IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.97 OF 2013

WITH

CIVIL APPLICATION NO.1157 OF 2013
IN SA/97/2013

LALITADAS AMBADAS DOIPHODE

VERSUS

VIJAY CHAGAN THAKARE

...
Advocate for Appellant : Mr. V. C. Solshe
Advocate for Respondent : Mr. D. P. Deshpande
…

CORAM : SMT.VIBHA KANKANWADI, J.

DATE : 22-10-2021

ORAL ORDER :

1. The present appeal has been filed by the original plaintiff challenging the perverse findings. Appellant/original plaintiff had filed Regular Civil Suit No.29 of 2002 before Joint Civil Judge, Junior Division, Tuljapur for possession and mesne profits. It was the contention of the original plaintiff that the defendants have encroached to the extent of 7.49 square meter of City Survey No.1448. The respondent/ original defendant denied it and it was his contention that plaintiff in collusion with measurement officer has shown the

encroachment. The notice of measurement was not served upon him and measurement has done behind his back and prior to the filing of the suit.

2. Parties have led evidence, especially the plaintiff, who had got the land measured prior to the suit, examined Cadestral Surveyor PW 1 Dnyandeo Sarje. The learned Trial Judge believed the evidence adduced by the plaintiff and it has been held that the plaintiff has proved the encroachment at the hands of defendant. The suit came to be decreed on 06-08-2007.

3. Defendant filed Regular Civil Appeal No.202 of 2007, it was allowed by learned Principal District Judge, Osmanabad, on 25-06-2012 and set aside the Judgment given by Civil Judge, Junior Division, Tuljapur. Hence, present second appeal.

4. Heard leaned Advocate Mr. V. C. Solshe for appellant and learned Advocate Mr. D. P. Deshpande for respondent.

5. Learned Advocate Mr. V. C. Solshe appearing for the appellant submitted that the approach of the learned Principal District Judge in deciding the first appeal was perverse. He had not framed proper points for determination as required under Order 41 Rule 31 of the

CPC. In fact, he did not consider the prayer to have joint measurement though it was made by the respondent. In fact, the defendant had not raised in ground challenging the measurement in the appeal memo but before the lower Court it was so contended that the measurement was not proper. The surveyor in his measurement had clearly stated that the vacant suit strip of 7.49 square meters is part and parcel of Survey No.1411/1 which belongs to the plaintiff/appellant. If at all the First Appellate Court was not agreeing with the suit measurement, he could have ordered joint measurement. The appellant/plaintiff had contended that the defendant is in possession of the suit strip which was part and parcel of the ownership of the plaintiff and the defendant had not contended that he has become the owner by adverse possession. Under such circumstances, by taking a reverse the suit ought not to have been dismissed. He, therefore, submitted that substantial questions of law are arising in this case.

6. Per contra, the learned Advocate appearing for the respondent/defendant supported the reasons given by the First Appellate court and submitted that it has been rightly considered that the plaintiff has admitted that the defendant uses the lane i.e.

the disputed portion. The evidence of the Cadastral Surveyor was not believable at all. The suit was rightly dismissed and, therefore, no substantial question of law is arising in this case.

7. At the outset, the basic principles required to be considered here that the First Appellate Court should have mandatorily frame the points for determination as contemplated under Order 41 Rule 31 of the CPC. It also appears that the learned First Appellate Court has not written the Judgment as contemplated in the ratio laid down in *Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs., reported in (2001) 3 Supreme Court Cases 179*. If the learned First Appellate Court was not agreeing to the evidence collected or was not satisfied with the map of the surveyor then he could have got the measurement done at the appellate stage also. The plaintiff had come with a case that the Northern side strip admeasuring 7.49 meters was part and parcel of the suit property and it was kept open by him. Defendant has made encroachment upon the same. In this case, the Cadastral Surveyor was appointed as Court Commissioner. Plaintiff had given application to measure the land and after issuing notices on 19-10-2001 and 20-10-2001, the actual measurement was done by PW 2 Dnyandeo Sarje on 20-10-2001. He has shown

encroachment to the extent of 7.49 square meter. Thereafter, the suit was filed on 13-02-2002. There was no attempt by the defendant to get the land measured once again during the pendancy of the suit. Important point to be noted is that what has come on record is that there was measurement of CTS No.1411/1 only. If we consider the disputed map (Exhibit 33) then major portion of the property is 4111 and the disputed area belonging to the plaintiff is stated to be 1411/1. Towards its East there is road, towards North 1448, towards West 1447 and towards South there is portion of 1411. Defendant is the owner of City Survey No.1447, however, he uses the road from City Survey No.1448 and it is stated that in the open space of 1411/1 he has erected a small tin shed (Tapri). When disputed property is surrounded by other property and if the appellate Court was of the opinion that the joint measurement ought to have been done, he could have ordered the same. It appears that both the Courts below have not adhered to the decisions of this Court in the past which have been given in any suit involving question of encroachment. In a catena of Judgments, especially in *Ushabai w/o Sharadchandra Bannore v. Wasudeo Baliramji Mehare and others, reported in 2004 (2) Mh.L.J. 594 (Bench At Nagpur),* it has been held that,

> *"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."*

The First Appellate Court was not powerless to direct a joint measurement and to have that measurement on record which can be said to be an admitted map after the measurement. This Court would rely on the observations of the earlier Judgment of this Court 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."

8. Only one point has been framed by the First Appellate Court is that, merely because the plaintiff is not using portion of open space in CTS No.1448 for ingress and egress, that does not mean that he cannot object for anybodies encroachment. Further when he has come with a case that the encroachment on his land, there was no point in considering whether he is exercising the right of ingress and egress from another property or not. Under such circumstances, when both the Courts below appears to have not tried to have complete evidence on record, the matter deserves remand to the Trial Court with a directions to get the land measured at the cost of plaintiff. Hence, second appeal stands partly allowed.

ORDER

1) The second appeal is hereby partly allowed.

2) The Judgment and decree passed by learned Jt. Civil Judge Junior Division, Tuljapur in RCS No.29 of 2002 dated 06-08-2007 and Judgment and decree passed by learned District Judge, Osmanabad in RCA No.202 of 2007 dated 25-06-2012, are hereby set aside.

3) The Regular Civil Suit No.29 of 2002 is restored to the file of Jt. Civil Judge Junior Division, Tuljapur with following directions :-

A) After appearance of the parties before the Trial Court, original plaintiff to file application for appointment of Court Commissioner under Order XXVI Rule 9 of Code of Civil Procedure, within a period of two (2) weeks from the date of appearance before learned Trial Court for getting the lands measured.

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, against him.

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 2002 is being restored today to the File of learned Joint Civil Judge Junior Division, Tuljapur, 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 Trial Court on 22-11-2021.

8) No order as to costs.

9) The second Appeal stands disposed of. Pending civil application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.