

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

923 SECOND APPEAL NO.226 OF 2012

PANDURANG RAMRAO TANDALE AND ORS
VERSUS
GOVIND LIMBAJI KHADE AND ORS

...
Advocate for Appellants : Mr. Jarare h/f Thombre S. S.
Advocate for Respondents No.1, 2 : Mr. A. B. Hawale
Advocate for Respondents No.1A, 1B, 1C(i), 1C(ii), 1D, 1E : Mr. A. M.
Gaikwad.
...

CORAM : SMT.VIBHA KANKANWADI, J.

DATE : 24-08-2021.

ORDER :

1. The present appeal has been filed by the original plaintiffs challenging the concurrent findings. They had filed Regular Civil Suit No.386 of 2000 before Joint Civil Judge, Senior Division, Beed for possession of the encroached land. It was the contention of the plaintiffs that the defendants have encroached to the extent of 64 R land. The defendants denied it and it was the contention that the sale deed of the defendants is prior in time and the boundaries shown in their sale deed are intact and that much portion is in their possession. However, alternatively, they contended that they are using the said land for the last many years and, therefore, became owners by

adverse possession. The main contention of the plaintiffs is that the river Manjra which was flowing through Gut No.243 changed its path in 1989 in floods creating the two pieces of Gut No.243.

2. Parties have led evidence, especially the plaintiffs, who had got the land measured prior to the suit, examined Cadastral surveyor. The learned Trial Judge disbelieved the evidence adduced by the plaintiffs and it has been held that the plaintiffs have failed to prove the encroachment. It is also held that the defendants have failed to prove the acquisition of title by adverse possession. The suit came to be dismissed on 12-06-2007.

3. Plaintiffs filed Regular Civil Appeal No.137 of 2007, it was dismissed by learned District Judge-1, Beed on 27-09-2011. Hence, present second appeal.

4. Heard learned Advocate Mr. Jarare holding for Mr. Thombre, learned Advocate Mr. A. B. Hawale for respondents No.1 and 2, learned Advocate Mr. A. M. Gaikwad for respondents No.1A, 1B, 1C(i), 1C(ii), 1D, 1E.

5. Learned Advocate Mr. Jarare holding for Advocate Mr. Thombre submitted that both the Courts below have wrongly discarded the

evidence of the Cadestial Surveyor. As per the practice in Taluka Inspector of Land Records Office, notice was given to the defendants through under certificate posting. It ought to have been considered as served but the learned Trial Judge has held that there is no adherence to principles of natural justice. Substantial questions of law are arising in this case.

6. Per contra, learned Advocate Mr. Gaikwad appearing for respondents No. 1A, 1B, 1C(i), 1C(ii), 1D, 1E and learned Advocate Mr. A. B. Hawale appearing for respondents No.1 and 2 supported the reasons given by both the Courts below and submitted that taking into consideration the fact that the sale deed of the defendants No.1 and 2 is earlier in time and there is no change in their possession, it cannot be said that they have made any kind of encroachment.

7. At the outset, it appears that both the Courts below have not adhered to the decisions of this Court when in any suit there is a 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."

Though the suit was filed in the year 2000, it was decided in the year 2007. Therefore, the learned Trial Court ought to have considered this Judgment and ought to have appointed Taluka Inspector of Land Record as Court Commissioner once again by giving due notice to the defendants and an admitted map ought to have been got produced on record. Further, it is to be noted that the learned First Appellate Court has expressed the opinion that there ought to have been a joint measurement but no such measurement has been done. 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. If we consider the testimony of the Cadestial Surveyor

especially the cross, then it can be seen that PW.1 Shivaji Gaikwad had measured Gut No.243 and he has not made a statement that he had measured the lands of defendants also. The method of measurement has not been stated, but then he says that after the measurement he had fixed the boundaries of Gut No.243 only. In his cross-examination, he has stated that he had shown that the river is flowing through Gut No.243 but it is actually not in existence. He was unable to say since when it is not in existence but he had shown it as per the record. He had not felt it necessary that he should have taken help of the record which was available with the District Inspector of Land Record, Osmanabad. When all these shortcomings were noticed, especially by the Trial Court, the Trial Court ought to have appointed a Court Commissioner. Since the suit was for removal of encroachment then only the expert is expected to be the Court Commissioner. There ought to have been a joint measurement before concluding whether there is encroachment or not. As aforesaid, even the First Appellate Court failed to exercise its powers, however, since this Court cannot shut its eyes, the matter deserves to be remanded to the Trial Court for getting the lands measured once again. Hence, the 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 Senior Division, Beed in RCS No.386 of 2000 dated 12-06-2007 and Judgment and decree passed by learned District Judge-1, Beed in RCA No.137 of 2007 dated 27-09-2011, are hereby set aside.
- 3) The Regular Civil Suit No.386 of 2000 is restored to the file of Jt. Civil Judge Senior Division, Beed with following directions :-
 - A) After appearance of the plaintiffs/respondents 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, 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, plaintiffs 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 plaintiffs 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 2000 is being restored today to the File of learned Joint Civil Judge Senior Division, Beed, 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 03-09-2021.

8) No order as to costs.

9) The second Appeal stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-

GAWADE
VIRENDRA
J

Digitally signed by
GAWADE
VIRENDRA J
Date: 2021.08.25
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