

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No. 431 OF 2017
WITH
CIVIL APPLICATION No. 554 OF 2017 IN A.O. No. 431 OF 2017

Hasan Bapulal Inamdar ... Appellant/Applicant

Vs.

Dilawar Gulab Mhabri ... Respondent

Mr. Umesh R. Mankapure, Advocate for the appellant/applicant.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 11th August, 2017.

P.C.:

The registry report discloses that the notice is served on the respondent/original plaintiff, however, none present for the respondent/original plaintiff.

2. Admit. This Appeal is heard finally at the stage of admission, as the issue involved is short.

3. The original plaintiff has filed Regular Civil Suit No. 158 of 2009 for injunction that the appellant/defendant shall not obstruct his way by constructing a frame. The suit was dismissed by judgment and order dated 12th January, 2012 passed by the 5th Joint Civil Judge

Junior Division, Islampur, against which Regular Civil Appeal No. 25 of 2012 was preferred and the Appellate Court on hearing both the sides remanded the matter to the trial Court with direction that the City Survey Officer is appointed as Court Commissioner to measure CTS No. 2012 and CTS No. 2013 and to fix the boundaries. Both the parties are directed to bear the expenses equally.

4. The learned counsel Mr. Mankapure for the appellant submitted that the Appellate Court ought not to have remanded the matter but should have decided the Appeal on the basis of evidence recorded by the trial Court. He further submitted that the appointment of City Survey Officer as Court Commissioner to measure the lands will amount to collection of evidence, which is not permissible under Order 26 Rule 1 of the Code of Civil Procedure. He further submitted that declaration of ownership of the land is not the issue before the Court and it was the suit for simplicitor injunction. The Appellate Court ought to have framed the issue and then could have asked the trial Court to record the evidence limited to the issue. He submitted that the order passed by the Appellate Court of appointment of Court Commissioner is illegal and is to be set aside.

5. Perused the judgment passed by the Appellate Court. Considered the submissions of the learned counsel for the appellant. Perused the plaint, written statement and also the judgment of the trial Court. I am of the view that the order of remanding the matter to the trial Court needs to be set aside, as there is no discussion in respect of evidence tendered by the witnesses. However, the order of appointment of City Survey officer to measure the lands is maintained. Hence, I pass following order :

- (i) The order of Appellate Court of remanding the matters to the trial Court for fresh trial is hereby set aside;
- (ii) The judgment and decree passed by the learned Civil Judge Junior Division, Islampur is restored;
- (iii) The order of the Appellate Court of appointment of City Survey Officer Court Commissioner for measuring the lands and fixing the boundaries is maintained. Parties to bear expenses equally;
- (iv) If the report of the City Survey Officer is not acceptable to either of the parties, then the Appellate Court may frame issue to that effect and send the matter to the trial Court for recording chief and cross-examination of the City Survey Officer. The evidence can be recorded to

that limited issue.

6. The Appeal from Order is disposed of. Civil Application is also accordingly disposed of.

(MRIDULA BHATKAR, J.)