

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

**APPEAL FROM ORDER NO.10 OF 2020 WITH
CIVIL APPLICATION NO.5672 OF 2019**

Aba s/o Narayan Shegade & anr. ... APPELLANTS

VERSUS

Hamid Akbar Shaikh & anr. ... RESPONDENTS

.....
Mr. R.R. Karpe, Advocate for appellants
Mr. A.V. Hon, Advocate for respondents
.....

CORAM : R. G. AVACHAT, J.

DATE : 14th DECEMBER, 2021

ORDER :

Heard. The challenge in this appeal is to the order dated 16/11/2018, passed by the District Judge-11, Ahmednagar in Regular Civil Appeal No.137/2006, remanding the suit back to the trial Court. The operative order impugned in this appeal reads thus :

- (1) Appeal is partly allowed.
- (2) The impugned judgment and decree in Regular Civil Suit No.10/1999, dated 8/2/2006 is hereby set aside.
- (3) Regular Civil Suit No.10/1999 is remanded back to the learned Civil Judge, J.D., Karjat,

District Ahmednagar with direction to appoint T.I.L.R. as a Court Commissioner for taking measurements of the suit property and property of defendants, at the cost of plaintiffs. The trial Court shall fix the date of measurement in consultation with T.I.L.R. and both the parties shall remain present for the measurement.

Parties shall mark their presence in the trial Court on 4/12/2018.

(4) After receipt of report and map of the Court Commissioner, the learned Civil Judge, J.D., Karjat shall decide the suit afresh, after giving an opportunity to both the parties to lead evidence, if any, and make submissions.
....."

2. It appears that, the matter has a chequered history. The present appeal has been filed by the original defendants in the suit. The suit was filed for removal of encroachment and possession of an agricultural land. The trial Court dismissed the suit. In the trial Court, two Surveyors were examined. The trial Court did not believe the measurements made by both of them and the resultant map drawn. The original plaintiffs, therefore, preferred appeal. The appeal was dismissed on merits. The plaintiffs, therefore, preferred Second Appeal bearing No.505/2011 before this Court. This Court, in the said appeal, passed the following order :

"..... this appeal is allowed. The judgment and

order of the first appellate Court delivered in Regular Civil Appeal No.137/2006 is hereby set aside and the matter is remanded back to the District Court. The District Court is to appoint the Court Commissioner for taking measurement in the manner observed above and the measurement is to be done at the cost of original plaintiff. The surveyor is to ascertain as to whether the area which ought to have been shown in one gat number is shown in other. In those terms the appeal is allowed and disposed of. The parties are to appear in the District Court on 9.10.2015. Record be sent to the District Court. The appellate Court is to see that the measurement and appeal are expedited."

3. This Court remanded the matter back to the first appellate Court. As directed by this Court, the Surveyor was appointed by the appellate Court and on appreciation of the evidence of the Surveyor, the learned District Judge remanded the suit back to the trial Court.

4. This was not expected of the appellate Court. The appellate Court should have obeyed this Court's order in letter and spirit. The suit is of the year 1999. Now both the learned counsel come around to submit that, the exercise which has been directed to be done by the trial Court can very well be done in the first appeal.

5. In view of the above, the order impugned in this Appeal is hereby set aside. The District Inspector of Land

Records, Ahmednagar is directed to nominate a senior Nimitandar (Surveyor) to measure the land in terms of the order dated 14/9/2015, passed by this Court in Second Appeal No.505/2011. On receipt of the said report, the first appellate Court may give the parties an opportunity to lead evidence in proof of the Survey Map that may be drawn and any evidence in rebuttal and then decide the appeal on its own merits and shall, in no case, remand the suit back to the trial Court.

6. Both the parties are expected to co-operate with the appellate Court and shall remain present when the measurement takes place. The plaintiffs to bear the expenses of the measurement.

7. In view of disposal of the Appeal from Order, Civil Application No.5672/2019 stands disposed of.

**(R. G. AVACHAT)
JUDGE**

fmp/-