

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

SECOND APPEAL NO.170 OF 2014

Sunil Bhimrao Latpate and another

... Versus ...

Prabhau Gangaram Latpate and others

...

Mr. C.R. Deshpande, Advocate for the appellants

Mr. S.S. Manale, Advocate for the respondent No.1

Mr. T.M. Venjane, Advocate for respondent No.4

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 27th FEBRUARY, 2019

PRONOUNCED ON : 26th APRIL, 2019

ORDER :

1 Present appeal has been filed by original defendant Nos.1 and 2 challenging the concurrent findings of the Courts below. Present respondent No.1 filed Regular Civil Suit No.422/2006 before 3rd Joint Civil Judge Senior Division, Latur for declaration of ownership, recovery, possession and mandatory injunction. It was contended by the plaintiff that he is the owner of agricultural land Gat No.107 admeasuring 01 H 80 R situated at village Ganjoor, Tq. & Dist. Latur. Defendant No.1 is the owner of land Gat

No.108/3 admeasuring 01 H 56 R, defendant Nos.2 and 3 are the owners of Gat No.108/2 admeasuring 02 H 86 R (revenue record of the land of defendant No.2 is to the extent of 01 H 63 R and land of defendant No.3 is to the extent of 01 H 23 R), defendant No.4 is the owner of land Gat No.108/1 admeasuring 01 H 17 R, defendant No.5 is the owner of land Gat No.109 admeasuring 01 H 28 R, defendant No.6 is the owner of land Gat No.110 admeasuring 46 R and defendant No.7 is the owner of land Gat No.111 admeasuring 82 R. It is stated that all the defendants had agreed to get the lands measured in the year 1999. However, they failed to deposit the necessary expenses, therefore, the said land was got measured by plaintiff through District Inspector of Land Records, Latur on 26.07.1999. It was revealed in that measurement, that there is encroachment by defendant No.1 over the land belonging to the plaintiff from western side, to the extent of 40 R. Plaintiff had requested defendant No.1 to remove the encroachment and hand over the possession, however, he refused, therefore, plaintiff had filed R.C.S. No.569/1999. In the said suit defendant Nos.1 to 5 had admitted the ownership of the plaintiff. Defendants had also agreed to get the land measured during the pendency of that suit. However, due to the assurance by the defendants, the plaintiff did not prosecute that suit and as a result of which the suit is dismissed in default on 25.01.2002. It is contended that

consolidation scheme was introduced in their village in 1977. At that time also there was a proposal to measure the land as the Gat numbers were formulated and the measurement was done at the behest of plaintiff and defendant No.4 on 12.12.2005. It was revealed that defendant No.1 had committed encroachment on the suit property to the extent of 35 R. It was also revealed that defendant No.5 had committed encroachment on Gat No.108/1. Plaintiff had requested defendant No.1 to vacate the encroached portion, however, he did not respond. Hence, the suit was filed. By way of amendment, after a joint measurement, during the pendency of the suit on 20.04.2009, it was prayed that possession of 37 R which is encroached, be given to the plaintiff.

2 Defendant Nos.1 and 2 have filed the written statement. It was admitted that the suit property is ancestral property and the plaintiff is the owner of the same. However, they disputed the total area of the suit property to the extent of 01 H 80 R. It is denied that they had committed any kind of encroachment. There is bandh in between their properties and it is intact, therefore, there was no question of any encroachment by them. It was contended that the land belonging to the plaintiff as well as defendants was the part and parcel of erstwhile Sy.No.44. As per the consolidation scheme,

plaintiff's father Gangaram was the owner of Sy.Nos.26, 35, 42, 44 and 52 in the said village. It is stated that during the consolidation scheme plaintiff's father was shown to be the owner of excess area to the extent of 39 R. According to them, therefore the consolidation scheme is faulty and as a result of which, it has affected the measurement. Even after carrying out the amendment to the extent of 37 Ares, they have filed written statement denying the said fact.

3 Defendant Nos.3, 4, 6 and 7 by filing their written statement admitted the claim of the plaintiff. Defendant No.5 denied the claim of the plaintiff by filing written statement, however, he claimed ignorance about measurement that was carried out in 2005.

4 Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, the Trial Court has partly decreed his suit. Plaintiff was declared to be the owner of the suit property which is described in para No.2 of the plaint. Defendant No.1 was directed to hand over the possession of 37 R land out of Gat No.107, as shown in map Exh.53.

5 Original defendant Nos.1 and 2 challenged the said Judgment

and Decree in R.C.A. No.197/2011 before District Court, Latur. The said appeal was heard by learned Adhoc District Judge-2, Latur and after hearing all the parties, the appeal came to be dismissed on 07.08.2013. Hence, the original defendant Nos.1 and 2 have filed the present Second Appeal.

6 Heard learned Advocate Mr. C.R. Deshpande for appellants, learned Advocates Mr. S.S. Manale for respondent No.1 and Mr. T.M. Venjane for respondent No.4. Other respondents were served but remained absent. Perused the record. It has been vehemently submitted on behalf of appellants that the land belonging to the defendant Nos.1 and 2 is adjacent to the land belonging to the plaintiff i.e. Gat No.107. Initially plaintiff had come with the case that there is encroachment to the extent of 35 R, however, after the Court Commissioner was appointed and Nimtandar of office of Taluka Inspector of Land Records measured the land on 20.04.2009, it was stated that the encroachment is to the extent of 37 R. Plaintiff had examined the said Court Commissioner PW 2 Shridhar. In his cross-examination the Court Commissioner has admitted that the Tipan i.e. notes taken by him show that land admeasuring 01 H 56 R is with defendant. Though he had contended that he had measured all the lands which were the part and parcel of erstwhile Sy.No.44, he has not shown the area in map Exh.53. He clearly

admitted that there is bandh of 3 feet width in between the land of plaintiff and defendant Nos.1 and 2. It was intact when the work of Court Commissioner was done. Under such circumstance, obvious question is, How there could have been an encroachment ? In fact, an appropriate joint measurement was not at all done by the Cadestral Surveyor and therefore, Civil Application No.11655 of 2018 has been filed to appoint Taluka Inspector of Land Records as Court Commissioner for the measurement of lands. Substantial question of law is arising in this matter, as there is no proper joint measurement which is required in a suit for removal of encroachment. He relied on a decision in **Kashinath Chindhuji Shastri vs. Haribhau Nathuji Bawanthade, 2004(2) Mh.L.J. 720**, wherein it has been observed by this Court -

“Where there is a dispute about an encroachment or dimension of a site, the first essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same and/or subsequent reference in the pleadings or judgment to place the mark on a map should be referred to this map which must be attached to the decree and signed by the Judge. In the absence of such a map, the decree is probably meaningless and execution means virtually starting the case overall again. The appellant/defendant was directed to deliver the possession of 4 gunthas of land which is said to be under encroachment as shown in the map drawn by the surveyor.

It appears to be absolutely necessary that the cadastral surveyor ought to have been appointed by the trial Court for taking joint measurements of properties owned by the respective parties. Neither the trial Court nor the appellate court had appointed a Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure for taking the joint measurements and, therefore, this is a fit case for remand to the trial Court for fresh decision in accordance with law.”

He has also relied on two orders passed by this Court in Second Appeal No.485 of 2015 with Second Appeal No.486 of 2015 dated 21.10.2015 and Second Appeal No.445 of 2009 dated 25.06.2012, wherein Taluka Inspector of Land Records was appointed as Court Commissioner.

7 Per contra, the learned Advocate appearing for the respondent No.1 submitted that in fact, the present appellants had given no objection for exhibiting Exh.53, which clearly showed the encroachment by them. There is no denial to the fact by the defendant Nos.1 and 2 that a joint measurement was done. The panchnama drawn at the time of measurement bear their signatures or the signature of the representative of the defendants. Much stress was given by the defendants to show that the revenue record shows incorrect area of the lands and stretched to the consolidation scheme that was implemented in the year 1977. According to the defendant Nos.1 and 2, mistake was committed in implementation of the consolidation scheme,

however, they never challenged the same. Under such circumstance, now they cannot take a different stand and challenge the ownership of the plaintiff. In fact, in the earlier suit the defendants had admitted the ownership of the plaintiff over the suit property. As regards Civil Application No.11655 of 2018 is concerned, it is stated that it cannot be allowed for the simple reason that there was no such attempt made by the defendants-appellants before the First Appellate Court to have a joint measurement done again. The evidence that was adduced by the plaintiff clearly proved his ownership and the fact that the defendant No.1 had encroached on the suit land from western side to the extent of 37 R. Therefore, findings given by both the Courts below are correct. There is no question of any substantial question of law.

8 At the outset, it can be said that though the defendant Nos.1 and 2 have admitted that suit property is the ancestral property of the plaintiff, they are disputing the area. They have contended that a mistake was made at the time of implementation of the consolidation scheme. Opportunity was available to the defendants to demonstrate as to how the mistake was committed in the consolidation scheme, but it appears that defendants did not examine appropriate authority to demonstrate the said mistake. Though

the certified copies of consolidation record were produced, there was no proper explanation for the same. Taking into consideration those extracts the learned Trial Court has given a finding that Gat No.110 and old Sy.No.44/2 has nothing to do with Gat No.107. For that purpose, the distance between Gat No.110 and 107 was also considered. The learned Trial Court has correctly taken a view that since the consolidation scheme has been implemented and never challenged by the defendants, there is presumption to the official act performed. There was heavy burden on the defendant No.1 to prove inaccuracy regarding the area of Gat No.107, to which he has failed. Since the cloud over the ownership right of the plaintiff was raised, he was praying for the declaration of his ownership over the suit property also, therefore, there is no defect in the format of the suit also.

9 Much stress has been given on the testimony of PW 2, the Cadastral Surveyor. He was appointed as a Court Commissioner. He has filed his report and thereafter he has been examined in the matter. In his examination-in-chief he has categorically stated that he examined the suit property as well as the adjacent Gat numbers, which were part of erstwhile Sy.No.44. The method for measurement was 'plain table' as well as 'chain'. He has also given the names of the persons who were present at the time of

the measurement after notice was served to them. Defendant Nos.1 and 2 were represented at that time. Therefore, procedurally there is no defect in the same. Thorough cross-examination has been conducted on behalf of the defendant. Though he had not shown the area of the other lands, but then after going through his notes he has given the area of those lands including the land of the defendant, which is definitely matching with the 7/12 extracts, those have been produced on record. He cannot be said to be the proper authority to say anything regarding consolidation scheme which was never challenged by the defendant Nos.1 and 2. The minor discrepancies that there were no permanent signs of the Gat numbers and not showing the area of the Gat number in the map Exh.53, cannot raise a doubt over the work of Court Commissioner done by him. So also, it does not give a right to appellants to have a re-measurement. Unless any gross defect is shown in the measurement carried out by him, we cannot say that a case is made out for re-measurement. In fact, the ratio laid down in **2004(2) Mh.L.J. 724** was followed in this case and therefore, the joint measurement has been got done. It will not be out of place to mention here that after the report was submitted by the Court Commissioner i.e. Exh.51, the concerned Court had passed the order on the same and called upon both parties to file their say. That was the first opportunity available to the appellants to take objection

and for re-measurement or got the measurement done on a particular point. It was the opportunity for them to show that the Court would be dissatisfied with the work that has been done by the Court Commissioner. This step was taken in view of Order 26 Rule 10(3) of the Code of Civil Procedure, which provides – “where the Court for any reason dissatisfied with the proceedings of the Court Commissioner, it may direct such further inquiry to be made as it shall think fit”. However, both parties did not file any say and that note is also taken by the concerned Court at Exh.51. Thus, one more opportunity was available to defendant Nos.1 and 2 when the matter was before the First Appellate Court. There was no attempt made, during the pendency of the appeal. Now, in the Second Appeal they have come with the prayer for re-appointment of TILR for joint measurement, on the ground that the earlier measurement was not done properly. The learned Advocate appearing for the appellants has failed to demonstrate as to how the measurement carried out by PW 2 Shridhar and the map drawn by him Exh.53 is defective requiring re-appointment of Court Commissioner. Hence, said application deserves to be rejected.

10 The fact shows that there is bandh of three feet width in between the land of plaintiff and defendants and therefore, question has been raised

by appellants that how encroachment could have been made. This point is in fact, a point of fact/question of fact, which cannot be gone into by this Court dealing with pure question of law. Yet, it can be said that the said point was also raised before the Trial Court as well as First Appellate Court and both of them have discarded it, on the ground that destruction of bandh may be one of the signs of encroachment, but cannot be taken as exclusive sign of encroachment.

11 Taking into consideration all these aspects, no substantial question of law is arising in this matter as contemplated under Section 100 of CPC, since there is concurrent findings. Reliance can be placed on **Gurnam Singh (D) by LRs. & Ors. vs. Lehna Singh (D) by LRs. in Civil Appeal No.6567 of 2014** decided by the Apex Court on 13.03.2019; wherein it has been observed that the existence of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of CPC. Reliance also can be placed on the decision in **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar** reported in **(1999) 3 SCC 722**, wherein it has been held that

“In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First

Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

- (i) Contrary to the mandatory provisions of the applicable law;
OR
- (ii) Contrary to the law as pronounced by the Apex Court;
OR
- (iii) Based on in-admissible evidence or no evidence.

Present appeal does not satisfy the parameters laid down above. Hence, the Second Appeal is disposed of as “**Not admitted**”. Civil Application No.11655 of 2018 is rejected. Pending Civil Application stands disposed of.

(Smt. Vibha Kankanwadi, J.)