

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 264 OF 2012
WITH
CIVIL APPLICATION NO. 428 OF 2012

- 1 Shivajirao Baburao Salunkhe
Age : 66 years, Occu. : Agriculture
- 2 Malan Dattatray Dhumal
Age : 63 years, Occu. : Housework
Both residing at R/o. Umbraj, Tal. Karad
Dist. Satara.

Both Through Power of Attorney Holder
Mr. Suresh Shivajirao Salunkhe
Age : 43 years, Occu. : Agriculture
R/o. Umbraj, Tal. Karad, Dist. Satara.

...Appellants

Versus

Dattatray Vithoba Kharade
Age : 61 years, Occu. : Laborer
R/o. Umbraj, Tal. Karad, Dist. Satara.

...Respondent

Mr. Dhananjay Rannaware, for the Appellants.
Mr. Nagesh Chavan, for the Respondent.

CORAM: N. M. JAMDAR, J
DATED: 31 JANUARY, 2018

Oral Judgment:-

1. On 5 August, 2015, notice was issued to the Respondent after framing the following substantial question of law:

“Whether the matter is required to be remanded back to the trial Court for appointment of a Court Commissioner for measurement of the property and a decision in the Suit afresh is required ?”

2. The Respondent has been served. Considering the limited nature of the controversy, the Appeal is taken up for hearing forthwith. Filing of paper-book is dispensed with. Heard the learned Counsel for the parties.

3. The Respondent – Plaintiff filed Regular Civil Suit No.438 of 1996 in the Court of Civil Judge, Junior Division, Karad, for injunction against the Appellant – Defendant. The Suit was decreed by the learned Civil Judge by the judgment and order dated 31 October, 2006. Thereafter, Regular Civil Appeal No.95 of 2006 was filed by the Appellant in the District Court, Satara. The learned District Judge dismissed the Appeal by the impugned judgment and order dated 8 November, 2011. Both the Courts below framed an issue as regard to the alleged encroachment in the suit property and answered the issue against the Appellant.

4. The learned Counsel for the Appellant submitted that the Appellant had disputed that the suit property was part of the sale deed dated 26 October, 1945 relied upon by the Respondent – Plaintiff. It is his contention that the Court

Commissioner appointed, had submitted report stating that the properties are required to be measured, but were not measured. The learned Counsel for the Respondent – Plaintiff supported the impugned order.

5. It is apparent from the record that the Court Commissioner had submitted a report and had expressed that the property requires to be measured. In fact, when the order was passed on 5 August, 2015 by the learned Single Judge (R. K. Deshpande, J.), after hearing both the sides, the learned Judge recorded that it is an admitted position that there is no finding recorded that the property described in the plaint is part of the sale deed dated 26 October, 1945, and the matter needs to be remanded to the trial Court. It appears that by the order dated 27 June, 2017, the learned Single Judge (S. J. Kathawalla, J.), had directed that measurement to be carried out by Taluka Inspector Land Record (“TILR”, for short). It is informed that the TILR has submitted his report.

6. The learned Counsel for the parties have sought to advance various submissions as regard the report submitted in this Court. Though the TILR had submitted report pursuant to the order passed by this Court, it is not possible to analyse this piece of evidence, namely the report, an entirely factual aspect, for the first time in the Second Appeal. The Report will have to

be placed first before the trial Court where the parties be given opportunity to deal with the same and then the trial Court as well as the First Appellate Court can decide the factual controversy.

7. Therefore, as expressed in the order dated 5 August, 2015, the matter is required to be remanded to the trial Court. Accordingly, the question of law framed is answered.

8. The Second Appeal is allowed. The judgment and order passed by the learned Civil Judge, Junior Division, Karad, in Regular Civil Suit No.438 of 1996 dated 31 October, 2006 and the judgment and order passed by the learned District Court, Satara, in Regular Civil Appeal No.95 of 2006 dated 8 November, 2011, are quashed and set aside. Regular Civil Suit No.438 of 1996 stand restored to the file of the Civil Judge, Junior Division, Karad. The parties shall appear before the learned Civil Judge on 5 March, 2018. The Registry to send order as well as the report of the Court Commissioner, forthwith. It is open to the parties to apply for the copy of the report of the Court Commissioner tendered in this Court.

9. It is made clear that the impugned judgments and orders are set aside in the light of the observations made above and the Suit be decided on the basis of the report now submitted. It is open to the parties to advance contentions as regard the Report.

It is open to the learned Civil Judge to call for additional evidence, if the learned Civil Judge deems it necessary for adjudication of the Suit.

10. The parties shall maintain the position in respect of the suit land, which exists as on date, till further orders to be passed by the learned Civil Judge. The learned Civil Judge will consider the aspect of the interim relief on its own merits.

11. In view of the disposal of the Appeal, the Civil Application does not survive and is disposed of accordingly.

[N. M. JAMDAR, J.]