be required to pay the defendants that amount which was incurred towards them legal costs. Hence, in answer to issue No. 8, I pass following order.

:: O R D E R ::

1. The suit is dismissed with costs.
2. Decree be drawn-up accordingly.

(Dictated and pronounced in the open Court.)

30th March, 2019

(P. B.Taur)
Jt. Civil Judge Jr. Division,
Loha.