

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

10 WRIT PETITION NO. 11567 OF 2017

NADARBAI WAMANRAO SANSARE AND ANOTHER
VERSUS
RAJU BABAN VYAVHARE AND OTHERS

...
Advocate for Petitioners : Mrs. G. N. Chincholkar.
Advocate for Respondent Nos.1 to 3 : Mr. Anil S. Bajaj.
...

CORAM : **V. K. JADHAV, J.**
DATE : 13th November, 2017.

ORDER:

. Being aggrieved by the order passed below Exhibit 16 dated 2nd August, 2017 by the Ad-hoc District Judge-1, Sangamner in Regular Civil Appeal No.50 of 2013, the original Defendants have approached to this Court by filing the present writ petition.

2 The Respondents / Plaintiffs had instituted Regular Civil Suit No.220 of 2007 for decree of perpetual injunction, removal of encroachment and possession in respect of land Block No.397/1 situated at village Zarekathi, Taluka Sangamner, District Ahmednagar. The learned 2nd Joint Civil Judge Junior Division, Sangamner by judgment and decree dated 29th April, 2013 dismissed the suit with costs. Being aggrieved by the same, the Respondents / Plaintiffs have

preferred an appeal bearing Regular Civil Appeal No.50 of 2013. Pending appeal, the Respondents / Plaintiffs have submitted an application Exhibit 16 for appointment of Court Commissioner in order to measure the suit land to ascertain the encroachment. The Ad-hoc District Judge-1, Sangamner by impugned order dated 2nd August, 2017 allowed the said application. Hence, this writ petition.

3 The learned counsel for Petitioners / original Defendant Nos.1 and 5 submits that the Plaintiffs have admitted the entries in respect of the crops cultivation and as such, the Trial Court has come to the conclusion that the total area under cultivation of the Plaintiffs is seem to be 1 Hectare 97 Ares. The Trial Court in para 17 has concluded to the effect that the Plaintiffs are in occupancy of 1 Hectare 97 Ares, which is under cultivation. The learned counsel submits that the Respondents / Plaintiffs never challenged the measurement carried out by the Cadastral Surveyor and the report submitted by him before the Court. Though the parties have examined said Cadastral Surveyor as PW-2 in the suit, the Trial Court has disbelieved his evidence and further concluded to the effect that the Respondents / Plaintiffs have failed to substantiate their case about the alleged encroachment over the portion of the suit land. Consequently, the

Trial Court has dismissed the suit in its entirety. The learned counsel submits that the lower Appellate Court, however, allowed the application Exhibit 16 and further directed that the Taluka Inspector of Land Record, Sangamner to be appointed as Court Commissioner for the purpose of local investigation. The learned counsel submits that during the pendency of the suit, the measurement was carried out by the Taluka Inspector of Land Record. The learned counsel also submits that the suit land and the land belonging to the Petitioners / Defendants are not on the same level and as such, there can be hardly any encroachment when the lands are not in one and the same level.

4 On careful perusal of the judgment and decree passed by the Trial Court most particularly paras 24 and 25, it appears that the Trial Court has specifically observed that without the *Phalani* map, PW-2 has carried out the measurement. The Trial Court has also observed that the rough notes drawn on the spot of measurement are not produced on record. There is specific provision in Survey Manual for such a compliance when there is a dispute about the encroachment and the boundaries marks. In para 25 of the judgment, after referring the cross-examination of the said witness Taluka Inspector of Land Record, the Trial Court has observed that the measurement has been

carried out only on the basis of occupancy without considering the village map or *Phalani* map. The learned Judge of the Trial Court has observed that there is no other alternative but to arrive at the conclusion that the measurement has not been properly done and on the basis of such measurement, the conclusion of encroachment cannot at all be arrived at.

5 The learned District Judge on perusal of the record and the judgment and decree passed by the Trial Court, has observed that the Cadastral Surveyor has not followed the proper procedure and the map produced by him cannot be considered or accepted as an accurate map. The learned District Judge has also observed that it would not be proper to allow the parties to suffer due to the gross negligence on the part of the Cadastral Surveyor during the course of the measurement. It appears from the judgment and decree passed by the Trial Court that the entire basis of dismissal of the suit is that the map prepared by the Cadastral Surveyor is not accurate. The learned District Judge has therefore, rightly allowed the application Exhibit 16 and further appointed the Taluka Inspector of Land Record, Sangamner for carrying out the measurement of the lands with some specific directions.

6 The learned counsel for Petitioners though placed her reliance in the case of **Chandrarao s/o Hanumantrao Wable Vs. Dhondu s/o Fula Patil**, reported in, **2012(2) Mh.L.J. 847**, I do not think that the ratio laid down in the aforesaid case can be made applicable to the facts and circumstances of the present case. I find no substance in this writ petition. Hence, the following order:

ORDER

The writ petition is hereby dismissed. No costs.

[V. K. JADHAV, J.]

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