

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

906 APEAL FROM ORDER NO.32 OF 2016  
WITH CA/453/2016 IN AO/32/2016

SUKHDEO NIVRUTI THOMBRE AND ANOTHER  
VERSUS  
RAMESH UTTAMRAO BORATE AND ANOTHER

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Advocate for Petitioners : Mr. Khande Avinash A  
Mr. D.A.Mane, Adv. h/for Mr. Patil Milind Adv For  
Respondent Nos. 1 & 2.

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**CORAM : P.R.BORA, J.**

**DATE : 2<sup>nd</sup> August, 2016.**

**PER COURT :**

1) Heard the learned Counsel for respective parties. The present appeal is filed against order dated 27<sup>th</sup> April, 2015 passed by Ad hoc District Judge-4, Jalna in Regular Civil Appeal No. 103/2011. Vide the impugned order, the learned Ad hoc District Judge has remitted back the matter to the trial court with a direction to appoint a Court Commissioner for carrying out measurement of the disputed portion of land and to further provide adequate opportunity of adducing evidence to the parties to decide the

controversy afresh.

2) The learned Counsel appearing for the appellant has assailed the impugned order on the ground that the same has been passed ignoring the evidence which was before the Trial Court. The learned Counsel submitted that when the respondent has filed the suit alleging that the present appellants have made encroachment on their land to the extent of 75 R., the burden was on the plaintiff to prove the said fact. The learned counsel submitted that the original plaintiffs have failed to discharge the said burden. The learned Counsel further submitted that it was open for the plaintiffs to file an application seeking fresh measurement of the land by appointing a Court Commissioner, however, that was also not done by the plaintiffs. The learned Counsel further submitted that the appointment of the Court Commissioner by the order of the court will now amount to collecting evidence for the original plaintiff, which is impermissible in

law. The learned Counsel submitted that the judgment, relying on which the impugned order has been passed, is altogether on different facts and the ratio laid down in the said judgment would not apply to the facts of the present case. The learned Counsel, therefore, prayed for setting aside the impugned order.

3) Countering the submissions advanced on behalf of the appellant, learned Counsel appearing for Respondent, supported the impugned order. The learned counsel, referring and relying upon the judgment of this Court in the case of Bento Antonio Gomes Alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro and Ors. - 2014(1) Bom.C.R. 678, and more particularly inviting my attention to the observations made by this Court in para Nos.19, 20 and 21 of the said judgment, submitted that no interference is required in the order so passed.

4) On perusal of the impugned order and the

judgment passed in RCS No. 92/2008, and having regard to the observations made by this Court in the case of Bento Antonio Gomes (cited supra), it does not appear to me that the learned Ad hoc District Judge has committed any error in passing the impugned order.

5) In the instant case also, the learned Civil Judge has discarded the measurement reports, on which reliance was placed by the plaintiffs. The learned District Judge has rightly observed that when there was no evidence as regards to the encroachment, the issue of encroachment could not have been effectively adjudicated by the Court without having any other assessment by appointing a Court Commissioner, which powers could have been exercised by the learned Trial Court under Order XXVI Rule 9 of the Code of Civil Procedure. I find it appropriate to reproduce herein below the observations made by this Court in the case of Bento Antonio Gomes (cited supra), which are

thus, -

19. It can thus be seen that it has been consistently held by this Court that wherein a question of boundary dispute or an encroachment arises it is appropriate that the Court should exercise power under Order XXVI Rule 9 of the Civil Procedure Code. Section 75 and specifically clause b thereof empowers the Court to make local investigation. Rule 9 of Order XXVI enables the Court where it provides that a local investigation is requisite or proper for the purpose of elucidating any matter in dispute, to issue a commission to such person as it thinks fit to make such investigation and report thereof to the Court.

20. In the present case, the plaintiff as well as four witnesses had specifically deposed that there existed a ridge from time immemorial and that the said ridge was a boundary between the said property and the defendants' land. They had also deposed that there were trees on the said ridge which were in

possession of the plaintiff and the plaintiff had enjoyed the fruits thereof. This evidence of plaintiff and his four other witnesses was countered by the defendants by his evidence alone deposing that the ridge was not a boundary line. However, he also did not dispute about the existence of the ridge. Not only that the Appellate Court also found that there exists a ridge. Though the learned Trial Court had believed the evidence of two experts examined by plaintiff, the learned Appellate Court disbelieved the evidence of these two witnesses as well as the expert examined by the defendants. In the peculiar facts and circumstances where the Court found that the evidence of neither of the experts was to be believed, it would have been necessary for the Court to have got done the local investigation done by appointing a Court Commissioner and calling for his report after making investigation. The report of such an independent Commissioner would have certainly enabled the Court for elucidating the

matter in dispute. In any case, an appointment of the Commissioner would not have prejudiced the interest of either of the parties. If any of the parties felt aggrieved by such a report, a liberty would have been available to such a party to cross-examine the Commissioner. The party who was not aggrieved could also have proved how the investigation report was correct. In any case, it would have certainly enabled the Court to arrive at appropriate conclusion, particularly in the nature of the fact that arises for consideration in the present case.

21. No doubt that in the present case, application for appointment of Court Commissioner was not made. However, it is to be noted that before the learned Trial Judge three experts' reports were available. Two were in support of the plaintiff's plea and one in support of defendants' claim. The learned Trial Judge had decreed the suit relying on the experts' evidence. However, the Appellate Court disbelieved the

experts' evidence on behalf of the plaintiff as well as the defendants. In that view of the matter, there was no expert's evidence available before the Appellate Court. In the circumstances, it was necessary on the part of the learned Appellate Court to remit the matter to the learned Trial Court appointing an expert as a Commissioner for doing the local investigation."

6) It appears to me that the facts in the present matter are akin to the facts which were before the court while delivering the judgment in the aforesaid case. Moreover, it does not appear to me that any prejudice is likely to be caused to the appellant, if the court Commissioner is appointed and the factual aspects are brought on record of the court so as to effectively decide the controversy raised in the matter. The Appellate court has further provided an opportunity to both the sides to adduce evidence on their behalf. As such, I do not find any reason to cause any interference in the impugned

order. Hence, following order.

**ORDER**

I) The Appeal from Order is dismissed,  
however, without any order as to costs.

II) Pending Civil Application, if any,  
stands disposed of.

sd/-  
(P.R.BORA)  
JUDGE

bdv/