

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.76 OF 2013

Ramratan Budhai Vishwakarma
Since deceased through his L.Rs.and others
VERSUS
Damu Kama Patil Since deceased through his L.Rs.

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Advocate for Appellants : Mr. M. S. Kulkarni
Advocate for Respondent No.1A to 1C : Mr. S. B. Yawalkar
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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 16-09-2021

ORDER :

1. Present appeal has been filed by the original plaintiffs challenging the concurrent findings and decree by the Courts below.
2. The present appellants/original plaintiffs had filed Regular Civil Suit No.425 of 1986 for possession, mandatory injunction and damages. The said suit came to be dismissed on 19-10-2006. They preferred Regular Civil Appeal No.285 of 2006 before District Court, Jalgaon. It was heard by learned District Judge-1, Jalgaon and dismissed on 19-03-2012. Hence, the present second appeal.
3. Heard learned Advocate Mr. M. S. Kulkarni for appellants and learned Advocate Mr. S. B. Yawalkar for respondents No.1A to 1C. In order to cut short, it is stated that both of them have made

submissions in support of their respective contentions.

4. At the outset, it is to be noted that the learned Trial Judge has noted all the evidence that was led by the parties and a detailed order has been passed. The plaintiffs had claimed that they are the owners of the suit property and the defendant has made encroachment. That fact was denied by the defendant and, therefore, issues were framed. Though there was no direct issue in respect of proof of ownership of the plaintiffs, yet when it was challenged by the defendants in their written statement, and the plaintiffs were claiming possession of the same, they ought to have produced all the evidence which was in their favour to prove the ownership. In fact, the issue of ownership is impliedly covered under issue No.1. However, both the Courts below have held that the plaintiff has failed to produce and prove the sale deed. In fact, there is no dispute in respect of plaintiffs ownership over City Survey No.3024 but the suit property was City Survey No.3025 which was stated to be admeasuring 20.1 Square Meter situated in the city of Bhusawal. According to the plaintiffs, their predecessor had purchased it on 12-10-1983 from one Fazale Abbas Kasam Ali by registered sale deed. In the normal course, the said sale deed

would be in possession of the plaintiffs, yet for the reasons best known to them they have not produced it. Production of mere property card will not prove the ownership.

5. Another fact that is also recorded by both the Courts below is that though the appellants had applied for appointment of Taluka Inspector of Land Records as Court Commissioner and accordingly the Court Commissioner was appointed, the report along with the measurement map was produced, but no pains were taken by the plaintiffs/appellants to examine the said Cadastral Surveyor. The measurement map and the report of the Court Commissioner is against the plaintiffs. After the receipt of that report, it appears that the appellants/plaintiffs had not resorted to provisions under Order 26 Rule 10 (3) of the Code of Civil Procedure. The said provision can definitely be exercised by the Court *suo motu* if it comes to the conclusion that the report is not satisfactory and some more act is required to be got done through the Court Commissioner. The said provision can be used by the parties to the suit also to show that in fact the report cannot satisfy the Court and without there being a proper assistance to the Court when Court Commissioner is appointed, the matter cannot proceed further. The said provision

under Order 26 Rule 10 (3) of the Code of Civil Procedure is seldomly used by the parties as well as the Court themselves. In fact, if such procedure is adhered to, then any confusion that would be created later on can be avoided and if at all by giving certain directions to the Court Commissioner which would be helpful to remove the doubts, then a clear picture may emerge before the Courts.

6. Thus in this case, in spite of having measurement got done from Court Commissioner, yet that report could not have been considered in favour of the plaintiffs.

7. When the plaintiffs had failed to prove the title as well as the fact of encroachment, it will have to be concluded that the suit has been rightly dismissed and the appellate Court has also rightly dismissed the appeal.

8. No substantial question of law is arising in this case requiring admission of the second appeal. Hence, second appeal stands dismissed at the threshold.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-