

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.155 OF 2013
WITH
CIVIL APPLICATION NO.2499 OF 2013
IN SA/155/2013**

Hariram Tukaram shinde,
Age 58 years, Occupation Agri.,
R/o Laul No.1 Tq. Majalgaon
Dist. Beed.

**....Appellant
(Original deft. No.1)**

VERSUS

Baliram Bapurao Washimbe,
Age Major, Occup. Agriculture,
R/o Laul No.1 Tq. Majalgaon
Dist. Beed, and others.

**....Respondents
(Original plaintiff)**

...
Advocate for Appellant : Mr. V. V Bhavthankar
Advocate for Respondent No.1: Mr. B. S. Kudale
...

**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 20-09-2021**

ORAL ORDER :

1. The present appeal has been filed by the original defendant No.1 challenging the perverse findings. Respondent/original plaintiff had filed Regular Civil Suit No.371 of 2003 before Joint Civil Judge, Junior Division, Majalgaon, Dist. Beed, for recovery of encroached portion of 5 R. It was the contention of the original plaintiff that the defendants have encroached to the extent of 5 R land. The appellant/defendant No.1 denied it and it was his contention that plaintiff in collusion with

measurement officer has shown the encroachment. The notice of measurement was not served upon him and measurement has done behind his back and prior to the filing of the suit. It was the contention of the appellant/defendant that the boundaries are intact and that much portion is in their possession.

2. Parties have led evidence, especially the plaintiff, who had got the land measured prior to the suit, examined Taluka Inspector of Land Records. The learned Trial Judge disbelieved the evidence adduced by the plaintiff and it has been held that the plaintiff has not proved the encroachment at the hands of defendants. The suit came to be dismissed on 28-09-2008.

3. Plaintiff then filed Regular Civil Appeal No.88 of 2006, it was allowed with costs by learned District Judge-1, Majalgaon District Beed on 10-03-2013. Hence, original defendant No.1 filed present second appeal.

4. Heard learned Advocate Mr. V. V. Bhavthankar for appellant and learned Advocate Mr. B. S. Kudale for respondent No.1.

5. Learned Advocate Mr. V. V. Bhavthankar for the appellant submitted that learned Trial Court has correctly dismissed the suit of

present respondent/original plaintiff, but learned First Appellate Court has wrongly allowed the appeal filed by the original plaintiff. Substantial questions of law are arising in this case. Per contra, learned Advocate Mr. B. S. Kudale appearing for respondent No.1 supported the reasons given by First Appellate Court.

6. At the outset, it appears that both the Courts below have not adhered to the decisions of this Court when in any suit there is a question of encroachment. It is to be noted that the plaintiff had got his land measured on 14-01-2002, he filed the suit in the year 2003. Therefore, when the defendants in their written statement had contended that the measurement was got done behind their back and no notice was served on them, there ought to have been an endeavour basically by the Trial Court first and in case of failure of the Trial Court, by the First Appellate Court, to get an admitted map. Both the Courts below as it appears failed to exercise their power under Order 26 of the Code of Civil Procedure to appoint Court Commissioner by giving opportunity to both sides i.e. asking the plaintiff to deposit the cost of remeasurement and by giving notice in advance to the defendants to remain present at the time of measurement. Further, it appears that the measurement in respect

of only plaintiff's land has been done and the defendants land has not been measured, that is also one of the point that could have been got cured when the measurement could have been got done of both the lands by appointing a Court Commissioner. In a catena of Judgments, especially in *Ushabai w/o Sharadchandra Bannore v. Wasudeo Baliramji Mehare and others*, reported in 2004 (2) Mh.L.J. 594 (Bench At Nagpur), it has been held that,

"The maps or plans made for the purpose of any cause must be proved to be accurate. The onus of proving that such a map is accurate lies on the party who produces it. The maps must be proved by the person who has prepared them. In case of dispute about an encroachment or dimension of a site, the first essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same. In the absence of such a map, the decree is probably meaningless and execution means virtually starting the case overall again."

Though the suit was filed in the year 2003, it was decided in the year 2008. Therefore, the learned Trial Court ought to have considered this Judgment and ought to have appointed Taluka Inspector of Land Record as Court Commissioner once again by giving due notice to the defendants and an admitted map ought to

have been got produced on record. Further, it is to be noted that the learned First Appellate Court went wrong in considering the plea of adverse possession taken by defendant in written statement. It would always be in the alternative. Such alternate defence does not ipso facto amount to admission of title of plaintiff. When the fact of encroachment is disputed, unless it is proved, it will not draw inference that plaintiff has proved encroachment only on the ground of possession of disputed portion with defendants. The First Appellate Court was not powerless to direct a joint measurement and to have that measurement on record which can be said to be an admitted map after the measurement. This Court would rely on the observations of the earlier Judgment of this Court in *Sulemankhan s/o Mumtajkhan and Others Versus Smt. Bhagirathibai wd/o. Digamber Asalmol and Another*, reported in 2014 (5) ALL MR 552, are reproduced here,

"This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/ map in any suit in which there is a boundary dispute. The Trial Court as well as 1st Appellate Court, which are Courts of Facts, are duty-bound to ascertain that a map is drawn to the appropriate scale by competent Government official from the

office of TILR or DILR, as the case may be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed and boundary dispute is finally settled by producing map in the Court by the plan maker who can prove its genuineness by deposing in support of such plan/ map, if it is so necessary in the absence of admission for exhibiting the map.”

7. If we consider the testimony of the Taluka Inspector of Land Records then it can be seen that PW.2 Farukkhan Rajdarkha had measured disputed land only but he has not measured the lands of defendants. When all these shortcomings were noticed, especially by the Trial Court, the Trial Court ought to have appointed a Court Commissioner. Since the suit was for recovery of possession then only the expert is expected to be the Court Commissioner. There ought to have been a joint measurement before concluding whether there is encroachment or not. As aforesaid, even the First Appellate Court failed to exercise its powers, however, since this Court cannot shut its eyes, the matter deserves to be remanded to the Trial Court for getting the lands measured once again. Hence, the second appeal stands partly allowed.

ORDER

- 1) The second appeal is hereby partly allowed.
- 2) The Judgment and decree passed by learned Joint Civil Judge Junior Division, Majalgaon Dist. Beed in RCS No.371 of 2003 dated 28-09-2008 and Judgment and decree passed by learned District Judge-1, Majalgaon Dist. Beed in RCA No.155 of 2013 dated 10-01-2013, are hereby set aside.
- 3) The Regular Civil Suit No.371 of 2013 is restored to the file of Jt. Civil Judge, Junior Division, Majalgaon Dist. Beed with following directions :-
 - A) After appearance of the parties before the Trial Court, original plaintiff to file application for appointment of Court Commissioner under Order XXVI Rule 9 of Code of Civil Procedure, within a period of three (03) weeks, for getting the lands measured.
 - B) The Trial Court shall appoint Taluka Inspector of Land Records / (Deputy Superintendent of Land Records) as Court Commissioner under Order 26 Rule 9 of the Code of Civil Procedure, 1908.
 - C) After the Court Commissioner is appointed, plaintiff to deposit the requisite charges with the concerned authority within a period of two (02) weeks thereafter.
 - D) The Court Commissioner shall prepare measurement map showing the boundaries of the land and with conclusion as to whether there is any

encroachment or not and submit report before the Trial Court within a period of four months, after the order/writ is given to the Commissioner.

4) Failure on the part of the plaintiff to file such application for appointment of Court Commissioner, should be taken adversely, which may also result in dismissal of the suit.

5) The Trial Court to decide the suit afresh by giving opportunity to both the parties to lead evidence, if necessary and so advised.

6) Since the suit of 2003 is being restored today to the File of learned Joint Civil Judge Junior Division, Majalgaon Dist.Beed, the Trial Court should give priority to dispose of the suit and to decide the same within a period of ONE YEAR from the receipt of the writ or placing of authentic copy of the order of this Court before it, whichever is earlier.

7) Both the parties to appear before the learned Court on 20-10-2021.

8) No order as to costs.

9) The second Appeal stands disposed of. Pending civil application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE