

JPP

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

APPEAL FROM ORDER NO. 675 OF 2014

Mr. Bhimrao Krushna Patil

Since deceased through his legal heirs

Indubai Bhimrao Patil & Ors.

... Appellants.

V/s.

Mr. Anant Narayan Patil & Ors.

... Respondents.

Mr. S.B. Deshmukh for the Appellants.

Mr. R.V. Pai a/w. A.R. Pai i/b. Rushikesh Patil & Kedar Lad for the
Respondents 1 to 3.

Mr. R.G. Shinde i/b. P.D. Dalvi for Respondent 4.

CORAM : N.M. Jamdar, J.

30 June, 2016.

Oral Order :-

The Appellants challenge the judgment and order passed by the District Judge, Kolhapur dated 18 March 2014 remanding the proceedings to the Civil Judge, Junior Division, Radhanagari.

2. A Suit No. 125 of 1997, filed by the Appellants, who are Plaintiffs, for removal of encroachment stated to be carried out by the Respondents – Defendants and for order of perpetual injunction. The Suit was decreed by the learned Civil Judge on 19 March 2005. Thereafter, the Respondents filed Civil Appeal No. 166 of 2005 in the District Court, Kolhapur. The learned District Judge, by order dated 3 October 2005 remanded the proceedings to the Trial Court for appointment of a Court Commissioner with certain directions and to examine the Court Commissioner. Upon remand, the learned Civil Judge decreed the Suit by order dated 8 January 2014. Thereafter, the Respondents filed Regular Civil Appeal No. 31 of 2014. By the impugned order dated 18 March 2014, the learned District Judge, has remanded the proceedings to the Trial Court.

3. Heard the learned Counsel for the parties.

4. When the Appeal No. 166 of 2005 was disposed of by the District Judge earlier, the following directions were issued :-

“ The appeal is hereby allowed as under :

The judgment and decree passed in Reg. Civil Suit No. 125/97 is hereby set aside.

The Suit is remanded to Trial Court for appointment of Court Commissioner – Taluka

Inspector of Land Records to measure the suit land block No. 79, land Block No.63 and the road either in Block No.63 or adjacent to it with boundary of Gavthan and to point out the location of the disputed shed.

The learned Lower Court is hereby ordered to direct to the Court Commissioner to measure the above lands within a period of three months from the date of receipt of appointment order of Court Commissioner.

The appellants are hereby directed to deposit the fees of the Court Commissioner as per the rules within a period of 15 days of the record and proceedings received by the lower Court.

The learned Lower Court is hereby directed to record the evidence of Court Commissioner on the basis of measurement map and on the basis of his evidence and evidence on record to give fresh judgment.

In peculiar circumstances, parties to bear their own costs.

Parties are hereby directed to appear before the Lower Court on 7.11.2005.

Decree be drawn accordingly.”

When the matter was heard by the learned Civil Judge again, the specific directions given by the learned District Judge were not implemented and erroneous commission work was conducted. The directions in toto was therefore not complied with. The learned District Judge in the impugned order observed that when specific

directions were given including details of measurement and location, they should have been complied with. It is the contention of the learned Counsel for the Appellants that in view of certain admissions of the Respondents even if the measurement aspect is kept aside, the Appellants are entitled to succeed and therefore, erroneous measurements will be of no consequence.

5. The order dated 3 October 2005 remanding the proceedings was not challenged by the Appellant. Neither at that time or at the time of remand that a stand was taken that it is not necessary to measure the land in view of the admissions of the Respondents. Once a specific directions was given by the District Judge as to how to carry out measurement, it was incumbent upon the Civil Judge to ensure that the measurement as directed is carried out or to rectify the defect. The learned District Judge, while remanding the matter relied on the decision of this Court in the case of *Vijay Shrawan Shende and Ors. v/s. State of Maharashtra and Ors.* Reported in 2009 (5) Mha. L.J. 279, in which this Court has stressed the need to have local inspection and measurement in the matters of encroachment and the boundary disputes. The order passed by the learned District Judge therefore, being in conformity with the decision of this Court and passed to implement its earlier order, cannot be stated to be illegal or the incorrect exercise of jurisdiction and discretion.

6. The learned Counsel for the Respondents submitted that even otherwise this being an Appeal against the order of remand, there is no substantial question of law that arises and there is need to import the test laid down in Section 100 of the Code of Civil Procedure of this nature. Since I have held that on merits itself the Appellants are not entitled to succeed, it is not necessary to go into the wider question. The Appeal is accordingly dismissed.

(N.M. Jamdar, J.)