

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.607 OF 2016

Isaq Nawab Shaikh,
Age 5 yrs., Occ. Agri.,
R/o Fattepur, Tq. Ausa,
Dist. Latur.

... **Appellant.**

...**Versus...**

- 1 Maidabee w/o Turabsab Shaikh,
Age 55 yrs., Occ. Agri.,
- 2 Amirhamja Maheboob Shaikh,
Age 55 yrs., Occ. Agri.,

Both are r/o Fattepur, Tq. Ausa,
Dist. Latur.

... **Respondents.**

...

Mr. R.K. Ashtekar, Advocate for the appellant

Mrs. M.D. Thube-Mhase, Advocate for the respondent No.1

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 22th JANUARY, 2019

PRONOUNCED ON : 28th FEBRUARY 2019

JUDGMENT :

1 Present appeal has been filed by original defendant No.1 challenging the Judgment and Decree passed in Regular Civil Appeal No.129/2011 passed by District Judge-1, Latur on 03.05.2016, in which Judgment and Decree passed in Regular Civil Suit No.8/2005 by 2nd Joint Civil Judge Junior Division, Ausa, Dist. Latur dated 16.06.2011 was challenged. Present respondent No.1 was the original plaintiff and she had filed suit for declaration and possession.

2 Plaintiff had come with a case that she purchased 80 Ares land from Gat No.319, which is more particularly, described in para No.1 of the plaint, situated at village Fattepur, Tq. Ausa, from one Gafur Nawab Shaikh on 28.12.1999. She had also purchased 4 Aana share in the well along with the same. It is stated that since the date of the purchase of the property she is in peaceful possession. Defendant No.1 was having 8 Aana share and defendant No.2 was having 8 Aana share each, in the well, in the suit property. The son of the plaintiff is in Military and therefore plaintiff and her husband used to reside along with their son, but they used to visit suit property oftenly. Taking disadvantage of this fact, the defendants had encroached on the suit land and therefore she had got the land measured by Taluka Inspector of Land

Records, Ausa (hereinafter referred to as "TILR"). Thereafter, she had requested defendant No.1, who had encroached to the extent of 14 Ares from Northern side and defendant No.2 to the extent of 5 Gunthas from Southern side to hand over the possession of the encroached portion. However, they have refused and therefore she filed the suit for recovery of possession of the encroached area.

3 Defendant No.2 had initially contested the suit, but thereafter during the trial, he has compromised the matter with plaintiff and then handed over the encroached area to her.

4 Defendant No.1 had resisted the claim of the plaintiff by filing written statement. He had totally denied the title of plaintiff over the suit property through Gafur Shaikh. He admitted that his land is situated towards North side and also admitted the four boundaries of the suit property. However, it was his say that the plaintiff had not shown the road going in between and Nala in between the suit properties. It is stated that no partition had taken place between him and his brother Gafur as well as mother and therefore, he resisted the claim. By way of additional written statement, he contended that his brother Gafur was addicted to liquor and therefore got false record prepared in his name.

His brother Gafur was not at all owner of the suit property. According to him, plaintiff has taken that area, which was encroached by Gafur. It is stated that there was a stone wall towards East side of the property, but plaintiff, her husband and son have got it demolished with the help of JCB machine. He has also stated that water from the land of the defendant No.2 used to flow from the Western corner of the well towards Southern side and because of the same the suit land became mud land. The plaintiff has dug earth from the Northern side of the suit land with the help of JCB and had put it towards South side and the new ditch near stone wall of the defendant No.1 has been dug, with an intention to cause damage to his property. It is also stated that the plaintiff has prepared the false measurement without giving notice.

5 With these contentions of the parties, issues were framed and parties went to trial. After considering the evidence on record, the learned Trial Judge has partly decreed the suit. Defendant No.1 was directed to deliver 14 Ares land, shown in red colour, in map, in Exh.66, within two months, to the plaintiff.

6 Original defendant No.1 challenged the said Judgment and Decree in R.C.A. No.129/2011 and after hearing both sides the appeal

has been dismissed on 03.05.2016. Hence, the defendant No.1 has filed the present Second Appeal.

7 It will not be out of place to mention here that with consent of both the parties, the matter was heard finally, at the stage of admission itself and therefore, taking into consideration arguments advanced, it is required to be seen as to whether interference is required. It has been argued on behalf of the appellant-original defendant No.1 that both the lower Courts have not considered the documentary evidence on record, in fact, the TILR had not measured the land properly. The said map was not trustworthy because even PW 1 Turabsab admitted the existence of stone wall of height of 1 to 1½ feet towards North side of the suit property, DW Govind Somwanshi and DW 4 Ram Somwanshi have deposed about the location of the stone wall, however, the Cadestral Surveyor, who was examined to prove the map, could not locate or notice any such stone wall. Existence of stone wall has not been mentioned in the measurement map Exh.66, so also it cannot be stated that a Joint Measurement of the property was made. Further, the Courts below have not considered that the vendor of the plaintiff has admitted that there was no partition between him and defendant No.1 and as per his

contention he has given possession of that property, which was in his possession. He was unable to tell the measurement of his own land. There was no attempt made by both the Courts below to get an admitted map on record by appointing Court Commissioner. He, therefore, relied on the decision in Ramchandra Bhikaji Jagtap vs. Dudharam Langruji Padvekar dead through LRs Bulkabai Padvekar and others, 2004(1) Mh.L.J., 278, wherein it has been observed that -

“There is no presumption of accuracy in respect of map or plan which is made for a particular cause and it goes without saying that a map prepared for the purpose of a particular suit, therefore, be duly proved and it is not admissible in evidence in absence of proof of its accuracy. The onus of proving that such a map is accurate lies on the party who produces it.

He further relied on the decision in Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade, deceased, through Pooja @ Poojari Y. Lakade & ors., 2011(3) Bom.C.R., 807. He, therefore, also prayed that matter can be remanded to get an admitted map by again appointing the Court Commissioner.

8 Per contra, the learned Advocate appearing for the

respondent No.1 submitted that there is absolutely no necessity to remand the matter, for the simple reason that no attempt was made by the defendant No.1, to get the land measured, during the course of the trial, when by way of additional written statement he himself had come with a case that plaintiff-vendor had encroached on his land. Both the Courts have taken a consistent view that plaintiff has proved that defendant No.1 has encroached to the extent of 14 Ares from Southern side. The testimony of the Cadestral Surveyor has not been shaken the existence of stone wall nor affected the area which is shown to be encroached upon. Therefore, she prayed for the dismissal of the Second Appeal.

9 First and the foremost fact, that is required to be considered is that in this Second Appeal the appellant is restricting himself to the point that the measurement of the encroached area is not done properly. This question/point is basically mixed question of fact as well as law. Here, no doubt, the measurement had taken place prior to the institution of the suit i.e. on 30.10.2004 and PW 4 Shaikh Abdul Turab Shaikh, who was the then Cadestral Surveyor working in TILR office, AUSA has been examined. He says that prior to the measurement, notices were issued to

plaintiff, defendant and adjoining holders. Two documents have been produced, which are stated to be noticed, which are in the name of plaintiff only. One is notice dated 20.10.2004, wherein it is stated that on the basis of the application for measurement given on 19.10.2004 there would be measurement on 30.10.2004, however, after date 30 underscore 31 is written. There is no name of defendant No.1 on the same. However, overleaf it is stated that copy is given all the adjoining holders. But then, there is another notice, which is stated to have been issued to the plaintiff on 16.11.2004, which appears to be given for fixation of boundaries and it is stated that, that work would be done on 20.11.2004. Therefore, the question is – Exactly when the map was prepared ? Even if, for the sake of argument it is accepted, that measurement was done on 30.10.2004, then on the copy of the acknowledgment receipt of the said notice to the defendant No.1 has not been produced. It appears that a panchnama was drawn on 30.10.2004 at the spot after the measurement and it is stated to have been signed by three panchas, even the name of defendant No.1 has been taken in the list of panchas and then it is stated that he has refused to sign. Though the defendant No.1 has admitted in his cross-examination that he has not

taken any objection in respect of the said measurement, it was clear, on the basis of the written statement that he was disputing the measurement. Under such circumstance, it was for the Courts below to take help of Order 26 Rule 9 of the Code of Civil Procedure and appoint T.I.L.R. as Court Commissioner and get the map prepared. Reliance can be placed on the decision 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”*.

10 Further, 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”.

11 In this case, the evidence has tried to be brought on record that on 30.10.2004 defendant No.1 was present i.e. at the time of measurement, but then he had refused to sign. But there appears to be one more notice as aforesaid, which stated that the boundaries would be fixed or boundary stones would be fixed on 20.11.2004. What happened on that day has not come on record. It has come on record that the Cadestral Surveyor had not taken note of the stone wall, which is stated

to be present in the land of defendant No.1. The existence of the same has been partially admitted by the General Power of Attorney of the plaintiff. Therefore, without getting the boundaries fixed, it can be said that the measurement is half way done and it can be so inferred that without fixing the boundaries or boundary stones in presence of defendant No.1 the said work has been done. Thus, there is substance in the arguments advanced on behalf of the appellant that both the Courts have not exercised their jurisdiction judiciously and had not tried to bring on record an agreeable measurement to resolve the dispute. Following paragraph in **Sulemankhan's** Judgment is important.

“8. 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 Kishor Sen & ors v. Union of India & ors reported in MANU/SC/0052/1965 : AIR 1966 SC 644) Where 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 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.”

12 Though both the Courts below have taken note of presence of defendant No.1 at the time of drawing panchnama Exh.67, they have not considered that there is no evidence in respect of presence of defendant No.1, on the date, on which the boundaries/boundary stones were allegedly fixed. Therefore, the substantial question of law, that has been raised in this case is that whether without getting an admitted map of the encroached area, decree for removal and possession of encroached area can be passed, and the answer is in the negative.

13 It was also argued that there was no partition between the vendor of the plaintiff as well as defendant No.1 and therefore the vendor of the plaintiff had no authority to dispose of the property. It is to be noted that the sale deed was executed between plaintiff and her vendor in the year 1999. The suit was filed in 2005. It is impossible to consider that though the said land is adjacent to defendant No.1's land, he had no knowledge about the transaction. He never challenged the same and therefore, now, he cannot raise that point in the suit.

14 Though both the Courts below have taken the map Exh.66 as a proved map and as per Section 83 of the Indian Evidence Act, for the aforesaid reasons it cannot be considered to be an admitted map. It was

not necessary for the defendant to challenge the said map independently, when he had challenged it in the suit, after the said challenge steps ought to have been taken to get the land measured through the Court Commissioner, by resorting to Order 26 Rule 9 of CPC. Under the said circumstance, 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 suit to the Trial Court with directions to appoint the Commissioner/Surveyor from the office of TILR, AUSA or any such officer nominated by him for the purpose of local investigation under Order 26, Rule 9 of the Code of Civil Procedure. Hence following order.

ORDER

1 In such circumstances, the appeal is allowed.

2 The judgments and decrees passed by the Courts below are set aside and the suit is remanded to the Trial Court for fresh decision in accordance with law and in the light of the observations made hereinafter.

3 The Trial Court is directed to appoint the Surveyor from the

office of TILR, AUSA 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 01.03.2019. 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 The plaintiff is directed to submit his application before the Trial Court within two weeks from the date of appearance of both the parties for appointment of Court Commissioner.

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.

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

8 The record and proceedings be sent immediately to the trial Court.

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

10 Parties to act on authenticated copy.

(Smt. Vibha Kankanwadi, J.)

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