

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:**NAGPUR BENCH : NAGPUR****Second Appeal No. 479 of 2016****[Diwakar Anandrao Wankhede Vs. Shyam Wamanrao Wankhede & another]****AND****Second Appeal No. 492 of 2016****[Diwakar Anandrao Wankhede Vs. Ravindra Wamanrao Wankhede & another]**

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

Second Appeal No. 479 of 2016 :

Mr. C. A. Joshi, Adv., for the appellant.

Mr. A. R. Deshpande, Adv., for respondents.

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Second Appeal No. 492 of 2016 :

Mr. C. A. Joshi, Adv., for the appellant.

Mr. A. R. Deshpande, Adv., for respondents.

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CORAM : A. S. CHANDURKAR, J.**DATE : 08th January, 2018**

Since identical questions arise in both these appeals, they are being decided together. For sake of convenience, facts in Second Appeal No. 479 of 2016 are being referred to.

The respondents are the original plaintiffs who had filed a suit for removal of encroachment to the extent of 12 Are land that was alleged to be in possession of the appellants - defendants. The suit as filed was initially decreed. The appellate Court, however,

had set aside that decree and directed the parties to appear before the Taluka Inspector of Land Records who, in turn, was directed to measure the lands in question and submit his report. Pursuant thereto, the Taluka Inspector of Land Records was appointed as Commissioner and after measuring the land, he submitted his report. The trial Court on considering the evidence on record held that the plaintiffs were the owners of land admeasuring 2 hectares 86 Are. It, however, did not accept the report of the Commissioner and proceeded to dismiss the suit. The appeal filed by the plaintiffs was thereafter allowed and after recording a finding that the defendants had committed encroachment, the suit was decreed. Being aggrieved, the defendants have filed the aforesaid appeals.

The learned counsel for the parties have been heard on the following substantial question of law:-

“Whether reversal of the decree by the appellate Court solely on the basis of the report of the Court Commissioner ignoring other oral evidence on record is legally sustainable?”

Shri C. A. Joshi, learned counsel for the appellans, submitted that the appellate Court merely on the basis of the report of the Commissioner decreed the suit. The oral evidence of the defendant and his witness has not

been taken into consideration. According to the learned counsel, the father of the defendant - Anandrao as well as his uncle - Madhavrao were examined. They had deposed that in the year 1955 by laying down a "Dhura" which was subsequently destroyed by the plaintiffs, the partition had taken place. It is submitted that the first appellate Court being the final Court of facts, it ought to have considered the entire evidence on record before reversing the decree. The same was not done and in view of the judgment of the Honourable Supreme Court in **Madhukar & others Vs. Sangram & others** [AIR 2001 SC 2171] , the judgment under challenge was vitiated.

Shri A. R. Deshpande, learned counsel for the respondents - plaintiffs, supported the impugned judgments. According to him, the finding recorded by the trial Court that the plaintiffs were the owners of land admeasuring 2 hectares 86 Are was not challenged by the defendant by filing any Cross-objection. After the Taluka Inspector of Land Records filed his report, the defendant did not cross-examine said witness. As no objection was raised to the report of the Commissioner, the appellate Court did not commit any error by accepting that report. In fact, the trial Court had erroneously excluded that report from consideration. He placed reliance on the decision in **Vemuseti Appayamma Vs. Lakshman Sahu** [AIR 1973 Andhra Pradesh 168]. It was also submitted that the evidence

referred to by the appellants was not relevant for deciding the aspect of encroachment. It was, therefore, submitted that no interference was called for.

I have heard the learned counsel for the parties at length and perused the relevant material on record.

It is not in dispute that initially the first appellate Court had remanded the proceedings for having the lands measured by the Taluka Inspector of Land Records. After the lands were measured and the report was submitted, the defendant filed Pursis stating that he did not intend to cross-examine the Commissioner. The first appellate Court after considering the said report found that the plaintiffs were in possession of land admeasuring 2 hectares 77 Are, when, in fact, they were the owners of 2 hectares 86 Are land. On that basis, it was found that the defendant had committed encroachment and the suit came to be decreed. Considering the fact that the defendant did not choose to challenge the report of the Court Commissioner and also did not cross-examine him, no fault can be found with the approach of the appellate Court while accepting the report of the said Court Commissioner.

In so far as oral evidence is concerned, the defendant had examined his father – Anandrao who had stated that in the year 1955 by laying down a “Dhura”, partition had taken place between himself and his

brother - Vyankatrao. According that witness, the "Dhura" was in existence and it was destroyed about four-five years back. The other witness - Madhukarrao has also deposed on the same lines. When the entire material on record is taken into consideration, I do not find this piece of oral evidence very material for determining the question of encroachment. The decree as passed is on the basis of the report of the Taluka Inspector of Land Records which was not objected by the defendant. Though it is true that the appellate Court is required to take into consideration the entire material on record as held in *Madhukar & others* [supra], in the facts of the present case, I do not find that much will turn on the basis of deposition of the defendant's witnesses - Anandrao and Madhukarrao.

In view of aforesaid discussion, I do not find any case made out to take a different view from that taken by the first appellate Court. The substantial question of law as framed is answered by holding that reversal of the decree by the appellate Court on the basis of report of the Court Commissioner is legally sustainable.

Hence, the Second Appeals stand dismissed with no order as to costs.

Judge

