

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

SECOND APPEAL NO. 44/2018

Subhash Mahadeo Kokane, aged about
 52 years, Occupation: Labourer, R/o
 Dahatonda, Tq. Murtizapur, District
 Akola.

.....APPELLANT

...V E R S U S...

- 1) Namdeo Motiram Kokane, aged about
 70 years, occupation: agriculturist
- 2) David Namdeo Kokane, aged about 40
 years, occupation: labourer
- 3) Secretary, Gat Gram Panchayat,
 Dahatonda, Tq. Murtizapur, District
 Akola
- 4) Sarpanch, Gat Gram Panchayat,
 Dahatonda, Tq. Murtizapur, District
 Akola

All R/o Dahatonda, Tq. Murtizapur,
 District Akola.

...RESPONDENTS

 Mr. Vinay V. Dahat, Advocate for Appellant.
 Mr. U.J. Deshpande, Advocate for the Respondent Nos.1 & 2.

CORAM :- **S.M. MODAK, J.**
DATED :- **06/06/2022**

JUDGMENT

Heard by consent at admission stage itself.

2. Respondent Nos.3 and 4 are the office bearers of the Gram Panchayat. No one is appearing on behalf of respondents. Considering the issue involved, the appeal can be decided only on hearing respondent Nos.1 and 2. This Court has framed following substantial question of law while issuing notice dated 18/09/2018:

“In the light of deposition of the Deputy Superintendent of Land Records at Exhibit 85, whether the Courts ought to have directed a fresh measurement for determining the aspect of encroachment as alleged?”

3. This Court has also called record and proceedings. It was also noticed that the matter will be heard on merits even though respondents remained absent. Considering the limited issue involved, I have heard both the learned Advocates finally at the admission stage itself.

4. The suit of the plaintiff bearing Regular Civil Suit No.01/2008 came to be dismissed by the Court of Joint Civil Judge, Junior Division, Murtizapur on 15/10/2015. The plaintiff has asked for removal of the encroachment carried out by defendant Nos.1 and 2 and for possession. The suit was contested by them and both the parties adduced oral and documentary evidence. Even Taluka Inspector of Land Record was appointed and he measured the land and submitted the report. Plaintiff examined him.

5. There were two maps available before the learned trial Court. One is Exhibit 64 on which the plaintiff is relying and he had drawn it whereas Exhibit 82 is the map drawn by T.I.L.R. and it was tendered in evidence when he was examined.

6. The learned trial Court after examining the oral and documentary evidence was pleased to observe that the plaintiff could not prove the encroachment carried out by defendants. In all seven issues were framed by the learned trial Court. The issue of ownership over property No.94 shown in the map was answered in favour of plaintiff whereas rest of the issues were answered against him. Predominantly, the learned trial Court relied on map prepared by T.I.L.R. According to the learned trial Court the map prepared by T.I.L.R. does not show any encroachment carried out by defendant No.2 on the land possessed by the plaintiff.

7. When the plaintiff has filed First Appeal bearing Regular Civil Appeal No.147/2015, the plaintiff also failed to convince First Appellate Court and Appeal was dismissed. The First Appellate Court even framed three points. Except the issue of ownership, rest of the points relating to encroachment were answered against the plaintiff that is how he has filed this Second Appeal.

8. When this Court has framed substantial question of law on 18/09/2018, predominantly, the evidence of Deputy Superintendent of

Land Records was considered and on the basis of his evidence, substantial question of law relating to ordering fresh measurement was framed. According to the learned Advocate Shri Dahat for the plaintiff, fresh measurement is necessary. It is for the reason that Deputy Superintendent of Land Record has in fact not measured the land under encroachment. In order to support his contention, he invited my attention to the answers given by the Deputy Superintendent of Land Record. He is witness No.2 Sanjay Wanwakode. I have read his evidence. He has visited the suit site and measured the land in the presence of the plaintiff, defendants and other persons. He has measured the land as per the possession shown to him at the time of measurement. As there is no City Survey in that area, a City Survey Record is not available in his office and that is how that record was not considered by him. Naturally so. He has put that remark on Exhibit 82. Learned Advocate for the defendants invited my attention to the answers given by the said witnesses during cross-examination. He has admitted that on Exhibit 82, he has not shown encroachment of anyone. Whereas according to the learned Advocate Shri Dahat when he has not measured the encroached portion and that is why he has not shown the any encroachment.

9. Learned Advocate Shri Deshpande relied upon the observation in case of *Sarita Vs. Public Co-op. Hsg. Society Ltd.* reported in 2010 (2) Mh.L.J. 308. According to him when the measurement is done in presence

of the parties and when either of them have not objected, such map cannot be disputed.

10. In the light of substantial question of law, I have perused the entire record. Learned Advocate Shri Dahat has submitted that the approach of his surveyor and also of both the Courts below is misdirected one. He submitted that on Exhibit 82, the surveyor has shown the house of the plaintiff on extreme north side and that is different house which is not connected to the dispute whereas the house of defendant No.1- Namdeo Motiram Kokane is also shown in the Exhibit 82 and in fact that is the land in possession of the plaintiff. That is why there is a request for fresh measurement of the land.

11. Learned Advocate Shri Dahat, has a right to submission but I am unable to subscribe to his views and it is for the reason that this argument could have been accepted if the matter in the learned Lower Court ought to have been conducted in that direction. That is to say when T.I.L.R. was examined, I do not find any questions put to him on that line. There is no case put to him that in fact T.I.L.R. has not measured the real encroached portion and there is a defect in that measurement. In fact T.I.L.R. has concluded that there is no encroachment. There is material to note that the measurement was carried out on the basis of possession shown to him by the *partition* and it is not on the basis of record. So it was necessary for the plaintiff to show where is the encroached portion. So the argument now

advanced is that there are no foundation. It is for the reason that neither the plaintiff has shown the encroached portion to T.I.L.R. (as clear from the evidence of T.I.L.R.) nor, T.I.L.R. was put certain lacunas and lapses on his part. If such is the conduct of the plaintiff, the Court is not enable to assist such plaintiff. So I do not think that fresh measurement is justified. I am fortified in my view by the observations in case of **Sarita Shahu and others** (*supra*). So I do not think that any case for admission is made out. For the above discussion no substantial question of law is involved. Hence I am unable to accept the arguments advanced on behalf of the plaintiff and hence the appeal is dismissed.

Pending Civil Applications are disposed of, if any.

JUDGE

R.S. Sahare