

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

SECOND APPEAL NO.277 OF 2012

Sanjay Vasant Wani,
Age 35 years, Occu.Agriculture,
R/o Nagardeole, Taluka Pachora,
District Jalgaon

..Appellant
(Orig.Defendant)

Versus

Anandsingh Dagadu Patil,
Age 65 years, Occu.Agriculture,
R/o Nagardeole, Taluka Pachora,
District Jalgaon

..Respondent
(Orig.Plaintiff)

Mr M.M.Bhokarika, Advocate for appellant
Mr V.B.Patil, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 6th January 2015

PER COURT

1. This second appeal is by original defendant.
2. The respondent herein has filed Regular Civil Suit No.3/1996 before the Joint Civil Judge, Junior Division, Pachora for declaration and perpetual injunction. It is claimed by the respondent - plaintiff that he is owner of land bearing Block No.54/2 whereas the defendant - appellant is owner of land Block No.55/1. According to the plaintiff, as there was incorrect measurement qua the boundary marks, he filed suit for declaration and perpetual injunction on the ground that the measurement carried on 15th November 2014 and boundary marks demarcated on 1st September 1995 are incorrect and has prejudice to the rights of plaintiff - respondent.

3. The said claim preferred by the plaintiff was resisted by the defendant by filing written statement at Exh.25.
4. According to defendant, the measurement was carried out on 15th November 1994 and demarcation of boundary marks on 1st September 1995 pursuant thereto was correct.
5. The defendant, as such denied the entire claim of the plaintiff.
6. Having regard to the rival pleadings of the parties on record, the trial Court framed the following issues and answered accordingly.

Issues	Findings
1. Does the plaintiff proves that the neem trees are standing on the common boundary of fields Gat No.54/2 and 55/1 ?	In the affirmative
2. Does the plaintiff further proves that the measurements taken by measurer on 1.9.1995 are incorrect ?	In the affirmative
3. Does the plaintiff further proves that there is danger of the trees being sold or cut-down by the defendant ?	In the affirmative
4. Whether the plaintiff is entitled for any relief as sought for ?	In the affirmative
5. Whether the defendant is entitled for compensatory costs ?	In the negative
7. Learned trial Court was pleased to decree the suit of the plaintiff observing that the measurement carried out on 15 th November 1994	

and demarcation of boundary marks on 1st September 1995 is incorrect. The learned trial Court also perpetually restrained the defendant from cutting or disposing of 88 neem trees and other trees standing on the common boundary of land Block No.54/2 and land Block No.55/1 at village Nagardeola, Taluka Pachora, District Jalgaon i.e. the respective land owned by the plaintiff and defendant.

8. An appeal carried by the present appellant to the Court of learned District Judge, Jalgaon vide Regular Civil Appeal No.151 of 2003 suffered the same fate, as such the present second appeal.

9. Learned Counsel for the appellant – defendant Shri Bhokarikar has argued the present second appeal at length and has taken me through the evidence of Cadestral Surveyor i.e. plaintiff's and defendant's witness. In addition to above, he has also invited my attention to the legal infirmity that the simplicitor suit for the injunction is not tenable unless the declaration is sought, as according to him there cannot be injunction against the true owner of the property.

10. In addition to above, learned Counsel for the appellant submits that the appellant has moved an application being Civil Application No.5910 of 2012, for appointment of Court Commissioner in accordance of provisions of Section 75 read with Order XXVI, Rule 9 of the Code of Civil Procedure before this Court. He submits that similar attempt on his part before the learned lower appellate Court has suffered fate of rejection. According to him, having regard to the number of measurement reports brought on record, it will be in the

fitness of things that there should be a final measurement report by a (Senior Officer) from the concerned department, so as to bring the correct fact/position as regards the measurement on record.

11. He has also sought to draw the support from the judgment of the Apex Court in the matter of **Boodireddy Chandraiah and Ors., Vs. Arigela Laxmi and Anr.**, reported in **AIR 2008 SUPREME COURT 380** so as to canvass that the issue which goes to the root of the matter and has not covered by any dictum of law can be termed as question of law. He further urged that from the interpretation of the measurement by the government Surveyor, the perversity in appreciation of the same can be treated as substantial question of law. In addition to above, he has also placed reliance upon the judgment of the Apex Court in the matter of **Haryana Waqf Board Vs. Shanti Sarup and Ors.**, reported in **AIR 2008 SC (Supp) 616** so as to canvass that the appointment of the local Commissioner could have been even granted at the stage of second appeal so as to draw appropriate conclusion and non consideration thereof and the rejection of application for appointment of Court Commissioner by lower appellate Court can be termed as substantial question of law.

12. Shri Bhokariker further relied upon the judgment of this Court in the matter of **Sukhdeo Parashramji Bhugul (DR.) Vs. Wamanrao Nagorao Charhat**, reported in 2004 BCI (0) 60 and in the matter of **Yashwant Bhaduji Ghuse Vs. Vithobaji Laxman Ladekar**, reported in **2010 (3) Bom.C.R.373** and **Govind s/o Raoji Katole Vs. Ganpati s/o Tukaramji Khanke Dead through L.Rs.**, reported

in **2002 (1) Bom.C.R.124** so as to canvass that in case the report of measurement submitted by the Surveyor which is brought on record is true, an evidence if it is established that the reports are incorrect or suffer from error in such cases, it is always open for the Court in second appellate jurisdiction to pass appropriate order either of remanding the matter to the Court below for directing fresh measurement and re-appreciation of evidence or the appointment of Court Commissioner at the level of hearing of the second appeal.

13. Per contra, Mr Patil, learned Counsel for the respondent - plaintiff submits that the report which was placed on record and appreciated by the Courts below was upon an application moved by the plaintiff during the proceedings of the suit. He submits that the said application was neither objected by the present appellant - defendant nor contested. He further urged that the report that was submitted before the Court, the issue qua the measurement to be carried by a Senior Officer from the department, was not canvassed any time before and sought to be raised for the first time before this Court. In addition to above, he submits that there was report Exh.60 in his favour dated 23rd April 1996 by the Surveyor. He has intentionally not pressed the said document in service but moved an application for appointment of Court Commissioner which was granted. He submits that both the Courts below having concurrently held against present appellant - defendant, no case for interference in the second appellate jurisdiction is made out.

14. Having considered rival contentions of the parties, it is required

to be noted from the facts of the present case that there are three measurement reports on record.

15. The first report was at the behest of the present appellant – defendant in which one Mr Sonar, DW-1 has carried out measurement on 15th November 1994. Said Mr Sonar was posted in the said office, till 17th March 1995. After his transfer from the said office, said government Surveyor, for the reasons best known to him has again visited the property in question and has demarcated boundary marks on 1st September 1995. The fact remains that he was not posted or authorised to do so on 1st September 1995 once having carried out the measurement on 15th November 1994. Said report, though according to present appellant was in his favour, was objected by the plaintiff – respondent herein.

16. The objection raised by the plaintiff to the above referred report of measurement carried out by Mr Sonar was followed by second measurement on 23rd April 1996 by government Surveyor Mr Phirange which is placed on record at Exh.60. Said Mr Phirange was not examined by the plaintiff – respondent to the present suit and as such, the trial Court restricted the said measurement report only to the extent of reference and has not relied upon the said report.

17. The third report that is taken into account by the Court below was by virtue of an order passed below Exh.43, an application moved by the plaintiff under Section 75 read with Order XXVI, Rule 9 of the Code of Civil Procedure. It is apparent from the record that the said

application was neither contested nor objected to the extent that some senior person should be appointed as Court Commissioner. The said application was granted by the learned trial Court by passing order below Exh.43. In compliance with the said order, the government Surveyor Mr Shivaji has carried out measurement and prepared the measurement map at Exh.43/1. The said government Surveyor has entered into witness box at Exh.42 and has deposed in support of the measurement carried out by him.

18. With the aid and assistance of learned Counsel for the parties, I have gone through the independent evidence of both the witnesses i.e. P.W.1 Shivaji who was examined at Exh.42 by the plaintiff – respondent herein and government Surveyor DW-1 Mr Sonar who was examined as defendant's witness. Having considered both the reports, the Court below has considered all the three reports placed on record and has reached to the finding that measurement report dated 15th November 1994 and the demarcation of boundary marks dated 1st September 1995 are illegal.

19. The learned trial Court as is observed herein above, as also the lower appellate Court have considered the entire set of facts, evidence, pleadings of the parties so as to form an opinion that the reports dated 15th November 1994 and 1st September 1995 are liable to be declared as illegal. One more aspect of which this Court cannot lose sight of the fact that the report dated 1st September 1995 was prepared by DW-1 Mr Sonar after his transfer from the said office i.e. he was not officially authorised to carry out measurement. In his

deposition, he has in express terms cited that he was working in the said office up to 17th March 1995 whereas the boundary marks were placed by him on the property in question on 1st September 1995 i.e. after his transfer. The above referred conduct of DW-1 Mr Sonar speaks voluminous about his (mis) conduct in carrying out the measurement.

20. The another aspect of which this Court cannot lose sight of the fact that the application for appointment of Court Commissioner preferred by the plaintiff - respondent was never objected by the present appellant - defendant which has resulted into brining on record the measurement map at Exh.43/1 by government Surveyor Mr Shivaji. Said Mr Shivaji has entered into witness box at Exh.42. Upon going through his evidence and after considering the said evidence by the trial Court and the lower appellate Court, in my opinion, both the Courts below have rightly appreciated the said evidence and have given finding in favour of the present respondent.

21. Both the Courts below have concurrently held against the present appellant.

22. So far as the judgments on which the present appellant has placed reliance, particularly the judgments of the Apex Court (cited supra), I am of the opinion that the proposition of law relied upon by the present appellant will be hardly of any assistance to the appellant, particularly, the claim of the appellant that some senior person from the concerned department be appointed as Surveyor so as to carry out fresh measurement. I am afraid, if the above referred contentions of the appellant are considered, same may give rise to fresh litigation

and there will be no end to the contention of the appellant qua the illegal measurement. The trial Court was alive of the fact as regards reports of measurement of 1994, 1995 and also 1996 at Exh.60 and has rightly passed order permitting appointment of Court Commissioner. The trial Court has rightly taken into account the said fact. In my opinion, the claim of the appellant for appointment of Court Commissioner, at this stage, will be hardly of any assistance to the present appellant.

23. In that view of the matter, reliance placed by the appellant on the judgments cited supra, particularly in the matter of exercise of powers under Order XXVI, Rule 9 is concerned, the very conduct of the appellant dis-entitles him for the relief claimed.

24. As such, the present second appeal which lacks merits, stands rejected.

(N.W. SAMBRE, J.)

(vvr/277.12sa)