

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**930 SECOND APPEAL NO.348 OF 2021
WITH
CA/8686/2021 IN SA/348/2021**

DHARUBAI SAMBHAJI UDHANE
VERSUS
MOTIRAM CHUDAMAN YALHARE

...
Advocate for Appellant : Mr. Pathan Hamzakhan I.
R/1, 2 Served
...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 12-10-2021.

ORDER :

1. Heard learned Advocate Mr. H. I. Pathan for appellant.
2. The appellant is the original plaintiff who had filed Regular Civil Suit No.21 of 2004 for removal of encroachment and possession as well as declaration. The learned Civil Judge, Junior Division, Kalamnuri partly decreed the suit. Plaintiff was declared owner of the suit land and the defendant was directed to hand over the possession of 11 R land from the Northern side to the plaintiff within three months.
3. The original defendant challenged the said Judgment and decree in Regular Civil Appeal No.16 of 2015. Learned Adhoc District Judge-1, Hingoli partly allowed the appeal and confirmed the decree of

ownership, however set aside the decree passed by the Trial Court for removal of encroachment and handing over of vacant possession of 11 R land. Hence, this second appeal.

4. It appears that earlier there was no proper measurement and, therefore, the matter was remanded by the District Court for joint measurement, and after the joint measurement was carried out, it is stated that neither the plaintiff nor the defendant took objection. Therefore, on the basis of the report of the Court Commissioner, the Trial Court partly decreed the suit. However, it appears that the First Appellate Court set aside the part of the decree on the ground that the Court Commissioner was not examined. It also appears that submission was made on behalf of the respondent/original plaintiff before the First Appellate Court that since the report is admissible in evidence vide Order 26 Rule 10 (2) of the Code of Civil Procedure, examination of the Cadastral Surveyor is not required, yet the report appears to have not been considered by the First Appellate Court. Under such circumstances, the substantial question of law is arising in this case. Hence, the second appeal stands admitted.

5. Following are the substantial questions of law :-

A) Whether the First Appellate Court erred in not considering the provisions of Order 26 Rule 10 (2) of the Code of Civil Procedure which provides that the report of the Court Commissioner and the evidence taken by him (but not the evidence without report) shall be the evidence in the suit and shall form part of the record ?

B) Whether the First Appellate Court was justified in reversing the decree in respect of removal of encroachment to the extent of 11 R land ?

C) Whether interference is required ?

6. Issue notice to the respondent, returnable on 01-02-2022.

7. Call for record and proceedings.

8. Civil Application No.8686 of 2021 for 'Stay' stands withdrawn on the statement made by learned Advocate for the applicant. Hence, said application stands disposed of as withdrawn.

9. Permission is granted to file private paper book.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-