

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

**APPEAL AGAINST ORDER NO.6 OF 2021
WITH
CIVIL APPLICATION NO. 9 OF 2021**

BABAN S/o. MADHAVRAO MALPE)
Aged about 73 years, Occ : Agriculturist)
R/o. Warud, Tahsil-Warud, Bhawani Chauk,))
Warud, District Amravati)...**APPELLANT**

Vs.

YOGESHWAR S/o. PURUSHOTTAM)
KANUGO)
Aged about 62 years, Occupation Business)
R/o. Warud, Tahsil-Warud, Bhawani Chauk,))
Warud, District Amravati)...**RESPONDENT**

Mr. Rohit Joshi, Advocate for the Appellant.

Mr. S.P. Kshirsagar, Advocate for the Respondent.

CORAM : V.G.BISHT, J.

RESERVED ON : 8th APRIL 2022

PRONOUNCED ON : 6th JUNE 2022

JUDGMENT :

1 The appellant–original defendant has preferred the present appeal under Order 43 Rule 1(u) of the Code of Civil Procedure, 1908 (the Code) against judgment and order dated 27th November 2020 passed by the learned Principal District Judge, Amravati, in Regular Civil Appeal No.42

of 2013 thereby setting aside the judgment and decree of learned Civil Judge, Junior Division, Warud, passed in Regular Civil Suit No.22 of 2004 and remanding back the matter to the said Court with a direction as given in paragraph 25 of the impugned judgment and order of the learned Principal District Judge, Amravati.

2 Brief facts of the case are as under :

- (a) The respondent-original plaintiff had filed a suit for declaration and perpetual injunction being Regular Civil Suit No.22 of 2004. It is the case of respondent-plaintiff that he is the owner of land bearing Survey No.1722, House Property No.176, Ward No.,11, Warud along with a well in the said property. The residential house of the appellant-defendant is abutting the western boundary of the suit property of the respondent-plaintiff. The respondent-plaintiff sought a decree for declaration of ownership over the said well and that no person other than him had a right to use the said well. The respondent-plaintiff also alleged that since the appellant-defendant is creating obstruction in the construction activity undertaken by him in his property, he has no right to do so and he should be permanently restrained.

- (b) The appellant-defendant resisted the claim and denied all the contentions of the respondent-plaintiff in respect of exclusive ownership of well and about the alleged interference in the construction activity.
- (c) According to the appellant-defendant he is the owner of the adjoining land bearing Survey No.1724 and 1725 and likewise other two adjoining Survey Nos.1726 and 1727 are owned by his family members.
- (d) The appellant-defendant by way of counterclaim claimed the exclusive ownership over the well of his family members since for last more than seventy to eighty years. He also alleged that under the garb of construction activity, the respondent-plaintiff, infact, is committing encroachment in his property and thus sought perpetual injunction against the interference in his property including the well.
- (e) It then appears that the suit and counterclaim were decided vide judgment and decree dated 16th December 2005 passed by the learned Civil Judge, Junior Division, Warud. The learned trial Court

held that the suit well was a part of the Survey No.1722 owned by the respondent-plaintiff and restrained the appellant-defendant from interfering with possession of the suit well. The counterclaim of the appellant-defendant was also partly decreed restraining the respondent-plaintiff from making any construction in Survey No.1724 and 1725 owned by the appellant-defendant.

- (f) In view of above, the appellant-defendant preferred Regular Civil Appeal No.182 of 2008 challenging the said judgment and decree dated 16th December 2005. The respondent-plaintiff also filed cross objection in the said appeal. The appeal and the cross objection came to be decided vide judgment and order dated 4th July 2012 passed by the learned Adhoc District Judge-2 Amravati. The learned Adhoc District Judge was pleased to set aside the judgment and decree dated 16th December 2005 passed by the learned trial Court and remanded the matter back with a direction to appoint Court Commissioner from the office of Tahsil Inspector of Land Records (T.I.L.R.) for measurement of the property and to identify location of the suit well.

- (g) The Court Commissioner on his part carried out measurement and submitted report stating that the suit well was a part of Survey No.1724 owned by the appellant-defendant and that the respondent-plaintiff had committed encroachment to the extent of 8.00 sq.meters in Survey No.1725 and 1.00 sq.meter in Survey No.1724 owned by the appellant-defendant. In view of the aforesaid, the suit filed by the respondent-plaintiff was dismissed and the counterclaim filed by the appellant-defendant was allowed vide judgment and decree dated 12th February 2013 passed by the learned Civil Judge, Junior Division, Warud.
- (h) The respondent-plaintiff preferred an appeal challenging the aforesaid judgment and decree dated 12th February 2013 vide Regular Civil Appeal No.42 of 2013. The learned Principal District Judge, Amravati decided the appeal vide judgment dated 27th November 2020 and again remanded the matter for fresh measurement in order to ascertain the boundaries of Survey No.1722 owned by the respondent-plaintiff and Survey Nos.1724 and 1725 owned by the appellant-defendant. It is this decree and judgment which is impugned in the present appeal.

3 Mr. Rohit Joshi, learned counsel for the appellant, submits that Court Commissioner appointed pursuant to the direction of learned Adhoc District Judge, Amravati, was in his favour. The points which were never raised before the lower court, for the first time came to be agitated before the Appellate Court and which were also wrongly considered leading to the passing of the impugned judgment and decree. The learned counsel also invited my attention to the objection taken by the respondent-plaintiff to the report submitted by the Court Commissioner which is very much on record. Thereafter, the learned counsel took me through the deposition of the Court Commissioner namely Vilas Ramsdasji Wankhade and tried to impress upon me as to how the report was properly prepared. Thus, for all these reasons, the appeal deserves to be allowed, argued learned counsel.

4 Mr. Kshirsagar, learned counsel for the respondent, on the other hand, would support the impugned judgment and decree and would invite my attention to the various observations made by the learned Appellate Court in paragraphs 28 and 30 of the impugned judgment and decree. The learned counsel also invited my attention to the cross-examination of the Court Commissioner wherein he admitted that he had not shown in

the map (Exh. 97) as to how much of the square meter of land belonged to them. According to the learned counsel this is aptly and properly taken into consideration by the learned Appellate Court and no fault can be found. Thus, in the light of evidence of the Court Commissioner, there is no merit in the appeal and the same is liable to be dismissed. The learned counsel also placed reliance in **Vachhalabai w/o. Kundlik Gavane and Others vs. Chinkaji s/o. Malhari Jadhav and Others**¹ in support of his submission.

5 I have considered the rival submissions in proper perspective. I have also gone through the record and proceedings made available on record.

6 There is no dispute to the fact that initially Regular Civil Suit No.22 of 2004 was partly decreed and counterclaim of the appellant-defendant was also partly decreed. Being aggrieved and dissatisfied with the said judgment and decree, respondent-plaintiff filed Regular Civil Appeal No.182 of 2008 and appellant-defendant also filed cross objection. The learned Adhoc District Judge-2, Amravati, allowed the appeal and remanded back the suit to the trial Court with a direction to appoint the

1 2012(4) Mh.L.J. 198

Court Commissioner (T.I.L.R.) in order to get the lands of both the parties measured. Later on, T.I.L.R. namely Vilas Wankhade (DW5) was examined by the appellant-defendant. After considering the evidence on record, the learned trial Court was pleased to dismiss the suit of the respondent-plaintiff whereas it allowed the cross objection of the appellant-defendant.

7 What emerges from the record and as also the submissions advanced before me is that the dispute is two-fold. One, where is the existence of suit well i.e. whether it is in the property of respondent-plaintiff or appellant-defendant, and two, the factum of alleged encroachment levied by both the parties against each other.

8 I also find that the learned Appellate Court, whose judgment and decree is impugned in the present appeal, was of the opinion on the basis of material on record that although the oral evidence shows that the suit well is situated in Survey No.1725 but the Cadastral Surveyor found that the well is situated in City Survey No.1724. On the other hand, Exhs. 62 and 64 i.e. extract of Nazul Inquiry sheets show that the well is situated in Chalta No.197 having City Survey No.1725 but Nazul Inquiry sheet i.e.

Exh. 63 nowhere shows that the well is situated in Chalta No.197 having City Survey No.1725. Thus, in the opinion of the learned Appellate Court, oral evidence and documentary evidence are contradictory, and therefore, the Appellate Court, in its wisdom, thought it proper to remand back the matter to the trial Court for ascertaining the exact situation of the well.

9 The Appellate Court was also of the opinion that necessary procedure as mandated by Section 135 of the Maharashtra Land Revenue Code (MLR Code for short) was not followed by the Court Commissioner. The learned Appellate Court further found that the Cadastral Surveyor had not mentioned the measurement of both the lands of the parties nor the “Tipans” of the measurement and other documents leading to his conclusion that the well is situated in City Survey No.1724 was produced on record. There was also no explanation as to why there is no entry in Exh. 63 i.e. Nazul Inquiry sheet of City Survey No.1725 regarding the well.

10 I have also carefully gone through the evidence of Court Commissioner. In the cross-examination, which is rightly so noted by the learned Appellate Court, he stated that he had not shown how much of

the square meter of land belonged to the parties. This piece of evidence is nothing but an admission of the fact that he did not carry out the measurement of both the lands i.e. the land belonging to the appellant-defendant and respondent-plaintiff.

11 It is also clear from the record that no records pertaining to the measurement i.e. “Tipans” or any other document was produced by him in his evidence to support his conclusion that the suit well is situated in City Survey No.1724. Apparently, quite admittedly, when both lands belonging to parties were not measured by this witness, in my view, the Court Commissioner could not have reached to the conclusion of either existence of well in the land of plaintiff or of the defendant, as the case may be, and as also about the allegation of interference / encroachment levied by both the parties against each other. Essentially speaking, encroachment has to be proved with the help of public record and the procedure as contemplated by Section 135 of the MLR Code. Section 135 of MLR Code provides an elaborate and exhaustive procedure, which, needless to say, has not been followed by the Court Commissioner.

12 Equally important aspect of the matter is about the existence of well. Nazul Inquiry Report shows that well is situated in City Survey No.1725 i.e. old Chalta No.197 whereas the extract of Nazul sheet pertaining to City Survey No.1725 has no entry regarding the well on the said Nazul sheet. Similarly, Cadastral Surveyor has ascertained that the well is situated in Chalta No.196 having City Survey No.1724. There is no explanation from the Cadastral Surveyor as to the aforesaid contradictory record in as much as his claim of measurement and Nazul record cannot be satisfactorily reconciled as both go in different directions. It was necessary or incumbent on the part of the Cadastral Surveyor to put a comment or two in respect of above noted contradictions.

13 In the case of **Vachhalabai (supra)** there were two reports from T.I.L.R. Office on record, one prepared after measurement of the land of the plaintiffs on an application filed by the plaintiffs for measurement of their land and another, prepared after measurement of the land of the defendants, on an application filed by the defendants. In such a situation, directions were issued to lower Appellate Court to appoint Court Commissioner for joint measurement of the land of the appellants and respondents and then to pass an appropriate order on merits after hearing

the parties. Although, the factual situation obtaining therein and as also the case in hand are different, but what is necessary is that the ratio laid down therein must be taken into consideration and the ratio is that there has to be a joint measurement of lands of both the parties. In the case in hand although there was joint measurement but as noted from the evidence of the Court Commissioner, he did not mention the area of plaintiff's property and defendant's property in the map (Exh. 97) nor his evidence shows so.

14 For the aforesaid reasons, I am not inclined to interfere with the impugned judgment and decree of the Appellate Court as I do not find any perversity or illegality. Hence, the following order :

ORDER

1. Appeal from Order is dismissed.

2. In view of disposal of Appeal from Order nothing survives in the Civil Application No. 9 of 2021 and stands disposed of accordingly.

(V.G.BISHT, J.)