

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

**SECOND APPEAL NO.258 OF 2023
WITH
CIVIL APPLICATION NO.6245 OF 2023**

- . Chandrakant s/o Pandurang Hajgude,
Age: 65 years, Occu.: Agril.,
R/o. Ambejawalge, Tq. & Dist.
Osmanabad .. Appellant
(Orig. Deft. No.1)

Versus

1. Anant s/o Ganpat Devkate,
Age: 57 years, Occu.: Agril.,
R/o Kaudgaon, Tq. & Dist.
Osmanabad
2. Raosaheb s/o Balbhim Devkate,
Age: 87 years, Occu. Agril.,
R/o. as above .. Respondents
(Resp. No.1 Orig. Pltf
& No.2 Orig. Deft. No.2)

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Advocate for Appellant:

Mr. M. B. Kolpe h/f. Mr. V. B. Deshmukh

Advocate for Respondent No.1:

Mr. Anuj A. Fulpagar h/f. Mr. Ashish B. Shinde

...

CORAM: ARUN R. PEDNEKER, J.

DATE: 13.07.2023

ORDER:

1. Heard.

2. By the present second appeal, the
appellant is challenging the order dated

21.01.2023, passed by the appellate court, whereby the decree of the trial court is confirmed directing the defendant to remove the encroachment and to give possession of the 13 Are land in favour of the plaintiff.

3. Mr. M. B. Kolpe holding for Mr. V. B. Deshmukh, learned counsel for the appellant contends that, in the instant case, the defendant had although appeared through an advocate, has failed to cross-examine the plaintiff so also the report of the commissioner was made in absence of the appellant. The commissioner conducted site inspection in absence of the appellant. He further submits that the appellant's advocate has also failed to raise objection to the report of the commissioner. The learned counsel further submits that the notice issued by the commissioner, to the appellant, does not bear the signature of the appellant, as the appellant is illiterate and does not know to affix signature. Thus, he contends that the commissioner's report was without notice to the appellant. The learned

counsel submits that this gives rise to the substantial question of law in the present second appeal.

4. The appellant has taken me to paras 23, 24, 26, 27, 54 and 55 of the judgment of the appellate court, which reads as under:-

"23. It is apposite to note that during pending trial the Court Commissioner was appointed for carrying out the measurement of the boundaries under the panchanama. Accordingly the same was carried out by the competent authority and the report was submitted at Exh. 28 along with panchanama. The further reliance is placed on the map of the boundaries of Gat No.273, 274 and 281 marked at Exh. 69. The memorandum of partition deed is also filed on record at Exh. 48 and 49 among the family member of plaintiff.

24. Plaintiff examined P.W.2 Bharat Bhimrao Deshmukh, a retired Deputy Superintendent of Land Record to prove the measurement was carried out by competent authority in accordance to law. As per his evidence during his tenure of service he received order dated 15.10.2012 to carry out the measurement of the boundaries of Gat No.274 and 281. It is further stated that accordingly the notices were issued to the plaintiff and defendants dated 18.03.2013 to remain present on 18.05.2013 during the course of measurement. The true copy of the notice is furnished on record at Exh. 63. It is his further evidence that in view

of order the procedure for measuring the boundaries were initiated on 18.05.2013. The panchanama Exh.68 was draw to that effect. It is specifically stated during the measurement he found 13 R. of Gat No. 274 was included in Gat No.281. According the map was drawn and marked A, B and C. The disputed 13 R. was marked in red colour. The entire proceedings were carried out as per the rules framed and accordingly the report was submitted.

26. The learned advocate for appellant vehemently argued that, the learned trial failed to appreciate the fact that the measurement of boundaries of disputed land was not carried out in his presence neither he was served with the notice to remain present. It is further argued that the learned trial court erred in giving a fair opportunity to the appellant. The witnesses of plaintiff were not cross-examined by the appellant and therefore, their right to defend has been violated. They were not given fair opportunity to prove their case and hence the matter may be remanded back to the learned trial court for evidence of defendant No.1 appellant as a course of natural justice.

27. It is further worth to note the issues in the present case were framed on 15.05.2017. Plaintiff filed his affidavit of examination in chief on 17.04.2017. There is an endorsement of receiving the copy. On careful perusal it is apparent on the day when the examination in chief was conducted and kept for cross-examination both the defendants and their advocates were absent and therefore, matter was adjourned for cross-examination on 23.10.2017. On the said day also when repeatedly called none for

the defendants remained present neither their advocate. Hence, no cross order was passed.

54. ...The written statement of defendant No.1 is filed on 12.08.2013 which clearly indicates the defendant No.1 was having a full knowledge of all the stages and the order passed by the trial court appointing court commissioner. The measurement of the boundaries was carried out in the presence of panchanama and accordingly panchanama was drawn dated 18.05.2013. The written statement of defendant No.1 is subsequently filed on 12.08.2013. If any objection or grievance in regards to the measurement of the boundaries the defendant No.1 had ample opportunity to protest before the trial court and could have also initiated the proceeding before the competent authority for cancellation of the measurement which was carried out. The defendant No.1 also could have applied for fresh measurement of boundaries, but all the rights which were availed to defendant No.1 became exhausted when he filed written subsequently after 3 months from the date of measurement carried out by competent authority...

55. The fair opportunities were given to both the parties by the ld. Trial Court as it has been already noted the suit was filed in the year 2011 and was pending 8 years and subsequently it was decided on 25.06.2019 thereafter, it is pending in appeal for last 3 ½ years. It is very unfortunate to state the suit has been pending since last 12 years."

5. From the perusal of the judgment of the trial court and so also the appellate court it could be noticed that the commissioner had issued notices to all the parties and in any event even if it is taken that any other person has signed on behalf of the appellant and that the appellant had not received the notice, the courts below has observed that the appellant had filed written statement 3 months after the commissioner's report and was aware of the commissioner's report but he has not raised any objection as regards the report of the commissioner to be behind the back of the appellant. Further, the parties have accepted the report of the commissioner jointly and has read the report into evidence. The appellant had opportunity to ask for fresh report or make grievance of commissioner's report, before the trial court. But it had failed to do so. At an appellate stage, it is too late, to show that the commissioner's report was without notice, when the parties have accepted the same. I cannot put back the clock after long period of time when the

defendant has not agitated the same before the trial court. It is not possible for this court today to re-investigate the whole matter by appointing the court commissioner and to verify the encroachment as prayed and contended by the appellant. The appellant had also not filed any application before the trial court for fresh report of commissioner and for measurement of land on the ground that the earlier report was without notice to the appellant. At this stage to entertain this request is untenable. This will only prolong the matter and the plaintiff who has been agitating the matter for such a long years would be deprived of the fruits of the decree.

6. In view of the same, the second appeal is without any merits and no substantial question of law arises for consideration and the same is dismissed. Pending civil application is also disposed of.

[ARUN R. PEDNEKER, J.]

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