

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**937 SECOND APPEAL NO.2 OF 2018
WITH
CA/90/2018 IN SA/2/2018**

- 1) Munjaji s/o Ganpati More,
Age 52 years, Occup.Agri.,
R/o Trikut Tq. And Dist. Nanded.
- 2) Madhav s/o Munjaji More,
Age 30 years, Occup.Agri.,
R/o As above.
- 3) Ramdas s/o Munjaji More,
Age 28 years, Occup.Agri.,
R/o As above.

**....Appellants
(Original Defendants)**

VERSUS

Bhujangrao s/o Irba More,
Age 72 years, Occup. Agri.,
R/o Brahmanwada, Nanded
Tq. And Dist. Nanded.

**....Respondent
(Original Plaintiff)**

...
Advocate for Appellants : Mr. Rathi Swapnil S.
Advocate for Respondent : Mr. Kadam Gajanan G.

...
**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 28-01-2021**

ORAL ORDER :

1. Appellants are the original defendants who are challenging the concurrent findings. Respondent is the original plaintiff who has filed Regular Civil Suit No.877 of 2012 before learned Civil Judge, Junior Division, Nanded for recovery of possession of the encroached portion and perpetual injunction. The suit was decreed on 27-06-2014 by learned 2nd Joint Junior Division, Nanded, thereby it was directed to the defendants

that they should hand over the vacant possession of 31 R land shown in the map of Taluka Inspector of Land Records (Exhibit 42) with yellow colour within a period of three months to the plaintiff. The consequential prayer of injunction was also granted and separate inquiry for mesne profits was directed. It will not be out of place to mention here that the counter claim of the defendants was rejected which was in respect of perpetual injunction.

2. The original defendants challenged the said Judgment and decree in Regular Civil Appeal No.102 of 2014 before learned District Court, Nanded. The appeal was heard by learned Ad-hoc District Judge-3 and the appeal came to be dismissed on 15-02-2017. Hence, this second appeal.

3. Heard learned Advocate Mr. Rathi Swapnil S. representing appellants and learned Advocate Mr. G. G. Kadam representing respondent.

4. It has been vehemently submitted on behalf of the appellants that both the Courts below failed in considering the basic requirements of law that there has to be an admitted map before decree for removal of encroachment can be passed. Plaintiff is the owner of Gut No.6 whereas the defendants are owner of Gut No.5

situated in village Trikut Taluka and District Nanded. Plaintiff contended that his land Gut No.6 admeasuring 3 H 74 R and it has been described by boundaries in plaint. He had come with a case that he realize that there is damage to the Western boundary between his land and the land of defendants in the month of May 2011, and therefore, he filed an application to Taluka Inspector of Land Records for measurement. The record shows that the Taluka Inspector of Land Records measured the land on 18-02-2012 and demarketed and fixed the boundaries on 09-03-2012. It is stated that the Taluka Inspector of Land Records found that the defendants have made encroachment to the extent of 31 R, and therefore, he filed the suit on 13-06-2012. That means, the map which was drawn by Taluka Inspector of Land Records was prior to suit. The defendants resisted the claim by filing their written statement and denied all the allegations in the plaint. On the contrary, they had raised counter claim and prayed for injunction. In the counter claim the property was shown as Gut No.5 admeasuring 3 H 80 R situated in the same village.

5. It has been further submitted on behalf of the appellants that after the issues were framed, parties have led oral as well as

documentary evidence. The learned Advocate for the appellants has taken this Court through the testimony of plaintiff's witness Uttam Ramji Murmure (Exhibit 41) who was the then Taluka Inspector of Land Records. It is submitted after reading his entire testimony that the Taluka Inspector of Land Records had not issued notices to the adjoining owners as he has clearly stated that there is no proof in his file regarding service of notice to the adjoining owners. Further in his cross examination he has admitted that he has not measured the Gut No.6 from its Eastern, Southern and Northern direction. Further it is not in dispute that old Survey number was divided into two parts as Gut No.5 and 6. The original Survey No.6 was admeasuring 18 Acres 28 Gunthas having 4 Gunthas barren. The Sub-Division No.1 measures 9 Acres 15 Gunthas and No.2 admeasures 9 Acres 12 Gunthas. The maps which were drawn by Consolidation Officer were not in the file of the Taluka Inspector of Land Records. He was not able to say the measurement of Gut No.5 which belongs to the defendants. He does not say that he had measured Gut No.5. On the basis of such defective evidence, both the Courts below have come to a wrong conclusion that the defendants have encroached on the land belonging to the plaintiff. There was no attempt at both the levels to have an admitted map.

He, therefore, submitted that both the Judgments and decrees deserve to be set aside. He relied on the decision by this Court in *Ushabai w/o Sharadchandra Bannore v. Wasudeo Baliramji Mehare and others*, reported in 2004 (2) Mh.L.J. 594 (Bench At Nagpur), *Niranjanabai Chandrakant Vira v. Pramilabai Balkrishna Zade and Another*, reported in 2004 (6) Bom.C.R. 829 and *Vachhalabai w/o Kundlik Gavane v. Chinkaji Malhari Jadhav* (Second Appeal No.662 of 2011, decided by this Court on 28-03-2012). Relying these decisions, the learned Advocate for the appellants prayed that the matter deserves to be remanded for having an admitted map.

6. Learned Advocate Mr. Kadam representing the respondent/plaintiff strongly supported both the Judgments, especially the Judgment by the learned Trial Judge, and submitted that though the file which was brought by the learned Taluka Inspector of Land Records was not containing the copies of the notice that was issued to the defendants, yet from the panchanama that was executed and also from the cross-examination of the plaintiff taken on behalf of the defendant, it was very much clear that the defendants had the knowledge about the measurement that would be undertaken. The plaintiff admits that there was dispute between him and the plaintiff

admits that there was dispute between him and the defendant at the time of measurement and it is also the subsequent statement that dispute was after the measurement was concluded. Under such circumstance, the defendants had sufficient knowledge about the measurement, now they cannot take disadvantage and submit that since the file had no such acknowledgement, there was no notice to them.

7. It has been further submitted on behalf of the respondent that the measurement that has been carried out by PW. Murmure is perfectly legal. Map (Exhibit 42) would make the position of the land clear. There was no scope for encroachment from the Northern side. As there is the boundary of the village and after the points were fixed as per the procedure, the conclusion has been arrived at by the Taluka Inspector of Land Records that the defendants have made encroachment to the extent of 31 R on the land of plaintiff. No substantial question of law is involved in this case, and therefore, he prayed for dismissal of the appeal.

8. At the outset, it can be seen that the suit was based on the measurement that was carried out prior to the date of the suit. The measurement was carried out on 18-02-2012 and the boundaries

were fixed on 09-03-2012, whereas the suit was filed on 13-06-2012. After the defendants had filed the written statement denying the claim of the plaintiff, neither the plaintiff nor the concerned Court found it necessary to have an admitted map on record. Further even after the testimony of PW. Murmure, the Taluka Inspector of Land Record was concluded, yet there was no such attempt. Further it can be seen from the Judgment of the First Appellate Court that there was no such attempt during the pendency of the appeal to have an admitted map on record. Therefore, now it is required to be seen as to whether the measurement that was carried out by the Taluka Inspector of Land Records and the map drawn by him Exhibit 42 was sufficient or it requires the matter to be remanded.

9. The testimony of Taluka Inspector of Land Records PW. Murmure would show that in his examination-in-chief he states that he had issued notices to the adjoining owners of Gut No.6. The first and the foremost fact that is required to be considered is that the application that was filed by the plaintiff was in respect of measurement of Gut No.6 only. In his entire examination-in-chief he has not stated that he had measured Gut No.5 also. Now it can

be seen from the cross-examination of this witness that the measurement of Gut No.5 was also necessary taking into consideration the fact that Gut No.5 and 6 were the part of same survey number. In his cross-examination this witness says that there is no 7/12 extract of Survey No.6, but then he says that, the original land of Survey No.6 was admeasuring 18 Acres 27 Gunthas comprising of 4 Gunthas of barren land. He gives two sub-divisions of said survey number, but then he says that, in his file there is no map drawn by the Consolidation Officer. Definitely the boundaries those were fixed by dividing the original survey number ought to have been considered by him. Further in his examination-in-chief itself he ought to have stated about the method of measurement carried out by him and then after measuring there was a super imposition technique adopted by him to arrive at a conclusion that there is encroachment. Further in his cross-examination he has stated that he had not taken the 7/12 extract of Gut No.5, and therefore, he was not even able to tell the measurement of Gut No.5. Here, at this stage reliance can be placed on the observations in the decision of *Ushabai w/o Sharadchandra Bannore (Supra)* wherein the elaborate procedure as well as its importance was laid down : -

"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."

Further, in the subsequent Judgments, the same ratio has been led down and further this Court Bench at Nagpur has taken further view that if the Trial Court fails to take such map on record in view of decision in *Ushabai w/o Sharadchandra Bannore (Supra)* then, the First Appellate Court should make an endeavour to have the admitted map on record. The relevant observations 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.”

The said ratio in case of *Sulemankhan (Supra)* was reiterated in *Meenadevi w/o Vasdev Vatnani Versus Narmadabai @ Leelabai w/o Gopaldas Zanwar*, reported in [2015 (6) Mh.L.J.] 578. Therefore, it is required to be seen from these pronouncements that, there was a necessity to have a map drawn in the suit which can be said to be an admitted map.

This ratio is continued till recently delivered Judgments by this Court in *Arunrao Jagannatrao Deshmukh v. Rajabhau s/o Manikrao Deshmukh (Second Appeal No.294 of 2017, decided on 02-04-2019)* and in *Chandkhan Faridkhan Patel and Others v. Mehrunissa Begum*

w/o Gaffurkhan Patel and Another (Second Appeal No.67 of 2017, decided on 22-07-2019). Therefore, this Court time and again is impressing on the Trial Courts that they should have an admitted map in a suit for removal of encroachment and possession, but it appears that the said procedure is still not followed. Under such circumstance, as there is a necessity of admitted map in this case and the fact that the Taluka Inspector of Land Records had not measured land Gut No.5 also, the matter deserves remand to the Trial Court.

10. In view of the fact that this Court is of the opinion that the matter deserves remand and this Court is not strictly admitting the second appeal as contemplated under Section 100 of Code of Civil Procedure, there is no necessity to formulate substantial question of law, however necessary directions needs to be given to the learned Trial Judge in view of the above said legal pronouncements. Hence, following order.

ORDER

- 1) The second appeal is hereby partly allowed.
- 2) The Judgment and decree passed by learned 2nd Jt. Civil Judge Junior Division, Nanded in RCS No.877 of 2012 dated 27-06-2014 and Judgment and decree passed by

learned Adhoc District Judge-3, Nanded in RCA No.102 of 2014 dated 15-02-2017, are hereby set aside.

3) The Regular Civil Suit No.877 of 2012 is restored to the file of 2nd Jt. Civil Judge Junior Division, Nanded with following directions : -

A) After appearance of the plaintiff/ respondent before the Trial Court, appellant 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.

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 2012 is being restored today to the File of learned 2nd Joint Civil Judge Junior Division, Nanded, 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 08-02-2021.

8) No order as to costs.

9) Civil Application No.90 of 2018 in SA/2/2018 stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.