

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

SECOND APPEAL NO.360/2016

Pramod s/o Vitthalrao Khadatkhar ..vs.. Maroti s/o Shjrawan Khadatkhar

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Mr. Abhijit Deshpande, Advocate for appellant.

CORAM : V.M. DESHPANDE, J.

DATED : NOVEMBER 28, 2017

1. Heard Mr. Deshpande, learned counsel for the appellant.

2. The submission of the learned counsel for the appellant is that though a specific prayer was made before the learned appellate Court for remand of the matter for appointment of Court Commissioner to ascertain the exact area of encroachment, the learned appellate Court has failed to exercise the powers of remanding the matter for doing justice to the parties.

3. No doubt true, if there is no map by which it could be ascertained the exact measurement of the alleged encroachment, the Court should always exercise the powers under Order XXVI of the Code of Civil Procedure for apportionment of Court Commissioner for measuring the disputed land. However, in my opinion, this exercise will be futile in the present case since the suit filed by the appellant was barred by limitation.

4. The appellant has filed a suit for declaration and permanent injunction and separate possession and for removal of encroachment. The record shows that the present appeal is between the family members inter se. Even according to the appellant, the partition took place and at the time of effecting partition, he was minor. According to him, in that partition, he was given one share and the land which has fallen to his share is encroached upon by defendant Maroti, his uncle. The suit was filed in the year 2002. The partition was effected on 15.12.1982. Thus, it was open for the plaintiff to file a suit after attaining the majority to seek the reliefs. However, the suit was filed at much later stage. Both the Courts below have bestowed their thoughtful consideration on this aspect and have recorded finding concurrently that suit is hopelessly barred.

5. In that view of the matter, the submission of the learned counsel for the appellant that the appellate Court has committed error in not remanding the matter for apportionment of the Court Commissioner, in my opinion, is nothing but it would have been a futile exercise. The appeal is therefore rejected. No order as to costs.

JUDGE