

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 272 OF 1992

Vishnu Vithal Rainak
: V/S :
Ganpati Gopale Rainak

.....Appellant

.....Respondent

* * * * *

Mr. P.B. Shah, Advocate for the appellant.
Respondent and Advocate absent.

Coram :- Smt. R.P. SondurBaldota, J.

15th January, 2015.

P.C. :-

1). This appeal arises out of the judgment and order dated 28th November, 1991 by which the lower appellate Court set aside the judgment and decree of the trial Court and dismissed the suit.

2). The brief facts of the case are as follows :-

. The appellant is the owner of land at survey no.157/1F which is part of survey No.605/1F. The land at survey no.157/1F was received by the appellant as his 8 anna share in survey No.605/1F. The respondent is the owner of the adjoining land having purchased by him in the year 1929 from one, Lakshman Krishna Rainak. In the year 1973, the appellant got his land surveyed through a private surveyor. The

measurements taken during the survey indicated that, the respondent was occupying land admeasuring 2 Ares which was part of the land of the appellant. Therefore, the appellant filed Regular Civil Suit No. 279 of 1983 for removal of the encroachment and for possession of the encroached portion. The trial Court held that, the appellant was the owner of the land at Survey no.157/1F and that the respondent has no right to that land. It also accepted, on the basis of the measurements alone, that the respondent has encroached upon the land of the appellant to the extent of 2 Ares and decreed the suit.

3). The lower appellate Court reversed the findings of the trial Court as regards the encroachment with following observations.

“ In plaint, plaintiff states defendant encroached on his land in the year 1973. But in statement before the Court, he does not state when defendant made encroachment and actually when. He states in his examination before the Court, in the year 1973, he got his land and at that time, he found encroachment. As per plaintiff, encroachment is to the extent of 2 area. If really there was encroachment, then plaintiff should have certainly restrained defendant and he will have to take some legal steps immediately. As per plaintiff's own version, he got knowledge of encroachment from measurement only. It is admitted, on boundary marks were present at the spot. Surveyor has carried measurement as per boundaries shown by the parties. He cannot tell actually on what basis has carried the measurement. Measurement alone is no conclusive proof of encroachment. It is a factual state which the plaintiff has to prove by oral, as well as documentary evidence. Map on the basis of which plaintiff claims possession, in not produced on record.”

4). The lower appellate Court is correct in its appreciation of the facts in saying that the fact of encroachment by the respondent on the property of the appellant was required to be proved by the appellant by oral, as well as, documentary evidence. It was necessary for the appellant to depose about, the overt act by which the respondent encroached upon his land. The measurements taken by the private surveyor, who according to the lower Appellate Court, would be interested in the appellant cannot be the basis for establishing the fact of encroachment. The Appellate Court, further notes that, there is no evidence on record to show as to what were the boundaries as per the original record or what was the actual position existing at the site. It also noted that, the bandh between the land of the appellant and the respondent is old bandh and has been in the position till date. There is no infirmity whatsoever in the view taken by the lower Appellate Court.

5). Grounds at (h) and (j) treated as substantial questions of law at the time of admission of appeal read as follows :-

“(h). The Lower Appellate Court erred in holding that the Appellant has not proved his possession over the suit land.

(j). The Lower Appellate Court erred in holding that the surveyor was a private surveyor and was interested in the

appellant.”

Bare perusal of the questions is enough to see that they are questions of fact. There is no substantial question of law arising for consideration of the Court in the appeal. Therefore, the Second Appeal is dismissed.

(SMT. R.P. SONDURBALDOTA, J)