

Dusane

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.107 OF 2017
WITH
CIVIL APPLICATION NO.245 OF 2017**

Ramchandra Khandu Marle ...Appellants
(deceased) thru LRs
Balasaheb Ramchandra Marle
& Ors.

V/s.

Ramchandra Babu Hubale ...Respondents
(deceased) thru Dilip Ramchandra
Hubale & Ors.

BHALCHANDRA
GOPAL DUSANE

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Mr. Anilkumar Patil for Appellants/Applicants
Mr. Ranjeet H. Patil for Respondents.

**CORAM: MADHAV J. JAMDAR, J.
DATE: 19th DECEMBER, 2022**

P.C.:

1. Heard Mr. Anil Patil, learned Counsel appearing for the Appellants and Mr. Ranjeet Patil, learned Counsel appearing for the Respondents.

2. Mr. Anil Patil submitted that the substantial questions of law involved in this appeal are the grounds (J) and (K) raised in the appeal memo. The said grounds read as under :

j) Whether lower Courts erred in holding that the report submitted by Court Commissioner is true and conclusive proof that the Appellants have encroached on the land which is part and parcel of the land gat no. 558 especially when the Court Commissioner was not examined by the Respondents to prove the correctness and genuineness of the report submitted and maps prepared by the Court Commissioner in respect of the suit property ?

k) The learned lower Courts erred in not appreciating the case laws filed by the Appellants and wrongly relied upon the case laws filed by the Respondents herein ?

3. To appreciate substantial questions of law, certain factual aspects are required to be noted. The Respondent-Plaintiff filed Regular Civil Suit No. 277 of 1979 for recovery of possession of encroached portion of the suit property and for perpetual injunction.

4. The learned Trial Court decreed the suit and the learned First Appellate Court set aside the decree and remanded the suit to the Trial Court with a direction to allow the parties to adduce additional evidence and to decide the matter again. After remand, the learned Trial Court decreed the suit by the impugned judgment and decree dated 2nd August 2008 and the appeal filed challenging the same was dismissed by the learned

First Appellate Court by judgment and decree dated 24th August 2016.

5. Both the Courts below have relied on the report of the Court Commissioner, which is at Exhibit 39. Both the Courts have observed that the objection has not been taken by the Appellant to the report of the Court Commissioner and the report of the Court Commissioner shows that there is an encroachment. As objections are not filed to the Court Commissioner report, there is no substance in the first substantial question of law raised by the learned Counsel appearing for the Appellant.

6. Mr. Anil Patil relied on the judgment of this Court, in the matter of **Ramchandra Bhikaji Jagtap V. Dudharam Langruji Padvekar**¹. In the said judgment, it has been held that there is no presumption of accuracy in respect of the map or plan which is made for a particular cause and it goes without saying that a map prepared for the purpose of a particular suit must, therefore, be duly proved and it is not admissible in evidence in absence of proof of its accuracy. The onus of proving that such a map is accurate lies on the party who produces it. Therefore appointment of Commissioner under Order XXVI, Rule 9 of the Code of Civil Procedure was directed. The said judgment

¹ 2004(1) Mh. L.J. 278

has no application to the facts of this case, as in the present case map is not produced but the Court Commissioner was appointed and he submitted the report showing the encroachment and objection has not been taken to the said report by the Appellants. In view of this, there is no substance in the second substantial question of law raised by the learned Counsel appearing for the Appellant.

- 7.** Second Appeal is dismissed with no order as to costs.
- 8.** In view of dismissal of the Second Appeal, nothing survives in the Civil Application and same is accordingly disposed of.
- 9.** Record and Proceedings be sent to the learned Trial Court.

(MADHAV J. JAMDAR, J.)