

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

APPEAL FROM ORDER NO. 13 OF 2017

WITH CIVIL APPLICATION NO.1674 OF 2017

1. Ashok Tulshiram Ingle ... **Appellant**
Age 59 years, Occu: Agril. (Original
R/o Mahadeo Galli, Omerga, Plaintiff)
Tq. Omerga, Dist. Osmanabad

VERSUS

1 Ashok Manik Mirkale ... **Respondents**
Age 54 years, Occu: Agri.
2 Balaji Manik Mirkale
Age 51 years, Occu: Agri.
Both R/o Omerga, Tq. Omerga,
Dist. Osmanabad

Mr.P. V. Barde , Advocate for the appellant.

Mr.Shoyab Shaikh, Advocate for the respondents.

CORAM : K. L. WADANE, J.

RESERVED ON : 10.08.2017

PRONOUNCED : 11.08.2017

ON

J U D G M E N T:

1. This appeal takes exception to the judgment and order dated 20.12.2016 passed by the District Judge-1, Omerga in Regular Civil Appeal No. 22/2012, by which the appeal is partly allowed and the Regular Civil Suit No. 441/2005 is remanded to the trial court for the purpose of appointment of the Court commissioner for joint survey of land Gat Nos.408/1 and 408/2.

2. Brief facts giving rise to the present appeal are as under:

i. The appellant purchased land admeasuring 3H 25R from Gat No. 408/2 by two sale deeds. In the year 2009, dispute arose between the appellant and the adjacent land owner and therefore, the appellant got his land measured.

ii. On 14.07.2005, the respondents were trying to disturb the peaceful possession of the appellant/ plaintiff. The appellant filed Regular Civil Suit No. 441/2002 simplicitor for injunction. The respondents filed Application Exh. 23 and thereby prayed for appointment of the Court Commissioner. After hearing both the sides, the learned Civil Judge, Junior Division, Omerga rejected the application Exh.23 on 17.10.2005. The Respondents/defendants assailed the said order by way of filing Writ Petition No. 2744/2006 which was rejected by this court

iii. On 19.04.2012, the learned Civil Judge, Junior Division, Omerga decreed the suit. The respondent presented Regular Civil Appeal No.

22/2012. The District Judge, Omerga, by the impugned judgment and order, remanded the matter for appointment of Court Commissioner to measure the land Gat Nos.408/1 and 408/2.

3. I have heard Mr. Barde, the learned counsel for the appellant and Mr. Shoyab Shaikh, learned counsel for the respondents.

4. During the course of argument, Mr. Barde, the learned counsel for the appellant submitted that earlier, Application Exh.23 in the suit was decided by the learned Civil Judge and it was rejected and that order was assailed in the writ petition and the same was also rejected by this Court. The finding regarding rejection of the measurement of the land has attained finality and therefore, now this issue cannot be reopened. Mr. Barde has further submitted that the learned District Judge has not taken into consideration this legal position and has wrongly remanded the matter.

5. On perusal of the relevant reasons recorded by the learned District Judge, it appears that the learned District Judge has observed in para 9 that-

"No doubt the plaintiff has got his land measured about six years before he filed the suit in Court. But the description of the situation of the suit land and the land of the defendant shown by the plaintiff in the rough sketch in the plaint compared with the survey map indicate that indirectly the plaintiff is claiming his possession in the portion admeasuring 4 Hectares 02 Ares though admittedly he is an owner of the portion admeasuring 3 Hectares 25 Ares."

6. Above observations recorded by the learned District Judge appears to be incorrect, because, nowhere it is seen from the record, particularly, from the pleadings of the plaintiff in the plaint that he filed the suit for possession of the area admeasuring 4 Hectare 2 Ares. On the contrary, from the contents of of the plaint, it is crystal clear that the appellant/ plaintiff is claiming permanent injunction in respect of the area admeasuring 3 Hectares 25 Are. Even when the writ petition was decided, at that time also, the learned counsel for the appellant/respondent No.1 in the writ petition, had made a statement that the injunction is sought only in respect of an area to the extent of 3 Hectare and 25 Ares. There is reference in the

impugned order about the order passed by this Court in the writ petition. Therefore, the learned first Appellate Court must have gone through the reasons recored by this Court in the above writ petition. Still, the first appellate Court was apprehending that the plaintiff/present appellant is claiming possession over an area of 4 Hectare and 2 Ares, which is without any basis. The aforesaid observations of the learned District Judge are based upon assumption.

7. During the course of hearing of the present appeal, Mr. Barde, the learned counsel for the appellant also made a same statement that the plaintiff is claiming injunction in respect of area of 3 Hectares and 25 ares only and the decree of injunction was passed in favour of the plaintiff/appellant only to the extent of area of 3 hectare and 25 ares.

8. Further, it reveals from the record that respondents have not challenged the earlier measurement done by the appropriate authority i.e. T.I.L.R. It was for the respondents to challenge the measurement done by the T.I.L. R. However, the

respondents failed to do so.

9. From the reasons recorded in the impugned order, it appears that most of the observations are based upon assumption, particularly, when the plaintiff is seeking permanent injunction in respect of an area of 3 Hectare and 25 Ares from Gat No. 408/2. Therefore, the question of the ownership and possession beyond that area does not arise. In the circumstance, the findings recorded by the first appellate court appears to be incorrect. Hence following order:

O R D E R

- i. The Appeal from order is allowed.
- ii. Judgment and order dated 20.12.2016 passed by the District Judge-1, Omerga in Regular Civil Appeal No. 22/2012, is hereby set aside.
- iii. The order dated 19.04.2012, passed by the learned Civil Judge, Junior Division, Omerga in Regular Civil Suit No. 441 of 2005 is confirmed.

10. In view of disposal of the appeal, pending

Civil Application No.1674 of 2017 stands disposed
of.

(K. L. WADANE, J.)

JPC