

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

2 SECOND APPEAL NO. 118 OF 2012
WITH SECOND APPEAL NO.598/2011 WITH CIVIL APPLICATION
NO. 13966/2011 IN SECOND APPEAL NO.598/2011

GANPAT UMAJI DIGHE
VERSUS
SHRIRANG YASHWANT THORAT DIED LRS BABASAHEB SHRIRANG
THORAT AND ORS

...

Advocate for Appellant : Mr. Nagargoje Ankush N.
Advocate for Respondents : Mr. A.s. Bajaj

CORAM : T. V. NALAWADE, J

DATE : 26th April, 2016

PER COURT :

1. Heard both the sides. Seen the judgment delivered by the courts below.

2. It appears that original Plaintiff Ganpat Dighe had filed two suits against the two adjacent owners for removal of encroachment and possession of encroached portion. He had already taken measurement through T.I.L.R. and he had placed reliance on the evidence given by the T.I.L.R. The trial court dismissed both the suits by holding that the encroachment was not proved. The first appellate court accepted the evidence of cadastral surveyor in one appeal and the said appeal was allowed and the said suit was decreed accordingly. However, the District

court did not accept the evidence of cadastral surveyor in the other appeal and due to that the other first appeal came to be dismissed. As the one appeal was dismissed, the plaintiff has filed Second Appeal No. 118/2012 and as one appeal is allowed by the District Court, the defendant has filed Second Appeal No. 598/2011.

3. In view of the aforesaid circumstance, submission was made by the learned counsel for the plaintiff that he is ready to go for another measurement through court commissioner which can be made in the presence of both the sides and which can help to ascertain as to whether there is really encroachment made by the defendant.

4. The dispute needs to be settled once for all. In view of the conflicting decisions given by the District Court, this Court holds that opportunity needs to be given to both the sides to have one more measurement so that the dispute can be finally resolved.

5. Learned counsel for one of the defendants made submission that due to the location and difference of level in the land, it is desirable to measure one more land like Gat No.44. This land belongs to one of the

defendants though it is not adjacent to the land of plaintiff bearing Gat No. 56.

6. In view of the nature of dispute and aforesaid circumstance this court holds that both the present appeals need to be allowed on following substantial question of law.

“Whether the District Court has committed error in accepting the report of the cadastral surveyor and his evidence when in other matter it was rejected ?

The aforesaid point is answered accordingly for remanding the matters.

7. Both the appeals are allowed.

8. Judgments and decrees of the first appellate Court are hereby set aside and the matter are remanded back to the first appellate court. The first appellate court is to give an opportunity to the original plaintiff to get measured the land to ascertain the encroachment.

9. Care is to be taken to see that the measurement are to be taken not only of land Gat No. 56 but also of lands Gat Nos. 45, 46, 47, 55, 57 and 58. It is up

to the cadastral surveyor to decide as to whether measurement of Gat No.44 is necessary in view of the nature of dispute. That matter is to left to the cadastral surveyor. The expenses are to be borne by the plaintiff in respect of measurement of lands Gat Nos. 56, 45, 46, 47, 55, 57 and 58. If the land Gat No. 44 is required to be measured, the expenses of that measurement are to be borne by the defendant, owner of that land. After receipt of report of the cadastral surveyor, there will be liberty to both the sides to make amendment in the pleadings and to lead evidence.

10. Both the matters are to be expedited and the direction is to be given to the cadastral surveyor by the first appellate court to expedite the measurement.

11. The parties are to appear before the District Court on 17.06.2016.

12. Civil application also stands disposed.

(T. V. NALAWADE, J.)

JPC