

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 87 OF 2015
WITH
CIVIL APPLICATION NO. 181 OF 2015**

The Tata Power Company Ltd.	...	Appellant
V/s.		
Suresh Balkrishna Nayar & Ors.	...	Respondents

- Mr.C.S. Balsara a/w. Mr.H.N. Vakil, Mr.Yogesh Patil & Mr.Rushil Mathur i/b. Mulla & Mulla for the Appellant.
- Mr.S.R. Nargolkar a/w. Ms.Sheerie Rebello for Respondent No.3.
- Mr.Omkar V. Amberkar for Respondent No.4.
- Mr.A.R. Patil, A.G.P. for Respondent No.5.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 13th JUNE, 2018.

P.C. :

1] Heard learned counsels for the Appellant and Respondent Nos.3 to 5.

2] Respondent Nos.1 and 2 are absent though duly served with notice through Court and also by private notice. The Affidavit-of-service to that effect is also filed on record.

3] This Second Appeal is preferred against the judgment and decree dated 21/06/2014 passed by the Extra Joint Ad-hoc District

Judge-1, Pune, thereby dismissing the Civil Appeal No.320 of 2008, which was preferred against the judgment and decree passed in Regular Civil Suit No.111 of 2000 by the Civil Judge, Junior Division, Vadgaon Maval, Pune on 13/12/2007.

4] The said suit was filed by the Respondents for perpetual injunction restraining the Appellant herein from interfering in the suit property and from making construction close to the access of house No.320 owned by Respondent No.1. The trial Court has decreed the said suit, relying on the T.I.L.R. Report and the map Exhibit-26 holding that this Commissioner Report needs to be accepted, as the other party has not raised objection thereto. It was held that the perusal of the measurement map would reveal that the Court Commissioner has visited the site of the suit property and as per the Court Commissioner Report, the encroachment was found. Hence, the trial Court decreed the suit and directed the delivery of encroached portion to Respondent No.1.

5] The Appellant challenged this judgment and decree before the First Appellate Court wherein he also filed an application under Order-41 Rule-27 of the Code of Civil Procedure for production of additional evidence, contending *inter-alia* that in the written statement, the Appellant had clearly mentioned that the office of the

T.I.L.R. has carried out the survey in respect of Gat No.164 not only once but twice; firstly in the year 1986 and again in the year 1997. The Appellant wanted to produce the relevant documents pertaining to these two measurements of the suit land, by way of additional evidence. It was clearly stated that these documents were very important to decide the matter on merits. However, the Appellant could not produce them before the trial Court as the trial Court has closed the evidence of the Respondents on 05/08/2005, as the Respondents/Plaintiffs and their Advocate were absent when the matter was called out. Immediately thereafter the next date was fixed for adducing the evidence of the Appellant/defendant on 20/08/2005. On that day, the trial Court was pleased to close the evidence of the Appellant also, on the ground that the Appellant was absent and directed the suit to proceed to next stage.

6] Thus, it was submitted before the First Appellate Court that the sufficient opportunity of leading the evidence, in respect of these documents relating to the earlier two measurements, was not given to the Appellant by the trial Court.

7] It is submitted that the Appellate Court has, however, instead of deciding the said application prior to decision of the appeal, rejected the said application at the time of deciding the appeal itself,

by observing in paragraph No.10 of its judgment that,

“Even if the additional evidence adduced by the Appellant/defendant is considered, it is a map of T.I.L.R. of the year 1997. It shows the date of measurement as 14th and 15th February, 1997, whereas the date of fixing the boundaries is 04/12/1999. Thus, as per this measurement, the boundaries were fixed by the T.I.L.R. after two years of the measurement and hence, this map of T.I.L.R. produced by the defendant in the present appeal, though is read and recorded in evidence, is not cogent and trust-worthy to believe the contention of the defendant. The defendant has not examined any witness from the office of the T.I.L.R. or the Surveyor from that office in order to explain this map of 1997.”

8] Thus, it was held by the Appellate Court that the additional evidence adduced by the defendant in the present appeal, it is not sufficient to prove its case. Accordingly, the Appellate Court has confirmed the findings of the trial Court relying on the Court Commissioner Report and dismissed the appeal.

9] Being aggrieved thereby, this Second Appeal is preferred mainly seeking the remand of the matter in order to enable the Appellant to produce and rely upon these two earlier measurements of the suit land which rules out the Respondent's case of encroachment. I

find much substance in the submission of learned counsel for the Applicant.

10] From the facts, which are narrated above, it is apparent that the trial Court has closed the evidence of the Appellant/Defendant in haste on the same day, on which the evidence of the Plaintiff was also closed and the Appellate Court has also, without passing any order on the application filed by the Appellant for production of additional evidence at the relevant time, decided the said application in the judgment itself and without giving an opportunity to the Appellant to prove the said measurement map of the year 1997 held that the Appellant has not examined any witness from the office of the T.I.L.R. or the Surveyor from that office in order to explain the map of the year 1997. The proper mode for the Appellate Court was to allow such application for production of the additional evidence and thereafter to consider whether the map was correct, proper or there was any discrepancy and hence, it was not cogent and trustworthy. If the application for production of additional evidence was not allowed before deciding the judgment and in the judgment if the Appellate Court has considered the evidentiary value of the additional evidence, then it has to be held that the Appellate Court has committed an error apparent on the face of the record.

11] Therefore, here, in this case, an interference is warranted in the judgment of the Appellate Court. As dispute pertains to immovable property, it needs to be decided after giving sufficient opportunity of hearing to both the parties, which is not done in this case. Hence, the matter needs to be remanded to the First Appellate Court for deciding afresh the application filed by the Appellant under Order 31 Rule 27 of the C.P.C. dated 11/06/2013, for production/for additional evidence.

12] Accordingly, the Second Appeal is allowed to the extent of setting aside the impugned judgment and decree passed by the Appellate Court.

13] The matter is remanded to the Appellate Court.

14] Both the parties are directed to appear before the Appellate Court on 25th July, 2018.

15] The Appellate Court shall decide the application of the Appellant dated 11/06/2013 on its own merits and pass necessary order thereon.

16] If the Appellate Court comes to the conclusion of allowing the said application, the Appellate Court shall give the necessary opportunity of leading evidence to the Appellant and thereafter, shall decide the appeal afresh.

17] At this stage, liberty is sought by the learned counsel for the Appellant to make necessary application before the Appellate Court for seeking permission to cross-examine the Court Commissioner. Liberty is granted. If such application is filed by the Appellant before the First Appellate Court, it will be considered by the Appellate Court on its own merits.

18] All the contentions of both the parties on merits of the matter are expressly left open.

19] In view of disposal of the Second Appeal, nothing survives in the Civil Application and therefore, it stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]