

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

**SECOND APPEAL NO.470 OF 2021
WITH
CIVIL APPLICATION NO.11907/2021**

1. Pandit Gurumukh Chavan
and Another **= APPELLANTS**
(orig.Plaintiffs)

VERSUS

1. The State of Maharashtra & Anr. **= RESPONDENTS**
(Orig.Defendants)

Mr.SG Chapalgaonkar, Advocate for Appellants;
Mr.AM Phule, AGP for Respondent-State.

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 29th October, 2021.

PER COURT :-

1. Present appeal has been filed by original plaintiffs to challenge concurrent judgments and decree passed by the Courts below.

2. The present appellants-original plaintiffs had filed Regular Civil Suit No.6/2012 before 4th Joint Civil Judge, Senior Division, Jalgaon, for declaration and permanent injunction. The said suit came to be dismissed on 6.8.2018. Their appeal being Regular Civil Appeal No. 155/2018 has been dismissed by the leaned Ad-hoc

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District Judge-2, Jalgaon on 11.10.2021. Hence, this Second Appeal.

3. Heard learned Advocate and learned AGP appearing for the respective parties.

4. It has been vehemently submitted on behalf of the appellants-original plaintiffs that both the Courts below failed to appreciate the facts of the case and issues involved in the same. The Trial Court had not framed appropriate issues. In fact, while framing the issues, burden ought to have been cast on the shoulders of the defendants to prove the measurement dated 22.9.2011 carried out on behalf of them, was legal, proper and in accordance with law. The case of the plaintiffs is that they are real brothers and the suit properties are owned by them. In fact, after the purchase of the property by plaintiff No.1, it was partitioned between plaintiff Nos.1 and 2 as per the boundaries of the same given by them in para No.1 of the Plaint. The plaintiff had dug a well towards West-South corner and he was taking irrigated crops. Defendant No.2 had not acquired any land from the

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southern side of the original Gut No.25/1 and, therefore, the plaintiffs are the owners and possessors of 47 Ares land towards southern side. The plaintiffs had not encroached upon the land of the percolation tank. However, defendant No.2, under pressure of some political rivals of the plaintiffs, applied to T.I.L.R. for measurement of Gut No.25. Accordingly, the measurement was carried out and it was shown that the plaintiffs had made encroachment to the extent of 47 Ares. The plaintiffs have taken objection for the measurements, however, in view of the challenge to their title, they filed the suit. Though the issue was framed by the Trial Court as to whether the plaintiffs prove that the measurement carried out on behalf of the defendant No.2 is illegal, it can be said that the burden is negated. It ought to have been saddled on the shoulders of the defendant No.2 to prove that it is legal. Substantial questions of law are, therefore, arising in this case. There is absolutely no documentary evidence produced by the State Government to show that they had ever acquired the land belonging to the plaintiffs.

5. Learned Advocate for the appellants further submitted that this Court can appoint Court Commissioner and see as to whether the plaintiffs had made encroachment. In such cases involving encroachment, appointment of Court Commissioner would be the appropriate step which was not taken by both the Courts below and, therefore, after admitting the Second Appeal, this appointment can be made. He relied on a decision in the case of Ram Lal and Ors. Vs. Salig Ram and Ors. - 2019 SCC Online SC 121, wherein it has been observed by the Apex Court thus, -

"18. The fact that the Local Commissioner's report, and for that matter a properly drawn up report, is requisite in the present case for the purpose of elucidating the matter in dispute is not of any debate, for the order dated 24.01.1991 passed by the First Appellate Court having attained finality whereby, additional issues were remitted for finding on the basis of Local Commissioner's report. In the given set of facts and circumstances, we are clearly of the view that if the report of the Local Commissioner was suffering from an irregularity i.e., want of following the applicable instructions, the proper course for the High Court was either to issue a fresh commission or to remand the matter for reconsideration but the entire suit could not have been dismissed for

any irregularity on the part of Local Commissioner. To put it differently, we are clearly of the view that if the Local Commissioner's report was found wanting in compliance of applicable instructions for the purpose of demarcation, it was only a matter of irregularity and could have only resulted in discarding of such a report and requiring a fresh report but any such flaw, by itself, could have neither resulted in nullifying the order requiring appointment of Local Commissioner and for recording a finding after taking his report nor in dismissal of the suit. Hence, we are unable to approve the approach of High Court, where after rejecting the Commissioner's report, the High Court straightway proceeded to dismiss the suit. The plaintiffs have been asserting encroachment by the defendants on their land and have also adduced oral and documentary evidence in that regard. As noticed, the First Appellate Court had allowed the appeal and decreed the suit filed by the plaintiff not only with reference to the Commissioner's report but also with reference to the other evidence of the parties. Unfortunately, the High Court appears to have overlooked the other evidence on record.

19. In the totality of circumstances, in our view, for just and effectual determination of all the questions involved in the matter, the proper course is of issuing a fresh Commission and for direction to the Trial Court to decide the entire suit afresh on the issues as originally framed as also on the additional issues after taking the report of the Local Commissioner afresh

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and affording an opportunity to the parties to submit their objections, if any."

6. Further reliance has been placed on the decision in the case of Bento Antonio Gomes alias Antonio Bento Gomes Vs Rosario Salvador Carneiro and Ors. - 2014 (4)Mh.L.J. 366, wherein this Court observed that, when there was boundary dispute between the parties in respect of immovable property and evidence of both the parties was not accepted by the Appellate court, it was necessary for the Appellate court to remit the matter to Trial Court to appoint an expert as Commissioner for doing local investigation. Though application for appointment was not made, the matter remitted back with direction to appoint Court Commissioner for doing local investigation.

7. Further in Haryana Waqf Board Vs. Shanti Sarup and Ors. - (2008) 8 SCC 671, wherein, it has been held that, Second Appeal should not have been dismissed summarily and Local Commissioner ought to have been appointed for demarcation of land.

8. Further in the case of Fatima Gomes Furtado and Ors. Indirabai Vinayak Lotlikar and Ors. - 2016 (2) Mh.L.J. 905, this Court reiterated the point of appointment of Court Commissioner so also in the case of Jamir Khan s/o Amir Khan Vs. Dharamchand s/o Roopchand Sawala and Ors. - 2018(1) Mh.L.J. 174.

9. Per contra, learned AGP strongly opposed admission of the Second Appeal and supported the reasons given by both the Courts below. He submitted that there was ample opportunity to the appellants-plaintiffs to get Court Commissioner appointed before the Trial Court as well as the first Appellate Court and when no such attempt was made it cannot be sought for the first time in the Second Appeal.

10. At the outset, it is to be noted that the suit filed by the present appellants was not for deciding the encroachment. They were claiming to be owners of 47 Ares land on the southern side, which was then denied by the respondents-defendants. Therefore, it was for the plaintiffs to prove

existence of such land and then to show ownership and possession of the same. The catena of judgments, relied on by the learned Advocate appearing for the appellants, will not be applicable in the instant case as those directions are given in the suits involving different nature of disputes. Here when a specific plea about ownership is raised, then it is for the plaintiffs to prove as to how the ownership has come to them. Further, if we consider the evidence of the plaintiffs' witness PW-1 – Prakash, it can be seen that he had knowledge about the measurement that was carried out on 22.9.2011. The plaintiffs had legal remedy to apply for super measurement called "*Nimtana*" to the appropriate authority. In his cross-examination, he has admitted that there is land bearing Gut No.25/4 and 25/5 towards southern side of Gut No.25. He claimed ignorance as to whether notices were issued to the adjoining owners prior to the measurement. He never raised any objection regarding the measurement of Gut No.25 to office of T.I.L.R. Therefore, when he never raised any objection, though he has right or he had right at the appropriate time also, then he cannot raise

such point now in the Second Appeal when in addition to the application for *Nimtana*, he could have got the Commissioner appointed before the Trial Court as well as first Appellate Court.

11. As regards the burden that was put and wrong framing of issues also, it cannot be heard at the stage of Second Appeal when there was ample opportunity to raise the same before the appropriate Courts that too at appropriate stage.

12. Well reasoned orders have been passed by both the Courts below for arriving at the conclusion taking into consideration the evidence. The defendants have examined Sub-Divisional Engineer – Sanjeev Dalwala and he has produced many documents. He has also produced the documents in respect of acquisition of the land. Therefore, when such kind of evidence was available before the Courts below, then it was for the plaintiffs to show that still the area is remaining and they have not encroached upon the land of the defendants and 47 Ares land, which is alleged to be remaining, belongs to them. No case is made out to interfere.

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In view of the decision in the case of Kirpa Ram (deceased) through Lrs. and others Vs. Surendra Deo Gaur and others, [2021 (3) Mh.L.J. 250] the Second has to be dismissed at the threshold. Accordingly it is dismissed. Consequently the Civil Application stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV