

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER No. 1421 OF 2011
WITH
APPEAL FROM ORDER No. 1179 OF 2009**

Parashram Govind Jadhav & Ors. ... Appellants
Vs.
Maruti Narsu Jadhav & Ors. ... Respondents

Mr. Sandesh Patil a/w. Mr. Chintan Shah, Advocate for the appellant
in both the Appeal from Order.

Mr. Amit Sale, Advocate for respondent nos. 1, 3 to 5.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **8th September, 2017.**

P.C.:

The learned counsel for the appellant submitted that he has filed the affidavit of service and has also supplied the copies of the Appeal memo to the registry.

2. It appears that the registry has carried forward the earlier remark by mistake because the record discloses that the notices are issued by the registry. In Appeal from Order No. 1179 of 2009, respondent nos. 2 and 6 are served and same are the parties in Appeal from Order No. 1421 of 2011, however, none present for respondent nos. 2 and 6.

3. Admit. By consent, both the Appeals are heard finally at the stage of admission.

4. In these two Appeals from Order, the orders dated 7th March, 2008 passed in Regular Civil Appeal No. 117 of 2005 and Regular Civil Appeal No. 118 of 2005 preferred by the present respondents thereby allowing both the Appeals are challenged. The appellant have filed the Regular Civil Suit No. 297 of 1999 before the Civil Judge Junior Division, Miraj, District Sangli for injunction and the said suit was decreed by judgment and order dated 30th April, 2005, against which the present respondents, who are defendants, have filed Regular Civil Appeal No. 117 of 2005 which was allowed and the matter was remanded to the trial Court. The present respondents have filed Regular Civil Suit No. 282 of 1999 for perpetual injunction, possession, mense profit against the present appellants and the said suit was dismissed. Against this, the present respondents have filed Regular Civil Appeal No. 118 of 2005. Both the Appeals were allowed by the learned District Judge with the following order:

- (1) The appeal is hereby allowed;
- (2) The judgment and decree passed by learned Civil Judge, Junior Division, Miraj in Regular Civil Suit No. 282 of 1999 dated 30-04-2005, is hereby set aside;
- (3) The Trial Court is directed to appoint Special Nimtandar to measure the land Gat Nos. 664 and 665

jointly as superior test;

(4) The matter is remanded to the trial Court. The trial Court shall decide the matter afresh after giving an opportunity to both the parties to produce or adduce evidence;

(5) The appellants shall pay necessary charges of survey of said land by Nimtandar within stipulated time fixed by the trial Court. In case, the appellants fail to pay the said charges within stipulated time, the trial Court is at liberty to pass appropriate order.”

5. Both the parties have dispute on account of a common boundary line thereby dividing both the lands. Gat No. 665 is undisputantly owned by the appellants and Gat No. 664 belongs to the respondents. Existence of bund as a dividing line between the two lands is also not disputed. However, it appears that the land over which the bund stands though is shown in Gat No. 665, whether is an encroachment and is a land of Gat No. 664 is a dispute raised by the respondents. Both the parties have led evidence of their respective witnesses. Both the parties have produced the report of the measurement of their respective lands and the Court

Commissioner or the surveyor was examined respectively in their suits. The reports of both the Court Commissioner are contrary to each other and therefore, the District Court at the time of hearing of the Appeals held that the dispute in respect of encroachment cannot be adjudicated upon unless the evidence in respect of fixation of boundary is not produced before the Court. The Appellate Court has also taken note of Application Exhibit 37 preferred by the appellants in Civil Suit No. 282 of 1999 for joint measurement of 2 Gat nos. by Nimtandar. The said Application was opposed by the present respondents, who are plaintiffs in Suit No. 282 of 1999. The learned Appellate Judge has considered that the said Application Exhibit 37 requesting for joint measurement of two lands is not decided by the trial Court and thus, for want of sufficient evidence on the point of boundary, the learned Appellate Court felt it fit and remanded both the matters with the directions that joint measurements are to be taken and place before the trial Court. Hence, these Appeals.

6. The learned counsel for the appellants and learned counsel for the respondents both have taken me to the entire evidence of their respective witnesses on the point of measurement. The learned counsel for the appellants has submitted that the order passed by the

learned Appellate Judge of remanding the matter to the trial Court is illegal and it cannot be consistent with the legal requirement under Rule 23/23a of Rule 41 of the Code of Civil Procedure. In support of his submissions, the learned counsel relied on the judgement of this Court in the case of **Deputy Regional Transport Officer, Akola & Anr. vs. Yashwant Narayanarao Thakare**, reported in AIR 2003 Bom. 327. At this stage, the learned counsel does not press the Application Exhibit 37.

7. The learned counsel for the respondents while supporting the order of remand has submitted that the joint survey of both the lands is necessary to take a correct view. There is no proper evidence of joint measurement of both the lands and hence the order of remand is justified.

8. Heard the submissions, perused the impugned orders and the case law relied by the learned counsel for the appellants. In the case of **Deputy Regional Transport Officer, Akola** (*supra*), the Single Judge of this Court has considered the powers of the Appellate Court in respect of remand. It was held that the Appellate Court not to pass the order of remand without considering the pros and cons of

the evidence and has to go for the better alternative and the Appellate Court to exercise the power of remand with caution.

9. After hearing the learned counsel of both the sides, considering the evidence recorded by the trial Court and the reasoning given by the learned Judge of the Appellate Court, I am of the view that the order of remand is illegal and it is to be set aside. However, the Appellate Court has given reasoning that the report of joint measurements of Gat Nos. 665 and 664 is required for correct adjudication on the issue of encroachment. Thus, the said order of joint measurement can be maintained, as the Appellate Court has power under Order 41 Rule 27 of the Code of Civil Procedure to pass such order of additional evidence if it thinks necessary to decide the issue properly. Hence, I pass following order:

- (i) The orders dated 7th March, 2008 of remand passed by the learned District Judge in Regular Civil Appeal No. 117 of 2005 and 118 of 2005 are hereby set aside. To that extent, the Appeals from Order are partly allowed. Regular Civil Appeal No. 117 of 2005 and 118 of 2005 are restored to the file of the District Judge, Sangli.
- (ii) The orders dated 30th April, 2005 passed by the learned

Civil Judge Junior Division, Miraj in R.C.S. No. 282 of 1999 and R.C.S. No. 297 of 1999 are hereby restored;

- (iii) The Appellate Court is directed to appoint Special Nimtandar to measure the land Gat Nos. 664 and 665 jointly as superior test;
- (iv) Both the parties shall bear the expenses of joint measurement equally;
- (v) The report of joint measurement is to be considered as additional evidence at the time of hearing of Appeal.
- (vi) The parties to appear before the Appeal Court on 19th September, 2017 at 11 a.m.

10. Both the Appeals from Order are partly allowed.

(MRIDULA BHATKAR, J.)