

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

SECOND APPEAL NO.49 OF 2016

Samadhan s/o Kashiram Sushir and ors.

... Appellants

-VS-

Dilip s/o Sitaram Gai

... Respondent.

Shri P. S. Kshirsagar, Advocate for appellants.

Shri G. G. Mishra, Advocate for respondent.

CORAM : A.S.CHANDURKAR, J.
DATE : September 19, 2017

P.C.

Notice was issued on the following substantial question of law :

“ The plaintiff having brought on record the measurement as per Exhibit-32 which showed total area of 5 hectares 68 acres and the defendants having brought on record the measurement at Exhibit-42 which showed total area of 5 hectares 95 acres and both measurements having been carried out separately, whether it was necessary in these circumstances to have Survey No.423 measured through a Court Commissioner ? ”

2. The appellants are the original defendants in the suit for possession after removal of encroachment filed by the respondent-

plaintiff. It is the case of the plaintiff that he is the owner of Gat No.423 admeasureing 1H 21 R. Adjoining his land is the land of his brothers. On the southern side of said Gat number is the land purchased by the defendant. It is the case of the plaintiff that as some portion of his land was under encroachment, he got the same measured on 25/05/2006. This measurement showed the encroachment of the defendants to the extent of 22 R land. On that basis, suit for possession of the encroached portion came to be filed. In the written statement it was denied that any such encroachment was made. It was further pleaded that the measurement carried out by the plaintiff was not in accordance with the prescribed procedure and hence it cannot be said that there was encroachment to the extent of 22 R land.

3. After the parties led evidence, the trial Court held that the plaintiff had proved that there was encroachment committed by the defendants to the extent of 22 R land as per the measurement carried out and described in map at Exhibit-32. The appellate court confirmed this finding and dismissed the appeal.

4. Shri P. S. Kshirsagar, learned counsel for the appellants submitted that there were two maps on record at Exhibits-32 and 42.

Both the maps indicated different area of encroachment alleged to be committed by the defendants. The measurement carried out at the instance of the plaintiff was on 25/05/2006 while the permanent marks were fixed after four days on 29/05/2006. There was no clarity to indicate the portion on which encroachment was actually committed. He therefore submitted that on the basis of such contradictory maps the suit could not have been decreed.

5. Shri G. G. Mishra, learned counsel for the respondent supported the impugned judgment. According to him the measurement as carried out by the plaintiff was in accordance with law. The map at Exhibit-32 clearly indicated the encroachment committed by the defendants. He further submitted that even as per the measurement carried out by the defendants, they were shown in possession of 23 R land in excess as per report at Exhibit-42. He therefore submitted that both the Courts rightly held against the defendants.

6. I have heard the learned counsel for the parties at length and I have also gone through the records of the case. In so far as the measurement carried out by the plaintiff is concerned, it was deposed by the measurer at Exhibit-31 that the map at Exhibit-32

was prepared after joint measurement of the entire land. It was found that 22 R land from the portion of defendants' property was in their possession. In so far as the measurement carried out by the defendants is concerned, the same was during pendency of the suit on 17/04/2009. As per this map at Exhibit-42, it was shown that the defendants were in possession of 22 gunthas land exceeding their ownership.

7. On considering this evidence, it cannot be said that there is material variance in the measurement carried out by both the measurers. The plaintiff got the land measured on 25/05/2006 which showed the encroachment by the defendants to the extent of 22 R land. The defendants got the land measured on 17/04/2009 and same showed encroachment to the extent of 23 R land. There is a marginal difference of 1 R. Both the measurers however found the defendants to be in possession of excess land. I do not find that the trial Court committed an error in accepting the map at Exhibit-32 which showed encroachment to the extent of 22 R land. The area under encroachment is clearly shown in Exhibit-32. I therefore find that both the Courts rightly considered the entire evidence on record while holding in favour of the plaintiff.

8. The substantial question of law as framed is answered by holding that the encroachment committed by the defendants has been duly proved by the plaintiff as per Exhibit-32. It is not necessary to again re-measure Survey No.423.

The second appeal is therefore dismissed with no order as to costs.

JUDGE