

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

**SECOND APPEAL NO.561 OF 2016
WITH
CIVIL APPLICATION NO.1139 OF 2016
AND
CIVIL APPLICATION NO.760 OF 2017**

Shri Kedu Karbhari Jeughale

..Appellant

vs.

Shri Arjunbhai Devsibhai Patel

(Thr. POA Ashok Arjunbhai Patel)

...Respondent

Mr.Amey Deshpande for the Appellant and for the applicant in CAS No.1139/2016.

Mr.Shriram Kulkarni for the Respondent No.1 and for the applicant in CAS No.760/2017.

CORAM : A. M. DHAVALA, J.

DATE : 11th SEPTEMBER, 2018.

P.C.:

. Considering the narrow controversy involved the parties agree for final hearing at the admission stage.

2. Heard Mr. Deshpande, learned counsel for the appellant and Mr.Kulkarni, learned counsel for the respondent. The following substantial question of law is framed:

“Whether both the lower Courts have followed proper procedure as laid down in Apex Court and this Court judgments while conducting the suit for removal of encroachment? ”

3. The brief reference to the relevant facts is necessary to decide the substantial question.

The respondent herein is the original plaintiff. He filed Regular Civil Suit No.153/2012 contending that he was the owner of property

bearing Survey No.625/2/1 ad-measuring 6R out of 4107 sq. mtrs. Situated at Vinchur, Tal. Niphad, Dist. Nashik. He claimed that out of 6R land, area ad-measuring 4R was purchased by him from one Indubai Wagh and Anusayabai Shejwal by sale deed dated 4/9/1999 and remaining 2R was purchased by him from Rukhminibai Pail under sale deed dated 12/1/1996. He has filed R.C.S. No.145/2000 against Rukhminibai which was decreed and he has obtained sale deed. As per the decree the total area of land survey No.625 is 76R and out of 76R, area ad-measuring 21.25R is purchased by him and Kantilal Patel and the said area ad-measuring 21.25R bears Survey No.625/1 and remaining area ad-measuring 54.75R bears Survey No.625/2/1. According to the plaintiffs the defendant in collusion with the Revenue officer got prepared the suitable measurement. The plaintiff and others filed R.C.S. No. 83/2007 against the defendant for declaration and perpetual injunction in respect of land of 6R of the plaintiff. The said suit was compromised and withdrawn on an understanding that fresh measurement will be carried out, but the defendant made encroachment and put fencing around the land of the Plaintiff. The Plaintiff therefore filed suit for removal of encroachment.

4. The Defendant denied that he had made any encroachment and raised defence that he is not in possession of any property owned by the plaintiff.

5. The measurer from T.I.L.R. office was appointed and he submitted map at Exh.87. Though the measurer showed that the plaintiff was in possession of less land to the extent of 5.82R, he has not shown various sub divisions of different owners and encroachment made by any of the parties.

6. The learned Civil Judge observed that the encroachment was

not proved and dismissed the suit. The plaintiff preferred Regular Civil Appeal No.64/2015. The learned Additional District Judge agreed with the finding of learned Trial Judge that map was not properly drawn and encroachment made on various lands were not shown. He also referred to the judgment of this court in *Sulemankhan vs. Bhagirathibai*¹, which was based on Apex Court judgment in *Ramkishore Sen vs. Union, AIR 66 SC 644*. The learned Additional District Judge has referred to paragraph 9 which reads as follows:

9. In cases to determine encroachment, it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent. Oral evidence cannot prove such contentious issue conclusively. In a suit where parties are disputing boundaries of property and one of the parties alleges encroachment made by another party to the suit inside suit property. In such case the plaint map as evidence in respect thereof is vital document for to decide real controversy between the parties finally. This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit in which there is a boundary dispute. The Trial Court as well as 1st Appellate Court which are Court of Facts, are duty-bound to ascertain that a map is drawn to the appropriate scale by Competent Government official from the office of TILR or DILR, as the case may be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed and boundary dispute is finally settled by producing map in the Court by the plan maker who can prove its genuineness by deposing in support of such plan/map, if it is so necessary in the absence of admission for exhibiting the map. The Trial Court can certainly raise presumption of accuracy and genuineness of such map in view of Section 83 of the Evidence Act if map is drawn by competent authority. (See. Ram Kishore Sen & Ors. v. Union of India and ors reported in (AIR 1966 SC 644). When such vital document is duly produced, proved and established, necessary detailed decree can be follow if there is any encroachment on the suit property. As held by this Court in Vijay Shende's case (supra), in such cases, fact of encroachment may be proved partly by

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oral evidence although the extent of encroachment cannot be proved in absence of public records without following due procedure emerging from Section 36 and Section 60 of the Evidence Act. In view of this recent judicial precedent referred to above, in the larger interest of justice, when it appears that the trial Court as well as 1st Appellate Court failed to follow proper procedure in this regard to ascertain the boundaries of the suit property. I must allow this appeal by setting aside impugned judgments and orders with direction to the trial Court concerned to consider appointment of court commissioner; who shall be competent official from the office of Taluka Inspector of Land Records and District Inspector of Land Records, as the case may be. The court commissioner, if required, shall secure copies of necessary public record relating to Gat/Survey number, subject-matter of dispute for to settle boundaries of the suit property by carrying out measurement after due notice to the parties to the suit and also issuing notice to adjacent owners/possessors to the suit property. He shall submit his written report to the trial Court together with detailed map. Learned trial Court after considering such written report may allow the parties to lead additional evidence if it deems it fit and shall pass order according to law. Parties shall appear before the trial Court on 28th April 2014. It is desirable that the trial Judge shall endeavour to get an agreed map on record and in the absence of such agreed map/plan can depend upon evidence obtained through the Court Commissioner as indicated above.

7. In the light of this binding precedent, the learned Additional District Judge was bound to direct fresh measurement and obtain clear picture regarding the location of lands of different owners and the encroachment made on the land of the plaintiff but the learned Additional District Judge made a short cut and with a clear observation that encroachment was not proved, he went on to allow the appeal partly. He set aside the judgment of the Trial Court and issued detailed directions to the executing Court. Sub clause (iv) reads as under:

“iv) Respondent/defendant or other co-owners, whoever is found encroached upon the land of plaintiff/appellant to the extent of 5.82R, shall hand over the possession of encroached portion of land to the plaintiff/appellant.”

8. He has passed the judgment as if it was a preliminary decree and execution was to be carried out in terms of measurement. If the encroachment was not proved the Court could not have allowed the appeal even partly.

9. The judgment of this Court was binding on both the Trial Court as well as the Appellate Court and it was duty of both the Courts to appoint TILR or DILR government measurer and get the report regarding encroachment. But the Trial Court came to the conclusion that the measurer has not performed his work properly and like neutral umpires proceeded to dismiss the suit for default of the measurer for which the plaintiff was not at fault. Learned First Appellate Court also committed mistake in not directing fresh measurement. It should have kept the appeal pending and should have directed fresh measurement and should have decided the matter only after obtaining measurement report from the authorized agency. It is bounden duty of the Court to deliver substantial justice by eliciting the truth. When party was not at fault and there is report that he is short of land of 5.82 R in comparison to the lands purchased by him, the measurement work must be carried out by the Government measurer in such cases.

10. As such the orders of the lower Court are not sustainable. Hence, the judgments and decrees passed will have to be set aside and matter will have to be remanded back to the Trial Court. Hence the order.

ORDER

i) The appeal is allowed. The Judgment and decree of the First Appellate Court as well as the Trial Court are set aside and matter is remanded back to the Trial Court with a direction that it shall appoint measurer for carrying out measurement. The plaintiff shall

bear expenses for measurement. The Trial Court shall issue specific directions to the measurer to fix the boundaries and determine the encroachment on the plaintiff's land after due notice to all the adjacent land owners. The plaintiff is permitted to file a map as plaint map showing his plot and the encroached area. After the measurement report, the parties shall be permitted to led evidence and matter shall be decided afresh.

ii) Considering that the suit is of the year 2009 the Trial Court shall expeditiously decide it, preferably within a period of one year.

iii) The parties are directed to remain present in the Trial Court on 22/10/2018.

iv) There shall be no order as to costs. The appellant shall get full Court fee refund as per Section 15 of the Maharashtra Court Fees Act.

v) Civil Applications stand disposed of.

(A. M. DHAVAL, J.)