

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**APEAL FROM ORDER NO. 10 OF 2016
(WITH CA/2496/2016 IN AO/10/2016)**

PANDIT S/O SHANKARRAO PATIL AND ANOTHER
VERSUS
MANIK PANDURANG JADHAV DIED THROUGH HIS LRS
SMT. PANCHFULA W/O MANIK JADHAV AND Others.

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Advocate for Petitioners : Mr.A,.R.Tapse, h/f
Mr.Suryawanshi Prashant D.
Mr.Tawshikar Swapnil D., Adv. for R/1-a To 1-d

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CORAM : P.R. BORA, J.
Dated: September 28, 2016

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P.C.:-

1. Present appeal is filed challenging the judgment and order passed by the Principal District Judge at Latur in Regular Civil Appeal No.447/2012, on 26th of October, 2015, whereby the first appellate Court has remanded back the matter to the trial Court for deciding it afresh by appointing a Cadestral Surveyor as Court Commissioner in terms of the application of the plaintiff filed at Exh.52 at the cost of plaintiff and to seek measurement report and to give both the parties an opportunity to lead further additional evidence and to decide the suit afresh.

2. According to the learned Counsel appearing for the appellant, the first appellate Court has manifestly erred in passing such order. Learned Counsel submitted that the respondent herein i.e. the original plaintiff has never challenged the order passed by the trial Court below the application at Exh.52 and it has, thus, attained finality. Learned Counsel further submitted that without any prayer in the appeal therefor, the application so filed by the respondents in the trial Court at Exh.52 is allowed by the appellate Court vide the impugned judgment.

3. Learned Counsel further submitted that three measurement reports were already on record of the trial Court and the fourth application was made by the plaintiff seeking appointment of the Cadestral Surveyor, and measurement of entire Gat No.289. Learned Counsel submitted that the trial Court, after having considered the entire material on record, rejected the said application. Learned Counsel further submitted that, thereafter, the matter was proceeded further and the evidence was adduced by the parties. Learned Counsel further

submitted that on appreciation of the evidence on record, the trial Court has recorded an unambiguous finding that the plaintiff has failed in substantiating his allegation that the defendant has made encroachment on his portion. According to the learned Counsel, in view of rejection of the application at Exh.52 by the trial Court, and thereafter, since a clear finding is recorded by the trial Court that the plaintiff did not prove that the defendant has encroached upon his portion, there was no reason for the first appellate Court to remand back the matter to the trial Court for deciding it afresh by making appointment of the Commissioner in view of the request made by the plaintiff in his application at Exh.52. Learned Counsel submitted that the impugned order is wholly unsustainable and deserves to be set aside and quashed.

4. Shri Tawshikar, learned Counsel appearing for respondent i.e. the original plaintiff has supported the impugned judgment and order. Learned Counsel invited my attention to the observations made by the first appellate Court in paragraph nos. 37 and 38 and

submitted that the first appellate Court has, for right reasons, remanded the matter back to the trial Court and to do substantial justice has also directed the trial Court to appoint the Commissioner as was prayed by the plaintiff by filing an application Exh.52 before the trial Court. Learned Counsel submitted that it is undisputed that the plaintiff is the owner of the land admeasuring 2 Hectare 74 Ares. Learned Counsel further submitted that it is also not in dispute that presently the plaintiff is in possession of 89 Ares land less than owned by him. Learned Counsel further submitted that since in the earlier reports the Commissioner though has opined that the plaintiff is in possession of 89 Ares less land and has further opined that the land of the plaintiff has been encroached, did not specify as to who have made such encroachment and the extent of the said encroachment by each of them. In the circumstances, according to the learned Counsel, the plaintiff was fully justified in making a fresh application with a specific prayer to direct the measurement again of whole survey number and to find out the holding of the land holders of the said lands so as to determine who is in

possession of the land in excess than he ought to be.

5. Learned Counsel further submitted that though the plaintiff did not, at that juncture, challenge the order passed by the trial Court rejecting the application Exh.52, in the appeal filed by him, it was his principal contention that Exh.52 was wrongly rejected by the Trial Court and hence, prayer was also made by the original plaintiff to remand back the matter for deciding it afresh by appointing a Commissioner. Learned Counsel submitted that the said course was very well open for the plaintiff and the first appellate Court has rightly considered the request so made by the appellant plaintiff. Learned Counsel, therefore, prayed for dismissal of the appeal.

6. I have carefully considered the submissions advanced by the learned Counsel appearing for the respective parties. I have also perused the impugned judgment and the other material placed on record by the parties. It is not in dispute that the plaintiff is the owner of the agricultural land admeasuring 2 Hectares 74 Ares

out of Gat No.289 situated at village Javalga, taluka Renapur, district Latur. From the material on record and the discussion made by the trial Court as well as the first appellate Court, there further appears no dispute that the plaintiff possesses 89 Ares less land than shown in his name in the Revenue and other records. Admittedly, there are three measurement maps on record. However, as has been observed by the learned District Judge in the impugned judgment, though in all these measurement maps, it is shown that the plaintiff is in possession of less land than owned by him, indicating that the land belonging to the plaintiff has been encroached, none of the said maps specify the location of the alleged encroachment as well as by whom the alleged encroachment is made. In paragraph No.37 of the impugned judgment, the learned District Judge has observed that the trial Court has also recorded the same observations and, in such circumstances, there was no reason for the trial Court to reject the application at Exh.52. In paragraph No.38 of the impugned judgment, the learned District Judge has given reasons as to why for the application at Exh. 52

ought to have been allowed by the trial Court. I deem it appropriate to reproduce the said observations hereinbelow, which are thus:

"38. Considering the shortcomings in the earlier three measurement reports, fresh measurement for finding out the encroachment is not barred. In my opinion, in the facts and circumstances of the case, that earlier three measurements were not specifying the alleged encroachment, though the said measurements showed that the plaintiff was found 89 land less in possession than as per the revenue and ownership record, it was necessary for the Trial Court to allow the appointment of afresh Court Commissioner in terms of prayer appropriately in the application, Exh.52, made by the plaintiff. The measurement map, as per prayers in the said application, would definitely pinpoint area of the alleged encroachments specifying the land holder on whose land the encroachment was made and by which land holders in Gat No.289, the said encroachment was made. Admittedly, except the defendants, other land holders in Gat No.289 are not made parties by the plaintiff in this suit. However, the plaintiff would face legal consequences for non-joinder of those parties. That aspect need not to be addressed in this appeal and it is for the plaintiff to take necessary steps, if any. "

In paragraph no.39 of the impugned judgment, learned District Judge has further observed that though the area of 14 Ares land is shown to have been encroached upon by the defendants, in the map at Exh.61, no further

particulars are provided specifying the boundaries and extent and location of encroachment. In the circumstances, the learned District Judge felt it appropriate to remit back the matter to the trial Court for deciding it afresh by allowing the application filed by the plaintiff at Exh.52. It does not appear to me that the first appellate Court has committed any error in passing such order.

7. Though it was sought to be canvassed by the learned Counsel appearing for the appellant that the order passed by the trial Court below Exh.52 was not challenged by the plaintiff and has, thus, attained finality and therefore, could not have been assailed in the appeal before the learned District Judge, the contention so raised is liable to be rejected in view of the provisions under Rule 1A of Order 43 of Code of Civil Procedure. In paragraph No.37 the learned District Judge has also referred to the said provision and has rejected the argument in that regard advanced by the learned Counsel for the respondent therein i.e. the present appellant.

8. In view of the discussion made above, there appears no merit in the present appeal. The appeal, therefore, fails and is accordingly dismissed, however, without any order as to the costs.

Civil Application, if any, stands disposed of.

(P.R. BORA)
JUDGE

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