

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

1 APPEAL FROM ORDER NO.4 OF 2016
WITH CA/1037/2016 IN AO/4/2016

1) SHRI. BHAGWAN PUNJARAM KARDILE AND OTHERS
VERSUS
SHRI BABURAO JIVANJI KARDILE DIED THROUGH L.RS.
BABURAO JIVANJI KARDILE AND OTHER

...

Advocate for Petitioners : Mr. Mukul Kulkarni,
Adv. h/for Mr. Koralkar Arun H.
Mr. Thombre S.G. Adv. For R/1-a To 1-c.

CORAM : P.R.BORA, J.

DATE : 22nd November, 2016.

PER COURT :

1) With the consent of learned Counsel appearing for the respective the parties, the matter is finally heard.

2) The appellants have questioned the order passed by the District Judge-1, Vaijapur on 14th September, 2015 in Regular Civil Appeal No.25 of 2014, whereby the Court has remanded the matter back to the trial court with a direction for appointment of Court Commissioner for re-

measurement of the subject land and to decide the matter afresh accordingly.

3) Shri Mukul Kulkarni, learned Counsel appearing for the appellants, has assailed the impugned order on various grounds. The learned Counsel submitted that without recording any concrete finding whether the evidence on record was insufficient for deciding the appeal, the first appellate court has remanded the matter back for its fresh trial. Such course, according to the learned Counsel, was impermissible.

. The learned Counsel further submitted that without any specific request by the appellants seeking appointment of Court Commissioner afresh, the first appellate court has directed the trial court to consider the application which may be preferred by the original plaintiff/s for appointment of T.I.L.R. as Commissioner and to take measurement accordingly. The learned Counsel further submitted that a specific objection was raised by

the defendants in their written statement as about the measurements carried out, and as such, the plaintiff was supposed to take necessary steps for getting the subject land re-measured by filing an application for appointment of T.I.L.R. before the trial court itself. The learned Counsel further submitted that since the said opportunity was not availed by the plaintiff, it was not open for the first appellate court to pass an order directing the appointment of T.I.L.R as Commissioner, which would amount to permit the plaintiff to fill up lacuna in the evidence adduced by him in the suit.

. Referring to the provisions of order 41 Rule 23 and 23A of Code of Civil Procedure, 1908, the learned Counsel submitted that no such order of remand could have been passed by the first appellate court. The learned Counsel has, therefore, prayed for allowing the present appeal by setting aside the order passed by the first appellate court.

4) The learned Counsel appearing for the respondent – original plaintiff has supported the impugned judgment and order. The learned Counsel submitted that in the report submitted by the measurer, it has specifically come on record that the plaintiff is in possession of less land to the extent of 55 Ares than shown in the revenue record. The learned Counsel submitted that merely for certain technical reasons, the report of the measurer was not accepted by the trial court. The learned Counsel submitted that, therefore, a specific prayer was made by the plaintiff in the first appeal filed by him to remand the matter for its re-trial by giving an opportunity to the plaintiff to get appointed the T.I.L.R as Commissioner and to get the land re-measured.

5) I have carefully considered the submissions advanced by the learned Counsel appearing for the respective parties. I have also perused the impugned judgment as well as the judgment passed by the Trial Court. After having

gone through the material on record, apparently it does not appear to me that the first appellate court has committed any error in passing the impugned order. I need not to refer to the facts in detail for the reason that there is some material on record which indicates that the plaintiff is having 55 Ares less land in his possession than shown in the revenue record. If the first appellate court was of the opinion that the appointment of T.I.L.R. would help the Court to adjudicate on existence of any encroachment on the survey number belonging to the plaintiff, it cannot be said that the first appellate court has erred in exercising jurisdiction vested in it. Moreover, no prejudice is likely to be caused to the defendant, if the T.I.L.R is appointed and the subject land is re-measured for the reason that the defendant would have every opportunity to rebut the said evidence and as directed by the first appellate court to participate in the process of measurement also. I, therefore, do not see any reason to cause interference in the

order so passed. In the circumstances, the appeal from order is dismissed. Pending civil application, if any, stands disposed of.

(P.R.BORA)

JUDGE

bdv/