

JPP

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

APPEAL FROM ORDER NO. 221 OF 2015

with

CIVIL APPLICATION NO. 280 OF 2015

Mr. Vitthal Shankar Kad

Since deceased through LR's.

Mr. Ramnath Vithhal Kad.

... Appellant/Applicant.

V/s.

Mr. Kisan Khandu Dhule

Since deceased through LR's.

1A. Smt. Anusaya Kisan Dhule & Ors.

... Respondents.

Mr. Girish Agrawal for the Appellant/Applicant.

Mr. Rameshwar Gite for Respondent 1A to 1E and 2.

CORAM : N.M. Jamdar, J.

28 July, 2016.

Oral Order :-

The Appellant challenges the judgment and order passed by the Principal District Judge, Nashik dated 10 October 2014 remanding the Suit to the Trial Court with a direction to appoint the Deputy Superintendent of Land Records as Court Commissioner.

2. The Suit was filed by the Respondent with an allegation that the Appellant has encroached upon the suit property and to recover possession of the encroached land. The Suit was dismissed. Thereafter, the Respondent – Plaintiff filed an Appeal. The learned District Judge after considering the material on record and taking note of the nature of the dispute, which is encroachment, found that for achieving finality to the dispute, a Court Commissioner needs to be appointed to measure the land.

3. The learned Counsel for the Appellant submitted that though the Court Commissioner can be appointed however, the decree passed by the Trial Judge need not be set aside. This submission is without merit. The decree that is passed is only dismissal of the Suit. The Suit was dismissed without there being a proper measurement. Relying on the various decisions of this Court, which has emphasized the need for carrying out a measurement by an independent party so that the dispute can be resolved finally, the learned District Judge has only given effect to the settled position of law in this regard. Once the Suit was dismissed without there being a proper measurement, which is not a disputed fact, then the learned District Judge rightly set aside the decree and remand the Suit for trial. There is no error or perversity in the order passed by the learned District Judge. The Appeal is

accordingly dismissed. The parties will remain present before the Trial Court on 22 August 2016. It is open to the parties to make a request to the learned Trial Judge for early disposal of the Suit.

4. Civil Application is disposed of accordingly.

(N.M. Jamdar, J.)