

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

Second Appeal No.257 of 2015
(Smt. Kamlabai wd/o Marotrao Mahadule and others v. Shobharam
Kishnaji Gavane)

Office Notes, Memoranda of Coram,
 appearances, Court's orders or directions
 and Registrar's order

Court's or Judge's orders

Shri S.R. Deshpande, Advocate for Appellants.

Coram : R.K. Deshpande, J.
Date : 5th January, 2017

1. The Trial Court dismissed the suit for removal of encroachment on 12-3-2012. The lower Appellate Court has allowed Regular Civil Appeal No.710 of 2012, and the defendants are directed to remove the encroachment from the site shown by the letters A, B, C and D in the plaint map at Exhibit 50 and to hand over the possession to the plaintiff. It has also granted the other reliefs, with which the present second appeal is not concerned.

2. Shri Deshpande, the learned counsel appearing for the appellant-defendants, has invited my attention to the finding recorded by the Trial Court to the effect that the plaintiff is the owner of CTS No.1833, admeasuring 241 square meters, whereas the report of Commissioner shows that it is 349.5 square meters. He submits that this aspect has been ignored by the lower

Appellate Court. It is also his submission that the plaintiff has to stand on his own legs and cannot rely upon the weaknesses of the defendants. He further submits that the appellant-defendants have filed Civil Application Nos.870 of 2016 and 8 of 2017 under Order XLI, Rule 27 of the Code of Civil Procedure seeking permission to produce additional evidence on record. According to him, the sale-deed in respect of the property, i.e. CTS No.1834, owned by the appellant-defendants was not produced before the Trial Court, but since it has now become available along with the copy of Index-II, the same is being produced before this Court to seek an order of remand of the matter.

3. With the assistance of the learned counsel for the appellants, I have gone through the judgments and orders passed by both the Courts below. The removal of encroachment to the extent of 50 square meters of land owned by the plaintiff out of CTS No.1833 is the subject-matter of this second appeal. The lower Appellate Court has taken into consideration the findings recorded by the Trial Court on all aspects of the matter. It has concentrated on the finding that the appellant-defendants have failed to produce the vital evidence in the form of sale-deed in respect of their own property on the record of the Trial Court. The lower Appellate Court observes that the appellant-defendants have not produced any document showing their title over CTS No.1834. The title of the

appellant-defendants over the said CTS may not be in dispute, but it would have furnished an evidence to the extent of an area of which the appellant-defendants claimed to be the owners. It was permissible for the appellant-defendants to have asked the Trial Court to grant permission to lead secondary evidence, if such documents were not available with them during the course of trial. This has not been done. After perusal of the applications filed by the appellant-defendants, I do not find that any case is made out under Order XLI, Rule 27 of the Code of Civil Procedure for grant of permission to adduce additional evidence. All the necessary pleadings are lacking. The said civil applications are, therefore, rejected.

4. Shri Deshpande has relied upon the following decisions to urge that the property belonging to the appellant-defendants should have been measured, and for that purpose, the matter is required to be remanded back to the Trial Court.

- (a) Gajraj and others v. Ramadhar and others, reported in AIR 1975 Allahabad 406.
- (b) Baburao Tawade v. HES Ltd., reported in 1995(2) Mh.L.J. 595.
- (c) Fatima Jaju v. Village Panchayat, 2000(3) Mh.L.J. 624.
- (d) Shrikant v. Krishna Balu, reported in 2003(2) Mh.L.J. 276.

- (e) Kashinath Chopade v. Purushottam Tekade,
reported in 2005(6) Bom.C.R. 306.
- (f) P. Chandrashekharan v. S. Kanakranjan,
reported in 2007(3) ALL MR 826.
- (g) Vijay Sende v. State of Maharashtra,
reported in 2009(5) Bom.C.R. 306.
- (h) Vimal Madhukar Deshmukh v. Nagorao Babanrao
Chodaskar,
reported in 2008(3) Mh.L.J. 868.
- (i) Ramzan v. Panjab,
reported in 2016(4) ALL MR 765.
- (j) Vasantrao Nalkande v. Raghunath Nalkande,
reported in 2016(5) ALL MR 349.

In the absence of the document of sale-deed in respect of the house owned by the appellant-defendants being produced on record, it could not be possible to ascertain the extent of area over which they enjoy the right of ownership. In view of this, the question of measuring the property owned by the appellant-defendants does not at all arise. The law laid down in the aforesaid decisions cannot be disputed. It depends upon the facts and circumstances of each case as to whether such Commissioner is required to be appointed to measure the property of the plaintiff as well of the defendants.

5. Thus, no substantial question of law arises for consideration. The matter was argued for quiet some time on earlier occasion and it was adjourned at the instance of the learned counsel for the appellants. Again today, the learned counsel has argued the matter at length and same arguments are advanced, wasting time of this Court. This practice has to be deprecated. Hence, the second appeal is dismissed with the costs of Rs.5,000/- to be paid by the appellants to the High Court Legal Services Sub-Committee, Nagpur.

Judge.