

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

SECOND APPEAL NO. 634 OF 2014

Shri Rama Sopan Bansode & ors. .. Appellants
Vs
Machindra Khandu Waghmare. .. Respondent

Mr.Ajay Joshi, for Appellants.

Mr.Surel Shah, for the Respondent.

***Coram : N.M.Jamdar, J.
Date : 24 April 2017.***

Oral Order :

The Appellants are the Plaintiffs who had instituted Special Civil Suit No.81 of 1992 in the Court of Civil Judge, Senior Division Pandharpur. The Appellants by way of this Suit claimed that the Respondent-Defendant be directed to hand over the area of 95 Ares, which according to the Appellants, the Respondent has encroached upon. In the trial Court, the Appellants relied upon report of the surveyor, who was examined. The Respondent also examined witnesses including the cadastral surveyor and adjoining land owners. The learned Civil Judge, after considering the material produced by the rival parties, came to the conclusion that the Appellants have not proved their case that the suit land was

encroached upon by the Respondent. The trial Court held that the surveyor appointed by the Appellants did not carry out measurements correctly and could not be relied upon. After the learned Civil Judge dismissed the Suit by judgment and order dated 30 April 1998, the Appellants filed the Regular Civil Appeal No.46 of 1998 in the District Court, Pandharpur. This Appeal was dismissed by the District Court, on 30 September 2005. Thus the Appellants have challenged the concurrent finding that there is no encroachment by the Respondent.

2. The learned counsel for Appellants submitted that if the Courts had come to a conclusion that the measurement was not carried out correctly by the surveyor examined by the Appellant, the Courts could have directed an appointment of Court Commissioner. The learned counsel for the Appellants also relied upon decision of the learned Single Judge, in the case of *Ramchandra s/o Bhikaji Jagtap Vs. Dudharam Langruji Padvekar (dead thru LRs) & ors. - 2003(4) ALL MR 990; Niranjanabai Chandrakant Vira vs. Pramilabai Balkrishna Zade & another – 2004(6) Bom.C.R. 829* and contended that it will be necessary to remand the proceedings for fresh measurements in regard to the view taken in these decisions. The learned counsel for Appellants submitted that even in this Court, in Second Appeal, measurements can be directed.

3. The submissions of the Appellants cannot be accepted. The trial Court itself had rendered a finding that report of the surveyor

appointed by the Appellants could not be relied upon because of incorrect methodology. It was open to the Appellants-Plaintiffs to make a request to the trial Court to appoint a Court Commissioner. After finding was rendered by the trial Court, request could have been made to the appellate Court for appointment of Court Commissioner. Throughout, the proceeding the Appellants made no such request and insisted to rely upon and pursue the report of the surveyor appointed by the Appellants. It was not seriously disputed that the report of the surveyor appointed by the Appellant was not after following correct methodology, as the surveyor examined only one part of the land.

4. The Appellants had chosen to rely upon the evidence of their own surveyor-witness and insisted upon the same even in the first Appeal. None of the decisions placed on record point out to any legal obligation on the Appellate Court to *suo motu* appoint a Commissioner without there being any request made by the Appellants for appointment of Court Commissioner and even when the Appellant insists on relying on his own surveyor. There is no such legal mandate as regards this Court to appoint Court Commissioner while deciding the Second Appeal under Section 100 of the Code of Civil Procedure.

5. Whether there has been an encroachment or not is primarily a question of fact. No doubt an appointment of a Court Commissioner is generally a preferred methodology for resolving the boundary

dispute, as the decisions of this Court would indicate, however, the position is different when a party insist upon relying on a report in the fact finding Courts. The natural corollary would be that such a plaintiff will be non-suited if he failed to prove its case. No answer is forthcoming as to why appointment of Court Commissioner was not requested in even the first Appeal. Only argument advanced is that it is the legal duty of the Court irrespective of the stand of the parties. This submission cannot be accepted.

6. This is not a case where request for appointment of Court Commissioner was made and rejected or that the appellate Court took a view for the first time that the report of the surveyor was not proper.

7. The learned counsel for Appellants submitted that even keeping aside the evidence of the Appellants, the Respondent could have been directed to hand over possession of 37 Ares of the suit property in view of the report relied upon by the Appellants themselves. The learned counsel for Respondent pointed out that the entire report has been seriously contested by the Appellants in both the Courts. Apart from this position, there is no alternate argument made by the Appellants that atleast 37 Ares should be handed over, as can be seen from the decision of the Courts. If such argument would have been made the issue would have been debated in the Courts below and the Respondent would have been given an opportunity to explain the position. Court proceedings are not for taking chances and to take varying stands as the litigation goes along. The parties

should be forth right and candid at the institution of the suit itself.

8. There is no perversity in the concurrent finding of fact. In these circumstances no substantial question of law arises. Second Appeal accordingly stands dismissed.

(N.M.Jamdar, J.)