

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

APPEAL AGAINST ORDER NO.9 OF 2016

Kirtikumar Arvind Verma and Ors.

... Appellants

-vs-

Arya Prtinidhi Sabha, M. P. & Vidarbha, Nagpur.

... Respondent.

Shri Mahesh Rai, Advocate for appellantS.

Shri V. G. Bhamburkar, Advocate for respondent.

CORAM : A.S.CHANDURKAR, J.

DATE : March 24, 2017

P.C.

The appellants who are the original defendants in the suit filed by the respondent for removal of encroachment and possession are aggrieved by the order passed by the Appellate Court setting aside the judgment of the trial Court and remanding the proceedings for fresh adjudication after measuring the suit property through a cadesteral Surveyor.

2. It is the case of the respondent that the appellants by undertaking construction have committed encroachment to the extent of 10.05 sq. ft land. Before the trial Court, the plaintiff examined the Surveyor who had measured the plaintiff's plot and had submitted his report.

The defendants also examined witnesses. The trial Court found that the plaintiff had failed to prove encroachment on the part of the defendants and hence dismissed the suit. In the appeal preferred by the plaintiff it was found by the Appellate Court that the manner in which the measurement was done was not proper and on that count the Appellate Court after setting aside the judgment of the trial Court remanded the proceedings for having both the properties measured afresh. Being aggrieved, the present appeal has been filed.

3. Shri M. Rai, learned counsel for the appellants submitted that the plaintiff had not properly described the encroached portion in the plaint. Similarly, the pleadings of the plaintiff were insufficient to indicate any encroachment on the part of the defendants. According to him, no encroachment was found by the Surveyor who had measured the plot. He further submitted that during pendency of the appeal, an application for leading additional evidence was moved by the defendants which came to be rejected by the trial Court. Though the plaintiff challenged the aforesaid order by filing W.P.No.875/2014, the said writ petition was not entertained. He therefore submitted that the Appellate Court should have decided the appeal on merits.

4. Shri V. G. Bhamburkar, learned counsel for the respondent

supported the impugned order. According to him the Appellate Court was justified in remanding the proceedings so as to have the suit property measured afresh. He submitted that Appellate court rightly relied upon the judgment in *Vijay Shrawan Shende and ors. vs. State of Maharashtra and ors. 2009(5) Bom. C. R. 306* while remanding the suit.

5. I have heard the learned counsel for the parties and perused the documents on record. The Appellate Court after taking into consideration the nature of the suit filed by the plaintiff found that the measurement carried out by the plaintiff was not by following the proper procedure. By relying upon the judgment of this Court in *Vijay Shrawan Shende* (supra) it had directed appointment of cadesteral Surveyor as Court Commissioner for measuring both the properties. Considering the observations made by the Appellate Court in paragraph 11 of its judgment, I do not find that the Appellate Court committed any error while directing remand of the proceedings. The law laid down in the aforesaid decision has been rightly applied by the Appellate Court.

6. In so far as the submission that the pleadings of the plaintiff were insufficient for granting any decree, said aspect is a matter which can

be considered by the trial Court when it decides the suit on merits. It is not necessary to go into that aspect of the matter. Similarly as per the order passed in W.P.No.875/2014 the question with regard to the necessity to lead additional evidence as sought by the plaintiff was kept open.

In view of aforesaid, there is no case made out to interfere in the appeal. The same is therefore dismissed. There would be no order as to costs.

JUDGE