

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 384 OF 2016

1] Bhalchandra S/o Shankarrao Kulkarni,
Age – 55 years, Occu.- Agriculture,
R/o. Deoni, Tal – Deoni, Dist.- Latur

2] Ashutosh S/o. Shankarrao Kulkarni,
Age – 47 years, Occu. - Agri.,
R/o. As above

.. Appellants
(Orig. Plaintiffs)

VS.

1] Sheshrao S/o. Vishwanath Mankari,
Age – 47 years, Occu.- Agriculture,
R/o. Deoni, Tal.- Deoni, Dist. - Latur

2] Mangalbai W/o. Purushottam Kulkarni,
Age – 65 years, Occu.- Household,
R/o. Thane, Tal and Dist. - Thane **[Deleted]**

3] Mandakini W/o. Vishwanath Puranik,
Age – 59 years, Occu.- Household,
R/o. Aurangabad, Tal and
Dist.- Aurangabad **[Deleted]**

4] Usha W/o Arunrao Pathak,
Age – 57 years, Occu. - Household,
R/o. Aurangabad, Tal. and
Dist. - Aurangabad **[Deleted]**

.. Respondents
(Resp. no.1 is Orig. Def.
Resp. No.2 to 4 are
Original Plaintiffs)
(Resp. no.2 to 4 are
formal parties)

Dr. S.D. Tawshikar, Advocate for the appellants
Mr. P.R. Katneshwarkar, Advocate for the respondent no.1
Respondents no.2 to 4 deleted as per Court's order dated
02-12-2016

CORAM : SUNIL P. DESHMUKH, J.

DATE : 04-04-2017

ORAL JUDGMENT :

1. Heard learned counsel for the parties.
2. The substantial question of law in the matter, to be answered, appears;

" Whether, in the facts and circumstances of the case, it would be expedient to remand the matter to the trial court, for trial afresh, including the amendment to the pleadings by the plaintiffs and submission of written statement, by the defendant ? "

3. Original plaintiffs are in second appeal against dismissal of regular civil suit no. 3 of 2011, instituted by them, seeking possession of 4 Acre, 10 Guntha land from defendants, situated in survey no. 273/285 in village Deoni, Tq. - Deoni, District - Latur.

4. It appears to be the case of original plaintiffs, that they are owners of 12 Acre and 10 Guntha land in survey no. 273/285, and, from the same, about 8 Acre land had been mortgaged, and, they had retained possession of 4 Acre, 10 Guntha. Taking disadvantage of the larger chunk of land being in possession of the mortgagee, the defendant had caused accession over the suit land of 4 Acre, 10 Guntha, and, as such, he is claiming possession. While

claiming possession, he had referred to 4 Acre, 10 Guntha from survey no. 273/285 western portion alongwith the sketch map of the suit land. Trial court found the matter deficient in respect of proper description *viz.* the boundaries.

5. Learned counsel for the appellants - plaintiffs contends that, as a matter of fact, dismissal on that ground, is absolutely untenable for the plaint refers to sufficient particulars, which would identify suit property. He further points out that while issuing notice to the other side, this court referred to that the plaintiffs would move an application for measurement, since steps were not taken before the courts hitherto. He submits that appellate court had been in error in dismissing the appeal on almost the same grounds despite the plaint referring to the particulars alongwith the sketch map. The plaint satisfies the condition under rule 3 of order VII, yet, the appellate court has dismissed the suit, and, the dismissal, obviously is untenable, and, observations of the courts hitherto so far as description and the identity of the property are against the record and if the same is considered to be deficient, an opportunity to amend pleadings deserves to be made available.

6. He, therefore, submits that in accordance with the directions of this court earlier referred to hereinabove, he has already submitted an application for measurement of the suit land

through competent government agency, and, is prepared to bear the expenses therefor.

7. Learned counsel Mr. Katneshwarkar, for respondent/defendant, however, finds it difficult to accede to the request of measurement being made. He submits that the matter had been dismissed on merits by the trial court *albeit* in the absence of written statement. While considering second appeal, it may have to be taken into account that if measurement at all is to take place, according to the request made in the application, since the respondent/defendant had no opportunity to defend the case, as the suit was dismissed, there was no occasion for him during the first appellate stage, to resist the request as there was no application for measurement, and, the matter was considered by both the courts on the circumstances, as were subsisting. Opportunity shall come his way to defend the case, when the matter, if at all is being considered for remand, the trial court would have to consider the matter on merits. He submits that in such case, decision of granting application for measurement can be deferred, since an opportunity at this occasion can be availed of, by the defendant by filing written statement.

8. Taking overall view of the matter, it appears that it would be in the fitness of things, and, in the interest of justice, as the suit

is dismissed for insufficient description of the property, avenue be let open for the parties concerned, to contest the matter on merits, by letting the plaintiffs to amend the plaint as also by allowing the defendant to file his written statement.

9. As such, in view of aforesaid, the substantial question of law stands answered in the affirmative, holding that the matter is liable to be remanded to trial court for trial afresh, by making available opportunity for plaintiffs to amend the plaint and for defendant to file his written statement to the amended plaint, if any.

10. As such, judgments and orders of the two courts hitherto i.e. of appellate court dated 30-03-2016 in regular civil appeal no. 34 of 2011 and of trial court dated 17-10-2011 in regular civil suit no. 3 of 2011, respectively, are set aside.

11. The matter is remanded to trial court, for decision afresh on merits, by letting opportunity to the plaintiffs to amend the plaint and the defendant, to file written statement, and giving opportunity to lead further evidence.

12. In view of aforesaid, the plaintiffs would be at liberty to make an application for appointment of court commissioner for measurement of land afresh.

13. The whole exercise after remand, may be expeditiously taken up for disposal, as early as possible, preferably within a period of nine (9) months from receipt of writ of this court.

14. The inconvenience caused in the process, to the plaintiffs can be taken care of, by awarding costs against the defendant.

15. The defendant shall deposit a sum of Rs.15,000/- (Rs. Fifteen Thousand). Costs to be deposited in the trial court by 15th July, 2017.

16. Second appeal stands disposed of.

17. Consequently, civil application no. 11457 of 2016, seeking appointment of court commissioner, also stands disposed of accordingly.

[SUNIL P. DESHMUKH]
JUDGE

arp/