

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.482 OF 2018

Sudhakar s/o Baburao Kulkarni,
Age 85 years, Occupation Agriculture,
R/o Pimpalgaon (barav),
Tq.Bhokardan Dist. Jalna.

...Appellant.

VERSUS

1. Gorabai w/o Thansing Marag,
Age 55 years, Occupation Agriculture,
2. Ratan s/o Bandu Marag,
Age 35 years, Occupation Agriculture,
3. Amol s/o Bandu Marag,
Age 35 years, occupation Agriculture,
4. Devkabai w/o Bandu Marag,
Age 60 years, Occupation Agriculture

All Pimpalgaon (barav),
Tq.Bhokardan Dist. Jalna.

...Respondents.

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Mr. A. S. Deshmukh, Advocate for appellant.
Mr. S. B. Bhosale, Advocate holding for Mr. R. B. Singare,
Patil, Advocate for respondents.

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date Of Reserving The Order :
08-03-2019.**

**Date Of Pronouncing The Order :
22-04-2019**

JUDGMENT :

1. Present appeal has been filed by original plaintiff. He had filed Regular Civil Suit No. 143 of 2010 for possession of encroached portion of the land from defendants. He had come with a case that he is the owner of agricultural land bearing Gut No. 89/1 admeasuring 83 R situated at Pimpalgaon Barva, Tal. Bhokardan, Dist. Jalna. The total area of Gut No. 89/1 was 10 H, 45 R; however, he has sold 9 H, 62 R. Now area admeasuring 83 R is remaining with him. According to him, the defendants have made encroachment over the same. Hence, suit has been filed for removal of encroachment and possession.

2. Defendants were duly served but failed to appear, hence the matter proceeded ex-parte against them.

3. Plaintiff has filed his affidavit-in-chief and then examined the Taluka Inspector of Land Records (hereinafter referred to as TILR). The cadastral surveyor has deposed that he has measured land Gut No. 89/1 and found that defendants have encroached on the land of plaintiff. Learned Civil Judge Junior Division has decreed the said

suit on 02-05-2015.

4. Original defendants challenged the said judgment and decree before District Court Jalna by filing Regular Civil Appeal No. 46 of 2017. The said appeal was heard by the learned Ad-hoc District Judge-3, Jalna. After hearing both sides, the learned First Appellate Court has allowed the appeal and set aside the judgment and decree passed by learned Trial Court. Hence, the original plaintiff has filed this Second Appeal.

5. Heard learned Advocate Mr. Arvind Deshmukh for appellant and learned Advocate Mr. S. B. Bhosale holding for Advocate Mr. R. B. Singare Patil for respondents. It will not be out of place to mention that in view of order passed by this Court on 05-03-2019, the appeal has been heard finally at the stage of admission itself. Parties were put to notice in respect of the same.

6. It has been vehemently submitted on behalf of appellant that learned First Appellate Court erred in setting aside the decree passed by the learned Trial Court. First appellate Court has deprived the plaintiff of his legitimate right of restoration of property. The evidence of TILR has been disbelieved on technical ground, which

was never raised before the Trial Court. Dismissal of suit on the ground of non-compliance of Order VII Rule 3 of Code of Civil Procedure is hyper technical. When defendants preferred not to contest the matter even after due service of summons, then something can not be inferred in their favour without raising the said point at appropriate stage. It has come on record that presently, plaintiff possess only 35 R land out of 83 R, which has remained with him. It would have been proper for the learned First Appellate Court to remand the matter. If the defendants had any grievance in respect of the measurement, then proper course was to get the land measured again with consent of both the parties. However, dismissal of the suit by allowing the appeal was not a justiciable act. Learned Advocate for appellant has rather prayed for remand of the matter to the Trial Court with direction to have joint measurement.

7. Per contra, the learned advocate for respondents supported the reasons given by first appellate Court. He submitted that when there was no compliance of mandatory provision under Order VII Rule 3 of Code of Civil Procedure, then obvious result was to dismiss the suit. The measurement that was carried out, was illegal. No notice was given to the defendants about the same. Only the land of

the plaintiff was measured. Therefore, with these defects, the suit ought not to have been decreed by the learned Trial Court. The said decree has been rightly set aside by the First Appellate Court.

8. Here in this case, the defendants had not appeared before the Trial Court and had not taken any objection regarding the description of the property in plaint. In fact the boundaries have been quoted in the plaint. Map appears to have not been attached. However, the land was got measured on 26-06-2012. Various doubts were raised on the said measurement and the testimony of Cadastral Surveyor. Plaintiff had come with a case that after selling 9 H 62 R from the same land, he is still holding 83 R. There is evidence to the effect that 59 R land was acquired by the Government for road. Still plaintiff contends that he possessed 83 R. The said acquisition of land ought to have been considered, if cogent evidence regarding its acquisition from the land of the plaintiff would have been led. Still there was question of 48 R land. Learned First Appellate Court ought not to have completely dismissed the suit. If plaintiff is dispossessed by way of encroachment by the defendant to what ever extent of the land, the relief in respect of the same can be given. However, for that purpose there should be an admitted map on record. If the

measurement carried out on 26-06-2012 was faulty, then First Appellate Court ought to have directed for joint measurement. It should be the endeavour of the Courts to do justice and not to dispose of a matter on technical grounds.

9. This Court has taken a view in *Kashinath Ramkrishna Chopade vs. Purushottam Rulshiram Tekade & ors*, [2005(6) Bom.C.R., 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 identify of lands are instances when a Court should order a local investigation under Order XXVI Rule 9 of CPC. 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".

The said decision is later on followed in *Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade, deceased, through Pooja @ Poojari Y. Lakade & ors.*, [2011(3) Bom.C.R., 807].

10. Further, reliance can be placed on the observations in *Sulemankhan and ors. vs. Bhagirathibai and ors.*, [2014(4) Mh.L.J., 250], wherein it is stated 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 First 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".

In this case, it has been observed that of the Trial Court fails to get such measurement done, then it is the duty of First Appellate Court.

11. The learned First Appellate Court ought not to have taken too technical approach in present case. The matter could have been remanded to Trial Court also with direction to get the proper

measurement done. There is substance in the arguments advanced on behalf of the appellant that both the Courts have not exercised their powers/ jurisdiction judiciously and had not tried to bring on record an agreeable measurement to resolve the dispute. Another fact is also required to be considered is that the measurement carried out before the Trial Court was behind the back of defendants. It appears that the learned Trial Court did not issue fresh notice to defendants, when application for appointment of Court Commissioner was filed. Thereafter, the measurement of land belonging to plaintiff has only been carried out, when it was expected that the measurement should have been of the land belonging to plaintiff as well as defendants. Therefore, when it was noticed that the work of Court Commissioner has not been properly done, it ought to have been got done appropriately by both the Courts below. When the purpose of appointment of Court Commissioner itself was not fulfilled, then unless there would have been an admitted map on record, both the Courts below ought not to have gone ahead to dispose of the case. Parties will not get justice by adopting such procedure. Hence, it is necessary to remand the matter with direction to adopt proper procedure. Therefore, it is not necessary for this Court to consider other facts in this case.

Under the said circumstance, there is no necessity to frame substantial questions of law and keep the matter pending. In fact, the impugned Judgments and Decree passed by the Courts below have resulted into miscarriage of justice and in such circumstances, there is no alternative except to remand this case to the Trial Court with directions to appoint the Commissioner/Surveyor from the office of TILR Bhokardan or DILR Jalna or any such officer nominated by DILR, Jalna for the purpose of local investigation under Order 26, Rule 9 of the Code of Civil Procedure. Hence following order.

ORDER

1. Present Second appeal is hereby partly allowed.
2. The judgments and decrees passed by the Courts below are hereby set aside and the suit is restored to the file of Civil Judge Junior Division Bhokardan, Dist. Jalna for fresh decision in accordance with law and in the light of the observations made above.
3. The Trial Court is directed to appoint the Surveyor from the office of TILR Bhokardan or from the office of DILR, Jalna or any TILR having jurisdiction over the village in which suit land is situated, for the purpose of

local investigation under Order 26, Rule 9 of the Code of Civil Procedure.

4. Parties are directed to remain present before the Trial Court on 10.06.2019. If, defendants fail to appear on that day, Trial Court should issue notice and secure the presence of defendants by serving notice on them.

5. Plaintiff is directed to submit a fresh application for appointment of Court Commissioner before the Trial Court within two weeks from the date of appearance of both the parties.

6. Such appointed Commissioner shall conduct local investigation in accordance with the provision of Order 26, Rule 9 of the Code of Civil Procedure, after giving due notice to the parties and take the measurements of the property owned by the parties after taking into consideration the title deeds of the parties, if any and shall also demarcate the boundaries of the property by noting down the actual measurements in the joint measurement map itself by showing the precise and concise area under encroachment, if any, and then shall submit the map and report to the trial Court, within a period of two months thereafter. Learned Trial Court may give any other suitable directions to the Court Commissioner apart from directions given in this order,

in order to have an appropriate map to resolve the controversy.

7. The Trial Court shall decide the matter as expeditiously as possible and preferably within six months from the receipt of report of the Court Commissioner.

8. If the plaintiff does not submit his application for appointment of the Commissioner within aforesaid period, the suit shall stand dismissed.

9. Parties to act on authenticated copy. It is clarified that if authenticated copy is placed before the Trial Court, Trial Court to proceed on that basis and need not wait for the writ to receive.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.