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

***SECOND APPEAL NO. 229 OF 2017
with
CIVIL APPLICATION NO. 539 OF 2017***

Mr. Jotiba Subhana Pawar. ...Appellant/Applicant.

V/s.

Mr. Vijay Santram Pawar. ... Respondent.

Mr. V.S. Talkute for the Appellant/Applicant.

Coram : N.M. Jamdar, J.

Date : 27 March 2017.

Oral Order :-

Heard the learned Counsel for the Appellant.

2. The Appellant has challenged the judgment and order passed by the learned District Judge, Gadjinglaj in Regular Civil Appeal No.43 of 2015 wherein the Appeal filed by the Respondent – Plaintiff was allowed and the suit filed the Respondent – Plaintiff was decreed. The learned District Judge by the impugned judgment

and order has directed the Appellant to remove the encroachment to the extent of 12.5 Ares.

3. The Suit bearing No. 14 of 2008 filed by the Respondent – Plaintiff for recovery of possession of 12.5 Ares from Gat No. 179 of Village Kudanoor, Taluka Chandgad, District Kolhapur. Measurement was carried out by the Respondent – Plaintiff prior to the suit and by order passed by the learned Civil Judge, by a Court Commissioner. The learned Civil Judge, by the judgment and order dated 17 August 2015 dismissed the suit. The Appeal bearing No. 43 of 2015 filed by the Respondent – Plaintiff has been allowed by the impugned judgment and decree.

4. The learned Counsel for the Appellant submitted that there is a fundamental flaw as much as the Commissioner has admitted in the cross-examination that he has not carried out the measurement of the boundaries of the concerned gat number at the time of preparation of the report. He submitted that an objection was taken to the Commissioner's report and the learned District Judge while reversing the judgment and decree passed by the learned Civil Judge has not considered this aspect. The learned Counsel relied on the decision of the learned Single Judge of this Court in the matter of *Vijay s/o. Shrawan Shende and Ors. v/s. State of Maharashtra and Ors.* reported in 2009(5) Mh. L.J. The factual

position in the present matter will have to be adverted to. The perusal of the judgment passed by the learned District Judge will show that the argument that the Commissioner's report should not be accepted because the measurement itself was not carried out, has not been made before the District Court. The learned District Judge in a narration of factual position has referred to the report of the Commissioner and has stated that the report has been prepared after carrying out the measurement. The learned District Judge noted that the Appellant was present when the measurement was carried out. Therefore since the point was not urged as reflected in the decision of the District Judge, it cannot be taken for the first time. In spite of this position, I have considered the submission of the learned Counsel. The learned Counsel has heavily relied on the statement made in the cross-examination of the Commissioner that he did not carry out a measurement of Survey No. 35/1 i.e. Gat No. 179. However, this statement of the Court Commissioner will have to be looked into in totality of the circumstances.

5. In examination-in-chief, the Court Commissioner has deposed about the procedure followed. He had stated that he had issued notices to the Appellant and the Respondent. He went on site to prepare the map. He has stated that he has taken the boundaries of Gat No.179 as per the original record and thereafter, has shown the encroachment in colour since the map is in colour. He stated

that the map was prepared with reference to the original record and therefore specific details have not been given. In the cross-examination of the Appellant, the Appellant has stated that the measurement was carried out pursuant to the directions of the Court and that time both the Appellant and Respondent were present and signed on the report. Thereafter, the objection has been taken. However, since the Court Commissioner has gone by the original record and has demarcated the encroachment, it was not found necessary to re-measure the entire gat number as the boundaries and other details regarding the lands in question were available in the original record. Therefore, the one statement made in the cross-examination cannot be read out of context to discard the entire evidence of the Commissioner. Nothing is shown as to why the reliance of the Court Commissioner on the original record was not warranted or that situation had altered subsequent to the preparation of the original record. Therefore, in these circumstances, if the learned District Judge had relied upon the report of the Commissioner, same cannot be faulted with.

6. In the case of *Vijay s/o. Shrawan Shende v/s. State of Maharashtra*, the factual position was that the Plaintiff therein neither produced any map nor had taken any measurements. A Court Commissioner was appointed and the encroachment was sought to be proved through the report of the Court Commissioner.

The Commissioner had measured the encroachment without any authentic document with him and the Court found that the map was prepared without any material. In the present case, it is not that the Court Commissioner had with him no material whatsoever when he carried out the measurement. The Court Commissioner has gone by the original record for the purpose of ascertaining the boundaries. Therefore, the factual position is different than the one in the case of *Vijay Shrawan Shende*.

7. In these circumstances, it is not possible to interfere with the finding of fact recorded by the learned District Judge that the Appellant has encroached upon the suit property. No substantial question of law arises. The Second Appeal is rejected. The Civil Application does not survive and is disposed of accordingly.

(N.M. Jamdar, J.)