

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 13952 OF 2016

Smt. Ratnaprabha Suryakant Shah & Ors. ... Petitioners

Vs.

Shrikant Vishwanath Kulkarni & Ors. ... Respondents

Mr. Ketan Chothani i/b. Manjiri S. Paranis, Advocate for the Applicant.

Mr. Prashant Darandale, Advocate for respondent nos. 1 to 3.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 21st April, 2017.

P.C.:

This Writ Petition filed under Article 227 of the Constitution of India is directed against the order dated 26th July, 2016 passed by the learned District Judge-1, Khed-Rajgurunagar below Exhibit 18 in Civil Appeal No. 269 of 2014 (Old Civil Appeal No. 284/2012). The respondents/plaintiffs have filed the Regular Civil Suit No. 93 of 1985 for injunction and possession against the petitioners/defendants. The suit was decreed earlier in the year 1999, then the Appeal was preferred and in Appeal, the matter was remanded to the trial Court, as the surveyor was not examined. In second round, surveyor was examined again and the suit was decreed by order dated 20th March, 2012 by Civil Judge Junior Division, Ghodegaon against which the

Appeal No. 269 of 2014 was preferred. In Appeal, the appellants/original defendants have made an application under Order 36 for the appointment of Commissioner, i.e., surveyor to measure the area and boundaries of survey No. 1075 owned by the petitioners/defendants and survey No. 1078 owned by the respondents/plaintiffs. The said application was rejected. Hence, this Writ Petition.

2. The learned counsel for the petitioners has submitted that the reasons give by the District Judge, Khed by rejecting this application are not legally acceptable. He further submitted that the Application under Order 36 for appointment of Commissioner was made on the basis of admissions given by PW-2 Laxman Baburao Salave, retired surveyor. The learned counsel submitted that the surveyor was appointed as Court Commissioner to measure City Survey Nos. 1075, 1076, 1077 and 1078. On 19th April, 1994 he surveyed the suit land and the adjacent land and gave report in favour of the plaintiffs, so he was examined as witness by the plaintiffs. The learned counsel pointed out relevant portion in the cross-examination where the witness has given admission in respect of modification in the revenue record made in February, 1998. The witness has admitted

that if he would have carried out survey as per the modified record of area of survey nos. 1075 and 1078, then the boundaries which he has marked would have been different and the area which is shown as encroached, would have included in Survey No. 1075, i.e., the area owned by the petitioners/defendants. The learned counsel submitted that the application, which is made on the basis of admission in the cross-examination, ought to have been allowed by the District Judge in Appeal and fair opportunity should have been give to the petitioners to lead evidence. He further submitted that a specific admission is given by the surveyor that he carried out survey on the basis of old record of 1989 and it was conducted on 19th April, 1994 and thereafter the modifications were carried out; it was a sufficient ground to allow the application. He prays that the said order passed by the learned District Judge is to be quashed and set aside.

3. The learned counsel for the respondents while opposing this Petition has submitted that the respondents have succeeded in two rounds and the suit was decreed in the first round and also in the second round. He submitted that a portion of his land is encroached by the petitioners since long and he is waiting for the relief. He relied

on the findings given by the learned trial Judge who decreed the suit.

4. Perused the evidence of PW-3 Laxman Baburao Salave. It is true that he has admitted that if he would have carried out survey on the basis of modified markings, then the area would have been changed and the encroached portion would have been shown in Survey No. 1075 owned by the petitioners/defendants. However, the suit is always based on the cause of action when it arose and the present suit is filed in the year 1985 as the cause of action arose then. The surveyor carried out the survey on 19th April, 1994, naturally he carried out survey on the basis of 1989 record. Four years thereafter there were modifications in the revenue record and as per the modifications, he gave admission that then the encroached portion would have been included in survey No. of the petitioners. However, these admissions cannot form a good ground to appoint second surveyor. Considering the date of the cause of action, the Court has to relate back the survey which was carried out on the basis of 1989 record. Hence, I am of the view that this Application of appointment of second surveyor is rightly disallowed. Hence, Writ Petition is dismissed.

5. The learned counsel for the petitioners submitted that on 28th April, 2017, the learned Appellate Court is going to hear the Appeal. The petitioners want to challenge the order before the Hon'ble Supreme Court, hence this order be stayed.

6. The suit is very old, however, in all fairness, I pass the following order:

“The Appellate Court not to proceed for six weeks”.

(MRIDULA BHATKAR, J.)