

1. Present appeal has been filed by original defendant, challenging concurrent judgment and decree passed by both the Courts below. Present respondent – original plaintiff filed RCS No. 107/2008 before Joint Civil Judge, Junior Division, Gangakhed, District Parbhani for declaration of ownership and removal of encroachment and possession. The said suit came to be decreed on 30.1.2010. The appeal filed by the present appellant being RCA No.6/2010 before the learned Additional District Judge-1, Gangakhed, which came to be dismissed on 14.6.2013 by leaned Adhoc

(2)

District Judge-1, Gangakhed. Hence, this Second Appeal.

2. Heard learned Advocates appearing for the respective parties.

3. It has been vehemently submitted on behalf of the appellant that both the Courts below have not considered the evidence and the law points properly. Both the Courts have relied on measurement that was carried out by T.I.L.R., Gangakhed on 28.2.2008. However, it has been ignored by both the Courts below that there was no notice served to the defendant prior to measurement and he was not present at that time. If the measurement had taken place behind his back, then it ought to have been brushed aside and there ought to have been attempt to get the land measured once again to have an admitted map before the Court. None of the Courts have done that and, therefore, it is arising substantial question of law.

4. Per contra, learned Advocate for the respondent, supported the reasons given by both the

(3)

Courts below and submitted that substantial questions of law are not arising in this case.

5. At the outset, it is to be noted that there is no dispute that the plaintiff is owner of Gut No.51 to the extent of 91 Ares and later on he has purchased 12 Ares land from one Pandurang and Jairam Phad on 15.5.1973. After the purchase of the land by the plaintiff, the defendant had purchased some portion from same Gut number from said Pandurang and Jairam. Thereafter, they had started digging and destroying the southern boundary of the plaintiff's land. According to the plaintiff, the defendant has encroached to the extent of 10 Ares and it has been so depicted in the map after the measurement was carried out.

6. The defendant denied all the contentions, but admitted that the plaintiff is the owner. It is contended that defendant's father — Wasudeo purchased 86 Ares land from Pandurang and Jairam on 25.4.1975 and thereafter the defendant is in possession. He has not made any encroachment.

7. The plaintiff has examined himself and the T.I.L.R.; whereas the defendant has examined himself and three witnesses to support his contention. After considering the evidence on record, the learned Trial Judge held that the plaintiff has proved that defendant has made encroachment over the plaintiff's land to the extent of 10 Ares. The possession of that area is directed to be given to the plaintiff. As aforesaid, the appeal preferred by the present appellant has been dismissed.

8. Perusal of the testimony of Cadastral Surveyor would show that he had made a categorical statement that the notices were given to the defendant to remain present on the day when the measurement would be carried out. The notice was given Under Posting Certificate. When he went to the spot on 28.2.2008, the defendant was present. However, after the panchanama was drawn, according to the Cadastral Surveyor, the defendant has refused to put signature on the panchanama. Note of the same has been taken by him. Now, the defendant is coming with a case that the notice was

(5)

not received to him. Except bare contention, there is nothing on record to show that he had not received such notice. In fact, when the address is not in dispute, then communication made through under certificate of posting, can be said to have been received by the defendant by a corollary presumption under Section 27 of the General Clauses Act. Further, if we consider cross-examination of the Cadastral Surveyor, taken on behalf of the defendant, except denial of the statement about receipt of the notice of the T.I.L.R., there is nothing. No doubt that measurement was carried out prior to the suit, but nothing has been produced on record by the defendant to show that there was any kind of grudge in the mind of the Cadastral Surveyor against him or any such reason to give false report. Rather when opportunity was given to the plaintiff in cross-examination to point out as to whether there is any kind of fraud or falsity in the report, he claimed his ignorance. The Cadastral Surveyor has specifically denied that the defendant was not present at the time of measurement. He has stated as to which land was measured by him and how he has arrived at the

conclusion that there is encroachment to the extent of 10 Ares. He has produced C-sheet as well as A-sheet on record. If there is nothing in the cross-examination, which will destroy his examination-in-chief, then definitely testimony of the Cadastral Surveyor was reliable. Accordingly, it has been relied on by both the Courts below.

9. The defendant has examined three witnesses to support his contention that he has not made any encroachment. Those witnesses are adjacent owners. However, it is to be noted that their testimonies cannot be given weightage when the Expert's opinion shows that the defendant has made encroachment. In his testimony DW 1 - Shridhar has not even denied that the measurement had taken place on 28.2.2008 and that he was not present when the measurement was carried out. In the cross-examination, he has also denied it. When his examination-in-chief is silent on the point of denial, when, in fact, he ought to have given explanation about the said fact as to how the notice under Certificate of Posting, would not have received by him; there is no explanation. The other

(7)

witnesses cannot be relied, as aforesaid, and so also their cross-examination would show that they do not know the extent of the area of the disputed property.

10. When all these facts were considered by both the Courts below in proper perspective, it cannot be said that the scanning of evidence done by them is perverse. There is absolutely no necessity to disturb the concurrent findings.

11. No substantial questions of law, as contemplated under Section 100 of CPC, are arising in this case, requiring admission of the Second Appeal. Hence, the Second Appeal stands dismissed. Pending Civil Application, if any, stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV