

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.473 OF 2018
WITH
CIVIL APPLICATION NO.7923 OF 2018
IN SA/473/2018**

SHOBHABAI PRALHADRAO RANVEER AND ANR
VERSUS
SURESHCHANDRA PREMCHANDRA RATHOD AND ANR

.....
Advocate for Appellants : Mr. S. S. Bora
Advocate for Respondent No.1 : Mr. S. S. Gangakhedkar
Advocate for Respondent No.2 : Mr. G. D. Kale
....

**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 25-11-2021.**

ORDER :

1. Present appellants are the original plaintiffs who had filed R.C.S.No.557 of 2001 before 5th Joint Civil Judge, Junior Division, Nanded for recovery of possession. Their suit came to be dismissed on 16-03-2013. Thereafter they challenged the said Judgment and decree before the Appellate Court by filing R.C.A.No.61 of 2013. The said appeal came to be dismissed by learned District Judge-5, Nanded on 03-03-2018. Hence, this second appeal.

2. Heard learned Advocate Mr. S. S. Bora for appellants, learned Advocate Mr. S. S. Gangakhedkar for respondent No.1 and learned

Advocate Mr. G. D. Kale for respondent No.2.

3. It has been submitted on behalf of the appellants/original plaintiffs that the suit that was filed by the present plaintiffs was for recovery of possession of the encroached portion. Therefore, it was the duty of the Courts below to get the lands measured through expert like Taluka Inspector of Land Records, however, no proper attempts were made in this respect. Even if the plaintiffs had failed to bring on record the map of the encroached portion. The courts below could not have get rid of their duty. Procedure could not have been used in a rigid manner. In fact, there was no challenge to the ownership of the plaintiffs over the suit property, but then by taking a perverse view that the encroachment has not been proved, the suit has been dismissed. So also the Appellate court failed to exercise its jurisdiction. Both the Courts below failed to consider that though PW.2 Satish Dhan who was working as Taluka Inspector of Land Records, was appointed as a Court Commissioner, yet he had not come to a definite conclusion as to whether there is encroachment or not. Expert cannot take such kind of view. The mistakes in his measurement were pointed out, yet there was no attempt on the part of the Courts to get the land measured once

again. Therefore, substantial questions of law are arising in this case.

4. The learned Advocate appearing for appellants has relied on the decision of this Court in *Vijay and Ors. v. State of Maharashtra and Ors.*, reported in 2009 (5) BomCR 306, wherein it has been observed that,

"It would not be proper to dismiss the suit simply because Court Commissioner has not adopted a correct procedure of measurement and 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 Surveyors are not attributable to parties to suit.

Further reliance has been placed on the decision in *Raghunath Kashinath Chavan v. Sakharam Maroti Chavan and Anr.*, Second Appeal No.562 of 2005, decided on 29-01-2019, wherein this Court after taking into consideration the earlier decisions of this Court had remanded the matter by giving specific directions to appoint the surveyor from office of DILR or TILR to measure the land. Similar view was taken in *Avinash s/o Arunrao Deshmukh v. Rajabhau s/o Manikrao Deshmukh*, Second Appeal No.293 of 2017, decided on 02-

04-2019. He, therefore, prayed that the substantial questions of law be framed or in the alternative Civil Application No.7923 of 2018 filed for appointment of TILR as Court Commissioner be allowed and the evidence so brought on record be considered.

5. Per contra, the learned Advocates appearing for the respondents supported the reasons given by both the Courts below and submitted that sufficient opportunity was given to the plaintiffs to bring on record that any such encroachment has been committed. Even the Court Commissioner was appointed and the said expert could not point out that there is any such encroachment. Merely because the plaintiff is saying so, it cannot be said that till the Court Commissioner gives report in their favour, the Commissioner should be appointed. No substantial questions of law as contemplated under Section 100 of the CPC are arising in this case requiring admission of the second appeal.

6. It is to be noted that plaintiffs claimed that they are the owners of the suit property. Plaintiff No.2 had purchased the suit property on 09-07-1973 from one Laxmansingh Balramsingh. It was contended that towards the Northern side of the suit property there was excess land admeasuring 26.51 meters and plaintiff No.2 had

acquired that excess land on or about 19-01-1987. She executed sale deed in respect of that excess land in favour of plaintiff No.1. Defendant No.1 had filed R.C.S.No.717 of 1988 against both the plaintiffs for recovery of possession of Plot No.10. That suit was decreed and in execution proceedings, defendant No.1 received the possession of that property in April 2001. According to the plaintiffs, plaintiff No.1 had shifted to Vazirabad to reside along with plaintiff No.2 for a month and during that period defendant No.1 encroached over suit plot admeasuring 5 x 72 square meter and defendant No.2 encroached over 72 x 20 square feet East-West and, therefore, they have filed the suit. Defendants No.1 and 2 by filing their written statements denied all the allegations. Both the Courts below have held that the plaintiffs have failed to prove that the defendants have made encroachment. Plaintiffs have examined plaintiff No.2 as PW.1 and PW.2 Satish Dhan- TILR. Important point to be noted is that said TILR was appointed on the application filed for appointment of Court Commissioner under Order 26 of CPC filed by plaintiffs. However, prior to that when the suit was filed, it appears appears that there was compliance of Order 7 Rule 3 (Bombay Amendment) of CPC, by which it is expected that in case of encroachment the plaintiff should give a rough sketch. In spite of this lacuna when the

Court commissioner was appointed, he has filed the report and he was not sure as to whether there is encroachment or not. It is to be noted that he was appointed to measure plot No.10, 11 and 12. He has deposed that he has not measured the entire plot but then he has deposed that plaintiffs were not in possession of the suit plot but defendants are in possession. He had not seen many other documents. Here, it is to be noted that the plaintiffs could have taken help of two provisions, one is under Order 26 Rule 10 (3) of CPC which provides that, if Court is not satisfied with the report of the Court Commissioner, then the Court can ask the Court Commissioner to measure the land once again. The said provision has not been used nor the plaintiffs had challenged the measurement that was made by PW.2 Dhan by filing an application for Nimitana measurement i.e. appeal to the superior officer of PW.2 Dhan. When plaintiffs have not taken any such steps which were legally available to them, then it will not be the job of the Courts to collect evidence for a party. The facts in *Vijay and Ors. (Supra)* are different as in that matter it can be seen that only because the correct procedure was not adopted by the Court Commissioner, the suit was dismissed. But here by going one step ahead it can be said that though the legal provisions were at hand to the plaintiffs, they

have not utilized the same. Another factor to be noted is that as per the plaint itself defendant No.1 had filed R.C.S.No.717 of 1988 and the suit was decreed. Possession of plot No.10 was taken by defendant No.1 in the month of April and then the plaintiffs have come with a case that during the further period of one month only he has made encroachment. This appears to be unbelievable. If the person who is fighting from 1988 could get possession of that property in April 2001, then whether he would make encroachment within the next one month, is indigestible.

7. It is also to be noted that the defendants have produced on record documentary evidence such as construction permission, sale deed in respect of their property way back from 1984 and correction deed 1986, tax receipts etc. At no earlier point of time it was then stated that there was an attempt by the plaintiffs to raise objection. The conduct on the part of the plaintiffs is also surprising. Though by sale deed plaintiff No.2 on 09-07-1973 had purchased a less area i.e. 21.94 meters, and then it is stated that there was excess land which was acquired by plaintiff No.2 on or about 19-01-1987 and then she sold it to plaintiff No.1. It shows that plaintiffs themselves had taken high handed action but now since nobody is challenging

that they are utilizing it against defendants No.1 and 2. The other two decisions on which reliance has been placed, are also on a different point as there was no admitted map on record, the Court Commissioner was directed to be appointed.

8. At the cost of repetition it can be said that the view taken by both the Courts below appears to be correct when initially there was no compliance of Order 7 Rule 3 of CPC, and then even after granting appointment of Court Commissioner, the plaintiffs have not brought on record, as to whether there was any such encroachment as alleged by them. Therefore, no substantial questions of law as contemplated under Section 100 of the CPC are arising in this case requiring admission of the second appeal. The second appeal as well as the civil application deserves to be rejected, accordingly they are rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-