

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

SECOND APPEAL NO. 57 OF 2020

(Arun S/o Vitthalrao Bhakre
Vrs.
Sou. Malanbai Jairam Mitkar (dead) and another)

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

Court's or Judge's orders.

Shri Atul M. Mahajan, counsel for the appellant.

CORAM : ANIL S KILOR, J.
DATE : 04th MARCH, 2020.

The present appeal is directed against the judgment and decree dated 6th August, 2019 passed by the learned Principal District Judge, Chandrapur in Regular Civil Appeal No.79 of 2015 arising out of the judgment and decree dated 29th July, 2013 passed by learned Extra Joint Civil Judge, Junior Division, Chandrapur in Regular Civil Suit No. 38 of 2008.

2. Shri Mahajan, learned counsel for the appellant argues that on the basis of preponderance

of probabilities, both the Courts have held against him and dismissed the suit. He submits that sufficient evidence was produced by the plaintiff/appellant to establish the fact of encroachment by the defendant on the land of the plaintiff. Thus, according to him both the Courts have erred in dismissing the suit for removal of encroachment.

3. To consider the contentions of the learned counsel for the appellant, I have gone through the judgments of both the Courts below.

4. There is no dispute that plaintiff had measured the suit site with the help of one Shri Ramchandra Anyaji Indapawar who was retired as District Surveyor of Land Records and had taken training of preparing maps in the year 1952 and 1960. The said Shri Ramchandra Indapawar was examined and in his evidence he has deposed that he visited the spot on 7th February, 2008 and carried out

the measurement of the suit site and in the measurement map at Exh.45 he has shown red portion circumscribed within the points “D, E, F, I, D” as encroached portion by the defendant.

5. However, in cross-examination he failed to point out that while carrying out the measurement he had used any basic map while finding out the encroachment. He never served notices to the adjacent plot holders. He also did not record the name of persons at the time of carrying out the measurement and did not obtain any signature of any person who was present at the time of carrying out the measurement.

6. Learned trial Court has thus observed, many discrepancies in the said measurement of Shri Ramchandra Indapawar and those discrepancies are discussed in detailed by the trial Court in paragraph 8 of its judgment and on the basis of that trial Court has observed that measurement carried out by Shri

Ramchandra Indapawar is not proper and reliable one.

7. It is also not disputed that the Court had appointed a commissioner for carrying out the measurement and accordingly Commissioner Shri Marotrao Gomaji Lanjewar had carried out the measurement on 28th September, 2009 of the suit plot and in its report the encroachment to the extent of 3 square meter area has been shown.

8. However, in the cross-examination of the said commissioner he has admitted various irregularities committed by him while carrying out the measurement and those irregularities are discussed by the trial Court in paragraphs 11 and 12 of the judgment and on the basis of these irregularities, the trial Court has arrived at the conclusion that the measurement carried out by Shri Marotrao Gomaji Lanjewar is also not reliable one.

9. Learned lower Appellate Court in appeal has examined the correctness of those findings given by the trial Court relating to both the measurement reports and did not find any infirmity in the judgment of the trial Court and therefore confirmed the findings given by the learned Trial Court.

10. Thus, it is clear that both the Courts below after analysing the evidence available on record have concurrently held that both the measurement reports are not proved and in absence of any evidence in respect of encroachment both the Courts below have rightly dismissed the suit.

11. At this state, Shri Mahajan learned counsel for the appellant submits that both the Courts below ought to have referred the matter to the Commissioner to carry out the measurement a fresh.

12. He pointed out similar mode was adopted by this Court in the case of *LRs of Manohar (since*

deceased) Vs. Vishweshwar Tukaram Giripunje and others reported in 2008 (2) ALL MR 743. He has drawn attention to the relevant portion of the said judgment and submits similar mode may be adopted by this Court.

13. I have gone through the said judgment and according to me the said judgment is distinguishable on facts.

14. In the said judgment only private measurement report was available on record and it was found not correct and proper and therefore it was discarded by both the Courts below. However, this Court has expressed in the said judgment that Court below ought to have appointed Commissioner to measure the site of the plaintiff and defendant. Accordingly, this Court remanded the matter back for fresh decision.

15. However, in the present matter, the

learned Trial Court had rightly appointed the Court Commissioner and after finding the Court Commissioner's report not reliable, the suit was dismissed.

16. In the circumstances, I am of the opinion that both the Courts below have not committed any error in dismissing the suit filed by the plaintiff for removal of encroachment.

17. In view of the above observations, I have no hesitation to hold that no substantial question of law is involved in the present appeal and appeal needs to be dismissed.

18. According the appeal is dismissed.

19. No order as to costs.

JUDGE