

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO.624 OF 2016****ALONGWITH****CIVIL APPLICATION NO.1262 OF 2016****IN****SECOND APPEAL NO.624 OF 2016****Janki Devi Utkarsh Mandal & Ors.****..... Appellants****VERSUS****M/s.NRB Bearing Ltd. & Ors.****..... Respondents****Mr.Kishor K.Malpathak for the Appellants.****CORAM : R.D. DHANUKA, J.****DATE : 20th AUGUST, 2016****P.C.**

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants have impugned the order and judgment dated 22nd March, 2016 passed by the learned Principal District Judge, Thane allowing the appeal filed by the respondent no.1 (original plaintiff) and remanding Special Civil Suit No. 323 of 2000 to the trial court with various directions.

2. The original plaintiff had filed a suit for declaration, injunction and for removal of encroachment and possession of the encroached portion out of survey no.189, Hissa No.2(P) situated at Mauje Majiwade.

3. It was the case of the plaintiffs that the plaintiffs had purchased property bearing survey no.189, Hissa No.2(P) alongwith other six pieces of the land described in paragraph (1) of the plaint. It was the case of the plaintiffs that the

portion of the property purchased by the plaintiffs was encroached upon by the original defendants (appellants).

4. The learned trial judge by an order and judgment dated 6th July, 2010 has rendered a finding that the plaintiff was unable to prove his title and dismissed the said suit. Being aggrieved by the said judgment and decree passed by the learned trial judge, the original plaintiff filed an appeal (First Appeal No.17 of 2012) before the learned Principal District Judge, Thane. By a judgment dated 22nd March, 2016 the learned Principal District Judge, Thane allowed the said appeal filed by the original plaintiff partly and has set aside the decree passed by the learned Civil Judge, Senior Division. The learned Principal District Judge remanded the special civil suit to the trial court for re-trial. The learned Principal District Judge has directed the trial court to appoint cadastral surveyor from Deputy Superintendent of Land Record Office, Thane as a Court Commissioner and to hold joint survey measurement of Survey Nos. 189, Hissa No.4 and all subdivisions of survey no.189, Hissa No.2, survey No.189, Hissa No.3 and Survey No.365 after issuing prior notices to the owners of those survey numbers and other adjoining land owners, to ascertain the correctness of allegations of encroachment and extent of encroachment.

5. It is further directed that after receipt of the Court Commissioner's report, the trial court shall render opportunity to both the parties to lead additional evidence, if they desire.

6. Being aggrieved by the said order and judgment dated 22nd March, 2016 passed by the learned Principal District Judge, Thane, the original defendants preferred this appeal under section 100 of the Code of Civil Procedure.

7. Learned counsel appearing for the appellants invited my attention to some of the findings recorded by the learned trial judge holding that the original plaintiff had failed to prove their title. He submits that though the appellate court has not rendered any finding on the issue of title, the appellate court has erroneously remanded back the matter to the trial court. He submits that the plaintiff had already appointed a surveyor for the purpose of demarcation of the suit property and it was found that the land on which the defendants claim possession did not belong to the plaintiffs. He submits that remand of the suit was thus unwarranted. He submits that the entire suit cannot be re-opened in the facts and circumstances of this case.

8. A perusal of the order passed by the learned trial judge indicates that though the finding is recorded in paragraph 12 of the impugned judgment and decree passed by the learned trial judge that the conveyance relied upon by the plaintiffs would give title to the plaintiffs because that conveyance was not challenged by the defendants, at the same time it is observed that the defendants could take recourse to the said conveyance deed to establish that the plaintiffs could not prove its title to the disputed land in question. In my view this finding of fact of the learned trial judge is ex-facie contradictory and perverse.

9. A perusal of the order passed by the appellate bench clearly indicates that the appellate bench has perused the written statement filed by the defendants and has rendered a finding that there was no dispute in respect of the title of the plaintiffs in respect of the suit property and has thus answered the said issue in respect of the title though answered the issue as 'does not survive'. I am thus not inclined to accept submission of the learned counsel for the appellants (original

defendants) that the appellate bench has not reversed the finding recorded by the learned trial judge and has not recorded any finding insofar as issue of title is concerned.

10. A perusal of the record indicates that there was a dispute raised by the defendants to the effect that their possession was not in respect of the suit property in respect of which the plaintiffs had claimed ownership. In view of this dispute, the appellate bench in my view has rightly held that in order to determine whether there has been an encroachment, it was always desirable to get the land measured by an expert and to find out the area encroached upon. The appellate bench has rightly placed reliance on the judgment of this court in case of ***Kashinath Chindhuji Shastri vs. Haribhau Nathuji Bawanthade***, 2004(2) ***Mh.L.J.*** 722 and in case of ***Manohar vs. Sunanda***, 2008(4) ***ALL MR*** 718.

11. A perusal of the impugned order passed by the learned Principal District Judge indicates that the learned judge has directed the trial court to render opportunity to both the parties to lead additional evidence after submission of the court commissioner's report. The appellate court has directed the trial court to appoint cadastral surveyor from Deputy Superintendent of Land Record Office, Thane as a court commissioner for carrying out the measurement.

12. In my view there is thus no prejudice of any nature whatsoever caused to the appellants by virtue of the order of remand passed by the learned Principal District Judge, Thane. There is no substantial question of law having arisen in this appeal. Appeal is devoid of merits and is accordingly dismissed.

13. Both the parties are directed to remain present before the 5th Joint Civil

Judge, Senior Division, Thane on the date already fixed by the learned trial judge.

14. 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.]