

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

SECOND APPEAL NO. 477 OF 2019

Sudhakar s/o Mahadeorao Dhokane

...Versus...

Shyamrao s/o Sadashivrao Dhokane

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

Court's or Judge's orders

Shri S.G. Malode, Counsel for appellant
Shri P.H. Khobragade, Counsel for respondent

CORAM : AVINASH G. GHAROTE, J.

DATE : 20/02/2020

1. Heard Mr. S.G. Malode, learned Counsel for appellant and Mr. P.H. Khobragade, learned Counsel for respondent sole. The parties are referred in the nomenclature by which they were done so before the Trial Court. The appellant/original plaintiff, filed a suit for removal of encroachment claiming that the defendant while making construction of his house had encroached upon the land of the plaintiff to the extent of 2 ft. x 50 ft., by constructing the wall thereupon. A sketch was filed along with the plaint which the Trial Court held did not comply with the requirements of Order VII, Rule 3 of Civil Procedure Code, inasmuch as, the description given therein was vague and was not sufficient to identify the suit property, namely the encroachment claimed to

have been done by the defendant. The parties went to trial in which the defendant denied the allegation of encroachment. The Court Commissioner was appointed to measure the properties in order to ascertain the truthfulness of allegation as made by the plaintiff. The Court Commissioner is claimed to have measured the property and submitted his report at Exh. 67 and was examined as PW.2. The Trial Court, disbelieved the evidence of the Court Commissioner/PW.2, as well as the measurement map prepared by him, on the ground that the Court Commissioner had not measured the lane as depicted in Exh.67, nor had the Court Commissioner, depicted the common lane between the properties of the plaintiff and defendant, which he had admitted to be in existence in his examination-in-chief, itself. The Court Commissioner further admitted, that he did not measure the construction made by the defendant nor the area. The learned Trial Court therefore, disbelieved the evidence of PW.2 as well as the map prepared by him at Exh.67, in light of which, the plaintiff having failed to demonstrate any encroachment, the suit as filed by the plaintiff came to be dismissed. In appeal, the First Appellate Court upheld the contentions of the Trial Court regarding the incorrectness of the measurement report at Exh.67, and therefore, affirmed the dismissal of the suit by the Trial Court.

2. On 13.09.2019, notice was issued on the following substantial question of law :-

Whether, having recorded a finding that the Court commissioner did not carry out the measurement properly, the first appellate Court ought to have remanded the matter to the trial Court or ought to have appointed Court commissioner to measure the property afresh ?

3. Mr. Malode, learned Counsel for appellant submits, that this is a fit case, which needs to be remanded back to the Trial Court, in order to remeasure the entire property to determine the nature of the encroachment. He submits, that the re-measurement is necessitated as the Court Commissioner, failed to measure the property correctly. He, therefore, submits that remand for the above purpose would be justified in law.

4. Mr. Khobragade, learned Counsel for the respondent, while opposing this submissions, contends that when a party approaches the Court with a plea regarding removal of encroachment, it is mandatory for such a party/plaintiff to comply with the mandate of the Order VII, Rule 3 of Civil Procedure Code, inasmuch as, the plaint should be accompanied by a sketch/plan, correctly demonstrating the nature of the encroachment along with the dimension so as not only for the defendant to raise an effective defence, but also for the Trial Court to pass a executable decree. He draws my attention of paragraph No.6 of judgment of the Trial Court as well as paragraph No.9 of the First Appellate Court, which hold

that mandate of Order VII, Rule 3 of Civil Procedure Code, has not been complied. He, further submits, that in spite of the same, an opportunity having been afforded to the plaintiff by appointing the Court Commissioner, the plea of encroachment, has not been brought at home, as has been rightly held by the Courts below. He, therefore, submits that there is no substantial question of law involved.

5. Having heard learned Counsel for parties, and perused the sketch/map annexed with the plaint, which is a part and parcel of the paper book of the First Appellate Court, which was handed over across the bar for my perusal, I find that the plaint map, does not satisfy the requirement of Order VII, Rule 3 of Civil Procedure Code. The sketch map, annexed with plaint is drawn by the plaintiff himself and not by any person who is qualified to do so. The plaint map does not demarcate the boundaries of the land, and is vague. The learned Trial Court in paragraph No.6 of its judgment, has observed that the plaintiff and the defendant each claimed title over land admeasuring 650 sq ft. however, the plaint map does not depict so. The First Appellate Court in paragraph No.9 of its judgment, reiterates this position, by stating that the hand sketched map to the plaint, does not disclose the exact location of the property in dispute, or the boundaries, the property numbers etc. and therefore, it was not sufficient to locate the same exactly. It is thus clear, that the hand sketched map prepared by the plaintiff, does not satisfy the requirement of Order VII, Rule 3 of Civil

Procedure Code and the findings by the Courts below cannot be faulted with.

6. Insofar as, the map prepared by the commissioner at Exh. 67 is concerned, it has been found, that the same is also incorrect, inasmuch as, the construction made by the defendant is not measured, the map also does not depict the area. The map has also not measured the lane between the two houses, so as to determine the area. It has further come on record, that the Court Commissioner/P.W.2 had no document in hand for reference, still he measured the respective properties. The learned First Appellate Court, in paragraph No.14 of its judgment has categorically observed that the Court Commissioner did not measure the common wall between the houses of the plaintiff and the defendant, he however, included in the property of the defendant, the area of the adjoining lane, which has resulted in serious discrepancies, due to which the Court Commissioner report has been disbelieved by both the Courts below and in my opinion rightly so. It is a trite position of law, that when a plaintiff comes to the Court claiming possession and removal of encroachment, it is absolutely necessary for the plaintiff to demonstrate the nature and extent of the encroachment. The same can be done either by way of a properly prepared plaint map or a plan prepared by the Commissioner appointed by the Court or an independent measurement by the concerned Officer under the provisions of the Maharashtra Land Revenue Code. In the instant case,

though the measurement has been taken, due to defects in the same as indicated above, the veracity of the Commissioner report, itself has been questioned by the Courts below, which is based upon the evidence and cross-examination of the Court Commissioner/PW.2. It was open for the plaintiff to have objected to the Court Commissioner report and moved an application for appointment of a fresh Commissioner before the Trial Court, however the same for reasons best known, was not done. It was also open for the appellant to have applied as such before the First Appellate Court, but there also the same was not done, neither was a prayer for remand of the matter to the Trial Court was raised. The provisions of Order XLI, Rule 23 and 23-A of the Code of Civil Procedure, cannot come to the assistance of the appellant/plaintiff, at the stage of Second Appeal, in light of the express language as contained therein, as applicable to the facts of the present matter, more so, when the memo of appeal before the First Appellate Court, neither raises such a ground, nor seeks a relief to that effect. That being the position, I do not find that any substantial question of law arises. The second appeal therefore, being without any merit is dismissed without any order as to costs.

JUDGE