

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 886 OF 2016
AND
CIVIL APPLICATION NO. 9873 OF 2016

- 1] Executive Engineer,
B & C Department,
Amalner, Dist. Jalgaon
- 2] The Government of Maharashtra,
Through Collector,
Jalgaon
- VS.
- .. APPELLANTS
(Orig. Defendants)

- 1] Chandrakant Rajaram Bari,
Age – Major, Occu. Service and
Agriculture
- 2] Sau. Kumudini Chandrakant
Khanjodkar, Age 43 years,
Occu. Business and Agriculture
- 3] Shrimati Mathurabai Rajaram Bari,
Age 85 years, Occu.: Household
and Agriculture,

All Nos.1 to 3 R/o. Amalner,
Tal. Amalner, Dist. Jalgaon

- 4] Narendra Rajaram Bari,
Age Major, Occu. Service and
Agriculture, R/o Amalner,
Dist. Jalgaon .. (Second appeal dismissed
against Resp.No. 4 as per
Court's order dated 26/8/2016)

- 5] Prakash Rajaram Bari,
Age Major, Occu. Nil,
R/o Amalner, Dist. Jalgaon
- .. RESPONDENTS
(Orig. Plaintiffs)

Mr. S.W. Munde, A.G.P. for the appellants-State

Mr. Girish Rane, Advocate for respondents no.1 to 3

Second appeal dismissed against respondent no.4 as per Court's order dated 26/8/2016

CORAM : SUNIL P. DESHMUKH, J.

DATE : 07/03/2017

ORAL JUDGMENT :

1. Defendants in regular civil suit no.75 of 2005 are before this court, taking exception to decisions rendered by the two courts; trial as well as appellate, directing to hand over 28 Are land from gut no.1628 encroached over by them to respondents/plaintiffs, and, further directing them to close the drain holes created in the compound wall and against the enquiry directed in respect of *mesne* profits.

2. Respondents/plaintiffs had been in the suit, contending that they are owners of 4 Hectare, 92 Are land from gut no.1628 situated at Amalner. On the west of gut no.1628, there is gut no.1589 and the same had been in occupation of the defendants. Defendant no.1 purportedly had raised construction of office and other structures including the compound wall. Plaintiffs sensed that construction carried on by the defendants is by encroaching upon their land in gut no.1628. In January, 2004, measurement had been

carried out, and, it was found that the defendants had encroached upon an area of 28 Are land of plaintiffs from gut no. 1628. According to plaintiffs, their request to remove encroachment had been in vain, and, as such, the suit ensued.

3. During the pendency of the regular civil suit no.75 of 2005, an amendment was carried out requesting to close all drain holes in the compound wall which had been affecting the utility, user and quality of land owned by the plaintiffs.

4. Defendants resisted the suit. They had challenged the measurement of January, 2004. According to the defendants, gut no. 1589 admeasuring 5 Hectare had been handed over to them by Taluka Inspector of Land Records, Amalner and in the same, they had raised construction, including compound wall. The construction had been carried out in the years 1999 to 2001. They, as such, prayed for dismissal of the suit.

5. On the basis of aforesaid pleadings, trial court had framed issues, as to whether plaintiffs are owners of gut no.1628 and whether they have proved defendants have caused encroachment over 28 Are land from gut no.1628, whether suit is within limitation, and, whether they are entitled for possession and *mesne* profits. Trial court has held that the plaintiffs are owners and

the defendants have caused encroachment over 28 Are land, and, they are entitled to its possession and *mesne* profits.

6. In the appeal by present appellants before district court, the court framed points for determination, as to whether defendants have caused encroachment over 28 Are land of gut no.1628, whether the drain holes in the compound wall caused damage to the suit property, whether suit deserves to be remanded for retrial. Appellate court considered that the defendants have encroached over 28 Are of land of gut no.1628 and the drain holes in compound wall cause damage to suit property, and, remand would not be necessary.

7. Learned A.G.P. submits, may be, it is a case wherein the property gut no.1628 and gut no.1589 were measured during pendency of suit upon an application pursuant to order 26 rule 10 by the appellants, yet, in the absence of examination of the District Inspector of Land Records, it cannot be said that the measurement is proved and admissible in evidence. He submits, it has sufficiently come on record during the earlier measurement of 2004, the measurer had not verified all the four boundary marks of gut no.1628. He submits that it may not be a case wherein it can be said that an opportunity had come appellants' way to properly put up the case. He therefore urges indulgence into the request that the

matter be remanded for retrial.

8. Opposing aforesaid submissions, on behalf of the respondents/plaintiffs, learned counsel Mr. Girish Rane contends that indulgence into the request on behalf of the appellants may not be necessary for the reason that the evidence on record sufficiently vindicates that there is in-fact encroachment over 28 Are of land over gut no.1628 by the defendants.

9. He submits that it is not only once but twice there has been measurement by the concerned office. On both the occasions, measurement had been carried by following due procedure, and, the situation emerges that there has been no change of whatsoever nature.

10. He submits that the examination of officer as contended on behalf of the appellants is concerned, said ground had been taken up during the regular civil appeal, and, that has been adequately dealt with and decided with reference to the position prevailing in law with support of certain citations. He submits that here it is not a case before this court that legal position is otherwise.

11. He submits that in the circumstances, it is not a case wherein the grounds which should have been framed as substantial

questions of law at 'A', 'B' and 'C', would ever arise.

12. While one will have to consider that point 'A' and 'B' reading, thus,

A] Mere production of Commissioner's report and it being admitted in evidence by itself does not prove contents of document or as to what investigations were carried out by the court commissioner. Whether the Lower Courts, particularly the Appellate Court was justified in dismissing the appeal and granting decree in favour of the Plaintiffs based on such a Report ?

B] Correctness of contents of the Commissioner's report can only be proved by examining writer/author of document. In the present case whether the Lower Courts were justified in placing reliance on the court Commissioner's Report without examining the Commissioner as a witness ?

it would be pertinent to refer to the following observations of the appellate court, as contained in paragraphs no. 22, 23 and 24,

“22] Learned advocate for the plaintiff Mr. M.J. Bagul has submitted that the report submitted by the Court Commissioner under Order-XXVI Rule-10 of the Code, is admissible without examination of the Court Commissioner. In support of his submissions, he has placed reliance on the following judgments;

1] State of U.P. Vs. Smt. Ram Sri and another AIR 1976 Allahabad 121.

2] *Harbhajan Singh Vs. Smt. Shakuntala Devi Sharma and another* AIR 1976 Delhi 175.

3] *State of Kerala Vs. Kottammal Mammeeriyakutty and others* AIR 1985 Kerala 109.

23] *The Hon'ble Allahabad High Court in the case of State of U.P. Vs. Smt. Ram Sri and another (cited supra) has considered admissibility of the report of the Court Commissioner without his examination. It is held that -*

*“33. Order XXVI Rule 10(2) of the Civil P.C. lays down that the report of the commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. It is, therefore, clear from the aforesaid provision that it is not necessary in order that the report becomes evidence that the statement of the commissioner should also be made in the court for the purpose of proving it. It is up to the choice of the party to examine a commissioner in respect of the matters referred to him or mentioned in his report. But the examination of the commissioner is not at all required by the aforesaid provisions for the purpose of proving the report. The case relied upon by the learned counsel for the respondent in *Haji Kutubuddin V. Allah Banda* (AIR 1973 All. 235) is not at all relevant on the above controversy. In this case, the High Court did not hold that the statement of the commissioner was necessary in order to prove it or that without such a statement the same could not be read in evidence. We, therefore, do not accept the submission of the learned counsel for the respondent that the report of the first commissioner was not admissible as he had been produced as a witness.”*

24] *The same ratio has been laid down by other Hon'ble High Courts in the above two judgments. Therefore, I do not think it necessary to make reference of other judgments. In view of the ratio laid down in the case of State of U.P. Vs. Smt. Ram Sri and another (cited supra), the report of the Court Commissioner submitted under Order-XXVI Rule 10 of the Code is admissible,*

without his examination. Therefore, I have no hesitation to consider the report submitted by the District Inspector of Land Records, Jalgaon vide Exh. 32. In fact, if the defendants wanted to dispute correctness or genuineness of report Exh.32, in that case, it was expected from them to call Court Commissioner for cross examination. However, the remedy has not been availed by the defendants for the best reason known to them. In view of this, I admit report Exh.32 of the Court Commissioner in evidence.”

13. Even otherwise, the appellants are not in a position to show that any prejudice has been caused due to non-examination of the commissioner.

14. So far as ground no. (C) is concerned, learned assistant government pleader is not in a position to show that an opportunity had not come their way to make final arguments.

15. The decisions of the two courts sufficiently refer to submissions on behalf of the appellants. No material had been produced to show that it can be said that no opportunity had been given to the appellants.

16. In the circumstances, the second appeal does not appear to carry any substance in the same, the same stands dismissed as such.

17. At this stage, learned assistant government pleader for the appellants Mr. Munde requests that the proceedings in execution be kept in abeyance for a period of eight (8) weeks from today.

18. In the circumstances, execution proceedings to remain in abeyance for a period of eight (8) weeks from today. This arrangement, however, shall cease to operate, upon expiry of the aforesaid period, without further reference to the court.

19. Civil Application no. 9873 of 2016 accordingly stands disposed of.

[SUNIL P. DESHMUKH]
JUDGE

arp/