

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

26. SA/379/2012 With CA/6661/2012 In SA/379/2012

BIJLABAI NARAYAN BHOKNAL AND ANR
V/S
SOPAN DAGADU BHOKNAL AND ORS

Mr. R.L. Kute, Advocate for appellant.

Mr. A.N. Nagargoje, Advocate for respondent Nos. 1 to 3.

CORAM : T.V. NALAWADE, J.
DATED : 12th October, 2015.

ORDER :

1. The appeal is filed to challenge the judgment and decree of Regular Civil Suit No. 228/1992, which was pending in the Court of Civil Judge, Junior Division, Sangamner, District Ahmednagar and also against the judgment and order of Regular Civil Appeal No. 979/2000, which was pending in the Court of District Judge-2, Ahmednagar. Both the sides are heard.

2. The suit was filed by present respondent/original plaintiff for removal of encroachment of 53 R. portion of his land Survey No. 32/2 and for possession of this encroached portion. The land Survey No. 34 belongs to appellant and it is situated adjacent to the land Survey No. 32/2. It is the case of original plaintiff that defendant purchased land Survey No. 34 in the year 1991 and he forcibly took possession of 53 R. portion of Survey

No. 32/2. It is contended that in the month of November 1999, plaintiff realized the encroachment and then he took steps for measurement through Government Surveyor. It is contended that the measurement was taken by surveyor on 23/24.4.1992 and it transpired that there was such encroachment. It is contended that even after taking of the measurement in presence of defendant, defendant did not return the possession of the encroached portion and so, plaintiff was required to file suit.

3. The defendant contested the matter by filing written statement. He contended that it is not possible that within few months after the date of purchase of land, he made encroachment over such huge portion of land belonging to plaintiff. He contended that plaintiff wanted to purchase the land Gat No. 34 and as he could not succeed, only to harass the defendant, he has created false case of encroachment.

4. In the Trial Court, both the sides gave evidence. Court Commissioner was appointed and measurement was taken through another Government Surveyor. For proving encroachment, plaintiff examined himself and he examined Cadestral Surveyor. Defendant gave evidence in rebuttal.

5. It was mainly submitted by the learned counsel for the appellant that the evidence on the record does not show that measurement of Survey No. 34 was also taken by the Cadestral Surveyor. He submitted that it was necessary to take measurement of Survey Nos. 32 and 34 to ascertain as to whether there was encroachment and so, the measurement taken by the Cadestral Surveyor is not binding on the defendant. The learned counsel also submitted that notice of the measurement taken by the Cadestral Surveyor, the Court Commissioner was not served on the defendant and for that reason also, the measurement is not binding on the defendant. He submitted that on the basis of these two grounds substantial questions of law need to be formulated.

6. This Court has carefully gone through the evidence given by the Cadestral Surveyor. The Cadestral Surveyor has given evidence that he measured Survey No. 32 and 34. Though the plaintiff has come with the case that he is the owner of Survey No. 32/2 and there is 7/12 extract also of Survey No. 32/3, no record of *Phalni* was produced. However, in the 7/12 extract the area of Survey No. 32/2 is mentioned. The evidence of Cadestral Surveyor shows that he measured entire Survey No.

32 and during measurement, he realized that there was encroachment of 53 R. portion and it was made by the owner of Survey No. 34. His evidence shows that the road passing through both these lands was not required to be separately measured as the outer boundaries of these survey numbers were considered by him. The learned counsel for appellant submitted that in the report submitted by the Court Commissioner, there is no mention that Survey No. 34 also was measured by him. It is true that there is no such specific mention. The record of measurement, which include the map, however, shows that the relevant boundary marks were considered by the surveyor and accordingly, the measurement was made. The map of measurement is duly proved in the evidence of surveyor and the evidence on measurement shows that there was encroachment to the extent of 53 R. portion. This evidence is believed by the Courts below and the findings on this point is finding on the question of fact.

7. Much was argued on the circumstance that defendant was not present at the time of measurement taken by the Court Commissioner. The learned counsel for appellant placed reliance on two cases reported as **AIR 2007 SUPREME COURT 3036 [A. Rama Rao and Ors. Vs. Raghunath**

Patnaik and Ors.] and AIR 2006 SUPREME COURT 825 [State of Maharashtra Vs. Rashid Babubhai Mulai]. The facts and circumstances of each and every case are always different. In the present matter, the surveyor has given evidence that the notice was sent to defendant under certificate of posting. The record of the office in that regard was produced by the Court Commissioner in the Court. In view of these circumstances, it was necessary for the defendant to rebut the presumption, which is in favour of following of the due procedure by the public servant and also the receipt of the notice. Further, there is one more circumstance. Defendant is not disputing that notice of measurement taken prior to the date of suit was received by the defendant. Surprisingly in the cross examination of the Cadestral Surveyor the map prepared during the previous measurement was confronted to him. Thus, the previous measurement is not disputed by the defendant. Though more area (59 R) was shown to be encroached by the defendant in previous measurement, the plaintiff is claiming the possession only in respect of 53 R. portion. The Cadestral Surveyor has given reason as to how there can be such difference in the measurement. There is nothing to disbelieve the Cadestral Surveyor on this point. The difference is of few R. portion. Thus, in any case, there is the evidence to show that defendant has

made encroachment over the property of plaintiff.

8. Some more points were argued like within time fixed by the trial Court the measurement was not taken, notice of 15 days was not given when under the Rules such notice ought to have been given. The Courts below have given reasons for rejecting objections about the same. It was the measurement taken by the Court Commissioner as per the directions given by the Civil Court. The proper procedure was followed by the surveyor and in any case, he was expected to take measurement and submit the report as the Court Commissioner to the Civil Court. In view of these circumstances, this Court holds that there is no material on the basis of which substantial question of law can be formulated.

9. In the result, appeal stands dismissed. Civil Application is disposed of.

[T.V. NALAWADE, J.]

ssc/