

**IN THE SUPREME COURT OF INDIA**  
**(CIVIL APPELLATE JURISDICTION)**

**SPECIAL LEAVE PETITION (CIVIL) NO. \_\_\_\_\_ OF 2024**

(Against the final judgment and order dated 12.06.2023  
passed by the High Court of Judicature at Bombay in  
Second Appeal No. 626 of 2022)

**WITH PRAYER FOR INTERIM RELIEF**

IN THE MATTER OF :

Shri. Ramraj Khakhanu Yadav

(Since deceased)

Shri. Ramprasad Khakhanu Yadav

...Petitioner

V/s

Shri. Sakharam Jagannath Nerurkar

(Since deceased)

Shri. Shridhar Jagannath Nerurkar & Ors. ...Respondents

WITH

**I.A. NO. \_\_\_\_\_ OF 2024**

(Application for Condonation of Delay)

WITH

**I.A. NO. \_\_\_\_\_ OF 2024**

(Application for exemption from filing Official Translation)

**PAPER BOOK**

(FOR INDEX KINDLY SEE INSIDE)

**ADVOCATE FOR THE PETITIONERS:**

**DR. RAVINDRA S. CHINGALE**

**“A”**

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Shri. Shridhar Jagannath Nerurkar & Ors. ...Respondents

## **OFFICE REPORT ON LIMITATION**

1. The Petition is/are within limitation
2. The Petition is barred by time and there is delay of .....days in filing the same against order dated ..... and petition for Condonation of .....days delay has been filed.
3. There is delay of ..... days in Refiling the petition and petition for Condonation of ..... days delay in Refiling has been filed.

BRANCH OFFICER

NEW DELHI

Dated: 13.02.2024

they have cow shed (stable) in it for doing business of milk.

- iii. The said suit was decreed and it was directed to petitioner to remove encroached area as per map Exh. 61.
- iv. Petitioner filed R.C.A. no. 29/1996 and the same was dismissed with modification in the decree that the map at Exh. 61 was made part of decree.
- v. Petitioner filed Second Appeal no. 137/1999 before the Hon'ble High Court. The High Court recorded submissions of both the parties and recorded that 'decree passed by the two courts below relates to unauthorized construction of 13 Sq. mtr.' (date of judgment 07.04.1999).
- vi. In view of the para 2 and 3 of the order of the High Court in aforesaid second appeal it is clear that both the parties were agreed that the area shown in map exh.61 is more than 13 sq. mtr. However, the decree was limited to 13 sq. mtr. and therefore the respondents relinquished their

rights over other encroached area. The order of Hon'ble High Court merged with decision of trial court and first appellate court and it becomes conclusive and binding precedent.

- vii. Respondent filed execution petition and the same is pending.

**B. Second Round of Litigation:**

- i. Respondent immediately filed R.C.S. no. 333 of 2000 on 02.05.2000 for declaration, possession and perpetual injunction; same like earlier suit.
- ii. In this suit it was alleged that the petitioner had encroached 25 sq. mtr. in addition to earlier 13 sq. mtr.
- iii. However, it is the case of the petitioner that they are in possession of 2.2 Guntha of S. No.17/5 for more than 50 years.
- iv. The said suit was decreed and petitioner filed appeal (no. 53/2015). The appeal was dismissed and petitioner filed Second Appeal no. 626 of 2022 and the same was also dismissed.

It is submitted that the respondent filed application for appointment of commissioner to prove map at Exh.61 and also to ascertain exact location and boundaries of encroached area. The said application was rejected by trial court and the order was confirmed till this Hon'ble Court.

It becomes very clear that respondents could not prove the exact location of the encroached area and substantial question of law for general importance that; whether the Court can pass decree on the basis of vague description of property? Who has responsibility to prove encroachment? Is it not the duty of plaintiff to prove his case? Whether plaintiff has proved encroachment in absence of clear proof of map?

Whether the subsequent suit is barred by principle of Res- judicata and estoppel as stated in S.11 of C.P.C.?

Whether respondent has relinquished his rights other than 13 sq. mtr. in the background of order dated 07.04.1999 passed by Hon'ble High Court in Second Appeal

no. 133/1999? Whether the suit is barred by O.2 R.2 of CPC sand O.7 R.3 Bombay amendment?

Following the principles of judicial discipline, lower or subordinate Courts do not have the authority to contradict the decisions of higher Courts. In the current case, the Trial Court and the High Court, in the second round of litigation, violated this judicial discipline by adopting a position contrary to the High Court's final judgment dated 07.04.1999, from the first round of litigation.

Respondents are claiming that they have given the suit land on lease to one Trust. Whether the respondents can file suit on behalf of trust in absence of valid permission from Charity Commissioner to the trust?

Whether the courts below failed to appreciate that the depositions by petitioner (DW1) that he was having possession over more than 40 sq. mtr. was in the context of statement of petitioner that he was in possession of 2.2 Guntha. Thus, the inference drawn by court that petitioner

Exhibit-61. The said judgment of the High Court is dated 7th April 1999.

**5.** The Respondents i.e. Plaintiffs filed Regular Civil suit No. 333 of 2000 on 2nd May 2000 contending that the putting up of the shed like structure on the portion of the suit land by the Defendants i.e. present Appellants to the extent of 25 sq. mtrs. approx. (in furtherance to the earlier encroachment of 13 sq. mtrs.) is illegal and unlawful and praying for possession of the same. In the plaint, it has been stated that the said encroachment was done in the first week of April 2000 and stated that earlier encroachment of 13 sq. mtrs. was extended by further encroachment of 25 sq. mtrs. approx. The learned Trial court, by judgment and decree dated 19th March 2015 recorded a finding that the Plaintiffs are the owners of the suit property and that the Plaintiffs proved that the Defendants have made an encroachment of 25 sq. mtrs. of the suit property. While decreeing the suit, the learned Trial Court has taken into consideration the cross-examination of DW-1 i.e. Ramprasad Khakhanu Yadav, wherein he admitted about the encroachment of 40 sq. mtrs. i.e. 25 sq. mtrs of the present encroachment and 13 sq. mtrs. of the earlier encroachment. He has also admitted that he has not removed the encroachment of 13 sq. mtrs. about which decree has already been passed.

**6.** Mr. Damle, learned Senior Counsel fairly admitted that the said 13 sq. mtrs. encroachment is still in existence and execution is going on. The learned First Appellate Court, by judgment and decree dated 20th May 2022 dismissed the appeal by relying on the said statement of Defendant No.1 in the cross-examination in paragraph 14 that the Plaintiffs have encroached on 40 sq. mtrs. land.

**7.** Before considering the substantial question of law raised by Mr. Damle, the learned Senior Counsel, it is required to be noted that Mr. Damle has fairly admitted that the suit property is of the ownership of Plaintiff Nos. 1 to 6 and Defendant No.3. His only submission is that the provision of Order II, Rule 2 of Code of Civil Procedure, 1908 bars the fresh suit if the Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, then he shall not afterwards sue in respect of the portion so omitted or relinquished. He also submitted that Order VII, Rule 3 of CPC (Bombay Amendment) which specifies that where the subject-matter of the suit is an immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaintiff shall specify such boundaries or numbers. In case of encroachment a sketch showing as far as possible, the location



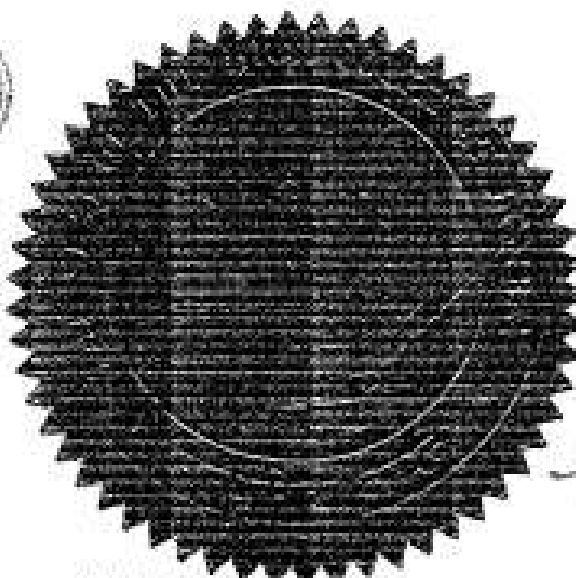
and extent of encroachment shall also be filed alongwith the plaint. He therefore submitted that the suit is also liable to be dismissed for non-compliance of Order VII, Rule 3 of CPC.

**8.** As far as the contention regarding Order II, Rule 2 of CPC is concerned, Mr. Damle, learned Senior Counsel stated that his objection to the plaint is on the basis of Order II, Rule 2(2) CPC, which is regarding relinquishment of part of claim. He fairly submitted that Order II, Rule 2 (1) and (3) CPC is not applicable to the present case. Said Order II, Rule 2(2) of CPC states that where a Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. In the present case, in fact the contention of the present Appellants in the earlier round of litigation is that although the plaint was only with respect to 13 sq. mtrs., the decree has been passed with respect to larger portion and therefore the learned Advocate appearing for the Respondents i.e. Plaintiffs restricted their claim to 13 sq. mtrs., which is the suit property. Therefore, the objection of the learned Senior Counsel will not apply to the present case. In the earlier round of litigation, the suit property or the encroachment mentioned in the suit was only with respect to 13 sq. mtrs. and as the decree was passed making reference to the map at Exhibit 61, which is the encroachment showing

**12.** It is further admitted position that although the decree regarding said encroached portion of 13 sq. mtrs. was granted on 29<sup>th</sup> April 1989 in a suit which has been filed in 1985 and which has attained finality by judgment and decree dated 7<sup>th</sup> April 1999 passed by the learned Single Judge in Second Appeal No. 137 of 1999 yet the Appellants are in possession of said 13 sq. mtrs. Therefore, the present Second Appeal is required to be dismissed with compensatory cost. Accordingly, the Second Appeal is dismissed with cost of Rs.10,000/-.

**13.** In view of dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also dismissed.

**14.** At this stage, Mr. Damle, learned Senior Counsel requested for stay of the decree passed by the learned Trial Court as confirmed by the learned First Appellate Court. However, in view of the facts and circumstances of the present case, the Appellants are not entitled for any stay order and therefore the said request is rejected.



Sd/-  
(MADHAV J. JAMDAR, J.)

**TRUE COPY**

*Sd/-*  
11/12/23  
(Mrs. S. S. Kadam)  
Assistant Registrar  
High Court, Appellate Side  
Bombay 400 032

10074  
11/12/23  
*[Signature]*

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(Since deceased) Shri. Ramprasad Khakhanu Yadav ...Petitioner  
V/s  
Shri. Sakharam Jagannath Nerurkar  
(Since deceased)  
Shri. Shridhar Jagannath Nerurkar & Ors. ...Respondents

**AFFIDAVIT**

I, **Shri. Ramprasad Khakhanu Yadav**, son of Khakhanu Yadav, Age 80yrs Occ.:Milk Vendor, R/o Yadav Tabela, Manpada Road, Near Pandurang Vidyalay, Dombivli (E), Tal. Kalyan, Dist. Thane, Maharashtra - 421201, do hereby solemnly affirm and state as follows:

1. I say that I am one of the petitioners in the above-mentioned Special Leave Petition. I say that I am conversant with the facts of the present case and as such I am able to depose thereto on behalf of Petitioners.
2. I say that I have read the contents of accompanying Special Leave Petition at paragraphs 1 to 8 at page 12 to 35 and the synopsis and list of dates at pages B to V and the I.A.s and the same are true to my own knowledge and belief.
3. I say that the documents as Annexure P/1 to P/ 13 annexed to the SLP are true copies of their respective originals and are part of the record of the courts below.
4. I say that the petitioner has not filed any other petition against the order impugned herein. I have understood the contents of the petition in my mother tongue and for that I am putting my signature herein below.

DEPONENT

**VERIFICATION**

Verified at Bhadoli dated this 15th of December, 2023 that the contents of this affidavit are true and correct to the best of my knowledge and belief and nothing has been concealed there from.

DEPONENT

Posting" were received by them and upon receipt of the said notices, the said Defendants had dismantled the said addl. Shed and, therefore, the Plaintiffs did not take any steps and/or action for removing the further encroachment.

12. In the first week of April, 2000, the said Defendants have again extended the earlier encroachment of 13 Sq. Mtrs., by putting up wooden poles and asbestos sheets thereon to the extent of further 25 Sq.Mtrs. approx.

The said Defendants have also put up the temporary pandan of bamboss and cloth/ linen to the extent of further 25 Sq.Mtrs., and have also allowed some strangers to use the same for selling watermelons.

13. The Plaintiffs have to \_\_\_\_\_ filed a Darkhast for the execution of decree dated 29.04.1989 passed by the Court in R.C.S. No.196/85, however, for the further encroachment to the extent of 25 Sq.Mtrs. as shown on the map of the suit land herewith filed by the Red colour boundary line, the Plaintiffs shall be required

Defendants deny that they have encroached upon the land belonging to the Plaintiffs as alleged. The said Defendants put the Plaintiffs to the strict proof thereof.

7. With reference to Para No.6 of the said suit, the contents thereof are substantially correct.
8. With reference to Para No.7 of the said suit, the said Defendants state that it is a matter of records and the Plaintiffs are put to the strict proof thereof.
9. With reference to Para No.8 of the said suit, the said Defendants strongly deny that they have encroached upon any part of the suit land belonging to the Plaintiffs as alleged by putting up 4 wooden poles and asbestos sheets thereon. The said Defendants strongly deny that they have encroached upon the land admeasuring to the extent of 40 sq.mtrs. as alleged by the Plaintiffs. The Plaintiffs are put to the strict proof thereof. The said Defendants deny that they have dumped the brickbats on the portion of suit land with a view to carry out some sort of

have been shown by Red Colour & Blue Colour <sup>Res</sup> respectively.

As the author of the Map is now no more, he could not be examined on behalf of the Plaintiffs as their witnesses and the said Map, therefore, could not be exhibited and proved. The said Map was drawn on the basis of the Map of the suit land which was at Exh. 61 in the R.C.S. No: 196/85 and therefore identical with it.

The certified copy of the said Map at Exh.61 in the said R.C.S.No: 196/85 has been produced in this suit and is exhibited at S.No. 128. As the said certified copy is the Xerox copy of the original Exh. 61, the colour of the encroachment etc., thereon are not seen (in the certified copy). The record and proceedings of the R.C.S. No. 196/85 needs to be ordered to be brought and produced in the matter.

The Defendant Ram Prasad has admitted in his cross that he had his construction having an area of more than 40 Sq.Mtrs on the suit land. The Plaintiffs have been declared and accordingly admitted to be the owners of the suit land. It is the contention of the Plaintiffs that there was earlier encroachment by the Defendants on the suit land to the extent of 13 Sq.Mtrs., which was ordered to be removed, and meanwhile the Defendants have committed the further encroachment to the extent of 25 Sq.Mtrs, and this suit has been instituted for requiring the Defendant Nos. 1 & 2 to remove the said further encroachment. Admission as aforesaid of the Defendant Ramprasad Yadav substantiated the contention of the Plaintiffs. The Map filed on record showing the further





Reg. Civil Suit No.333/2000.

Order below Exh.140

1] This is an application filed by plaintiff under order XXVI rule 9 of C.P.C. for appointment of court commissioner. The first prayer in the application is to call the R & P of R.C.S.No.196/1985. The second prayer made in this application by the plaintiffs for appointment of T.I.L.R. to ascertain the exact location and extent of encroachment made by defendants over the suit property.

2] It is submitted by advocate for plaintiffs that in the earlier suit R.C.S.No.196/1985 filed against the same defendants decree to the extent of 13 sq. meter is passed by the Court which is confirmed upto the Hon'ble High Court. It is submitted that subsequently defendants made further encroachment to the extent of 25 sq. meters. Besides the earlier encroachment to the extent of which the decree has been passed in their favour. According to plaintiff to the extent of the further encroached area he has filed this suit. The encroached area is shown in the map filed alongwith list Exh.3 in red and blue colour respectively. It is further submitted that the certified copy of the map in R.C.S.No.196/1985 is placed on record at Exh.138. The author of the map (Exh.138) is no more. Hence, it is not possible for plaintiffs to examine him and prove the same. It is further submitted that in the certified copy of the map (Exh.138) the encroached area is not shown by the colours. Advocate for plaintiff then drew my attention to Exh.129 cross-examination of Ramprasad particularly to

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Reason

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para 14 and submitted that he also admitted that approximately he made construction on the area of 40 sq. meters and therefore, according to him in order to brought on record actual position the appointment of T.I.L.R. is necessary in this case. In support of his above submission he relied on -

1) Ushabai V/s. Wasudeo and others reported in 2004(3) Civil LJ 371, wherein it is held that :-

" In any case, in which there is a dispute about an encroachment or dimension of site, the first essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same and subsequent reference in the pleading or judgment to place the mark on a map should be referred to this map which must be attached to the decree and signed by the Judge. "

2) S. Singh Reddy (died) and others V/s. K.Ramchandra Reddy reported on 2006(3) Civil LJ 559, wherein it is held that :-

" The principles relating to the appointment of Commissioner though well settled quite often Courts would be coming across such applications. It is not a case where at a very belated stage the application had been moved. The evidence of the plaintiff's side had been over and at the stage of the defendants' evidence, this application was moved. Apart from this aspect of the matter, clear stand had

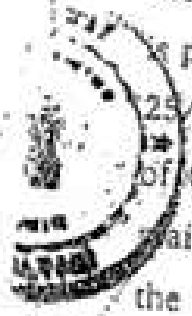


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been taken even in the written statement relating to the identity of the property and the boundaries being wrong boundaries. Apart from this aspect of the matter, P.W.1 himself in cross-examination deposed that he had no objection for appointment of Commissioner for the purpose of measuring the land within the specified boundaries."

3] Per contra, Advocate for defendant submitted that the application is filed at belated stage. It is submitted that the suit is filed on 2<sup>nd</sup> May, 2000. He submitted that the plaintiff has filed his evidence close pursis at on 19/03/2013. Thereafter defendant has filed his evidence close pursis on 18/04/2013. Thereafter the matter is posted for final argument on 15/06/2013. On the next date i.e. on 25/06/2013 the plaintiff has moved this application for appointment of Court Commissioner. It is submitted that the map filed by the plaintiff at Exh.3/3 is not exhibited and therefore, in order to fill up the lacuna in the evidence plaintiffs have moved this application at very belated stage. It is further submitted that when the matter is posted for final arguments the plaintiffs have no right to move application seeking appointment of Court Commissioner to measure the land. It is further submitted that if the Court Commissioner is appointed as prayed for then definitely according to him it will amount to collection of evidence through Court machinery and therefore, it is not permissible under the law. Advocate for defendants submitted that application be rejected with cost.



*[Signature]*  
06.7.13

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4) In support of above arguments he relied on -

1) Satish Agarwal and other V/s. Tirth Singh reported in 1996 A I H C 1761, wherein it is held that :-

" It appears to me as the record shows that from the time of filing of written statement it was known to the defendants petitioner-landlord about the position of the tenancy and whether the plaintiff-tenant was a licensee in respect of plot No.21. Even from the deposition of the plaintiff i.e. P.W.1 it was extract from him in his cross-examination held on 27-5-93 that the plan is a correct one, as annexed to the plaint and the challenge was thrown to that effect in cross-examination. So that position was known even in the month of May, 1993, but the defendant sat idle over this matter for the purpose of bidding time. He allowed the matters to go on and even after the stage of evidence when the matter awaiting arguments he came forward with an application for local investigation. In my view, this is nothing but to fill up the lacuna in the evidence of the defendants landlords. In other words, for the purpose of fishing an evidence, the defendants could not supply evidence and according to the decision of that Court in the case of Thane Institution of Engineers (India) (Supra) such practice should not be allowed if this is for the purpose of fishing out evidence. I am not unmindful that the case relied is on the point of Order 39, Rule 7 of the Code of Civil Procedure but that principle can be applied even in case of local investigation under Order 26, Rule 9 of the Code of Civil Procedure and for that purpose the principle should be extended. As it is a ploy to protract the limitation. "



2) Smt. G.Ammavva V/s. Smt. Gowramma reported in 2003 A I H C 55, wherein it is held that :-

" Farther, it is significant to note that in the instant case, the application was filed by the respondent at a belated stage when the evidence was concluded and the matter was listed for arguments. Therefore, I do not find any justification to sustain the impugned order passed by the trial Court, because there should be some finality in the cases. In the instant case, when the pleadings are completed, the evidence of both sides are completed and matter was listed for hearing, instead of proceedings with arguing the case, the respondent has filed an application for appointment of Commissioner just to drag on the litigation and this fact is not at all disputable on the basis of the material facts available on file. "

3) B.S.Nazir Hassan Khan V/s. Aswathanaravana Rao and others reported AIR 2004 Karnataka 92, wherein it is held that :-

" The present application has been filed on 2-11-2000 i.e. three weeks after the trial has reached the stage of finality and the case was fixed for arguments. To my mind, it is necessary that all applications of this type even if they are bona fide and genuine, have to be filed at a proper point of time in the proceedings. This is very necessary also from the point of view of the stage of the proceedings because the learned trial Judge is perfectly right when he pointed out that if this application were to be entertained, even assuming that was the position, it would mean that the trial which has reached the argument stage would get dilated, evidence will have to be reopened and all the procedures from that stage onwards would

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again have to be recommenced. The law does not permit such ill-timed applications which would only have the effect of disrupting the trial and dilating the proceedings. The Courts have been virtually struggling to ensure that civil proceedings are heard and disposed of within a reasonable time and applications of this type only disrupt the proceedings and dilate them. "

5] At the out set it is important to take note that the present suit is filed by the plaintiffs for removal of encroachment on the suit land to the extent of 25 sq. meters. At Exh.3/3 the plaintiff has filed hand sketch map in support of his case. Said map is not proved and got exhibited during the course of evidence. From the record it reveals to me that defendant No.2 has filed his evidence close pursis at Exh. 133 on 18/04/2013 and the matter is posted for final argument. Later on 25/06/2013 present application is moved by the plaintiff. After the defendants' evidence closed and matter is posted for arguments, the plaintiffs have placed on record the certified copy of map prepared by the surveyor in R.C.S.No.196/1985 at Exh.138. Document being certified copy same is marked exhibit number. So far the admission given by Ramprasad Yadav in his cross-examination (Exh.129 para 14) I find that said admission will not be relevant consideration for appointment of Commissioner under Order 26 rule 9 of C.P.C.

6] In the application plaintiff specifically stated that Cadastral surveyor who prepared a map Exh.138 is no mere, hence, he could not examine him in this proceeding. I find that in the Evidence Act

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there is provision to prove the contents of document/map by examining the other persons in whose presence the Cadastral surveyor has carried out the work and prepared his report. Even the plaintiff is in position to examine the person accompanying with the Cadastral surveyor from his office at the relevant time. No where in the application it has been stated by the plaintiff that Cadastral surveyor alone visited property and no one from the DILR office was accompanied with the Cadastral surveyor when he carried out the work. After the matter is posted for final argument the plaintiff has placed on record certified copy of the map Exh.138 in this proceeding. Had it been happened that during the course of evidence of plaintiff

He has filed the certified copy of the map from R.C.S.196/1985 and shown his inability to examine the person who has prepared the map and at relevant time and sought this relief then the matter would have been different. At the fag end of the proceeding plaintiff has moved this application I find that explanation offered by the plaintiff in the application is not at all justified and proper. As the suit is for removal of encroachment, I find that at this stage T.I.L.R. is appointed as Court Commissioner as prayed for then definitely it will seriously prejudice rights of the defendants. Apart from this I find that it will amount to collection of evidence through the Court machinery. The burden to prove the encroached area is on the plaintiff. Therefore, plaintiffs cannot seek any help or assistance from the Court to prove their case.

7) I find that according to plaintiffs defendants have made

  
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additional encroachment on area 25 sq. meters. Considering the pleadings in the plaint, I find that the map prepared by Cadastral surveyor in earlier proceeding R.C.S.196/1985 will not be helpful to plaintiffs to prove additional encroachment of 25 sq. meters. On this ground also I find the one of grounds pleaded in this application that earlier Cadastral surveyor is dead is found not justified to appoint a fresh Cadastral surveyor in this suit.

8) Advocate for plaintiff has given much stress in the word "elucidate" used in order 26 rule 9 of C.P.C., I find that if the Court Commissioner as prayed is appointed at this stage then definitely after measurement of the suit property the facts which will merge in respect of the alleged encroachment will be different. Thereafter again there will be amendment and proceeding will be start from the initial stage. As I have already observed that under the garb of word "elucidate" plaintiffs cannot use the Court machinery to collect evidence and to prove the suit claim in support of encroachment. Admittedly there is no boundary dispute between the parties. ~~is it~~ very specifically pleaded by the plaintiff that defendant had further made encroachment on 25 sq. meter on the suit land. Therefore, I find no merit in the argument advanced by the Advocate for plaintiff. The facts in 2006(3) Civil L.J.559 are totally different from the facts in the present case. In the supra case the defendant has moved the application at the stage of his evidence that is not the fact in the present case. The question of accuracy of the map filed by the

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Reg. Civil Suit No. 333/2000

plaintiffs has not raised by the defendant up till now as plaintiffs have not examined Cadastral surveyor and proved the contents. Therefore, the aforesaid point did not arise in this matter. Therefore, I find that ratio laid down in 2004 (3) Civil L.J. 371 is not applicable in the case in hand. On the contrary, I find that the plaintiff has moved this application at belated stage only to fill up lacuna in his evidence. Considering the facts and ratio laid down in 1996 A I H C 1761, 2003 A I H C 55, AIR 2004 Karnataka 92 with the facts of case in hand I find that facts are identical. Hence, I find that the ratio laid down therein are applicable to the case in hand. I find no merit in the application. Hence, following order is passed :-

## Order

1. Application is rejected with cost.

Kalyan.

Date :- 06/07/2013.

(D.D. Kurulkar)

Jt. Civil Judge, J.D., Kalyan.



आवाकिल मज कायमान्याची भर  
पडविली व न्यायालयात दाखल झाली 06/07/13

वकील

अशोक

वकील अशोक  
वकील अशोक अशोक, कल्याण

9/6/13

H.C  
dismiss

**16]** In his cross-examination he deposed that he has gone through the 7/12 extract of suit land and he is not aware whether its area is not more than 1326 sq.yards. He further deposed as per his contention both the defendants are in possession of 2.4 gunthe land of survey No.57/1 and apart from this they are also in possession of more than 2 gunthas of land of suit land survey No.17, Hissa No.5. So far as, this deposition is concerned defendant Nos. 1 & 2 have not filed any document on record to show the same that they are the lawful owners and possessors of survey No.57/1. No doubt survey No.57/1 is not the suit land but it is further contention of the defendants that the said land is adjacent to suit land and therefore, they are also in possession of 2 gunthas of land of suit land i.e. survey No.17, hissa No.5.

**17]** Before discussing the evidence i.e. oral as well as documentary adduced by both the parties it is necessary to go through the earlier litigation i.e. RCS No.196/85 filed by present plaintiffs against defendant Nos. 1 & 2 for removal of encroachment of 13 sq.mtrs. over suit land. The certified copy of decree in RCS No.196/85 is at Exh.163. On perusing the said copy it reveals that, the said suit was decreed by the trial Court. Being aggrieved by this judgment present defendants preferred appeal No.29/1996 in the Court of Hon'ble District Judge, Kalyan. The said appeal was dismissed and the judgment in RCS No.196/1985 was confirmed with slight modification that, the map produced on record at Exh.61 shall form part and parcel of the said decree. The certified copy of judgment in



chief-examination at Exh.70 has deposed on oath that, in the year 1978 or thereabouts defendant Nos.1 & 2 have unauthorizedly and illegally encroached upon the suit land to the extent of 13 sq.mtrs and they were also mischievously throwing and dumping cattle dung on the suit land. He also deposed that, in the aforesaid circumstances they filed RCS No.196/85 against defendant Nos. 1 & 2 for declaration, possession and injunction and direction defendants to remove the said encroachment. He further deposed that, said RCS No.196/1985 was decreed and it was declared that, plaintiffs were the owners of the suit land and present plaintiff No.11 is lessee in respect of the suit land. He further deposed that, defendants were also directed to deliver the peaceful possession of encroached portion to the present plaintiffs. He also deposed that, the appeal preferred by defendant Nos. 1 & 2 bearing Civil Appeal No.29/1996 and second appeal in the Hon'ble High Court were dismissed and the judgment of the Trial Court was confirmed.

**20]** He further deposed that, in the first week of April, 2000 defendant Nos.1 & 2 have extended the earlier encroachment of 13 sq.mtrs. by putting wooden poles and asbestos sheets, polythene sheets thereon to the extent of further 25 sq.mtrs. approximately. He also deposed that, defendants allowed some strangers to use the same place for selling watermelons. He also deposed that, by extending earlier encroachment of 13 sq.mtrs. to the extent of 25 sq.mtrs. of the suit land their rights over suit land is being jeopardized. In his cross-examination some questions in respect of lease deed which was executed between plaintiff Nos.1 to 7 and plaintiff No.11 Sane Guruji

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- iii) that the learned Judge grossly erred in law in coming to the conclusion that the Defendants have encroached upon a portion admeasuring 25 sq. metres of the suit property.
- iv) That the learned Judge ought to have held that the Respondents failed to prove encroachment by the Appellants on the suit property.
- v) that the learned Judge of the trial Court erred in law in not considering the Exhibit 180 and the Order passed below it by the Hon'ble Court.
- vi) that the learned Judge ought to have held that since the Respondents/Plaintiffs admittedly failed to prove the Plan and the alleged encroachment, the Respondents / Plaintiffs failed to prove encroachment by the Appellant on the suit property.
- vii) The learned Judge of the trial Court lost sight of the fact that since the Respondents admittedly failed to prove any encroachment on the suit property, they filed an application for appointment of Commissioner to collect evidence of encroachment, if any, on the suit property, the said application Ex. 180 was rejected by the trial Court, Petition being Writ Petition No. 7709 of 2013 preferred against the said Order was dismissed in limine by the High Court of Judicature at Bombay and Special leave Petition No. 953 of 2014 was also rejected by the Supreme Court of India on 27th January, 2014 and the Order passed by this Hon'ble Court has reached its finality with the result that the fact remaining that the Respondents have failed to prove any encroachment much less 25 sq. metres on the suit property by the Appellants.

practised a fraud upon the Hon'ble Court stating that they are the owners of the land admeasuring 1323 sq. yards.

- xiv) It ought to have been held that the Respondents failed to prove that they are the owners of the suit property admeasuring 1323 sq. yards.
- xv) The learned Judge did not follow the rulings of our High Court as well as that of the highest Court of law of the land, with the result that erroneous decree came to be passed against the Appellants.
- xvi) The learned Judge, it appears, has first come to the conclusion that the Respondents' suit is required to be decreed and after having arrived at such a conclusion for that purpose went on assigning reasons which are not borne out by the evidence on record nor can be said to be judicious reasoning as required by legal theory.
- xvii) Order regarding costs is wrong. The learned Judge ought to have framed issues properly.
- xviii) It is submitted that the entire reasoning given by the learned Judge is fallacious findings are perverse and are liable to be set aside by this Hon'ble Court in reappreciating the entire evidence, depositions and also the reasoning given by the learned Judge of the trial Court.
- xix) The learned Judge ought to have held that the suit filed by the Respondents is filed only with a view to cause maximum harassment to the Appellants with an intention to submit them to the Respondents' illegal and unwarranted demands.
- xx) The learned Judge ought to have answered all the issues in favour of the Appellants but instead thereof the learned Judge has given reasons which cannot stand to the test of