

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

SECOND APPEAL NO.875 OF 2016

1. Rambhau S/o Daulatrao Mule,
Age : 65 years, Occu: Agri.,
2. Narayan S/o Rambhau Mule,
Age : 65 years, Occu: Agri.,
3. Navnath S/o Rambhau Mule,
Age : 37 years, Occu: Agri.,
4. Hanuman S/o Sundarrao Mule,
Age : 14 years, Minor under
Guardianship of his father
Sundarrao Rambhau Mule,
Age : 42 years, Occu: Agri.,

All R/o Rajegaon, Tal. Majalgaon,
District : Beed.

... APPELLANTS

VERSUS

1. Balabhau S/o Pandharinath Kachre
Age : 72 years, Occu: Agri.,
2. Ashok S/o Chatur Vibhute,
Age : 29 years, Occu: Education,
3. Rajiv S/o Chatur Vibhute,
Age : 24 years, Occu: Education,

All R/o Rajegaon, Tal. Majalgaon,
District : Beed.

... RESPONDENTS

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Mr. R.M. Deshmukh, Advocate for Appellants.

Mr. S.W. Munde, Advocate for Respondent Nos.1 to 3.

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 11th September, 2019.**

**Date of pronouncing
the judgment : 08th November, 2019.**

JUDGMENT :

. Present appeal has been filed by the original plaintiffs challenging the judgment and decree passed in Regular Civil Appeal No.50 of 2011 by learned District Judge-1, Majalgaon Dist. Beed dated 07.10.2016 thereby the appeal filed by present respondents came to be allowed and the suit filed by the present appellants i.e. R.C.S. No.33 of 2008 came to be dismissed.

2. The facts giving rise to the Second Appeal are that :

Plaintiff Nos.2 and 3 are sons of plaintiff No.1 and plaintiff No.4 is the grandson of plaintiff No.1. The property is their joint family property, which is agricultural land bearing Gut No.133, admeasuring 13

Acre 32 Gunthas. The suit property is restricted to 6 R land at the east side and 28 R land to the west side which has been shown in blue and red colour in the map attached to the plaint. Defendant No.1 is the owner of Gut No.134 which is situated on the eastern side of Gut No.133. According to the plaintiffs, there is South-North common bandh. That bandh was damaged by defendant No.1 in the summer season of year 2005 and then he has made encroachment over the land belonging to the plaintiffs. Plaintiffs had requested to hand over the encroached portion, however, defendant No.1 replied that without measurement it is not possible for him to hand over the encroached portion. Plaintiff No.1 then moved an application to the office of Taluka Inspector of Land Records, Majalgaon (hereinafter referred to as "TILR") and accordingly measurement was done. In the said measurement, the encroachment was shown in the map by blue and red colours respectively. Again plaintiffs made request to the defendants to hand over the encroached portion, however, they refused. Hence, suit was filed for possession of the said encroached portion of the land.

3. The defendants appeared and filed written statements denying all the averments in the plaint except the fact that the plaintiffs are the

owners of Gut No.133. It was contended by them that there is South-North common bandh between their lands and there are two trees of Hivara as well as Babool and Jujube. All these trees are old to which they used to tie their cattle. Those trees are intact and, therefore, there is no question of damage to the common bandh and encroaching on the land belonging to the plaintiffs. They have alleged that the plaintiffs have broken the said bandh from the western side and had made encroachment.

4. Taking into consideration the rival contentions issues were framed. Parties have laid oral as well as documentary evidence. Taking into consideration the evidence on record the learned trial Court has come to the conclusion that plaintiffs have proved that they are the owners of the suit land and the defendants have made encroachment as stated in the plaint, thereby the suit came to be decreed and the defendants were directed to hand over the possession of the respective encroachments to the plaintiffs. As aforesaid, the said decree was challenged by original defendants before the learned District Judge-1, Majalgaon and after hearing both sides, the learned District Judge has allowed the appeal. The learned District Judge has set aside the decree passed by the learned trial Court and dismissed the suit. Hence, present Second Appeal.

5. Heard learned Advocate Mr. R. M. Deshmukh for appellants and learned Advocate Mr. S. W. Munde for respondent Nos.1 to 3. Perused the record and proceedings.

6. At the outset, objection has been raised on behalf of the respondents that cognizance of the Second Appeal cannot be taken unless there is substantial question of law to be framed. He relied on the decision in **Syeda Rahimunnisa Vs. Malan Bi (dead) by L.Rs and another [2017 (1) Mh.L.J. 934]** wherein it has been observed that “*sine qua non* for admitting second appeal is existence of “substantial questions of law” in case unless questions framed are debatable, and/or arguable and/or involving any legal question, High Court has no jurisdiction to formulate such questions treating them to be substantial questions of law.” It has been also held that “it is a settled principle of law that in order to claim remand of the case to the trial Court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the Appellate Court to remand the case to the subordinate Court is contained in Order 41 Rules 23, 23-A and 25 of Civil Procedure Code. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The Appellate Court is required to record the reasons

as to why it has taken recourse to any one out of the three Rules of Order 41, Civil Procedure Code for remanding the case to the trial Court. In the absence of any ground taken by the respondents (the appellants before the first Appellate Court and the High Court) before the first Appellate Court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order 41, Civil Procedure Code and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial Court. The High Court instead should have decided the appeals on merits.” Further reliance has been placed on the decision in **Sudam Kisan Gavane (D) Thr. Lrs and Ors. Vs. Manik Ananta Shikketod (D) Thr. Lrs and Ors. (Civil Appeal No.5272 of 2010)** decided by the Apex Court on 29.08.2019, wherein similar principle of law has been laid down.

7. It is to be noted that the present appeal has not yet been admitted and no cognizance in any manner has been taken. Therefore, definitely, the law laid down in both these authorities would be borne in mind while passing the judgment and order.

8. It has been vehemently submitted on behalf of the appellants that the plaintiffs had examined P.W.-1 - Narayan and then examined the

cadastral surveyor P.W.-2 Yuvraj Kokate. He had measured the land and the map Exhibit-56 was proved. The said map as well as his evidence was considered by the learned trial Court and then the said Court had come to the conclusion that the plaintiffs have proved the encroachment. Decree for removal of encroachment and possession was then passed by the trial Court which has been upset by the first Appellate Court on the ground that the evidence of cadastral surveyor is not reliable. He had not issued notice regarding measurement to respondent Nos.2 and 3. He has also stated that he had no knowledge as to whether the notice regarding measurement was received by defendant No.1 or not. If there was no 'admitted map' on record, then the first Appellate Court could have appointed a Court Commissioner and got the land measured. P.W.-2 Yuvraj Kokate had measured the land on the basis of application given by the plaintiffs to his office prior to the suit. There was no attempt made by any of the parties to get the Court Commissioner appointed during the pendency of the suit or the appeal. The point is not *res integra* and in catena of judgments of this Court, this Court has arrived at a conclusion that endeavor should be made to have an 'admitted map'. When such attempt has not been made, yet a contrary decision has been given; definitely, the matter requires admission as substantial questions of law are arising, but instead of admitting the

matter and keeping it pending, it would be just and proper to remand the matter before the trial Court itself so that an 'admitted map' can be secured by appointing a Court Commissioner. He submitted that the time, that will be consumed, would be curtailed.

9. Per contra, the learned Advocate appearing for the respondents submitted that when the burden was on the plaintiffs to prove that the defendants have made encroachment, then they ought to have produced proper evidence. Whatever evidence was adduced was not properly appreciated by the learned trial Court and therefore, they were required to file appeal. The learned first Appellate Court has considered the evidence of cadastral surveyor in proper perspective. When he has stated that he had not issued notice of measurement to the defendants, an opportunity was not made available to the defendants to show their possession before the cadastral surveyor. Such evidence cannot be believed and therefore, the learned first Appellate Court was justified in arriving at a conclusion that plaintiffs have failed to prove that the defendants have made encroachment over their land. No substantial questions of law are arising and therefore, there is no question of any remand.

10. At the outset, it can be seen that there is no concurrent finding or concurrent decree passed by the Courts below. On the basis of same evidence, the trial Court has decreed the suit whereas the first Appellate Court has allowed the appeal thereby dismissing the suit. Therefore, definitely, substantial questions of law are arising in this case regarding the appreciation of evidence of the cadastral surveyor. Perusal of the evidence of the cadastral surveyor, who was the expert, would show that as per the application given by the plaintiffs, prior to the lodging of the suit, the measurement was done. In cross examination, he has clearly stated that he had not issued notice to defendant Nos.2 and 3. So also he was not aware about the fact that whether notice was served on defendant No.1 or not. He has thereafter stated that defendant No.1 and one Kousabai were present. However, according to him, they had refused to sign on the Panchnama. He has not taken a note that they have refused to sign. He has also not stated the boundaries of the land which he had measured in the Panchnama. Admittedly, he has not measured Gut No.134 belonging to defendants. It has come on record that Gut No.133 belonging to the plaintiffs as well as Gut No.134 were earlier part of survey No.69. When there was no joint measurement, the conclusion drawn by him cannot be said to be a proper conclusion. But only on this fact, the entire suit of the plaintiffs cannot be

thrown away. Time and again this Court, in various judgments, has highlighted the necessity of appointment of Court Commissioner in such cases i.e. suits for removal of encroachment. Reliance can be placed on the decision in **Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade [2004 (2) Mh.L.J. 720]** wherein it has been observed that “... where there is 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 map, the decree is probably meaningless and execution means virtually starting the case over all again ...” It appears to be absolutely necessary that the cadastral surveyor ought to have been appointed by the learned trial Court for taking joint measurements of the properties owned by the respective parties. Neither the trial Court nor the first Appellate Court had appointed a Court Commissioner under Order XXVI Rule 9 of Civil Procedure Code for having the joint measurements and therefore, this is a fit case for remand to the trial Court for fresh decision in accordance with law. Further reliance can also be placed on the observations made by this Court Bench at Nagpur in

Sulemankhan S/o Mumtajkhan and Others Vs. Bhagirathibai Wd/o Digamber Asalmol and Anr., [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 the first Appellate Court, which are Courts of fact, 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 the 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 map/plan, if it is so necessary in the absence of admission for exhibiting the map.” In the present case also, there appears to be boundary dispute since both the parties have stated about the common bandh and then the encroachment is stated to be from two sides. When the trial Court had not exercised its power to get the cadastral surveyor appointed as Court Commissioner, in fact the first Appellate Court in this case ought to have got him appointed in view of the above pronouncements. Based upon these pronouncements, the same view

has been taken in **Raghunath Kashinath Chavan Vs. Sakharam Maroti Chavan and Anr.**, [Second Appeal No.562 of 2005] by this Court decided on 29.01.2019. Under such circumstance, definitely, substantial questions of law are arising in this case that:

- I) Whether the evidence of cadastral surveyor P.W.-2 Yuvraj Kokate has been properly appreciated by the first Appellate Court and ;
- II) Whether the plaintiffs had proved that defendants had encroached on their land as per map Exhibit-56.

However, instead of answering those substantial questions of law, for the reasons aforesaid based on the pronouncements of this Court, it is a fit case for remand to the trial Court itself by issuing certain directions. In fact, the impugned judgment and decree passed by the Courts below, especially the first Appellate Court, have resulted into miscarriage of justice as the basic directions given from time to time by this Court have not been adhered to by both the Courts. There is no alternative except to remand the suit to the trial Court as aforesaid by giving directions. Hence, the following order :

ORDER

- I) The appeal is hereby allowed.
- II) The judgments and decrees passed by the Courts below are hereby set aside and the suit i.e. R.C.S. No.33 of 2008 is remanded to the trial Court for fresh decision in accordance with law and in the light of the observations made hereinabove.
- III) The trial Court is directed to appoint the surveyor from the office of TILR, Majalgaon having jurisdiction over the village in which the suit land is situated, for the purpose of local inspection under Order XXVI Rule 9 of Civil Procedure Code.
- IV) Parties are directed to remain present before the trial Court on 25.11.2019. If defendants failed to appear on that date, the trial Court should give notice and secure their presence by serving them notice.
- V) The plaintiffs are directed to submit their application for appointment of Court Commissioner before the trial Court within a period of two weeks from the date of their appearance before the Court as aforesaid.

VI) The trial Court to appoint the Court Commissioner accordingly and such appointed Commissioner shall conduct local inspection in accordance with the provisions of Order XXVI Rule 9 of Civil Procedure Code after giving due notice to the parties concerned and take the measurements of the property owned by both 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.

VII) The trial Court shall decide the matter expeditiously and preferably within a period of six months from the receipt of the report of the Court Commissioner.

VIII) If the plaintiffs do not submit their application for appointment of Court Commissioner within the aforesaid period, then the suit shall stand dismissed.

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

X) Parties to act upon an authenticated copy of this judgment.

XI) No order as to costs.

(SMT. VIBHA KANKANWADI, J.)

SCM