

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

APPEAL FROM ORDER NO. 83 OF 2016

YASHWANT TOPA MAHAJAN
VERSUS
GANESH BAPURAO PATIL AND OTHERS

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Advocate for Petitioner : Mr. Ajit M. Gholap.

Advocate for Respondent No.1 : Mr. S. P. Shah.

Advocate for Respondent Nos.2 to 5 : Mr. P. B. Gamot.

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CORAM : **V. K. JADHAV, J.**

RESERVED ON : 25th April, 2017.

PRONOUNCED ON : 03rd May, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and order dated 20th September, 2016 passed by District Judge-1, Bhusawal in Regular Civil Appeal No.218 of 2014, Respondent No.1 before the lower Appellate Court / original Defendant No.1 has preferred this appeal from order.

3 Brief facts giving rise to the present appeal from order are as follows:

- a) Respondent No.1 to 4 / original Plaintiffs have instituted Regular Civil Suit No.202 of 2004 for

declaration, recovery of possession of encroached portion and decree of perpetual injunction in respect of suit plot No.22, T.P. Scheme No.2, final plot No.67, Survey No.49/1A/1+2/1B+1C admeasuring 261.03 square meters having eastern side 11.75 meters, western side 11.35 meters, northern side 22.60 meters and southern side 22.65 meters with the boundaries as detailed in the plaint. Respondents / Plaintiffs claim to be the owners of the aforesaid plot purchased on 29th June, 1998 under the registered sale-deed from one Harichandra Gidwani for a valuable consideration and on 24th January, 2003 the Respondents / Plaintiff Nos.1 and 2 sold the portion admeasuring 123.63 square meters from the aforesaid plot to Respondents / Plaintiff Nos.3 and 4 under the registered sale-deed and as such, all the Respondents / Plaintiffs are owners in possession of the aforesaid plot. Appellant / Defendant No.1

is the owner in possession of plot No.4 of T.P. Scheme No.2, final plot No.63, Survey No.47/5B/1+2 admeasuring 235.62 square meters as per the boundaries and the specification detailed in the plaint. The aforesaid plot owned and possessed by Appellant / Defendant No.1, is situated towards the southern side of the disputed plot owned by the Respondents / original Plaintiffs. As per the pleadings of Respondents / Plaintiffs, the Appellant / Defendant No.1 has encroached upon the portion of suit plot to the extent of 11.88 square meters and unauthorizedly made the construction of one room and compound wall on it. It is also been alleged that Appellant / Defendant No.1 had made the construction unauthorizedly, against the construction permission granted by the Municipal Council, Bhusawal. Consequently, the Respondents / Plaintiffs filed a complaint to Defendant No.2 / Municipal Council, Bhusawal

and after carrying out the inspection, Defendant No.2 / Municipal Council, Bhusawal has also issued notice to Appellant / Defendant No.1 for demolition of the illegal construction.

- b) Appellant / Defendant No.1 has strongly resisted the suit by filing written statement at Exhibit 18. Appellant / Defendant No.1 has admitted description of his plot, but specifically denied the area of the suit plot. It has been contended that eastern side of the suit plot is only 10.25 meters as against 11.35 meters shown by the Respondents / Plaintiffs and the same is evident from the first registered sale-deed dated 25th February, 1983 of the suit plot executed by one Digambar Vishnu Bhole in favor of Subhash Pralhad Kolhe. Appellant / Defendant No.1 has contended that the area of the suit plot is only 244.35 square meters and accordingly, denied the alleged encroachment over the suit plot. It has been contended that Appellant / Defendant No.1

has carried out the construction as per the permission and the map sanctioned by the Municipal Council, Bhusawal.

- c) Both the parties led their oral and documentary evidence in support of their rival contentions and the learned Civil Judge Junior Division, Bhusawal vide its judgment and decree dated 19th January, 2010 dismissed the suit with finding that the Respondents / Plaintiffs have failed to prove the total area of suit plot No.22 as 261.03 square meters and as such, failed to prove the encroachment over the suit plot from the southern side by the Defendant. Being aggrieved by the same, Respondents / original Plaintiffs preferred Regular Civil Appeal No.218 of 2014 and the learned District Judge-1, Bhusawal vide its impugned judgment and order 20th September, 2016 partly allowed the appeal and set aside the judgment and decree passed by the lower Court and remitted back the matter to the lower Court

with a direction to appoint Court Commissioner from the Government Department of Land Records, to carry out the measurement of the suit plot and the plot owned and possessed by the Appellant / Defendant No.1 to ascertain whether there is any encroachment on the suit plot and after receipt of the said report, directed the lower Court to decide the suit afresh. The learned District Judge has also given liberty to the parties to file additional evidence, if any, or they may choose to adopt part of the evidence already recorded. Being aggrieved by the same, original Defendant No.1 has preferred this appeal from order.

4 The learned counsel for Appellant / Defendant No.1 submits that as per the pleadings of the parties, the dispute is not about the boundaries. Appellant / Defendant No.1 has proved his case about the existence of less area of the disputed plot. The learned Judge of the Trial Court has recorded the finding to issue Nos.1 to 3 in the negative and thereby held that the total area of the

suit plot is not 261.03 square meters and the Plaintiffs failed to prove that Defendant No.1 has encroached upon the suit plot as detailed in the plaint from the southern side and had made the construction over it. The learned Judge of the Trial Court has specifically observed that the Plaintiffs are required to prove their ownership and possession over the suit plot admeasuring 261.03 square meters. The learned Judge of the Trial Court has specifically observed that the dispute is from the point of area of the suit plot as mentioned in the record and the actual area. The Trial Court has also referred the permission given to the Plaintiffs by the Municipal Council, Bhusawal for construction over the suit plot and on perusal of the said permission Exhibit 71, the actual measurement area of the suit plot is only 244.08 square meters and the permission is granted to the Plaintiffs for construction after making necessary correction in the construction permission map. The learned counsel submits that the Plaintiffs have filed *Hami Patra* (undertaking) before the Municipal Council, Bhusawal wherein they have admitted the measurement of the suit plot as 244.08 square meters instead of 261.03 square meters. The learned counsel submits that the Respondents / Plaintiffs have not followed

the provisions of Order VII, Rule 3 of the Code of Civil Procedure. The Plaintiffs have failed to show the alleged encroachment by drawing a sketch to point out the location and the extent of encroachment. The learned counsel submits that the parties were fully aware of their respective cases and led the evidence in support of their rival contentions and despite the issues framed and decided by the Trial Court as per the pleadings of the parties, the lower Appellate Court has remanded the matter for fresh decision. The lower Appellate Court has not decided the appeal on merits and remanded the matter with liberty to adduced further evidence permitting thereby the Plaintiffs to fill up the lacuna.

5 The learned counsel for the Appellant in order to substantiate his contentions placed his reliance on the following cases:

- a) **Hameed (dead) by LRs and others Vs. Kummottummal Kunhi P.P. Amma (dead) by LRs and others**, reported in, **(2007) 15 Supreme Court Cases 155.**
- b) **Balkrishna Dattatraya Butte & Ors. Vs.**

Dattatraya Shankar Mohite & Ors, reported in,
1998(2) ALL MR 740 (Bombay High Court)

- c) **J. Lingaiah and others Vs. G. Hanumanthappa and others**, reported in, **(2001) 10 Supreme Court Cases 751.**
- d) **Sk. Ibrahim s/o. Sk. Mohamood and others Vs. Sk. Mehmood s/o Sk. Vazir**, reported in, **AIR 2003 Bombay 357.**
- e) **Ashwinkumar K. Patel Vs. Upendra J. Patel and others**, reported in, **AIR 1999 Supreme Court 1125.**

6 The learned counsel for Respondents / Plaintiffs submits that the Respondents / Plaintiffs have purchased the area of 261.03 square meters under the registered sale-deed Exhibit 54 and merely on the basis of undertaking submitted to the authority while seeking the construction permission, the title of the Plaintiffs to the suit plot admeasuring 261.03 square meters cannot be ignored. The learned counsel submits that Appellant / Defendant No.1 in para 9 of his written statement has contended that in T.P. Scheme

No.2 all the plot holders including his final plot No.63, received the excess area as per the revised plan from the road side. The learned counsel submits that Appellant / Defendant No.1 has thus, accepted the excess area of his plot and as such, the said plot owned and possessed by the Appellant / Defendant No.1 required to be measured alongwith the disputed plot to find out the encroachment as alleged by the Plaintiffs. The lower Appellate Court has rightly observed that the dispute is about the boundaries and the joint measurement is essential to resolve the dispute between the parties. The learned counsel submits that even the Trial Court in para 15 of the judgment, observed that even though the Plaintiffs were aware of the fact about the actual area of the suit plot by measurement is only 244.08 square meters, the Plaintiffs would have got measured the suit plot from TILR and in accordance with it would have shown encroachment by the Defendant on the suit plot. The learned Judge of the Trial Court has specifically observed that as such, the Plaintiffs have not complied the basic requirements to prove the alleged encroachment. It was appropriate on the part of the Trial Court to exercise the powers under Order XXVI, Rule 9 of the Code of Civil Procedure for the

purpose of elucidating the matter in dispute by issuing a commission to such person as it thinks fit to make such investigation and report thereof to the Court. The Respondents / Plaintiffs have filed the applications to that effect before the lower Appellate Court and while remanding the matter, the lower Appellate Court has granted liberty to the Respondents / Plaintiffs for filing the similar applications before the lower Court.

7 The learned counsel for the Respondents / Plaintiffs in order to substantiate his contentions placed his reliance on the following two cases:

- a) **Vijay s/o Shrawan Shende and others Vs. State of Maharashtra and others**, reported in, **2009(5) Mh.L.J. 279**.
- b) **Bento Antonio Gomes alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro and others**, reported in, **2014(4) Mh.L.J. 366**.

8 It appears from the pleadings of the parties that the main dispute is about the area of the suit plot. The lower Appellate Court in para 8 of the judgment has observed that as per the

demarcated layout plan Exhibit 50, the area of suit plot is 261.03 square meters and further the layout plan Exhibit 53 also indicates the area of suit plot as 261.03 square meters. The Respondents / Plaintiffs are claiming their title over the suit plot on the basis of sale-deed Exhibit 54, which indicates the area of the suit plot as 261.03 square meters. Appellant / Defendant No.1 has raised the objection to the said area on the basis of the undertaking given by the Respondents / Plaintiffs to the Municipal Council, Bhusawal at the time of seeking construction permission over the suit plot. The said undertaking is at Exhibit 72 wherein the Respondents / Plaintiffs have admitted the area of the suit plot as 244.08 square meters when it was actually measured. Though the Respondents / Plaintiffs undertaken for not raising any objection in future, it is also mentioned in the said undertaking that the area of the disputed plot as per the final sanction layout plan is 261.03 square meters. The Trial Court has given weightage to the said undertaking Exhibit 72 and observed that the Respondents / Plaintiffs failed to prove the area of the suit plot as 261.03 square meters. The learned Judge of the Trial Court has also observed that the Respondents / Plaintiffs should have got measured the disputed plot to ascertain its area

and the alleged encroachment. Thus, in order to resolve the real dispute between the parties, the lower Appellate Court has rightly remanded the matter directing the Trial Court to appoint an expert to jointly measure the suit plot as well as the plot owned and possessed by the Appellant / Defendant No.1. Appellant / Defendant No.1 has also admitted in his written statement the excess area of his plot by giving reference to the revised plan. According to the Appellant / Defendant No.1, the plot holders from the T.P. Scheme No.2 got the excess area in their respective plots from the road side owing to the revised plan. In the backdrop of these admissions, it would be just and necessary to find out whether the excess area as claimed by the Appellant / Defendant No.1 is on account of revised plan as alleged or whether it was on account of the encroachment over the suit plot. So far as the admissions given by the Respondents / Plaintiffs in the said undertaking, the Trial Court may consider it afresh after receipt of the report of the joint measurement.

9 In the case of *Hameed (dead) by LRs and others Vs. Kummottummal Kunhi P.P. Amma (dead) by LRs and others* (supra) relied upon by the learned counsel for Appellant, in the facts of the

said case, the Supreme Court has observed that while remitting the matter to the Trial Court for consideration, the High Court has not indicated as to what question of facts and law required to be assessed and the circumstances upon which the High Court found itself unable to decide the matter. The Supreme Court has thus, observed that in spite of the opportunity, the plaintiff has not filed any other document and the High High Court should not have remanded the matter with liberty to produce documents in order to fill lacuna in the evidence.

In the instant case, the main dispute is about the boundaries and the area of the plot and the said dispute cannot be resolved unless and until the joint measurement of both the plots is carried out. The case cited above cannot be made applicable to the facts and circumstances of the present case.

10 In the case of *Balkrishna Dattatraya Butte & Ors. Vs. Dattatraya Shankar Mohite & Ors* (supra) relied upon by the learned counsel for Appellant, this Court has observed that whenever a remand is made under Order XLI, Rule 23A, the findings recorded by the Trial Court have to be examined and reversed in appeal and then retrial, if considered necessary may be ordered.

In the instant case, the lower Appellate Court has examined the findings recorded by the Trial Court and observed that the real dispute between the parties is about boundaries / area of the suit plot and as such, the joint measurement through the appropriate forum is a best remedy to resolve the said dispute.

11 In the case of *Sk. Ibrahim s/o. Sk. Mohamood and others Vs. Sk. Mehmood s/o Sk. Vazir* (supra) relied upon by the learned counsel for Appellant, this Court has observed that when the parties fully aware of their respective cases, lead all the necessary evidence not only in support of their case, but in refutation of the claim of the other side, non-framing of the issues cannot be held to be a ground for remanding the case unless it is fatal to the case or resulted in mistrial which vitiates the proceedings. In pars 10 and 11 of the judgment, this Court has made the following observations:

“10. It is well settled law that when the parties fully aware of their respective cases, lead all the necessary evidence not only in support of their case, but in refutation of the claim of the other side, non-framing of the issues cannot be held to be a ground for remanding the case unless it is fatal to the case or resulted in mistrial which vitiates the proceedings.

Because if the evidence which has been led before the trial Court is sufficient to reach a right conclusion and neither party has raised any objection to the framing of the issues before the trial Court, there was no reason why the first appellate Court should have remanded the matter for fresh trial by giving suo motu directions to the parties to amend the pleadings which parties themselves have not sought. This is not permissible as a public policy for the reason that it is for the parties to put up their case in a proper manner and once they undergo the rigour of the trial, the findings should not be interfered with by remanding the case.

11. In the present case, the parties have been litigating since the year 1989, the question as to whether the plaintiff is entitled to right of way by virtue of prescriptive right or customary right, is a matter to be decided on merits as whatever evidence the parties have in the matter, has been led, but it is not the grievance of either plaintiff or the defendants that they were not given fair opportunity to lead the evidence or conduct the trial. The learned appellate Court has also not examined the case on merits which could have enabled it to assess the judgment and decree of the trial Court and, therefore, reverting the parties back to stage one could only result in prolonging the litigation and unnecessary waste of judicial time as well as causing inconvenience to the litigants.”

In the facts of the said case, this Court has made the observations as above. However, in the instant case, the lower Appellate Court has rightly observed that the dispute between the parties is about the boundaries / area of the suit plot and the said dispute cannot be resolved unless the joint measurement of the suit plot as well as the plot of the Defendant is carried out.

12 In the case of *Bento Antonio Gomes alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro and others* (supra) relied upon by the learned counsel for Respondents, this Court has referred the observations of the Apex Court in the case of **Haryana Waqf Board Vs. Shanti Sarup and ors.**, reported in, **(2008) 8 SCC 671** wherein the Apex Court has observed that in case of demarcation of the disputed lands, it was appropriate for the Court to direct the investigation by appointing a Local Commissioner as provided under Order XXVI, Rule 9 of the Code of Civil Procedure. In paras 19 and 21 of the judgment in the above cited case, this Court has made the following observations:

“19 It can thus be seen that it has been consistently held by this Court that wherein a question of boundary dispute or an encroachment

arises it is appropriate that the Court should exercise power under Order XXVI, Rule 9 of the Civil Procedure Code. Section 75 and specifically clause (b) thereof empowers the Court to make local investigation. Rule 9 of Order XXVI enables the Court where it provides that a local investigation is requisite or proper for the purpose of elucidating any matter in dispute, to issue a commission to such person as it thinks fit to make such investigation and report thereof to the Court.

21. No doubt that in the present case, application for appointment of Court Commissioner was not made. However, it is to be noted that before the learned Trial Judge three experts' reports were available. Two were in support of the plaintiff's plea and one in support of defendants' claim. The learned Trial Judge had decreed the suit relying on the experts' evidence. However, the Appellate Court disbelieved the experts' evidence on behalf of the plaintiff as well as the defendants. In that view of the matter, there was no expert's evidence available before the Appellate Court. In the circumstances, it was necessary on the part of the learned Appellate Court to remit the matter to the learned Trial Court appointing an expert as a Commissioner for doing the local investigation."

the judgment and order passed by the lower Appellate Court. There is no substance in the appeal and the appeal is thus, liable to be dismissed. Hence, the following order:

ORDER

- I. The appeal from order, is hereby dismissed. In the circumstances, there shall be no order as to the costs.
- II. The appeal from order is accordingly disposed of.
- III. Pending civil application stands disposed of.

[V. K. JADHAV, J.]

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