

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 547 OF 2015****ALONGWITH****CIVIL APPLICATION NO. 1205 OF 2015****Bhiku @ Bhikoba Laxman Raut****since deceased through his legal heirs & Ors. Appellants****VERSUS****Prakash Shanrarrao Raut & Ors.****..... Respondents**

Mr.Prabhanjan Gujar for the Appellants.

None for the Respondents.

CORAM : R.D. DHANUKA, J.**DATED : 3rd MARCH, 2016****P.C.**

By this second appeal filed under section 100 of the Code of Civil Procedure, 1908 the appellant (original defendant) has impugned the judgment dated 17th January,2015 passed by the Ad-hoc District Judge, Pune dismissing Civil Appeal No.637 of 2010 filed by the appellant and has upheld the decree passed by the learned trial judge.

2. The original plaintiff had filed a suit for removal of the encroachment and possession of the encroached portion of the plot situated at village Lavale, Taluka Mulshi, Dist.Pune and for demolition of the portion of the house constructed by the defendant no.1 on the said encroached portion of the land.

3. The suit was resisted by the defendant no.1 by filing a written statement. Defendant no.1 also filed a counter claim inter alia praying for declaration of title in respect of the encroached portion by way of adverse possession.

4. During the pendency of the said suit, defendant no.1 made an application for appointment of the Court Commissioner to ascertain whether there was any encroachment in the suit property. Pursuant to the said application made by the defendant no.1, the learned trial judge appointed Taluka Inspector Land Record, Mulshi as a court commissioner for taking measurement of the suit land and in order to ascertain encroachment if any over the suit land. The said court commissioner accordingly carried out the measurement of the suit land and submitted his report along with measurement map Ex.74 vide letter dated 19th August, 2006. The defendant no.1 raised objection to the said report of the court commissioner and also applied for re-measurement of the map vide application Ex.64 which came to be rejected by the learned trial judge.

5. The plaintiff entered the witness box and deposed that private measurement made by him prior to the date of filing of suit indicated that defendant no.1 had made encroachment over 1.5 R land on the suit land towards southern side and thereafter in the measurement made by the court commissioner it was found that the defendant no.1 made encroachment over 1.5 R land on the suit land. The plaintiff was cross examined by the defendant no.1. In the cross examination of the plaintiff, it has come on record that there were only two rooms in the house of the defendant no.1 on Gat No.413 adjacent to the suit land and three additional rooms were constructed by the defendant no.1 later on.

6. The son of the defendant no.1 was examined as a witness. During his cross examination he deposed that in the year 1990, the original defendant had renovated old house in Gat No.430 and admitted that at the time of renovation of the house, measurement of the land was not done. He also admitted that defendant no.1 had obtained permission from the Grampanchayat before starting the construction, but

no such permission or sanction map had been filed on record. He also admitted that during the pendency of the suit, the Court commissioner had carried out the measurement of the suit land and found some portion of his house in the suit land.

7. The learned trial judge framed various issues and also considered the fact that the defendant no.1 himself had called upon the court commissioner and at the instance of the defendant no.1 his evidence was recorded at Ex.77. Defendant no.1 had only raised objection in respect of the said report that at the time of measurement the court commissioner was asked to measure the south-north length of the suit land but that was not done.

8. The learned trial judge has rendered a finding that the court commissioner had carried out the measurement of the suit land in presence of both the parties. The defendant no.1 had failed to point out as to how the measurement done by the court commissioner was faulty. It is further held that the measurement map submitted by the court commissioner clearly showed that the court commissioner had found the permanent boundary marks on the site. The learned trial judge came to the conclusion from the measurement map Ex.74 and the evidence of the court commissioner and from his cross examination by the counsel for the defendant no.1 that no illegality was found in the measurement carried out by the court commissioner. It is held that merely because the court commissioner had not measured the south-north length of the suit land on the request of the defendant no.1, it could not be said that the measurement was faulty. It is held that the court commissioner in the said report had specifically shown permanent boundary marks found on the site and on the basis of those boundary marks, he had carried out further measurement of the suit land. The learned trial judge accordingly held that there was nothing on record to show that the measurement carried out by the court

commissioner and the map Ex.74 filed by the court commissioner was faulty.

9. A perusal of the record clearly indicates that though the defendant no.1 had initially cross examined the said court commissioner, the defendant no.1 did not turn up on the subsequent dates for conclusion of the cross examination. The application made by the defendant no.1 for recall of the said witness was rejected.

10. The lower appellate court also independently considered the averments made by the parties and formulated points for determination and came to the conclusion that the defendant had made encroachment on the suit property.

11. Insofar as submission of the learned counsel for the appellant that the plaintiff had not annexed any map or plan in the plaint in the suit for removal of encroachment and thus the suit ought to have been dismissed on that ground is concerned, a perusal of the record indicates that the court commissioner was appointed at the instance of and on the application of the defendant no.1 for the purpose of taking the measurement and to ascertain whether there was any encroachment on the said property or not. Pursuant to the said application, the learned trial judge had appointed the court commissioner. The court commissioner took measurement in presence of both the parties and submitted a report alongwith a map. The said map was considered by the learned trial judge. There was hardly any cross examination of the witness examined by the plaintiff and also of the court commissioner by the defendant.

12. Insofar as judgment of Allahabad High Court in case of ***Mt.Titli vs. Alfred Robert Jones***, AIR 1934 Allahabad 273, judgment of this court in case of ***Sulemankhan Mumtajkhan and others vs. Bhagirathibai Digamber Asalmol***,

2014 (4) Mh.L.J.250 and judgment of this court in case of ***Vijay Shrawan Shende and others vs. State of Maharashtra and others*** 2009(5) Mh.L.J. 279 relied upon by the learned counsel for the appellant is concerned, in my view since the defendant no.1 himself had applied for appointment of the Court commissioner for ascertaining the fact whether there was any encroachment made by him or not and the said court commissioner submitted a report alongwith a map after taking measurement in presence of both the parties, in my view the provisions of sections 36 and 60 of the Evidence Act were complied with. None of these judgments would thus assist the case of the appellant.

13. No other submissions are advanced by the learned counsel for the appellant including on rejection of the counter claim is concerned. The findings recorded by the two courts below are concurrent findings which in my view are not perverse and thus cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908. No substantial question of law has been arisen. Second appeal is devoid of merits and is accordingly dismissed. In view of dismissal of the second appeal, civil application does not survive and is accordingly dismissed. No order as to costs.

[R.D. DHANUKA, J.]