

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

**SECOND APPEAL NO. 721 OF 2014
WITH
CIVIL APPLICATION NO. 1695 OF 2014
IN
SECOND APPEAL NO. 721 OF 2014**

Hindurao Kashinath Bhosale
(Since Deceased Thr. Legal heirs)

... Appellants

Vs

Mahadev Sawala Bhosale & Ors.

... Respondents

...

Mr. Nagesh Chavan for Appellants/applicants.

Mr. Vinod Sangvikar i/b. Umesh Mankapure
for respondent Nos. 1 to 6.

CORAM : N. M. Jamdar, J.
DATE : 20 APRIL, 2016

P.C. :

- 1 Heard the learned counsel for the parties.
- 2 Admit on the following question of law.
 - i) Whether both the courts were right in dismissing the suit and appeal filed by the appellant on the ground that the appellant failed to produce the measurements from the competent authority on record, therefore, the suit and appeal were liable to be dismissed ?
- 3 Taken up for hearing by consent, Paper Book dispensed with.

4 The appellant filed Regular Civil Suit No. 46 of 1999 before the Court of Civil Judge, Junior Division, Atpadi, that the suit was filed for fixing the boundaries, recovery of possession of encroachment land and an order of injunction. During the hearing of the suit both the parties gave a joint application below Exh. 49 to carried out Nimatana measurement of the suit property. This request was accepted by the learned Judge and Taluka Inspector of Land Records Atpadi was directed to place the measurement on record. The map was placed on record below Exh. 84.

5 I have gone through the decision of the learned Civil Judge. The entire discussion by the learned Civil Judge is on the merits of the map below Exh. 84. The learned Judge has found that the map was based on an earlier map which was in torn condition and the surveyor did not carry out his work properly and since the earlier map which was in torn condition the measurement ought to have been done on scientific basis which was not done. The learned Civil Judge thereafter proceeded to pass strictures against officer having such a map filed on record. The learned Civil Judge proceeded to dismiss the suit by the order dated 3rd April 2008. The learned District Judge dismissed the appeal.

6 The suit is filed for measurement, encroachment and injunction. The measuring the boundaries is therefor is of importance for decision of this suit. Both the parties, in fact, had made a joint request for appointment of TILR. The map has been discarded by the court under as the officer has failed to perform his duty. Once the appellant had invoked the process of law for making appropriate application and that the authority thereafter committed a default, the appellant could not have been non-suited on this ground alone. Both the courts have not recorded any finding that appellant was at fault for any reason and in fact have recorded that the fault was purely of the concern officer. Both the courts committed an error in dismissing the suit and appeal of the appellant in its entirety. The appropriate course of action would have been to order fresh Nimatana instead of dismissing the suit. The question of law, therefore, which is framed above, will have to be answer in affirmative. Accordingly, the Second Appeal is disposed by following order.

- i) The judgment and order passed by the Civil Judge, Junior Division, Atpadi, dated 3rd April 2008 and judgment and order passed by the District Judge, Sangli dated 26th September 2014 are quashed and set aside. Suit filed by

the appellant being Regular Civil Suit No. 46 of 1999 is restored to the file of the learned Civil Judge, Junior Division, Atpadi.

- ii) Parties will appear before the Learned Civil Judge on 29th April 2016.
- iii) It will be open to the appellant to make an application for measurement of the suit property and if such application is made the learned Civil Judge shall direct the Taluka Inspector of Land Records, Atpadi, to carry out the appropriate measurement.
- iv) Since the measurement has not yet been placed on record, all contentions of the parties on merits are kept open.

(N. M. Jamdar, J.)