

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

SECOND APPEAL NO. 650 OF 2017

Narendra Laxmanrao Vaidya (Dead)
aged about 48 yrs.,
Occ. Agriculturist, R/o Sawali (Wagh),
Tah. Hinganghat, District : Wardha.

... **APPELLANT**

1. Smt. Meena wd/o Narendra Vaidya,
Aged about 49 years, Occ. Housewife,
R/o C/o Ghursade House,
Near Rani Rajkuvar School, Tukum,
Chandrapur, District-Chandrapur.

2. Ku. Gayatri d/o Narendra Vaidya,
Aged about 22 years, Occ. Education,
R/o C/o Ghursade House,
Near Rani Rajkuvar School, Tukum,
Chandrapur, District-Chandrapur.

3. Ku. Vanshika d/o Narendra Vaidya, Aged about 20 years, Occ. Education, R/o C/o Ghursade House, Near Rani Rajkuvar School, Tukum, Chandrapur, District-Chandrapur.	(Legal heirs of deceased appellant brought on record as per Hon'ble Court's order dated 14/01/2020).
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V E R S U S

Chandrakant Haribhau Farkade,
aged about 50 yrs.,
Occ. agriculturist, R/o Sawali
(Wagh), Tah. Hinganghat,
District Wardha.

... **RESPONDENT**

Shri Amol Mardikar, Advocate for appellants.
Shri T. B. Pantawane, Advocate for respondent-sole.

CORAM : V. G. BISHT, J.
DATED : 30/03/2022

JUDGMENT :

1. Heard. Admit. Heard finally with the consent of learned counsel for the parties.

2. This appeal under Section 100 of the Code of Civil Procedure, 1908 moved by the appellant takes an exception to the Judgment and order dated 28/06/2017 passed in Regular Civil Appeal No.39/2017 by the learned Additional District Judge, Hinganghat, whereby the learned Additional District Judge, Hinganghat upheld the Judgment and order of the learned Civil Judge, Junior Division, Hinganghat passed in Regular Civil Suit No.111/2003, thereby decreeing the suit for possession and mesne profit.

3. This Court on 14/12/2018 passed the following order :-

"The issue involved in the appeal is whether the measurement carried out by the court commissioner is in accord with the decisions of this Court inter alia the decisions in *Vijay s/o Shrawan Shende and others vs. State of Maharashtra* reported in 2009(5) Mh. L. J. 279.

2. Both the learned Counsel fairly agree that it would be appropriate if the cadastral surveyor is

appointed by T.I.L.R. or the T.I.L.R. himself carries out fresh joint measurement of the agricultural land owned by the appellant and his brother which are Survey 145/1 and 145/2 and the agricultural land sold to the respondent which is Survey 145/3.

3. Both the learned Counsel further agree that the costs shall be shared equally by the appellant Narendra Vaidya and the respondent Chandrakant Farkade.

4. The report shall be submitted by the T.I.L.R. or the cadastral surveyor appointed by him to this Court within two months.

5. Let the second appeal be listed after receiving the commissioner report."

4. I may further note that later on this Court again passed an order on 17/11/2021 as under :-

"i. Registry is directed to refer the report of the surveyor dated 10th December, 2019 to the trial Court. The trial Court shall grant an opportunity to both the parties to examine and cross-examine the surveyor and thereupon to prepare a report and refer the same to the lower Appellate Court for approval and after approval by the learned Appellate Court, the same shall be forwarded to this Court.

ii. Both the parties alongwith their lawyer shall remain present on 26th November, 2021 before the trial Court. Thereupon, the learned trial Court call the surveyor for examination and cross-examination within 30 days and complete the examination and cross-examination within two weeks thereafter and submit its report within one week thereafter. The report to the lower Appellate Court be sent within one week thereafter for approval. The lower Appellate Court after approval of the same send it to this Court. The learned appellate Court shall complete this procedure within two weeks on receipt of report of the trial Court.

iii. Office is requested to list this matter immediately on receipt of the approval from the lower Appellate Court, for further consideration."

5. Pursuant to the abovesaid orders, learned trial Judge conducted the examination-in-chief and cross-examination of surveyor and forwarded the report to that effect to the First Appellate Authority i.e. District Judge-1 and Additional Sessions Judge, Hinganghat. The learned District Judge-1 and Additional Sessions Judge, Hinganghat on his part after satisfying himself that the directions of this Court have been complied with by the

learned trial Judge, forwarded the report of the learned trial Judge to this Court through the Assistant Registrar of this Bench.

6. Before coming to the said reports, I may point out that by virtue of order dated 17/11/2021 passed by this Court, the learned trial Judge and as also the First Appellate Court were directed to submit their reports. However, it seems that although the learned trial Court did offer an opportunity to both the parties inasmuch as they were allowed to carry out examination-in-chief and cross-examination of the surveyor but the learned trial Judge did not record any finding as to the disputed question. Probably, the reason was that the learned trial Judge was asked to furnish only report in respect of examination-in-chief and cross-examination of the surveyor. It seems that similarly the learned First Appellate Court could not go beyond the directions of this Court and he also simply forwarded the report, which was submitted to him by learned trial Judge, to this Court.

7. It may not be out of context to mention that by passing orders dated 14/12/2018 and 17/11/2021, this Court after keeping in mind the decision given in Vijay s/o Shrawan Shende and others Vrs. State of Maharashtra and others, reported

in 2009(5)Mh.L.J. 279 had given necessary directions to the learned trial Judge and First Appellate Court. It appears that, inadvertently, instead of asking the findings in respect of controversy in issue, after examination-in-chief and cross-examination of the surveyor, a report came to be called. Rather, the learned trial Court ought to have been directed to decide the issue afresh and then leave it to parties to decide future course of action.

8. In my considered view, for want of finding of the learned trial Judge, this Court is again back to square one and cannot decide the appeal either way, particularly when this Court had earlier directed the learned trial Judge to appoint a Surveyor and conduct examination-in-chief and cross-examination of said witness having bearing on the controversy between the parties.

9. For the aforesaid reasons, error appearing in the earlier orders inadvertently of this Court can be rectified by remanding back the matter to the learned trial Judge for fresh trial in the light of examination-in-chief and cross-examination of the Surveyor.

10. In view of the above, I pass the following order :-

ORDER

- i] The second appeal is allowed.
- ii] The impugned Judgment and orders of learned learned Additional District Judge, Hinganghat and as also that of learned trial Judge are set aside.
- iii] The matter is remanded back to the learned trial Judge, who will decide the controversy between the parties afresh in the light of examination-in-chief and cross-examination of surveyor recorded pursuant to the directions of this Court, within two months from the receipt of this order
- iv] In the circumstances, there shall be no order as to costs.

(V. G. BISHT, J.)

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