

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

Second Appeal No. 78/2018

Mahadeo Sahebrao Thakre

Vs.

Rajesh s/o Keshavrao Sakore and another.

*Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.*

Court's or Judge's Orders

Shri V.G.Bhamburkar, Advocate for appellant.
Shri R.S.Sundaram, Advocate for respondents.

CORAM : A.S.CHANDURKAR, J.
DATED : 08.08.2018

Learned counsel for the parties have been heard
on the following substantial question of law :

“ The appellate Court having noticed in the suit
for removal of encroachment that the plaintiff had measured
only his plot, whether the powers under Order XXVI Rule 9 of
the Code of Civil Procedure, 1908 ought to have been
exercised by the appellate Court?”

The appellant is the original plaintiff, who is the
owner of plot no.32 admeasuring 30 feet by 50 feet. It is his
case that the said plot was encroached on 27.03.1986.
According to him, the defendants who were owners of plot
nos. 30 and 31, committed encroachment and hence, the suit
for removal of that encroachment came to be filed.

In the written statement, it was denied that any
such encroachment was committed. It was asserted that the
defendants were in possession of their respective plots. The
trial Court after considering the evidence on record, initially
appointed a Court Commissioner. That report was submitted
at Exh.23. Subsequently, another Commissioner, who was the

Surveyor from the City Survey Office, was appointed and he submitted his report at Exh.39. After considering that report, the trial Court dismissed the suit. The appellate Court confirmed the said finding. Being aggrieved, the plaintiff has filed present appeal.

Shri V.G.Bhamburkar, learned counsel for the appellant submitted that in the light of report of the Court Commissioner at Exh.23, it was clear that the defendants had committed encroachment and both the Courts committed an error in not decreeing the suit. According to him, further report of the Commissioner, at Exh. 39, also indicated the encroachment committed by the defendants. It was then submitted that the plaintiff had applied before the trial Court for amending the plaint and adding necessary parties to the suit. That application was rejected by the trial Court. Despite challenge being raised, the appellate Court failed to allow the amendment. It is thus submitted that the impugned judgment is liable to be set aside.

Shri R.S. Sundaram, learned counsel for the respondents supported the impugned judgment. According to him, the Courts in exercise of powers under Order XXVI Rule 9 of the Code of Civil Procedure, 1908(for short, the Code) had initially appointed the Commissioner, who submitted his report at Exh.23. That report was not found satisfactory and therefore, Officer from the City Survey Office was appointed. As per his report at Exh.39, all the plots were found existing in the lay out. It is then submitted that the parties proposed to be added were not necessary parties as no relief was sought against them. Same were rightly not permitted to be added. It is thus submitted that no interference is called for in the appeal.

I have heard learned counsel for the parties at length. I have perused the records of the case. It is not disputed that initially the trial Court had appointed a Court Commissioner, who submitted his report at Exh.23. In view of objection being raised, another Court Commissioner was appointed from the City Survey Office. In his report at Exh.39, it was indicated that all the plots were measured and the plots of the defendants were at the same location. On that premise, the suit came to be dismissed.

On perusing the report at Exh.39, it can be seen that all the plots within the lay out were measured and it was found that plot nos. 30 to 32 were existing at their respective locations. This report of the Commissioner has not been challenged. Hence, both the Courts did not commit any error in accepting that report. The report at Exh.39 having been obtained after exercising powers under Order XXVI Rule 9 of the Code, no error can be said to be committed by the Courts below.

Insofar as amendment to the plaint is concerned, it has been found that the parties proposed to be added, were not necessary parties. It was open for the plaintiff to have brought on record necessary evidence which he intended to bring by seeking addition of those parties. Hence, the order rejecting the amendment was not liable to be set aside.

In view of aforesaid discussion, it is found that powers under Order XXVI Rule 9 of the Code were exercised by appointing Commissioner from City Survey Office. The substantial question of law stands answered accordingly.

The Second Appeal is, therefore, dismissed. No order as to costs.

Needless to state that it is always open for the plaintiff to take such other steps as are permissible in law.

JUDGE

Andurkar