

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

**943 APEAL FROM ORDER NO.29 OF 2021
WITH CA/8492/2021 IN AO/29/2021**

**DINKAR DHONDIRAM CHAME
VERSUS
JALALSAB GAJBISAB BAGWAN DIED THR LRS MAINODDIN JALALSAB
BAGWAN AND ORS**

...

Advocate for Petitioner : Mr. Patil Jayant R.
Advocate for Respondents : Mr. Kedar Sunil Warad.

CORAM	:	MANGESH S. PATIL, J.
DATE	:	16.03.2022.

PER COURT :

This is an appeal under Section 104 read with Order XLIII of the Code of Civil Procedure against the judgment and order of the lower appellate court whereby in exercise of power under Order XLI Rule 23 and Rule 23A of the Code of Civil Procedure it has quashed and set aside the decree of the trial court passed in favour of the appellant/plaintiff granting him declaration that he was the owner of the plot Nos. 1 and 2 carved out from Survey No. 261/1 and directing perpetual injunction against the respondents /defendants who are in fact the legal representatives of the original defendant.

2. I have heard the learned advocates of both the sides and perused the papers including the copy of paper book of the lower appellate court.

3. The appellant asserting that he purchased plot Nos. 1 and 2 from one Maruti Chate out of the land Survey No. 261/1 and complained that the respondent/defendant who purchased couple of properties from one Vajjinath Chate along with one Govind Mundhe from land Survey No. 261/3 was obstructing his possession. He claimed declaration of his ownership

and sought injunction.

4. The respondent/defendant contested the suit by filing a written statement. He denied that suit plots purchased by the plaintiff were from land Sy. No. 261/1 and asserting that he had purchased the properties from the erstwhile owner Vaijinath Chate and there was no question of his obstruction to the appellant's plots, he prayed to dismiss the suit.

5. It appears that during the trial a surveyor was appointed as a court commissioner to carry out measurement of the properties. Even there was a superior measurement. Both these, surveyor and superior surveyor were examined as witnesses and by the judgment and order of the trial court decreed the suit *inter alia* holding that the measurement carried out was not reliable but the defendant was an attesting witness to the sale-deed executed in favour of the appellant and that he had admitted the boundaries of the suit plots during his cross-examination.

6. The lower appellate court specifically pointed out that the evidence of the surveyor and the superior surveyor was not reliable since they had carried out measurement without reference to any permanent boundary mark. Even the lay-out was not before them. It was also noticed that some portion of the house property of the respondent/defendant to the extent of 8.77 square meters was occupying the land Survey No. 261/1. It is on the basis of such a conclusion that the lower appellate court found it just and proper to direct the remeasurement to be carried out and for that purpose quashed and set aside the decree and remanded the suit for decision afresh directing remeasurement to be undertaken to ascertain the exact location of the plot Nos. 1 and 2 belonging to the appellant.

7. True it is that the power of attorney of the original defendant Mainoddin (D.W.1) during his cross-examination specifically admitted that he was an attesting witness to the sale-deed of the suit plots executed in favour of the appellant. However, conspicuously, he was not confronted

with the recitals of the sale-deed with a view to elucidate some admissions. The respondent/defendant had not disputed the fact of appellant having purchased plot Nos. 1 and 2 from land Survey No. 261/1. Ex-facie, the dispute was more in respect of identity of those plots and the exact location thereof. Though the trial court in para No. 7 observed that he admitted the boundaries of the suit plots, the learned advocate for the appellant in spite of having taken me through the entire cross-examination could not point out any such admission. Needless to state that even in the written statement the respondent/defendant never admitted the boundaries of the suit plots. It is thus quite clear that the dispute is clearly in respect of exact location of the suit plots purchased by the appellant rather than ownership.

8. Admittedly, the land was measured twice by the court commissioners Mr. Bhosale and Mr. Sarje. Both were examined as witnesses and as has been noted by the lower appellate court, they had mechanically carried out the measurement without even taking care to find out the permanent boundary marks without which the measurement carried out by them cannot be said to be perfect one. In fact, both the courts below have concurred in observing that the measurement carried out by them is of no avail and is of no help in arriving at any conclusion on either side.

9. Precisely for this reason, the lower appellate court has reached a plausible conclusion by observing that in the absence of remeasurement strictly in four corners of law, it would not be appropriate to decide the suit and has exercised the powers under Order XLI Rule 23 and 23A in remanding the suit for decision afresh by taking care to direct a further measurement to be carried out in accordance with law.

10. There is no perversity, arbitrariness or illegality.

11. The appeal is dismissed with costs.

12. The observations made herein are confined to the decision of the

present appeal and the trial court shall not feel persuaded by any of those.

13. The parties shall appear before the Trial Court now on 19.04.2022 and there shall be no need for it to issue notices/summons to them.

14. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)

mkd/-