


MHRG010033522019	 	Presented on	: 04/12/2019
		Registered on	: 04/12/2019
		Decided on	: 01/04/2026
		Duration	: Y M D 06 03 28

BEFORE THE PRINCIPAL DISTRICT JUDGE, RAIGAD-ALIBAG

Presided over by R. D. Sawant

Reg. Civil Appeal No. 127/2019

Exhibit No.: 18

1. **Shri. Manohar Ramdas Mhatre,**)
Age :- 59 Yrs., Occu.:- Agriculture)
2. **Shri. Sadankumar Ramdas Mhatre,**)
Age :- 67 Yrs., Occu.:- Agriculture)
3. **Shri. Vilas Ramdas Mhatre,**)
Age :- 63 Yrs., Occu.:- Agriculture)
4. **Shri. Moreshwar Ramdas Mhatre,**)
Age :- 59 Yrs., Occu.:- Agriculture)
All R/o. Div, Vadhav,)
Dr. Ramdas Mhatre Hospital,)... Appellants
Tal. - Pen, Dist. - Raigad) (Ori. Defendants)

V/s.

Shri. Ramakant Balaji Gaikwad,)
Age :- 79 Yrs.,Occu.- Agriculture)
R/o. House No.1111,Maruti Naka,)...Respondent
Tal. - Alibag,Dist. Raigad) (Ori. Plaintiff)

**Appeal against Judgment and Decree dt.
09.10.2019 passed by Jt. C.J.J.D.
Pen in Reg.C.S. No. 32/2004.**

Appearances :-

Advocate for Appellant - Shri. D.N.Joshi
Advocate for Respondent - Shri. G.G.Patil

JUDGMENT

(Delivered on 01/04/2026)

This civil appeal u/sec. 96 r/w. Order 41 Rule 1 of CPC is filed by Appellant/original Defendants against the Judgment and Decree dt.09/10/2019 passed by Ld. Jt. Civil Judge J. D., Pen, in Regular Civil Suit No. 32/2004 whereby the suit is decreed with costs and counter claim of the Defendant is rejected with costs.

Appellants are the original Defendants whereas Respondent is original Plaintiff. Hereinafter they are referred as per their original status in the suit.

02. **Brief facts giving rise to this appeal are as under -**

Suit for declaration, removal of encroachment possession and injunction was filed by Respondent/Original Plaintiff.

a) Gat No.628, admeasuring 0H 17.7R situated at Vadhav, Tal- Pen, Dist- Raigad, is hereinafter referred as the 'suit property'. Plaintiff and the defendant are adjoining owners.

Original Defendant is the owner of Gat no. 629 admeasuring OH 33.5 R, situated on the west of the Plaintiff's property.

b) It is the case of the Plaintiff that in the month of June 2002, Defendant committed encroachment from west side of around 140 Sq.Mtr. into the suit property of the Plaintiff and erected his wooden compound. Hence, on 24.03.2004, the Plaintiff conducted measurement by TILR, Pen. In the said measurement, it was found that Defendant has committed encroachment of 140 Sq. Mtr. into the suit property of the Plaintiff. He requested the Defendant to remove the said encroachment. However, Defendant failed to do so. Hence, the Plaintiff was constrained to file the present suit.

03. Defendants on service of summons filed their written statement at Exh. 24 and denied the case of Plaintiff. Defendants also filed counter claim in the present suit. According to the Defendants, the Plaintiff has no right to file the present suit. They have purchased Gat no.629 and 631 in the year 1988. At that time, the boundaries of the said properties are fixed. Defendants had put coconut trees on the said boundaries and also erected compound in presence of Plaintiff, adjoining owners and Police Patil. Plaintiff's brother and his sister-in-law did not tell them to remove the said compound. It is contended that the measurement carried out by TILR, Pen on 24.03.2004 is illegal. They have not committed encroachment in the Plaintiff's property. Infact, Plaintiff himself has committed encroachment in their property. Hence, by counter claim they are entitled to recover possession of their encroached property. Moreover, the

Plaintiff has not obstructed the possession of the Defendant over his property since last 15 years, hence they have become owner by adverse possession. It is further contended that the suit is barred by the principle of estoppel, acquiescence and also bad for non-joinder of necessary parties and prayed for dismissal of the suit with compensatory costs.

04. Plaintiff filed reply to the counter claim of the Defendants at Exh.25 and denied the counter claim of the Defendant. Plaintiff has stated he has no knowledge with regard to Defendants having purchased Gat no.629 and 631 in the year 1988. He denied that Plaintiff had erected compound in the presence of the Plaintiff. He has specifically stated that Defendant's have committed encroachment in the suit property in June 2002. Prior to that, they were not in possession of the suit property. Therefore, Defendants have not become owner of the suit property by adverse possession and prayed for dismissal of the counter claim with costs.

05. On the basis of pleadings, issues were framed by then Jt. Civil Judge J. D., Pen at Exh. 98. Same are reproduced herein for the sake of convenience :-

1. Whether the Plaintiff proves that Defendants have committed encroachment in the suit property ? If yes, the extent of the area ?
2. Whether Plaintiff is entitled for possession of the encroached property ?
3. Whether Plaintiff is entitled for the relief of declaration as

prayed ?

4. Whether Plaintiff is entitled for relief of mandatory injunction as prayed ?
5. Whether Defendants have become owner of the suit property by the principle of adverse possession ?
6. Whether Defendants are entitled for the counter claim as prayed ?
7. What order and decree ?

06. After appreciating oral as well as documentary evidence on record, The Trial Court answered Issue nos. 1 to 4 in affirmative and Issue nos. 5 and 6 in negative and decreed the suit with costs, vide judgment and decree dt. 20.11.2008 in R.C.S No. 32/2004 and rejected the counter claim of Defendants with costs.

07. Being aggrieved and dissatisfied with the judgment and decree dt. 20.11.2008 passed by Ld. Jt. CJJD Pen in R.C.S No. 32/2004, Defendants filed Civil Appeal No. 02/2009 in the District Court. Said Civil Appeal No. 02/2009 was allowed and the suit was remanded with directions to measure both properties of Plaintiff and Defendants.

08. After remand of the suit, Plaintiff examined PW 3 Narendra Kanchar, Court Commissioner at Exh. 131. Both parties placed reliance on the earlier recorded evidence and then the Trial Court decreed the suit on 09.10.2019.

09. Being aggrieved and dissatisfied with the judgment

and decree dt. 09.10.2019 passed by Ld. Jt. CJJD Pen in R.C.S No. 32/2004, Defendants filed the present appeal on the grounds more specifically mentioned below -

a] Trial Court did not consider the oral and documentary evidence on record properly.

b] Trial Court committed an error of law in not passing any order on Exh. 113 and also not given directions as per Exh. 113 and therefore, utter injustice is cause to the Appellants,

c] After remanding the matter, Respondent filed application at Exh. 111 and Appellants filed application at Exh. 113 for joint survey. Trial Court with nomenclature "Order below Exh. 111 and Exh. 113" passed order on 05.08.2017, however, infact no order was passed on Exh. 113. Consequently, there is no direction from the Trial Court to the Court Commissioner to consider the averments on Exh. 113 and the Trial Court by allowing Exh. 111 directed for joint survey on the basis of averments in Exh. 111. No court commissioner fee was accepted from Appellants and therefore Court commissioner only measured Respondents property i.e. Gat no. 628 without measuring properties of Appellants i.e. Gat No. 629 and 631. Consequently, there is no compliance of order of the District Court passed in Civil Appeal No. 02/2009.

d] Court Commissioner Shri. Narendra Ramrao Kanchar did not carry out survey properly and wrongly shown encroachment and stated that in view of the following discrepancies, the map is unreliable -

- (i) No area of Gat no. 628, 629 and adjacent gat no. 631 was shown.

- (ii) No lands of Appellants were measured by him and the order of the Trial Court was violated
- (iii) No land of Gat no. 628 was measured in between Eastern boundary and foot way including land occupied for cement construction of Respondent.
- (iv) No area was measured and shown under the road foot way
- (v) No standing trees, bandh, light poles were shown by the Court Commissioner
- (vi) No table and spot and no binoculars were kept in the land of Appellants for measuring the lands of the Appellants.
- (vii) Since there is no middle boundary in between Gat no. 629 and 631 the Court Commissioner ought to have shown Western Boundary of Gat no. 629 on the land itself to the parties but no such attempt was made.
- (viii) No court commissioner has fixed the boundaries of lands of both the parties and therefore the Trial Court ought to have discarded the said map and evidence.

f] Court Commissioner ought to have considered the original map of previous survey numbers as in Gat scheme the same location was kept to the lands of parties. But Court Commissioner did not even carry the tracing of the map of survey number.

g] If the Trail Court would have specifically directed to Court Commissioner to consider averment in Exh.113 and averments in written statement. Due to non-passing of any order on Exh.113, Court Commissioner had taken disadvantage of the said fact and

avoided to measure lands of Defendants. The heading shown in the map is misleading. Actually lands of Appellants were not measured.

h] After considering the defects in the survey carried out by Shri. Narendra Kanchar it is necessary to carry survey through District Superintendent of Land Record.

i] The inferences drawn and conclusion arrived are wrong and erroneous.

j] The Trial Court misstated and misconstrued the provisions of law.

k] The whole approach of the Trial Court is from wrong angle.

10. Heard Ld. Adv. Shri. D. N. Joshi for Appellants/ Original Defendants and Ld. Adv. Shri. G.G.Patil for Respondent/ Original Plaintiff. Perused the records. Following points arise for my determination and I have recorded my findings thereto with reasons thereon as under -

Sr. No.	Points	Findings
1.	Whether Defendants have made encroachment in the suit property as alleged by the Plaintiff ?	...Not Recorded
2.	Whether Plaintiff is entitled for removal of encroachment as prayed ?	...Not Recorded
3.	Whether Plaintiff is entitled for the declaration and mandatory injunction against Defendants as prayed ?	...Not Recorded
4.	Whether Defendants have become owner by adverse possession of the suit property ?	...Not Recorded

5.	Whether interference is called for at the hands of this Court against the Judgment and decree dt. 09.10.2019 passed by Ld. Jt. CJD, Pen in Reg.C.S. No. 32/2004 ?	... in the affirmative.
6.	What Order ?	.. As per final order.

:: REASONS ::

11. Plaintiff Ramakant Balaji Gaikwad examined himself as PW1 at Exh. 37 and also examined Waman Nathu Gondhali Surveyor as PW 2 at Exh.47 and examined PW 3 Narendra Ramrao Kanchar at Exh.131. He also produced documentary evidence viz. 7/12 extract of Gat No. 628 at Exh. 38, 7/12 extract of Gat No. 629 at Exh. 39, Gat book map of Gat No. 628 at Exh. 40, notice issued by Taluka Inspector of Land Records, Pen on 01.03.2004 at Exh. 41. PW 2 in his evidence produced map at Exh. 48, Court Commissioners report at Exh. 31 and Court Commissioners map at Exh. 34. Plaintiff closed his evidence by pursis at Exh. 50.

12. Defendants in answer to the plaintiff's claim examined Defendant no. 1 Manohar Ramdas Mhatre at Exh.56 and produced documentary evidence viz. 7/12 extract of Gat No. 629 at Exh. 57, Consolidation extract of village Vadhav Tal. Pen at Exh. 58. Defendants examined DW 2 Maruti Kashinath Mhatre at Exh.87. He has produced panchnama dt. 30.11.2005 at Exh. 90. Defendants also examined DW 3 Ganesh Shankar Mhatre at Exh. 93. He has produced the photos and negatives at Exh.95.

Defendants closed their evidence vide pursis at Exh.96.

13. In the above said suit initially without framing the charge both parties lead the evidence and therefore the Trial Court framed the issues at Exh.98 and gave opportunity to both sides to lead evidence if they choose so, in view of the issues involved. Thereupon Defendants cross examined the Plaintiff. Plaintiff has chosen not to adduce further evidence. Then Plaintiff and Defendant filed evidence closed pursis at Exh. 101 and 102 respectively.

14. Ld. Adv. Shri. D.N.Joshi had taken me through the records and drawn my attention to the common order below Exh. 111 and 113 and Sec. 105 of CPC and placed reliance on the Judgment of Hon'ble Bombay High Court Aurangabad Bench in case of **Raghunath Kashinath Chavan V/s. Sakharam Maroti Chavan & Ors.** reported in **AIR Online 2019 BOM 52** submitted that measurement are required through TILR or DILR and submitted for remanding the Reg. Civil Suit No. 32/2004 by setting aside the Judgment and Decree dt. 09.10.2019 passed by Jt. Civil Judge J.D., Pen in RCS No. 32/2004.

15. Ld. Adv. Shri. G. G Patil for Respondent submitted that the TILR was appointed as Court Commissioner by the Trial Court. Therefore no fresh order for the appointment of Court Commissioner is required to be passed. He has drawn my attention to order dt. 05.08.2017 passed below Exh.111 and 113 and submitted that Exh.113 has been allowed and just

because there is no specific mention of order below Exh.113 in operative clause it can not be said that order below Exh. 113 is not passed. He further submitted that all measurements before the Court are not contradictory. The encroachment is proved by Plaintiff. He further submitted that Defendants claimed that they became owner by adverse possession, of the suit property. However such stand cannot be taken by Defendants who claims themselves to have purchased the suit property for claiming the adverse possession, the title of other side is to be accepted first. Here the Defendants by taking the plea of ownership by adverse possession has contradicted their own case. He further submits that there is no reason to order re-measurement at the hands of DILR and the demand/requested by Appellants be rejected. He has tried to distinguish the judgment of the Hon'ble High Court cited supra by contending that in the Appeal before the Hon'ble High Court the survey was not conducted. With these submissions he prayed for dismissal for Appeal.

As to Point No. 1 to 4 :-

16. It is not in dispute that the Plaintiff is the owner of Gat No. 628 admeasuring 0H 17.7R and Defendants purchase Gat No. 629 admeasuring 33.5R of village Vadhav, Tal. Pen, Dist. Raigad and that the Plaintiff and Defendants are adjoining owners.

17. It is the case of Plaintiff that Defendants made encroachment in the property owned by the Plaintiff to the extent of 140 Sq. Mtr. When the Plaintiff measured the suit

property on 24.03.2004 by TILR, it was revealed that Defendants have made encroachment in the suit property to the extent of 140 Sq. Mtr. Defendants in their written statement contended that they have not made encroachment as alleged. On the contrary it is the Plaintiff who have encroached upon their land. As indicated above ownership of the properties held by Plaintiff and Defendants is not in dispute. The only question is whether Defendants encroached upon the property of Plaintiff to the extent of 140 Sq. Mtr. and whether the Plaintiff is entitled for removal of encroachment as prayed.

18. During the pendency of the abovesaid RCS No. 32/2004 after remand, Plaintiff took out an application at Exh.111 and Defendants took out application at Exh.113 for joint survey with nomenclature "Order below Exh.113 and 111", was passed by Trial Court on 05.08.2017. However according to the Appellants, though the nomenclature of the order is shown as common order below Exh.111 and Exh.113, infact in the operative order there is no mention about Exh.113 and there are no directions in regard to averments and prayer in Exh. 113. Consequently there is no directions from the Trial Court to consider the averment of Exh.113. Trial Court by allowing Exh.111 directed for joint survey on the basis of averments made in application at Exh.111. No Court commissioner fee has been accepted from Appellants and it seems Court commissioner measured only Plaintiff's property i.e. Gat No. 628 without measuring property of Appellants i.e. Gat No. 629 and 631. Consequently, there is no compliance of order of District Court

in Civil Appeal No. 02/2009. I find substance in the argument of Adv. Shri. D.N.Joshi as the Court commissioner Shri. Narendra Kanchar who was examined by Plaintiff as his witness as PW 3 at Exh.131 has not carried the survey properly and wrongly shown the encroachment. The notable discrepancies in the map are as under :-

- i) No area of Gat No. 628, 629 & adjacent Gat No.631 was shown.
- ii) No lands of Appellants were measured by Court Commissioner.
- iii) No land in Gat No. 628 was measured in between Eastern boundary and foot-way including land occupied for cement construction of the Respondent.
- iv) No area was measured and shown under the road foot-way.
- v) No standing trees, bandh light poles were shown by the Court commissioner.
- vi) No table and spot binocular were kept in the land of Appellants for measuring the lands of Appellants.
- vii) Since there is no middle bandh in between Gat No.629 & 631, the spot Court commissioner ought to have shown Western boundary of Gat No. 629 on the land itself to the parties but no such attempt was done.
- viii) No Court commissioner has fixed the boundaries of lands of both parties.

19. Moreover, Court commissioner has not considered the original map of previous survey numbers as in the gat scheme, same location kept to the land of the parties. Court

commissioner did not even carry the map of survey numbers. If the Trial Court would have specifically directed to Court Commissioner to consider the averments in written statement, the Court Commissioner would not have taken disadvantage of fact of non passing of any order on Exh.113. The Court commissioner seems to have mischievously avoided to measure the land of Appellants and the heading shown in the map is per se misleading as actually land of Appellants do not seem to be measured.

20. In the suit for removal of encroachment, it is necessary to measure both the lands of Plaintiff and Defendant, encroachment cannot be proved only by measurement of one land. Evidence shows surveyor has measured only the properties of the Plaintiff and not of the Defendants. Appellants/Defendants in support of their contention has placed reliance on the Judgment of Hon'ble Bombay High Court in case of **Harsing Kewala Rathod Vs. Ramji Hemla reported in 2008 BCI 111** wherein it has been observed that, Unless both the survey numbers belonging to Plaintiff and Defendant are measured, it is not possible to come to the conclusion that there is encroachment by Defendant over the Plaintiff's land.

21. Hon'ble Bombay High Court, Aurangabad Bench in case of **Raghunath Kashinath Chavan V/s. Sakharam Maroti Chavan & Ors.** cited supra, reproduce para 8 of the judgment in Suleman Khan, which is for the sake of convenience is reproduced herein ;

“8. In cases to determine encroachment, it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent. Oral evidence cannot prove such contentious issue conclusively. In a suit where parties are disputing boundaries of property and one of the parties alleges encroachment made by another party to the suit inside suit property. In such case the plaint map as evidence in respect thereof is vital document for to decide real controversy between the parties finally. This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit in which there is a boundary dispute. The Trial Court as well as 1st Appellate Court which are Court of Facts, are duty bound to ascertain that a map is drawn to the appropriate scale by competent Government official from the office of TILR or DILR, as the case may be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed and boundary dispute is finally settled by producing map in the Court by the plan maker who can prove its genuineness by deposing in support of such plan/map, if it is so necessary in the absence of admission for exhibiting the map. The Trial Court can certainly raise presumption of accuracy and genuineness of such map in view of Section 83 of the Evidence Act if map is drawn by competent authority. (See : Ram Kishor Sen & ors v. Union of India & ors reported in MANU/SC/0052/1965 : AIR 1966 SC 644) Where such vital document is duly produced, proved and established, necessary detailed decree can be follow if there is any encroachment on the suit property. As held by this Court in Vijay Shende's case (supra), in such cases, fact of encroachment may be proved partly by oral evidence although the extent of encroachment cannot be proved in absence of public records without following due procedure emerging from Section 36 and Section 60 of the Evidence Act. In view of this recent judicial precedent referred to above, in the larger interest of justice, when it appears that the trial Court as well as 1st Appellate Court failed to follow proper procedure in this regard to ascertain the boundaries of the suit property”.

22. In the light of abovesaid observations, the

observations made by Trial Court on examination of PW 3 Narendra Kanchar are not acceptable. The length and breadth of the encroachment in the land is not shown. The surveyor who was appointed as Court Commissioner has not measured both lands of Plaintiff and Defendants hence I hold that the work of Court Commissioner is not been done properly. Appellants/ Original Defendants cannot be blamed when there is specific application of Defendants. Hence, I am inclined to remand the case by setting aside judgment/decreed dtd. 09.10.2019 in Reg. Civil Suit No. 32/2004.

23. As regards contention of the Advocate G. G. Patil for Respondent that this court can not take note of the orders passed by the Trial Court in interlocutory stage, if not challenged immediately thereafter. In view of this submissions it is necessary to have glance through Sec. 105 of CPC, as contended by Adv. Shri. D. N. Joshi.

Sec. 105 of CPC provides that - "Save as otherwise expressly provided, no appeal shall lie from any Order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any Order, affecting the decision of the case, may be set forth as ground of objection in the memorandum of appeal".

24. Therefore Id. Adv. Shri. D. N. Joshi is right in saying that the order below Exh.111 and 113 dt. 05.08.2017 can also be questioned in present appeal. Since the Trial Court has not given

specific directions relating to averments and prayer in Exh. 113, the Court Commissioner has not taken into consideration the averments and prayers in the application at Exh. 113. Therefore, I am inclined to remand RCS No.32/2004 to the Trial Court, by setting aside judgment/decreed dt. 09.10.2019. Therefore I do not propose to answer point nos. 1 to 4 which arose for determination before this court. Hence, I answer point nos. 1 to 4 accordingly.

As to Point no. 5 :-

25. The impugned judgment and decree of the Trial Court resulted into miscarriage of justice and there is no alternative left to this court except to remand this matter to the Trial Court with directions to appoint Court Commissioner/Surveyor from the office of DILR for the purpose of local investigation under Order 26 Rule 9 of CPC. Hence I answer point no. 5 accordingly in affirmative.

As to Point No. 6 :-

26. In view of the abovesaid discussion, I proceed to pass the following order:-

:: ORDER ::

1. Reg. Civil Appeal no. 127/2019 is hereby partly allowed.
2. The Judgment and Decree dt. 09.10.2019 passed in Reg. Civil Suit No. 32/2004 by ld. Jt. Civil Judge J. D., Pen is hereby set aside and the suit is restored to the file of the Jt. Civil Judge J. D., Pen for fresh

decision in accordance with law and in the light of observations made above.

3. The Trial court is directed to appoint the Surveyor from the office of DILR having jurisdiction over the village in which suit property is situated for the purpose of local investigation under Order 26 Rule 9 of Civil Procedure Code.
4. Parties are directed to remain present before the Trial Court on 27.04.2026. If defendants failed to appear on that day, Trial Court should issue notice and secure the presence of the both parties by serving notice upon them.
5. Defendants are directed to furnish the fresh application for appointment of court commissioner before the Trial Court within two weeks from the date of appearance of both the parties.
6. Such appointed commissioner shall conduct local investigation in accordance with the provisions of Order 26 Rule 9 of Code of Civil Procedure, after giving due notice to the parties and take the measurements of the properties owned by parties, after taking into consideration the title deeds of the parties, if any and shall also demarcate the boundaries of the property by noting down the actual measurements on the map itself by showing precise and concise area under encroachment, if any, and then shall submit the map and report to the Trial Court, within the period of 2 (two) months thereafter.
7. The Trial Court may give any other suitable directions to the Court Commissioner apart from the prior

directions given in this order, in order to have a appropriate map to resolve the controversy.

8. The Trial Court shall decide the matter as expeditiously as possible and preferably within 6 (six) months from the receipt of the report of Court Commissioner.
9. If Defendants do not submit the application for appointment of Court Commissioner within aforesaid period, the decree of the Trial Court passed on 09.10.2019 shall stand confirmed.
10. R & P of Reg. Civil Suit No. 32/2004 be sent back to the court of Jt. C.J.J.D. Pen.

Alibag.
Date :-01.04.2026

Sd/-
(R. D. Sawant)
Principal District Judge,
Raigad-Alibag.

CERTIFICATE

I affirm that, the contents of this PDF file is same word to word, as per the original judgment.

Name of Steno :- S. S. Puro (Grade-I)

Name of Court :- Principal District Court,
Raigad-Alibag.

Judgment Dictated on :- 01.04.2026

Judgment signed by P.O. on :- 04.04.2026

Judgment uploaded on :- 04.04.2026

