

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.151 OF 2005
WITH SA/152/2005

NIVRUTHI GOVINDA SALUNKE and ORS.
VERSUS
GANGARAM RAMJI SALUNKE and ORS.

...

Advocate for Appellants : Mr. M D Narwadkar
Advocate for Respondents : Mr. U. P. Bilolikar

...

CORAM : R.M. JOSHI, J

DATE : APRIL 05, 2023

PER COURT :

1. By consent of both sides, Appeals are heard finally at the stage of admission.

2. A short point arises for consideration in these appeals are whether the first appellate Court is justified in refusing the application filed by the original defendants for re-measurement of the suit property through Cadastral Surveyor. It is stated that said refusal is contrary to the law laid down in the case of Vijay s/o Shrawan Shende and Ors Vs. State of Maharashtra and Ors, 2009(5) Mh.L.J. 279 wherein it is held that for the fault of the cadestral surveyor party cannot made to suffer and the measurement needs to be carried out time and again till correct measurement is

done.

3. In view of above, following substantial question of law is framed:

"Whether the first appellate Court committed error in refusing the application for re-measurement of the suit land filed by the defendant in support of his counter claim, contrary to the law laid down by this Court in Vijay (supra)".

4. At the outset, learned Counsel for the Appellants/Orig. Defendant states that the Appellants do not wish to challenge the findings recorded by the trial Court as confirmed by the first appellate Court with regard to the injunction granted in favour of the plaintiff against defendant nos. 1 to 5 restraining them from causing interference and the obstruction in the lawful possession of the gut nos. 191, 192 and 193 situated at village Dugaon. He states that the Appeal is pressed only to the extent of non consideration of the prayer in the counter claim about removal of alleged encroachment in gut no. 194.

5. Perusal of the judgment of the trial Court shows that for want of notices to the plaintiff, the

measurement carried out by the cadestral surveyor was held to be not proper. The Trial Court did not consider the fact that as to whether the measurement carried out was otherwise proper. Learned first appellate Court rejected the request made by the defendants for appointment of cadestral surveyor for re-measurement of gut no. 194 and adjoining land.

6. This Court in case of Vijay (supra) has held thus:

38. ...

"(v) It would not proper to dismiss the suit simply because the Court Commissioner has not adopted a correct procedure of measurement and the exercise of re-measurement, according to rule, will have to be got done through Court Commissioner again and again, if necessary, because failures of Cadestral Surveyors are not attributable to parties to the suit."

7. It is thus clear that only for the fault of cadestral surveyor the defendants could not have been made to suffer. It was therefore absolutely necessary for the First Appellate Court to accept request made by the defendants for appointment of cadestral surveyor to

carry out measurement afresh. The judgment and decree passed by the First Appellate Court, therefore, to this extend needs interference. The substantial question of law is answered in affirmative.

8. To the extent of order of refusal for measurement of the suit properties for the purpose of substantiating counter claim of the defendant is set aside. R.C.S. No. 58/2000 is relegated back to the trial Court with direction to appoint Cadestral Surveyor as the Court Commissioner for measurement of the suit land in the counter clam filed by the defendant. Learned Trial Court also to make sure that all parties to the proceedings as well as the adjoining land owners remain present at the time of measurement, so that later no objection to measurement is taken on that grounds. Trial Court to decide the said issue within a period of one year from the date of receipt of the writ.

9. It is clarified that issues which are decided by the trial Court and confirmed by the first appellate Court pertaining to Gut Nos. 191, 192 & 193 have

attained finality. It is, therefore, not open for the parties to reopen those issue before the trial Court.

(R.M. JOSHI, J.)

Malani