IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.147 OF 2015
Uttam s/o Nathusa Shribhate
..vs..
Narayanrao Marotrao Tijare

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's order

Shri S.C. Bhalerao, counsel for the appellant.
Shri Abhay Sambre, counsel for the respondent.

CORAM : A.P. BHANGALE, J.
DATE : JULY 14, 2015.

1. **Heard**.

2. This second appeal is preferred against the judgment and order dated 20.2.2014 passed by the learned District Judge-2, Yavatmal in Civil Appeal No.67 of 2009 whereby the appeal was dismissed. The said appeal arose from judgment and decree dated 27.8.2009 passed by the learned 4th Joint Civil Judge Junior Division, Yavatmal in Regular Civil Suit No.85 of 2008.

3. The facts of the case in brief are as under, thus:

The respondent/plaintiff owned the house property nazul plot No.2/2 of nazul sheet No.55 and layout plot No.112, area 3500 square feet (325.157 square meters) (50 x 70 feet) having boundaries as under :

Towards East : Layout plot No.111 now in possession of U.T. Waikar
Towards West : Layout plot No.113 now in possession of defendant
Towards North : Road
Towards Sought : Layout plot Nos.114 and 116 in possession of Smt. Mangala Kulkarni

Thus, the household property situated on the plot was fully described. According to the respondent/plaintiff, the appellant/defendant who is in possession of plot No.113 admeasuring 4200 square feet undertook excavation for foundation in the month of December, 2007 and the work was done in the month of January, 2008 without permission of the local Authority i.e. Municipal Council, Yavatmal. Thus, the defendant had constructed latrine and bathroom by encroaching upon the land belonging to the plaintiff to the extent of 78.75 square feet. Though the plaintiff objected to the encroachment, the defendant did not pay any heed to it. Thus, the plaintiff was constrained to lodge the civil suit and complained about illegal acts of the defendant to the Municipal Council, Yavatmal as well as the President of Samata Gruha Nirman Sahakari Sanstha. The Chief Officer of the Municipal Council had issued notice under Section

53(i) of the Maharashtra Regional and Town Planning Act, 1966 calling upon the defendant to demolish the structure constructed upon the encroached portion area 78.75 square feet owned by the plaintiff. Since the Municipal Council informed the plaintiff that it had no power to remove the encroachment, if any, done in the private property, the plaintiff had applied to the Taluka Inspector of Land Records (TILR) to measure the plot No.112. Accordingly, the TILR measured the said plot observing that the defendant had encroached upon portion admeasuring 78.75 square feet (7.31 square meters) as shown in the map "ADEA". Thereafter, the plaintiff had issued notice calling upon the defendant to remove himself from encroachment but the defendant did not pay any heed. Thus, the suit was instituted with a prayer to direct the defendant to remove the illegal construction of latrine and bathroom on the encroached portion measuring 78.75 square feet as shown in the plaint map.

4. The defendant had denied having made any encroachment and contended that the measurement map was incorrect and illegal. Thus, resisted the suit.

5. Learned trial Judge who recorded the evidence in

respect of the suit property found that the defendant had illegally constructed latrine and bathroom by encroaching upon the suit plot belonging to the plaintiff to the extent of measuring 78.75 square feet as indicated by letters “ADEA” in the map drawn by the TILR. The documentary evidence as to communications with the TILR's office, the evidence of measurer Shri Rajendra Krushnarao Wagh (Exh.34) was also recorded. The sale deed (Exh.16) was relied upon as documentary evidence in respect of title of the plaintiff to the suit property. The documentary evidence was relied upon to establish that the measurement was prayed for and carried out by the TILR concerned in accordance with law. Thus, the trial Court found that there was admission in the cross examination by the defendant that the plaintiff has got measured both the plots for detecting encroachment.

6. Thus, after considering the entire evidence on record including documentary as well as oral evidence, learned trial Judge recorded the findings as to existence of encroachment made by the defendant to the extent of area measuring 78.75 square feet as shown in the plaint map (Exh.36) and directed the defendant to remove himself the said encroachment within a period of two months from the

date of decree and handover the vacant possession thereof to the plaintiff. The decree was passed on 27.8.2009 to which the defendant had challenged in the appeal. The first appellate Court while entertaining the appeal found that the plaintiff had succeeded to prove that the defendant had made encroachment over the suit plot to the extent of measuring 78.75 square feet and constructed latrine and bathroom over it. Thus, the appellate Court also directed possession of encroached portion to be handed over to the plaintiff and confirmed the order of the trial Court considering the evidence on record. The first appellate Court found that since the judgment of the trial Court was just, legal and proper, no interference was warranted in the judgment impugned before it.

7. Learned counsel for the appellant in order to support his appeal has placed reliance in the case of **Bhupendra s/o Bhagwat Turkar ..vs.. Homraj s/o Zituji Meshram**, reported at **2014(4) Mh.L.J. 231**. This Court had expressed its view that in case of boundary dispute it is always desirable to get suit land or field measured by an expert or competent public official to find out the area of the suit land encroached upon. It is always desirable to insist

upon the parties in such cases, to have a joint measurement carried out in respect of the area of the suit land or joint property, then the trial Court upon evidence led before it is enable to decide the real controversy in the suit finally, effectively and in accordance with law. For this purpose, when the parties are not in agreement with the map annexed with the plaint, the Court commissioner (preferably competent surveyor) may surely be appointed in order to prepare a map or plaint in respect of the area of suit property in order to assist the Court. This Court, therefore, directed that the trial Court to appoint TILR or DILR to take measurement of the suit land in the presence of the parties so that map prepared by the TlLR and DILR, as the case may be, can be read in evidence after the parties are offered full opportunity to lead their necessary evidence.

8. Learned counsel has placed reliance upon another ruling in the case of **Sulemankhan s/o Mumtajkhan and others ..vs.. Bhagirathibai wd/o Digamber Asalmol and another**, reported at **2014(4) Mh.L.J. 250**. This Court had again reiterated its opinion in respect of the suits involving boundary disputes between the parties and necessity of map drawn to the appropriate scale by the competent Government

official from the office of TILR and DILR,, as the case may, so that measurement of suit property is carried out in the 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 properly 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 plan/map, if it is so necessary in the absence of admission/consensus between the parties for exhibiting the map. The trial Court can certainly raise presumption as to accuracy and genuineness of such map in views of Section 83 of the Evidence Act. When such vital document is duly produced, proved and established, necessary detailed decree can be passed if there is any encroachment on the suit property for vacating thereof.

9. In the present case, the care was taken by the plaintiff himself to get the disputed property measured through the TILR, the suit property owned and possessed by the plaintiff was fully described with its nazul sheet number, plot number, boundary area, and measurement etc.. The first Appellate Court also appreciated the evidence of measurer Rajendra Krushnarao Wagh (plaintiff's witness No.2) as

inspiring confidence to believe that there was encroachment on the suit plot by the defendant to the extent of 78.75 square feet. It was specifically noted that on western side of the suit plot No.113 there was a road and on northern side there was layout road.

10. The defendant during the course of the cross examination admitted that he had received notice of measurement and was present at the time of measurement by the TILR. Thus, after appreciating plaint map Exh.36 drawn by the competent public official the trial Court as well as First Appellate Court arrived at their respective concurrent findings in favour of the plaintiff. Thus, the defendant was directed to remove the encroachment to the extent of 78.75 square feet only.

11. Learned counsel for the appellant is apprehending that if the opportunity is not given to the defendant to get the property measured in respect of his own plot before removing alleged encroachment, he would suffer irreparable loss. Since both the Courts below have appreciated the admission of the defendant during the course of his cross examination regarding his presence at the time of measurement by TILR and measurement carried out, I am

not impressed with this submission but it is for the defendant even during execution proceeding to call upon the competent public official who measured the suit land to draw a map and fix boundaries thereof so that the decree can be executed effectively and without causing any inconvenience or loss to the defendant. It is for the executing Court to do the needful while executing the decree to hand over vacant possession of the encroached portion to the plaintiff to ensure that the competent public official has verified the boundaries and area of the respective plots. At the stage of second appeal, I do not feel necessary to remand the matter back to the trial Court particularly when the TILR concerned had measured the disputed property, drew the map, led the evidence about genuineness thereof and then after appreciating the evidence lead by the parties both the Courts below arrived at the concurrent findings in favour of the plaintiff recording that the defendant had illegally constructed latrine and bathroom by encroaching upon the suit plot to the extent of 78..75 square feet. The defendant was and is bound to demolish construction upon the encroached portion and hand over vacant possession thereof to the plaintiff decree holder.

12. Learned counsel for the appellant submits that

opportunity may be granted to the appellant defendant to prepare another map drawn by the competent public official to verify earlier plaint map. He can approach executing Court. It is for the executing Court to effectively and properly execute the decree and it may require any competent public official to verify the fact exact area of encroachment made by the defendant so that he can be evicted from the encroached portion of the suit property or is compelled to vacate the encroached portion of the plaintiff's property. In the facts and circumstances of the case, therefore, I do not find any substantial question of law so as to entertain the present appeal as the fact of encroachment was proved to the satisfaction of both the Courts below and no substantial question of law is thus arising in the case.

13. In view above, the second appeal is dismissed with costs.

JUDGE

!! BRW !!