

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

**APEAL FROM ORDER NO. 18 OF 2016
WITH
CA/4346/2016 IN AO/18/2016**

PRAKASH S/O BALIRAM KHANDARE AND ANOTHER
VERSUS
RAHUL S/O BHASKARRAO RANKHAMB

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Advocate for Petitioners : Mr S A Dhengle/B A Dhengle
Advocate for Respondent : Mr. P S Chavan

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CORAM : V.K. JADHAV, J.
Dated: May 04, 2016

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PER COURT :-

1. With the consent of the learned counsel for the respective parties, heard finally at admission stage.

2. Being aggrieved by the Judgment and order passed by the learned District Judge, Osmanabad, dated 21.12.2015 in RCA No.99 of 2014 the original defendants (respondents before the Appellate Court) preferred this appeal.

3. Brief facts, giving rise to the present appeal, are as under :-

a] The respondents-plaintiffs instituted a suit bearing RCS No.312/2012 before the Jt. Civil Judge J.D.,

Osmanabad for recovery of possession of the encroached area to the extent 2 H 20 R out of land gat No.313 with the pleading that the appellants/defendants are the neighbors and they have purchased the land in gat No.315. The appellants-defendants have strongly resisted the suit by filing their written statement and the appellants-defendants have denied the ownership and possession of the plaintiffs over the suit land and also denied the contentions raised by the respondents-plaintiffs as to the encroachment over the suit land. The learned Judge of the Trial Court, after considering the pleadings of the parties and evidence on record pleased to dismiss RCS No.312 of 2012 by its judgment and decree dated 12.3.2014. Being aggrieved by the same, respondents-original plaintiffs preferred Regular Civil Appeal No.99 of 2014 before the District Court, Osmanabad. The learned District Judge-3, Osmanabad, by its impugned judgment and order dated 21.12.2015 partly allowed the appeal and thereby quashed and set aside the judgment and decree passed by the Trial Court in RCS No.312 of 2012 and remanded the matter back to the Trial court with certain directions,

prominent amongst them is, to appoint the Dy. Superintendent of Land Records, Osmanabad, as the Court Commissioner to measure the land block no.313 (suit land) and land gat no.315 land owned and possessed by the defendants and adjoining lands including the suit land of village Alani Tq. & District Osmanabad at the expenses of the plaintiffs. Further the Appellate Court has directed that, upon receipt of the report of Dy. Superintendent of Land Record, Osmanabad, the Trial Court shall expeditiously decide the suit after fullest opportunity to the parties with liberty to them to adduce their evidence on record. Being aggrieved by the same, the appellants-original defendants preferred this appeal.

4. The learned counsel for the appellants submits that, the respondents/plaintiffs have approached the Civil Court with the pleadings that the appellants-defendants have made encroachment over the suit land to the extent of 2H 20R out of the land block no.313. The same appears to be impossible. Learned counsel submits that, after considering the evidence on record

and most particularly, the evidence of PW 2 Bharat Deshmukh, the trial court has recorded findings that the plaintiff is not the owner and was in possession of the suit land gat no.313 ad measuring 5H 88R and that the plaintiffs have failed to prove that the defendants have encroached upon the suit land to the extent of 2H 20R area as alleged. Learned counsel submits that, the respondents/plaintiffs have not examined himself before the Trial Court and oral evidence lead through the power of attorney before the Trial Court.

5. Learned counsel appearing for the respondents/original plaintiffs submits that, the Trial Court has dismissed the suit mainly on the ground that, the evidence of P.W.2 Bharat Deshmukh is not sufficient to find out that the appellants-defendants made encroachment over the suit land as alleged. PW 2 Bharat Deshmukh has admitted in his cross examination that he measured the suit land gat no.313 only and he has not measured the adjacent land. Learned counsel submits that, however, said witness Bharat Deshmukh cadastral surveyor has deposed

about the encroachment on the suit land to the extent of 2H 20R. On the basis of these observations and also in view of the ratio laid down in **Janki Vasudeo Bhojwani Vs. Indu Sind Bank Ltd., reported in AIR 2005 Supreme Court 439**, the lower appellate Court has rightly remanded the matter with certain directions. Learned counsel submits that, no interference is required and there is no substance in the appeal and the appeal is thus liable to be dismissed.

6. In paragraph No.12 and 13 the Trial Court has made following observations :-

“12.PW 2 Bharat has filed measurement map, notice and panchnama on record. However, he specifically admitted that he get measured only land gat no.313. He has not measured adjacent land. He also admitted that the measurement map is prepared on the basis of record of gat numbers. He has not seen 7/12 extracts of the previous survey numbers of gat numbers. It appears that PW 2 Bharat measured the suit land on the basis of entries in the 7/12 extract of gat numbers.

13. On having perusal of the testimony of P.W.2 Bharat it shows that, he measured the suit land only. There is no evidence to show that defendants were present at the time of measurement. The area of previous survey number is not taken into consideration at the time of measurement. The adjacent lands were not measured. There is no evidence to show that, the measurement of suit land was tallied with the previous record.”

7. On the basis of these observations, the Trial Court in paragraph No.14 of the Judgment has observed that the plaintiff has failed to prove his ownership over the suit land to the extent of 5H 88R and there are drawbacks in the measurement of the suit land. The trial Court has further observed that, the plaintiff has failed to prove the encroachment upon the suit land to the extent of 2H 20R. The Lower Appellate Court has thus rightly observed that the Trial Court since rejected the evidence of cadastral surveyor PW 2 Bharat on the ground of unilateral measurement of the land, in the fitness of things matter is required to be remanded. In a suit for recovery of possession, with the allegations of

encroachment, the suit land as well as the adjacent lands are required to be measured. Respondents-plaintiffs have moved an application Exh.12 for appointment of the Court Commissioner to measure the lands through the Court Commissioner Dy. Superintendent of Land Records, Osmanabad and the appellants-defendants raised an objection for the same on the ground that the re-appointment of the Commissioner is nothing but recollection of evidence. It appears from the evidence of witness PW 2 Bharat Deshmukh that there is an encroachment on the suit land to the extent as alleged, however, in view of the admissions given by him in his cross examination and the fact that adjacent land gat no.315 was not measured, there is no positive evidence indicating the encroachment made by the appellants-defendants on the suit land. In view of this, the Lower Appellate Court has rightly remanded the matter with certain directions. Furthermore, the Lower Appellate Court in view of the ratio laid down in Janki Bhojwani's case (supra) observed that the opportunity is also required to be given to the plaintiffs to put up their case. I do not

think that any prejudice is likely to be caused to the appellants-defendants because of the said directions. The appellants-defendants would get an opportunity to cross examine the plaintiffs and also the Dy. Superintendent of Land Records, if, the report as submitted before the Court, is adverse to them.

8. In view of this, I do not find any substance in the appeal. Hence, following order is passed.

ORDER

- I. Appeal is hereby dismissed.
- II. In the circumstances, there shall be no order as to costs.
- III. Pending Civil Applications also stand disposed of.

(V.K. JADHAV, J.)

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