

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

902 SECOND APPEAL NO.293 OF 2017

Avinash s/o Arunrao Deshmukh,
Age 40 years, Occupation Agriculture,
R/o Katpur Tq. Dist. Latur. ...Appellant.

VERSUS

Rajabhau s/o Manikrao Deshmukh,
Age 58 years, Occupation Agriculture,
R/o Katpur Tq. Dist. Latur. ...Respondent

...
Advocate for Appellant : Mr. Salunke Sudarshan J.
Advocate for Respondent : Mr. Gunale V.D.
...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 02-04-2019.

ORAL ORDER :

1. Present appeal has been filed by the original plaintiff challenging the Judgment and decree passed in Regular Civil Appeal No.08 of 2013 by District Judge -4, Latur, dated 26-10-2016, whereby the appeal filed by the present respondent came to be allowed and the suit filed by the present appellant came to be dismissed. Present appellant - plaintiff had filed Regular Civil Suit No.580 of 2008 before Civil Judge, Junior Division, Latur for removal of encroachment and possession which came to be decreed on 31-10-2018. It was contended by the

present appellant-plaintiff that the original defendant has encroached on the land belonging to the plaintiff i.e. Gut No.58 to the extent of 12 R. The land is agricultural land situated at village Sikandarpur Tq. Latur. Plaintiff had also contended that, the measurement was done through TILR on 12-04-2007 i.e. prior to the institution of the suit.

2. After the claim of the plaintiff was denied by the defendant, issues came to be framed. Parties have led oral as well as documentary evidence and after considering the evidence on record the learned trial Court had decreed the suit. Defendant was directed to hand over the encroached portion to the plaintiff. As Aforesaid the original defendant challenged the said Judgment and decree in the appeal and after hearing both sides, the said appeal came to be allowed. Hence, the plaintiff has filed this second appeal.

3. The matter has been heard finally at the stage of admission itself by consent of both the parties. Both the learned advocates have made submissions in support of their respective contentions. Few more facts which are necessary to be considered here are that even the defendant had got the land measured through TILR on 10-03-2008 in which also it was revealed that the encroachment was to

the extent of 12 R by him on the land belonging to the plaintiff. The fact which prevailed on the learned first appellate Court was that there was no joint measurement of the properties. Though the Cadastral Surveyor who had measured the land belonging to the plaintiff was examined and the said map was proved yet it was not considered as admitted map by the first appellate Court. According to the first appellate Court the plaintiff ought to have made a request to the trial Court to have measurement by appointing Court Commissioner of the Survey No.58 as well as 56 which is owned by the defendant. The measurement which was done on the basis of application of defendant was also brought on record before the trial Court but the said submission was not accepted by the learned first appellate court. Taking into consideration this aspect the substantial question of law that arises as to whether the measurement which has been carried out either on the basis of the application by plaintiff or by defendant can be said to be accepted measurement or can be taken as an appropriate measurement based upon which the finding could have been arrived at as to whether defendant has encroached on the land of the plaintiff or not. Taking into consideration this substantial question of law, the legal position that has been laid down in catena of Judgment laid down by this Court as well as by

the Apex Court is required to be considered.

4. Initially in *Kashinath Ramkrishna Chopade Versus Purushottam Tulshiram Tekade And others*, reported in 2005 (6) *Bombay CR 267*, wherein it was observed that,

“It is clear that under Order XXVI, Rule 9 of the Code of Civil Procedure, the Court has the discretion to order local inspection or not. The object of the local inspection is not so much to collect evidence which can be taken in Court, but to obtain evidence which from its peculiar nature can only be had on the spot. The cases of boundary disputes and disputes about the identification of lands are instances, when a Court should order a local investigation under Order XXVI, Rule 9 of the Code of Civil Procedure. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the area encroached upon.”

Thus it is to be noted in this case that, the measurement was got done by the plaintiff prior to the suit and even the defendant had also got it measured prior to the suit. There was no attempt on the part of the trial Court to get the land measured during the pendency of the suit by appointing Court Commissioner. When defendant was not agreeing to the map which was drawn on the basis of

measurement carried out on the application of plaintiff, and so also on the basis of the application given by himself, this was appropriate case where the learned trial Court ought to have exercise its power to appoint Court Commissioner under Order XXVI Rule 9 of Code of Civil Procedure.

5. Further in *Sulemankhan s/o Mumtajkhan and Others Versus Smt. Bhagirathibai wd/o. Digamber Asalmol and Another*, reported in 2014 (5) ALL MR 552, it has been observed this Court that,

“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 Courts 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 said ratio in case of *Sulemankhan (Supra)* was reiterated in *Meenadevi w/o Vasdev Vatnani Versus Narmadabai @ Leelabai w/o Gopaldas Zanwar*, reported in *[2015 (6) Mh.L.J.] 578*. Therefore, it is required to be seen from these pronouncements that, there was a necessity to have a map drawn in the suit which can be said to be an admitted map.

6. In this particular case when the first appellate Court was of the opinion that, there was a necessity to have a joint measurement of Block Nos.58 and 56 owned by defendant then the first appellate Court ought to have exercised the said powers under Order XXVI Rule 9 of Code of Civil Procedure or the matter could have been remanded with those directions.

7. Here another fact that is also required to be considered is that, though there was measurement on the application filed by plaintiff as well as defendant, though the result is the same, the measurement was carried out by two different persons that is both the Cadastral Surveyor were different, and what is basically expected is that, both the lands should be measured by same person at one time only in presence of the parties as far as possible.

Therefore, failure on the part of the first appellate Court in this case to exercise its powers and call upon to have a joint measurement "admitted map" appears to have resulted in miscarriage of justice. On the same evidence in fact the learned trial Court has decreed the suit but then when it was felt necessary by the first appellate Court that there ought to have been a joint measurement, the powers with the first appellate Court ought to have been explored. Therefore, the substantial question of law will have to be answered in affirmative. As a result of which by setting aside both the decrees passed by both the Courts below, the matter deserves to be remanded to the trial Court with directions. Hence, following order.

ORDER

- 1) Second Appeal is partly allowed.
- 2) The Judgment and decree passed in Regular Civil Appeal No.08 of 2013, by learned District Judge – 4, Latur dated 26-10-2016, and the Judgment and decree passed in Regular Civil Suit No.580 of 2008 by Civil Judge, Junior Division, Latur dated 31-10-2012 are hereby set aside.
- 3) The said suit is restored to the file of Civil Judge, Junior Division, Latur with a direction that, Court

Commissioner be appointed for measuring land Gut No.58 as well as 56.

4) Liberty is given to the plaintiff to have a detailed application for appointment of Court Commissioner which should be filed before the trial Court on or before 29-04-2019.

5) Both the parties to appear before the trial Court on that day.

6) Even if that application is not filed, the trial Court should proceed to pass order regarding appointment of TILR / DILR, as the case may be, for measurement of the properties belonging to plaintiff as well as defendant, and after the measurement is done, the Court Commissioner should produce the report along with detailed map before the trial Court. Thereafter, the trial Court should give an opportunity to both the parties to make their submissions on the report. Thereafter, the trial Court to decide in view of Order XXVI Rule 10 (3) that, there is any ground or reason to dissatisfy with the proceedings of the commissioner then further directions may be given or further enquiry can be made, and thereafter the matter to be decided as per the law.

7) Needless to say that, since the suit was filed in 2008, the learned trial Court should expedite the trial. Both the parties to co-operate and the trial Court is

directed to decide the suit as early as possible.

- 8) No order as to costs.
- 9) Record and proceedings be sent back immediately.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.