

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3638 OF 2020

Eknath Pundalik Shejal and others

... Petitioners

Versus

1. Devram Sahadu Shejal

Deceased through LRs,

1-A. Bapusaheb Devram Shejal and others ... Respondents

....

Mr. Sanket S. Kulkarni, Advocate for the petitioners

Mr. N. K. Kakade, Advocate for respondent Nos. 1-A to 1-C

....

CORAM : R. G. AVACHAT, J.

RESERVED ON : 03rd MARCH, 2021

PRONOUNCED ON : 08th MARCH, 2021

PER COURT :-

. This writ petition is directed against the order dated 28.01.2020 passed by the District Judge, Kopargaon, below Exh-1 in appeal being Regular Civil Appeal (R.C.A.) No.59 of 2012. By the impugned order, Taluka Inspector of Land Records (T.I.L.R.) has been appointed as Court Commissioner to measure respective lands of the parties to the appeal.

2. The petitioners herein are the original defendants in a suit, Regular Civil Suit No.125 of 2004. The respondents are the plaintiffs in the suit. The suit is for removal of encroachment in the suit land *gut* No.310. The trial Court dismissed the suit on the ground that the measurement of the land carried out by the T.I.L.R., was not correct and proper. The T.I.L.R. did not adopt proper procedure. Fifteen days notice was not given to the parties to the suit etc.

3. Against the decree of dismissal of the suit, the respondents (plaintiffs) preferred R.C.A. No.59 of 2012. The learned District Judge-2, Kopargaon, passed the impugned order, observing that dismissal of suit for removal of encroachment on the ground of faulty measurement by T.I.L.R. is not correct. In such cases, remand of the matter by appellate Court is proper. The appellate Court may direct any document to be produced or any witness to be examined to enable it to pronounce the judgment. Aggrieved by this order, the original defendants/respondents in appeal have preferred this petition.

4. Shri Sanket S. Kulkarni, learned Advocate for the petitioners, would submit that the trial Court dismissed the suit since

it is found the survey map prepared by the T.I.L.R. to be not reliable one. The plaintiffs/respondents herein, therefore, moved application Exh.27 before the appellate Court on 12.03.2018. The appellate Court was pleased to reject the said application (Exh.27). The respondents/plaintiffs did not challenge the said order before this Court. In view of principle of *res judicata*, the respondents-plaintiffs are now precluded from seeking production of additional evidence. According to the learned Advocate, principle of *res judicata* applies at the subsequent stage of the same proceedings. He would further submit that the respondents-plaintiffs had also preferred similar suit (R.C.S. No.647 of 2012) against the petitioners for fixation of the boundaries of the suit land and removal of encroachment, if any. The said suit was hit by principle of *res judicata*. The petitioners cannot be vexed twice for the same cause. The trial Court dismissed the said suit. No appeal has been preferred against the decree passed in the said suit. According to the learned Advocate, a party may be allowed to produce additional evidence in appeal only when the appellate Court on hearing the appeal on merits, finds production of such evidence, to be necessary to enable it to pronounce judgment. According to the learned Advocate, the impugned order has been passed while the appeal was not taken up for final hearing. In

support of his submissions, learned Advocate has relied on the following judgments.

- (i) *Union of India vs. Ibrahim Uddin and another – (2012) 8 SCC 148;*
- (ii) *Malayalam Plantations Limited vs. State of Kerala and another – (2010) 13 SCC 487;*
- (iii) *Dilip Vinayakrao Kulkarni vs. Ganesh Dattoba Alias Dattatraya Chavan and others – Writ Petition No.3888 of 2020 of this Court.*

Learned Advocate, ultimately, urged for allowing the writ petition.

5. Shri N. K. Kakade, learned Advocate for the respondents, would on the other hand, submit that the impugned order has been passed while the appellate Court had taken up the appeal for hearing. According to the learned Advocate, it was a suit for removal of encroachment on agricultural land. For ascertainment of exact area of the alleged encroachment, measurement of the concerned lands is necessary. Such measurement could only be done by an expert – Surveyor. According to the learned Advocate, the law is well settled that suit for removal of encroachment, shall not be dismissed merely on the ground of failure of the Surveyor to carry out the survey by following proper procedure. If, report of a Surveyor is

found to be not correct and proper, the proper course for the Court would be to appoint a cadastral Surveyor for carrying out the superior test. The appellate Court has rightly passed the order impugned in this petition. Learned Advocate, therefore, urged for dismissal of the petition.

6. The respondents-plaintiffs filed the suit (R.C.S. No.125 of 2004) for removal of encroachment made on the suit land *gut* No.310 by the petitioners-defendants. In proof of the alleged encroachment, the Surveyor (T.I.L.R.) was examined as a witness. The trial Court found the Surveyor to have not carried the measurement by following proper procedure. The Court, therefore, found the measurement and the map drawn pursuant thereto to be not correct. The suit, therefore, came to be dismissed. The respondents-plaintiffs, preferred appeal. An application (Exh.27) was preferred before the appellate Court for appointment of T.I.L.R. as Court Commissioner for measurement of the respective lands. The appellate Court, rejected the said application observing that, “*the trial Court dismissed the suit on technical ground is not the reason for fresh measurement by appellate Court. The application is not maintainable. Hence, rejected.*”

7. It is a settled proposition of law that principle of *res judicata* applies at a subsequent stage of same proceeding. The said principle, however, would not apply in the present case since after rejection of the application Exh.27 the respondents-plaintiffs have not moved any application, oral or written for appointment of Court Commissioner for measurement of the concerned lands. It is the appellate Court, which has, on its own, passed the impugned order after hearing the parties to the appeal and perusal of the evidence in the case. It is also true that a person cannot be vexed twice for the same cause. Admittedly, the respondents-plaintiffs had filed one more suit for fixation of boundaries of the suit land *gut* No.310 and for removal of encroachment, if any. The subject matter of both the suits was one and the same. The trial Court, therefore, ought to have exercised jurisdiction under Section 10 of the Code of Civil Procedure(CPC) to stay the subsequent suit. The same has not been done. The petitioners (defendants in the suit) appear to have allowed the said suit to be heard on merits. Be that as it may, the petitioners now cannot make quarrel on the factum of filing of the subsequent suit. The appeal, wherein the impugned order has been passed is nothing but continuation of the former suit. The same has to be taken into his logical conclusion.

8. Section 75 CPC speaks of power of Court to issue commissions. Order 26 Rule 9 CPC authorises the Court to appoint commission to make local investigation. When the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, it may issue a commission to make such investigation and to report thereon to the Court. Needless to mention that the appellate Court can exercise power under Order 26 Rule 9 CPC. The impugned order has been passed by the appellate Court in exercise of jurisdiction under Order 26 Rule 9 CPC. Although, it has observed it to have power to seek production of additional evidence under Order 41 Rule 27(1)(b) CPC.

9. This Court, in the case of ***Jamir Khan vs. Dharamchand – (2018) 1 MhLJ 174***, in paragraphs 16 and 17, has observed thus:

“16] This Court has in its judgment in Vijay s/o Shrawan Shende and ors vs. State of Maharashtra and ors. 2009(5) Mh.L.J 279 has held that when there is question as to extent of encroachment, it is not a matter to be adjudicated upon oral evidence of any number of witnesses who have witnessed the act of encroachment, The extent of encroachment cannot be proved in absence of public records and procedure emerging from Section 36 and Section 60 of Evidence Act. Extent of encroachment can be proved only by the person who has measured the land allegedly encroached, with public records relating to the survey numbers. It was further held that the question of encroachment has a direct bearing on the boundaries of the land, which is subjected

to land revenue and is measured and marked in the process of public survey on preparation of Land Records under the provisions of Maharashtra Land Revenue Code or law in existence prior thereto, and these records are public documents. It was further held that, it would not be proper to dismiss the suit simply because the Court Commissioner has not adopted a correct procedure of measurement and the exercise of re-measurement, according to rules, will have to be got done through Court Commissioner again and again, if necessary, because failures of Cadestral Surveyor are not attributable to parties to the suit.

17] In another decision of this Court in case of Vasant Tukaram Prabhu vs. Xalinibai Borcar alias Shalinibai Borakar 2014(5) MhLJ 382 also this Court has dealt with same situation when the First appellate Court has remanded the matter on the count that the measurement map drawn by the TILR was not by adopting the correct and proper procedure. Placing reliance on various authorities of the Apex Court and this Court, it was held that, "whenever controversy in the suit revolves around the identity and boundaries of the suit property, the law would require the Court to suo motu exercise its power under Order XXVI Rule 9 of the Civil Procedure Code, 1908". The said legal position is also upheld in Kashinath s/o Ramkrishna Chopade vs. Purushottam Tulshiram Tekade and ors 2005(4) Mh.L.J. 471 and Girish Vasantrao Bhoyar and anr. vs. Nimbaji Warluji Bambal 2009(4) Mh.L.J. 371."

10. Order 41 Rule 27 CPC speaks of production of additional evidence in Appellate Court. Clause (b) of sub-rule (1) thereof, reads thus:

"(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined."

11. It is reiterated that the appellate Court has to be taken to have passed the impugned order in exercise of power under Order 26 Rule 9 CPC. Exercise of said power by the appellate Court may have a trapping of an order passed under Order 41 Rule 27 (1)(b) CPC. The appellate Court has in fact, not directed any of the parties to the appeal to produce any document or examine any witness to enable it to pronounce judgment.

12. It is true that in the case of *Union of India vs. Ibrahim Uddin and another* (supra), it has been observed that the application for taking additional evidence on record, at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the Court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/

inexecutable and is liable to be ignored.

13. Learned Advocate for the petitioner has also placed on record number of orders passed by this Court on the point of requirement of deciding application for additional evidence on record at an appellate stage while hearing the main appeal. Since the judgment of the Apex Court has been referred to herein above, I do not propose to make reference thereto.

14. It is for the petitioners to show that the impugned order has been passed by the appellate Court without hearing the parties on merits of the appeal. Since this has not been shown, this Court requested the Registrar (Judicial) of this Court to seek instructions in this regard from the Court which has passed the impugned order. It has been reported in writing that the learned District Judge informed that he had heard the appeal finally on merits after affording an opportunity to both the parties. Thereafter, the appeal was listed for final judgment. However, while reading the papers, the learned District Judge realised that the report of the Court Commissioner is defective. Consequently, he afforded an opportunity to both the parties to argue on the point of appointment of Court Commissioner and finally passed the order dated 28.01.2020.

15. In view of the above, there remains no substance in the contention of the learned Advocate for the petitioners. As such, the petition is devoid of merits. The petition therefore fails. The same is, dismissed.

[R. G. AVACHAT, J.]

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