

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 55 OF 2020

Leelabai Punjaji Ujjainkar ...Versus...Vaishali W/o Vinod Pendharkar

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Shri P. B. Patil, Counsel for appellant

CORAM : AVINASH G. GHAROTE, J.

DATE : 20/02/2020

1. Heard learned Counsel for appellant. Exception is being taken to the judgment of the First Appellate Court dated 07/11/2019, in Regular Civil Appeal No.43/2019, whereby the judgment of the Trial Court in Regular Civil Suit No.62/2004 dated 04/05/2012, dismissing the suit, is set aside and the matter is remanded back to the Trial Court, for deciding the suit afresh by appointing T.I.L.R./D.I.L.R. and Commissioner for measurement.
2. A Suit came to be filed by the original plaintiff, for declaration of ownership of plot No.18 and for removal of encroachment to the extent of 46 square meters, as shown by letters A, B, C, D, E, F in the plaint map and for possession of the same along with mandatory injunction. The suit plot was measured twice on 31/01/2004 and 22/11/2004. The Trial Court found that there was no joint measurement and therefore, dismissed the suit. The First Appellate Court, has remanded the same with a direction to conduct a joint measurement. It is urged

by the learned Counsel for the appellant, that it was not permissible to the First Appellate Court to remand the matter, as the measurement was already conducted.

3. A perusal of the impugned judgment demonstrates that though there was a plea of encroachment, a joint measurement was not conducted. It is a settled position of law, that if encroachment has to be determined, there has to be a joint measurement of the property of the plaintiff, as well as of the defendant, that too from the fixed points. It is only in the case of the joint measurement being conducted from fixed points, that the factum of encroachment can be determined and not otherwise. The judgment of the Trial Court, while answering issue No. 2-A, clearly indicates, that Exh. 73 the measurement map, was based upon a prayer for measurement of the suit plot, i.e., plot No.18 and not a joint measurement of the adjacent plot No.19 belonging to the defendant. That being so, no error can be found with the judgment of the First Appellate Court, in remanding the matter back to the Trial Court, for appointing a commissioner, for joint measurement of the plot properties from a fixed point in accordance with law. Thus, no substantial question of law is involved and the Second Appeal is accordingly dismissed with no order as to costs.

JUDGE