

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

APPEAL FROM ORDER NO.58 OF 2019
WITH
CA/13756/2019 IN AO/58/2019

SAYED JAVED SYED AMIN AND ANOTHER
VERSUS
RAMDAS SARJERAO JAGDALE AND ANOTHER

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Advocate for Petitioners : Mr. Kasliwal Ajit D.

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CORAM : V.K. JADHAV, J.
Dated: November 26, 2019

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PER COURT :-

1. I find no substance in this appeal from order.
2. The appellants are the original defendant nos. 1 and 3. Respondents/plaintiffs have instituted the suit bearing Regular Civil Suit No.780 of 2011 and the learned Civil Judge, J.D. Court No.10, Aurangabad by judgment and decree dated 2.5.2016 dismissed the suit. Being aggrieved by the same, the respondents/original plaintiffs have preferred RCA No.165 of 2016. The learned 11th District Judge & Assistant Sessions Judge, Aurangabad by judgment and order dated 15.10.2019 partly allowed the appeal, quashed and set aside the judgment and decree

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passed by the trial court and remanded the matter to the trial court for fresh decision on the conditions as detailed in the operative part of the order. Being aggrieved by the same, respondents/defendants have preferred this appeal from order.

3. Learned counsel for the appellants submits that the Trial Court has not dismissed the suit only on the ground that there is no joint measurement of the suit land alongwith the land of the appellants. The learned Judge of the Trial Court has considered the other aspects such as vague pleadings, without specifying the portion of the land encroached upon by the others including the appellants. Learned counsel submits that the First Appellate Court has considered case laws and directly come to the conclusion that since there is a boundary dispute, the Court Commissioner was required to be appointed by the Trial Court. Learned counsel submits that even during the pendency of the said appeal, respondents/plaintiffs have filed an application exh.12 to appoint the TILR, Aurangabad as a Court Commissioner for joint measurement of the land gut nos. 144, 143 and

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145 of village Sawangi (Harsool) and to record the encroachment, if any. However, the First Appellate Court has simply filed the said application in view of the final judgment. Learned counsel submits that the impugned remand order passed by the first appellate court is against the provisions of Order 41 Rule 25 of the Civil Procedure Code.

4. There is a boundary dispute and time and again it has been repeatedly held by this Court that boundary dispute or question of encroachment cannot be decided merely on the basis of the oral evidence. The First Appellate Court has rightly referred almost six cases on this point wherein it is held that wherever there is a boundary dispute, the Court Commissioner has to be appointed by the Court. In the instant case, even after examination of the cadastral surveyor, who has measured the suit land only, the respondents/ plaintiffs have filed an application before the Trial Court for appointment of the TILR for joint measurement of the suit land alongwith the land of the appellants/defendants, however, the Trial Court has rejected the said application. So far as the other

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aspects stated to have been considered by the Trial Court while dismissing the suit, those are mainly on the basis of the oral evidence adduced by the parties. Even though, respondents/plaintiffs have filed an application in the pending appeal for appointment of the T.I.L.R. as a Court Commissioner for joint measurement of the land, however, in the light of the directions given by the First Appellate Court to the Trial Court for appointment of the cadastral surveyor for carrying out the joint measurement with some other directions, I find no fault in the order passed by the First Appellate Court on the said application as filed. I find no substance in this appeal from order. The lower Appellate Court has rightly passed the order of remand. There is no substance in this appeal from order. Appeal from order is accordingly dismissed. Pending civil application also stands disposed off.

(V.K. JADHAV, J.)

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