

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 538/2019

1) Tukaram Bapu Nikode (dead)
Through Legal Representative
Ramesh Tukaram Nikode
Aged 50 years, Occu: Agriculturist
R/o Antargaon, Tah. Saoli,
District- Chandrapur.

.....APPELLANT
(ORIGINAL DEFT.)

...VERSUS...

1) Mukharu Vakatu Nikode,
Aged 69 years, Occu: Agriculturist,
R/o Antargaon, Tah. Saoli,
Distt. Chandrapur.

...RESPONDENT
(ORIGINAL PLTFF.)

Mr. Anil A. Dhawas, Advocate for appellant.

<u>CORAM</u>	<u>:- S.M. MODAK, J.</u>
<u>DATED</u>	<u>:- 06/10/2021</u>

ORAL JUDGMENT

Heard finally.

2. I have heard learned Advocate Shri Dhawas at great length on more than one occasion. The appellant is an unsuccessful defendant. Plaintiff is the owner of CTS No.461 and defendant is owner of CTS No.455 and 456. They are situated at Mouza Antargaon, Tah. Saoli, District Chandrapur. The plots of defendant

are situated on northern side of plaintiff's plot. The defendant has erected a hut/structure admeasuring 32 sq.mtrs on plaintiff's plot. (on evidence it was found of 30 sq.mtrs). Hence plaintiff filed a suit. Defendant's defence was of denial and plea of adverse possession. The suit filed by the respondent for possession by removal of encroachment and two kinds of injunctions was decreed on 18/01/2016. The defendant was directed to hand over the vacant possession of encroached portion of 30 sq. mtrs. When defendant filed first appeal, he could not convince the Court and his appeal was dismissed. That is how he has filed present second appeal.

3. The only substantial question of law argued before this Court is;

“Joint measurement of both the lands i.e. land belonging to plaintiff and land belonging to defendant was very much required” and

unless it has been carried out, it is difficult to conclude that the alleged encroachment falls on the land belonging to the plaintiff.

Earlier Appeal

4. During the hearing, it was revealed that prior to decision of the suit on 18/01/2016, Trial Court has also decided

the suit on 26/08/2005. Against said judgment, there was Regular Civil Appeal No.211/2005. The First Appellate Court at that time on 15/01/2014 was pleased to remand the suit and was pleased to appoint TILR by invoking the provisions of Order 26 Rule 9 of Code of Civil Procedure.

Documents

5. The appellant was kind enough to produce the necessary documents as per the Pursis Stamp No.01/2021. With the assistance of learned Advocate for the appellant, I have perused the said judgment. At that time, there was evidence of one Anandrao who was also a Government Surveyor. He has also measured the suit land. However, the First Appellate Court at that time found that there were certain lacuna in his measurement. That is why fresh directions were given. The directions given in paragraph no.(ii) are reproduced below:

“(ii) The Court Commissioner shall take joint measurement in presence of both the parties, their Advocates and adjoining land owners and shall prepare authenticate map by showing boundaries of both the lands of parties and encroachment if any.”

Evidence of Surveyor

6. After that, surveyor was appointed and he did measure the land. Plaintiff was cautious enough to examine him before the Trial Court. He is one Prasad Gangadhar Dhakat. Through him, the map drawn by him at Exhibit-88 is also proved. Learned Advocate has read over his evidence. He made feeble attempt to point out that there is a room for making grievance that said surveyor, Prasad Dhakate has not measured both the lands as directed by the First Appellate Court on **15/01/2014**.

7. On this background, when the evidence and map are perused, there is no scope for accepting that grievance. It is for the reason that, in his evidence he has clarified who were the persons present and amongst them plaintiff and defendant both were present. The concerned City Survey numbers are 461 and 456. He has noticed encroachment of 30 sq. mtrs. in the land bearing CTS No.456. He has also opined what ought to have been the measurement of CTS No.461 and of CTS No.456. He was thoroughly cross-examined. On its perusal, we do not find that any grievance was made to him that both the lands were not measured.

First Appeal

8. On this background, the Trial Court decreed the suit as per the judgment dated 18/01/2016. The Trial Court had given the weightage to the evidence of this surveyor and then concluded about the encroachment of about 30 sq.mtrs. Whereas the First Appellate Court after re-appreciating the evidence concluded that there is no scope for interference in the findings given by the Trial Court. The First Appellate Court also noticed the fact that after remand when this surveyor is appointed, defendant has not entered into the witness box (paragraph no.28). Even the First Appellate Court found “pleading of adverse possession were inadequate”. That is how the first appeal was dismissed. From the First Appellate Court’s judgment even it does not reveal that there was a grievance made on behalf of the defendant that surveyor has not carried out joint measurement.

9. For the above discussion, this Court does not feel that proposed substantial question of law does arise. This court feels that there is no substantial question of law involved. There is no perversity in the findings recorded by both the Courts below. Hence the appeal stands dismissed. As held by the Hon’ble Supreme Court in case of Ashok Rangnath Magar Vs. Shrikant

Govindrao Sangvikar reported in (2015) 16 Supreme Court Cases 763, there is no need to formulate substantial question of law, if this Court feels that such substantial question of law is not involved. (para 18)

JUDGE

R.S. Sahare