

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 3272 OF 2017

Suvarana Pratap Jagtap

... Petitioner

Vs.

Bhairu Parshuram Jagtap

... Respondent

Mr. Kalpesh U. Patil, Advocate for the petitioner.

Mr. Manoj A. Patil i/b. Mr. Ashish P. Pawar, Advocate for respondent
No. 1.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 5th June, 2017.

P.C.:

Rule. Rule made returnable forthwith. By consent, the petition is heard finally and decided at the stage of admission.

2. The petitioner is the original plaintiff, who has filed Regular Civil Suit No. 401 of 2016 that the original defendant/respondent has encroached on her land, i.e., Gat No. 880 of village Vadgaon Haveli, Taluka Karad, District Satara. The respondent/original defendant was having old house at Gat No. 878. He demolished his old house and while constructing new house, the wall of his house was shifted towards to the west side where the petitioner/plaintiff's land, i.e., Gat No. 880 situate. The respondent has encroached upon the land of the petitioner by 1½ ft. The petitioner's Application Exhibit 5 was

allowed by the learned 4th Joint Civil Judge Junior Division, Karad by order dated 29th September, 2011 and respondent/defendant was temporarily restrained from carrying out construction in the suit property till the final disposal of the suit house. The respondent moved Miscellaneous Appeal No. 82 of 2016 in the District Court Karad. By the judgment and order dated 6th March, 2017, the said Appeal was allowed and the order of injunction passed by the 4th Joint Civil Judge Junior Division, Karad was set aside. Hence, this Writ Petition.

3. After going through the orders passed by the learned Judges of the Courts below and after hearing the submissions, encroachment is not clear, as it involves necessarily issue of boundaries of Gat Nos. 878 and 880. Therefore, I find it necessary to fix the boundaries of both these Gat Nos.

4. The learned counsel for the petitioner has pointed out that pending Miscellaneous Appeal No. 82 of 2016, the respondent has moved an Application for appointment of Court Commissioner under Order 26 Rule 9 of Code of Civil Procedure. The said application was not objected to by the petitioner. However, the learned Appellate Court Judge felt it not necessary to allow the said Application but only

after hearing the matter on merit has allowed the Appeal. I am of the view that this being the boundary dispute, it is necessary to investigate the factual position where the respondent/original defendant after demolition of the old house has shifted the wall towards the western side than the original place of the old wall. This Application ought to have been allowed by the learned Judge of the District Court before disposing of the Appeal. Hence, I partly allow this Writ Petition and direct the Appellate Court to appoint the Court Commissioner as per the said Application which is Exhibit 12 in Miscellaneous Appeal No. 82 of 2016. Both the parties shall appear before the Appellate Court on 14th June, 2017. The order dated 6th March, 2017 is hereby set aside. The status quo granted earlier to continue.

5. The Appellate Court, after receipt of the report of the Court Commissioner, to decide the Appeal afresh on merits within two months thereafter, i.e., till 14th August, 2017.

6. Writ Petition is partly allowed.

(MRIDULA BHATKAR, J.)