

BDP-SPS

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 390 OF 2018
ALONGWITH
CIVIL APPLICATION NO 925 OF 2018
IN
SECOND APPEAL NO.390 OF 2018**

Ratan Ankush Khade

.... Appellant.

V/s

Shri Baburao Piraji Mane

..... Respondent.

Mr. A.V. Anturkar, Senior Counsel i/b Mr. Siddharth S. Deshpande for the Appellant.

Mr. Dnyaneshwar J. Deshmukh for the Respondent.

CORAM: NITIN W. SAMBRE, J.

Order reserved on 27/01/2020

Order pronounced on 11/09/2020

P.C.:-

1] Heard Shri Anturkar, learned Senior Counsel for the Appellant and Mr. Deshmukh, learned Counsel for the Respondent.

2] The appeal is by original Defendant. Respondent/Plaintiff initiated suit for removal of encroachment, possession of encroached area and for damages in the Court of Civil Judge, Senior Division, Solapur. It is alleged by the Respondent that the Appellant has encroached to the extent of 0.29 R land of the Respondent/Plaintiff.

Suit of the Respondent/Plaintiff came to be decreed vide judgment and order dated 19/11/2012 which was partly modified in appeal being RCA No.188 of 2012 decided on 28/7/2017. As such, this second appeal.

3] Facts necessary for deciding the appeal are as under:-

4] In Regular Civil Suit No. 303 of 2004 initiated by the Respondent, it is pleaded that he is the owner of land Gat No. 63/3 admeasuring 1.91 R, whereas the Appellant/Defendant is the owner of the land Gat No.65. It is claimed that the land encroached is to the extent of 0.29 R located on the Eastern side of the land of the Respondent/Plaintiff i.e. Gat No.63/3 having direction North-South, on East, land of the Appellant out of Gat No.65, on South-West:- balance land of the Respondent/Plaintiff out of Gat No.63/3 and on the North the boundary of village Badalkot by the Appellant.

5] According to the Respondent, he having noticed the aforesaid encroachment, requested the Appellant to remove the same. However, since same was refused, he carried out measurement vide

Measurement Case Nos. 1096 and 1097 on 10/05/2000. Pursuant to the aforesaid measurement, boundaries were fixed and the map fixing boundaries was drawn on 30/05/2002 depicting that Appellant/original Defendant has encroached to the extent of 0.29 R. As such, suit was brought into action.

6] The suit claim was denied by the present Appellant vide Written Statement at Exhibit-13. According to the Appellant, there was no encroachment as has been claimed. It is further claimed that measurement was carried out without notice and the measurement, if any carried out, was in connivance with the Land Surveyor.

7] Based on the said pleadings, Trial Court settled the issues at Exhibit-17. Amongst other, issues framed were, whether the Plaintiff is the owner of the suit land? and whether there was an encroachment to the extent of 0.29 R carried by the Appellant?

8] In support of the suit claim, Respondent/Plaintiff has placed on record 7 X 12 Extract of both the lands i.e. Land Gat No.63/3 and Land Gat No.65/3 of the Plaintiff and Defendant, Measurement Map-

Exhibit-68, whereas the Appellant has produced on record 7 X 12 Extract of Land Gat No.63/3. In support of the suit claim, Plaintiff examined himself at Exhibit 37-C and was subjected to cross-examination. He further examined P.W.2 – Bhajandas at Exhibit 69/C who worked as labour alongwith the Land Surveyor and has also examined P.W.3 - Prabhakar Gambhire, the Land Surveyor at Exhibit-67/C.

9] Defendant examined Ratan at Exhibit 73/C, one Bhamabai Kamble at Exhibit 85/C, Maruti Kamble at Exhibit 86/C and Devidas Rathod at Exhibit-135/C.

10] The Trial Court having noticed that the Plaintiff has proved his ownership over Land Gat No.63/3 so also the encroachment made by the Appellant to the extent of 0.29 R, decreed the suit upon appreciation of pleadings, oral and documentary evidence which was partly confirmed in appeal by the learned District Judge.

11] While assailing the aforesaid finding, Shri Anturkar, learned Senior Counsel appearing for the original Defendant would urge that

both the courts below have failed to appreciate the evidence in the light of provisions of Section 83 of the Evidence Act. According to him, neither measurement report nor map demarcating boundaries was proved in accordance with the provisions of Section 83. As such, he claimed that the question of law which warrants consideration before this Court is : whether both the Courts below have committed an error apparent on the face of record in ignoring the provisions of Section 83 of Evidence Act, while recording findings, that the suit claim based on evidence of P.W.3 Surveyor was proved? Shri Anturkar then would urge that admittedly land of the original Defendant being Survey No.65/3 was not measured by P.W. 3 Surveyor. Once the said land was not measured, Courts below committed an error in recording finding that there was encroachment to the extent of 0.29 R on the land of the Appellant. Learned Counsel then would urge that the evidence of P.W. 3 – Gambhire at Exhibit 67/C was incorrectly appreciated and as such, according to him, in the absence of details of boundaries of the land of the Plaintiff, suit claim is illegally decreed. As such, he has prayed for quashing and setting aside of the judgments of the Courts below.

12] Mr. Deshmukh, learned Counsel for the Respondent would support the judgments impugned. According to him, the Court is required to be conscious to the fact that the measurement was carried out qua the case in hand and that being so, measurement carried out by P.W. 3 at the behest of P.W.1 i.e. Plaintiff was duly proved. He has further claimed that the evidence of P.W.3 is in tune with requirement under Section 83 of the Evidence Act. According to him, Appellant/Defendant at whose behest Court Commissioner was appointed to measure the land Gat No.63 and 65 was not subjected to examination at the behest of Appellant and that being so, present appeal against the concurrent findings is liable to be rejected.

13] Considered rival submissions.

14] The Respondent/Plaintiff is the owner of land Gat No.63/3 and the land of the Appellant/Defendant is located on the Eastern side of the said land Gat No.65/3.

15] In the evidence of the Appellant, he has admitted that land of the Respondent/Plaintiff is admeasuring 1 Hectare and 91 R. The said

area is in possession of the Respondent/Plaintiff.

16] In the evidence of P.W. 2 - Bhajandas, it is proved by the Respondent that the measurement was carried out in his presence as he was employed as labour. According to him, the Appellant, her husband Ankush and their children were present. As such, he has proved the act of measurement undertaken. P.W. 3 – Prabhakar Gambhire, Land Surveyor who has carried out the measurement has specifically stated that he has issued notice of measurement to the Appellant also. After identifying two permanent marks over the land in the presence of the Appellant and Respondent he has carried out the measurement on 10/05/2000. He has further deposed that he has noticed encroachment to the extent of 0.29 R land by the Appellant over the land of the Respondent/Plaintiff. He has proved the measurement report at Exhibit-68. Though in cross-examination he has admitted that he has not measured land of the Appellant i.e. Gat No.65, however he has clarified that he has measured Land Gat No.62 and 63 though he has admitted that he has not inquired about total area of Gat No.65.

17] Fact remains that it was never the case of the Appellant, that his lawful holding was reduced or he has less holding than the one he is lawfully entitled to as per 7 X 12 Extract or record of right. Fact remains that in the evidence, Appellant has given an admission that area of the land owned and possessed by the Respondent/Plaintiff is 1.91 R and he should be in possession of that much area. As such, it can be noticed that the land was measured at the behest of the Respondent/Plaintiff and same was found to be the basis for initiation of suit claim. So as to prove that land Gat No.62 and 63 was measured and Exhibit-68 the map was correctly drawn as is contemplated under Section 83 of the Evidence Act, the Respondent has rightly examined P.W.3 – Land Surveyor so also Labour employed i.e. P.W.2. That being so, claim put-forth by the learned Senior Counsel for the Appellant that the judgments are contrary to the provisions of Section 83 of the Evidence Act cannot be accepted. Rather, evidence of P.W.1 to P.W.3 in categorical terms establishes that map drawn by the Surveyor was duly proved.

18] This Court cannot be oblivious to the admission given by the Appellant/Defendant about the lawful holding of the Respondent.

This Court is also required to note that it is not the defence set up by the Appellant that if suit is decreed, his holding is likely to be reduced to which he is lawfully entitled to. If the same was in the form of defence, then it was for the Appellant to prove that his lawful holding was reduced by 0.29 R. Though the Appellant/Defendant has extracted admission in the cross-examination that Survey No.65 was not measured, this Court however is required to observe that the Plaintiff has affirmatively established his short holding by 0.29 R from the document at Exhibit-68 so also the boundaries settled, of the Appellant's field after the map was drawn in accordance with Exhibit-68.

19] My attention has also been invited to the evidence of D.W.4 – Devidas Rathod who has carried out the measurement of the the Land Gat No.63 and 65 in 1985. According to learned Senior Counsel, the Courts below have committed an error in not considering the evidence of the said witness. It is required to be noted that the said witness has carried out the measurement way back in 1985 that too with an object of providing appropriate record for the purpose of acquisition of the land for Canal which has passed through the land in question. The

said witness has admitted that he has not produced on record original basic measurement document in the form "A". As such, the said measurement which was carried was before acquisition and that being so, same will be hardly of any significance particularly when same was more than twenty five years old and before the acquisition of the land.

20] One of the important aspects of which, the lower appellate Court has taken note of is, present Appellant with an intention to get his own land measured applied for appointment of Court Commissioner vide Exhibits-34, 50, 18, 96 and 121. The appellant initially appears to have not deposited the measurement fee. However, subsequent thereto, appellant even obstructed TILR in carrying out measurement as is reflected from the record. The Court Commissioner as was appointed pursuant to the request of the Appellant has submitted commission report at Exhibit-143 which depicts the encroachment to the extent of 0.19 R land and map to that effect was produced on record. The lower appellate Court considers the encroachment to the extent of 0.19 R instead of 0.29 R (as were the findings recorded by the Trial Court) and proceeded to dismiss the appeal with only modification that the encroachment was to the extent of 0.19 R. So

far as the said Court Commissioner who was appointed at the behest of the Appellant is concerned, since he has also shown the encroachment carried out by the Appellant particularly after measuring the land of the Appellant, Appellant has chosen not to examine this witness. As such, the lower appellate Court proceeded to dismiss the appeal only with a modification referred to above. The lower appellate Court relied on the map drawn by the Court Commissioner at Exhibit-143 and accordingly recorded findings that there is encroachment to the extent of 0.19 R land is also not questioned by the original Plaintiff, the present Respondent.

21] Rather it has come in the evidence of P.W. 3 that he has identified two permanent marks before the measurement was carried out by him and also through physical survey by table measurement and carried out the measurement and proved the encroachment. However, as the Respondent has not preferred any appeal on the finding recorded by the lower Appellate Court, in my opinion, finding of the lower appellate Court has attained finality qua the parties to the appeal. As such, claim of the learned Counsel for the Appellant that the land of the Appellant was not measured is falsified. Rather from

the measurement carried out vide Commissioner' Report at Exhibit-63 and Exhibit-143, it is apparent that boundaries of Respondent-Plaintiff were duly established. As such, contention to that extent raised by the learned Senior Counsel for the Appellant also cannot be accepted.

22] In view of the above, Appeal preferred by the appellant against the concurrent finding cannot be sustained. There is no question of law involved in the present Appeal. Appeal fails and same is dismissed. Since Appeal is dismissed, Civil Application taken out therein does not survive and the same stands disposed of.

(NITIN W. SAMBRE, J.)