

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.671 OF 2017

Madhav s/o Bhimrao Patil,
Age 70 years, Occupation Agri.,
Through : - Her General Power Of
Attorney – Bhagwat s/o Madhavrao
Patil, Age 37 years, Occupation
Agriculture and Service, R/o Tungi
(Kd.) Tq. Ausa Dist. Latur. ...Appellant.

VERSUS

Govind s/o Gunderao Patil,
Age 85 years, Occupation Agri.,
R/o Tungi (Kd.) Tq. Ausa
Dist. Latur. ...Respondent.

.....

Mr. S. S. Choudhari holding for Mr. D. B. Pokale,
Advocate for appellant.
Mr. S. V. Natu, Advocate for respondent.

.....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date Of Reserving The Order :
13-06-2019.**

**Date of Pronouncing The Order :
02-07-2019.**

ORDER :

1. Present appeal has been filed by the original defendant challenging the concurrent Judgment and decree passed in Regular Civil Appeal No.119 of 2014 by learned Ad-hoc District Judge -2, Latur, dated 21-07-2017 and Judgment and decree dated 05-07-

2014 passed by learned Civil Judge, Junior Division, Ausa Dist. Latur in Regular Civil Suit No.435 of 2007.

2. The present respondent – original plaintiff had come with a case that, agricultural land admeasuring 1 H 87 R from Survey No.26-D and 1 H 86 R from Survey No.28-E situated at village Tungi (Khurd) Tq. Ausa Dist. Latur has come to his share in partition and since then he is the owner and possessor of the said land. It is stated that, the defendant has encroached to the extent of 67 R from Northern side of his lands by breaking or destroying East-West bandh/ boundary. When he had requested the defendant to get the land measured, it was refused, and therefore, suit was filed for removal of encroachment with a prayer to get the land measured.

3. The defendant resisted the claim stating that, plaintiff as well as defendant were the joint family members of one family and the said family had agricultural lands bearing Survey No.11, 12, 14 and 26. After death of their father, the lands were divided into five sons. At the time of dividing Survey No.26 and 14, five portions were created and in order to adjust the area which was short for the holder of Survey No.26-D and 26-E, portion from Survey No.11 and 12 was given. The boundary of Survey No.26-D and 26-E is straight and it has cart road since the time of their father. It is in existence today also in the same position as it was in the past. It is stated

that, the plaintiff has concede the land given to him from Survey No.11 and 12. It is stated that, about 35 years ago there was repartition in which plaintiff had given Survey No.26-B which had gone to his share to one Shankar and took the shares which were adjacent to 26-D and 26-E from Keshav and Shankar. The contention of the plaintiff about encroachment is imaginary. But it was also stated that, by keeping the land as per 7/12 extract if it is found that defendant has encroached upon then he is ready to measure the land.

4. Taking into consideration the rival contentions, issues came to be framed. Both the parties have led oral as well as documentary evidence. It will not be out of place to mention here that during the pendency of the suit, Taluka Inspector of Land Records was appointed as Court Commissioner and he has measured the land in presence of defendant. Taking into consideration the evidence on record and hearing both sides, the suit was decreed. Defendant was directed to hand over the possession of the encroached portion 67 R to the plaintiff.

5. The said Judgment and decree was challenged by the defendant in Regular Civil Appeal No.119 of 2014. The learned Adhoc District Judge- 2, Latur has dismissed the appeal on 21-07-2017. Hence, present second appeal.

6. Heard learned Advocate Mr. S. S. Choudhari holding for Mr. D. B. Pokale, Advocate for appellant and Mr. S. V. Natu, Advocate for respondent.

7. The learned advocate appearing for the appellant has submitted that, perusal of the evidence adduced by the plaintiff would show that there was no map of Sub-Divisions of Survey No.26 maintained by Government, and therefore, it cannot be stated that the Court Commissioner had measured the land properly as per rules. The map which has been drawn or prepared by him cannot be said to be a map under Section 83 of the Evidence Act, and therefore, decree cannot be based on that map. The plaintiff has admitted in his cross-examination that, there is barren portion in the land which has come to his share. It was not shown in the map. Further the Taluka Inspector of Land Records in his cross examination has stated that, he has not shown the barren land separately in the map and he was unable to state in which portion of Survey No.26 that barren land is situated. He had not taken the Tonch map of Sub-Division with him. He has also not shown the rivulet which is going from the Survey No.26. With these defects both the Courts below ought not to have held that the map is proved and defendant has committed encroachment. He submitted that, since there is no proper measurement, the matter deserves remand

for measurement. He relied on the decision in, *Smt. Niranjanabai w/o Chandrakant Vira Vs. Smt. Pramilabai wd/o Balkrishna Zade and Anr.*, reported in 2004 (3) ALL MR 619, in which it has been held that,

“When the plaintiff is alleging encroachment on the land by defendant then required procedure is required to be followed by Surveyor while measuring and preparing map, if that required procedure is not followed then the map drawn by him cannot be said to be admissible.”

Similar view has been almost taken in *Vijay Shrawan Shende and Ors. Vs. State of Maharashtra and Ors.*, reported in 2009 (5) Bom.C.R. 306, *Sahebrao s/o Rama Yadav Vs. Sarjerao s/o Rama Yadav (Second Appeal No.676 of 2012)*, decided by this Court on 02-05-2014, *Gajanan s/o Bhanudas Jawale Vs. Babasaheb Manaji Gursal and Others (Second Appeal No.447 of 2013)* decided on 14-08-2013, And *Vishwanath s/o Nagnath Patil and Another Versus Sadashiv s/o Pralhad Patil (Died) Through LRs., (Second Appeal No.756 of 2012)* decided by this Court on 20-12-2013. In all these matters the appeal was allowed and the case was remanded with direction to appoint qualified surveyor as commissioner and then the Courts were directed to decide whether there is encroachment as alleged.

8. Per contra, the learned advocate appearing for the respondent has supported the reasons given by both the Courts below. It has

been specifically contended that, the measurement was done in presence of the defendant yet he did not take any objection at that time. Under such circumstance, he cannot challenge that map in second appeal. It was also submitted that, no such attempt was made when the matter was before first Appellate Court.

9. It is to be noted that, in order to take cognizance of the second appeal, the appellant is duty bound to show that, there is substantial question of law as contemplated under Section 100 of Code of Civil Procedure arising in this matter. When there is concurrent findings then this Court would be slow in interfering with those Judgment and decree. Therefore in this case, the appellant was required to point out as to how the said map which has been drawn by the Court Commissioner is illegal or not as per the rules. Perusal of the evidence, especially of the Court Commissioner, it can be seen that he has stated that, he had not taken Tonch map of Sub-Division but he has clarified that there is no sub-Division of Survey No.26 as per their office. But then he has admitted that, each of the occupant of Survey No.26 has separate 7/12 extract. It appears that, it has come on record or it is admitted that consolidation scheme has not been implemented in the village of the plaintiff and defendant and therefore the lands are yet recognized by their survey numbers. There is a communication on record given by office of Deputy Superintendent of Land Records, Ausa at Exhibit 69.

It was addressed to defendant and it has been stated that, Survey No.26 is the consolidated number and therefore the copies of Sub-Divisions (Pot Hissa) map and form No.04 of Survey No.26 cannot be given. It was also informed that, the Court Commissioner has measured the entire Survey No.26 on 13-06-2012. A separate map of Sub-Divisions has not been prepared at all. Under such circumstance there is no point in remanding the matter. It is then required to be seen as to whether in absence of the same, the map which has been drawn by the Court Commissioner can be considered as proof of encroachment.

10. In clear words the defendant has admitted in his cross-examination that, he was present when the measurement was taken and he had not taken any written objection with the measurer or surveyor on that day. Another important point that is required to be considered is that, Taluka Inspector of Land Records was appointed as Court Commission in this case. He has submitted the report to the trial Court, and thereafter the Trial Court would have ask both the parties to submit their say in respect of the report. As per order 26 Rule 10 (2) of Code of Civil Procedure, the report of the Court Commissioner shall be the the evidence in the suit. Under such circumstance, when the trial Court had given an opportunity to the defendant to raise objection to the report, the said opportunity has not been availed. Further as per Order 26 Rule 10 (3) of the Code of

Civil Procedure which prescribes that, "*Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.*"

Therefore, there was an opportunity for the defendant to put before the trial Court as to what are the lacunae those have been left to be complied by the Court Commissioner. If the trial Court would have been convinced then further directions could have been given to the Court Commissioner. Now when that opportunity has not been utilized by the defendant then now he cannot ask for the remand. Further another opportunity was available to the present appellant when the matter was before the first Appellate Court. No explanation has been given by the learned advocate for the appellant as to why no such attempt to get the court commissioner re-appointed or appointed once again to carry out the measurement was made before the first Appellate Court. In the decisions relied by the learned advocate for the appellant, the facts are different. The joint measurements which were required in those cases were not done by the Court Commissioner or there was some error in respect of procedure that was adopted by the Court Commissioner in measurement. Therefore, the appellant cannot take advantage of those decisions and pray for remand. As aforesaid in this case there is absolutely no availability map of Sub-Division. Even if the matter is remanded, the same result would be found.

11. In this case it is to be noted from the evidence of the surveyor that, he has measured entire Survey No.26 as well as its portions A to E as shown by the parties. It has been observed by both the Courts below that, there is absolutely no error committed by the surveyor in measuring the land. He has shown portions of Survey No.26-D and 26-E belonging to the plaintiff in "C" copy of the measurement map vide Exhibit 62 and further at the time of measurement no objection was taken by the defendant though he was present.

12. Evidence of the defendant does not suggest that, he is not challenging the fact that, plaintiff is now the owner of Survey No.26-D admeasuring 1 H 87 R and Survey No.26-E admeasuring 1 H 86 R. The 7/12 extract of the same is separate and under such circumstance taking into consideration the area which he was required to hold and which is in his actual possession, the Court Commissioner has come to the conclusion that defendant has made encroachment to the extent of 67 R.

13. Thus, taking into consideration the fact that, both the Courts have concurrently held that, there is absolutely no error committed by the Court Commissioner in measuring the land and it has been proved by the plaintiff that, defendant has made encroachment on the land of the plaintiff to the extent of 67 R shown in the map and

the fact that the said map is admissible under Section 83 of the Evidence Act for the aforesaid reasons, no case is made out for framing substantial question of law as contemplated under Section 100 of Code of Civil Procedure. No case is made out to interfere in the Judgment and decree passed and hence the second appeal is here disposed of as **not admitted**.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.

DATE : 02-07-2019

1. After pronouncement of order, Learned Advocate appearing for the appellant is praying for stay to the order of this Court as he intends to approach Hon'ble Apex Court.
2. It is to be noted that, both the Courts below have given a concurrent findings against the appellant. The Second Appeal has been disposed of on the ground that no substantial question of law is involved in this appeal. Under such circumstance, the oral prayer for stay is hereby rejected.

(SMT. VIBHA KANKANWADI)
JUDGE