

SGPunde

IN THE HIGH CO.URT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 617 OF 2017

Asefa Begum w/o Abdul Jalil & Anr.	... Appellants
<i>Versus</i>	
Damodhar s/o Kathalu Joshi	... Respondent

...
Mr. P. R. Katneshwarkar – Advocate for Appellants
Mr. V. C. Patil – Advocate for Respondents
....

CORAM : GAURI GODSE, J.
DATE : 18TH JANUARY, 2023

PER COURT :

1. This appeal is filed by the original defendants for challenging the judgment and decree passed by the trial court granting injunction as well as possession after removal of encroachment. The judgment and decree of the trial court is confirmed by the first appellate court. Hence the defendants have filed the present second appeal.
2. It was the case of the respondent that he had applied for carrying out survey of his land and pursuant to his application, there was a survey carried out and survey map no. 857/A/2010 was prepared. The said survey map showed that there was encroachment on the suit property by the defendants, hence by

relying upon the said survey map the respondent filed Regular Civil Suit No. 322 of 2011 for possession as well as for permanent injunction, which was decreed on 12th March, 2013 by the learned 3rd Joint Civil Judge Junior Division, Jalna. In Regular Civil Appeal No. 90 of 2013, preferred by the appellants the learned Principal District Judge, Jalna by judgment and decree dated 27th April, 2017 confirmed the decree passed by learned Trial Court.

3. The appellants/defendants appeared in the suit and filed written statement and denied the claim of the respondent/plaintiff. It was denied in the written statement that the defendants ever received any notice of measurement till 09th June, 2011. The appellants contented that on 10th June, 2011 they had raised objections to the said survey carried out pursuant to the application by the respondent and those objections were pending.
4. The learned trial Court framed issues and the respondent led oral evidence as well as produced the survey map at Exhibit 29. The respondent examined himself as well as the surveyor in support of the survey map produced at Exhibit 29. There was no cross-examination carried out by the appellants, hence on 08th

February, 2012, no-cross order was passed. Thereafter, there was no evidence led on behalf of the appellants, hence no evidence order was passed against the appellants on 18th July, 2012.

5. By relying upon the oral as well as documentary evidence produced by the respondent, the trial court recorded a finding that the evidence produced by the respondent showed that there was an encroachment carried out as pleaded by the respondent. The trial court relied upon the oral evidence of the surveyor and recorded a finding that as per the evidence led by the respondent and the evidence of the surveyor, the measurement notices were issued on 01st February, 2010 and thereafter survey was carried out on 09th June, 2011. As per the evidence on record, panchanama was also drawn and thereafter the survey map at Exhibit 29 was prepared. Thus, by relying upon the said survey map as well as the supporting evidence of the surveyor, the finding with respect to encroachment was recorded by the trial Court.
6. In view of the written statement of the appellants with respect to non-receipt of notice of measurement and the measurement carried out in absence of the appellants, there was further evidence of the witness to the survey, who was examined as

P.W. 3. The learned trial court also relied upon the said evidence in support of the procedure that was followed by the surveyor in carrying out the survey after following due procedure and preparing the survey map at Exhibit 29.

7. In the appeal preferred by the defendants, first appellate court also examined the evidence as well as the documents on record with respect to the pleadings of encroachment. The first appellate court referred to the contention of the appellants with respect to the objection raised to the survey measurement carried out on the application of the respondent. The first appellate court further considered the various opportunities that were given to the appellants for leading evidence. The first appellate court referred to all the relevant dates for which the trial was fixed for the purpose of evidence of the appellants/defendants. The first appellate court also recorded that even when the suit was fixed for final argument, the appellants/defendants were not represented and that there was no application made for seeking any further opportunity for hearing. The first appellate court has taken into consideration the various opportunities given by the trial court to the appellants for the purpose of final arguments. The first appellate Court has thus appreciated the evidence which

was led by the plaintiff and the evidence of the surveyor including other supporting evidence and has confirmed the findings recorded by the trial court.

8. The first appellate court has also dealt with the submission made on behalf of the appellants, that since the advocate who was appearing for the appellants was appointed as Government Pleader, they could not pay attention to the proceedings. The first appellate court has taken into consideration all the orders passed by the trial court against the appellants, recording “no cross” and “no evidence” by the appellants, as well as lapses on the part of the appellants in remaining absent. Perusal of the record of the second appeal shows that there were no steps taken by the appellants for cross examination of the witnesses examined by the respondent in support of the survey carried out. The first appellate court after properly appreciating the entire evidence as well as the grievances made on behalf of the appellants, have confirmed the findings recorded by the trial court.

9. It is not in dispute that during the trial there were orders passed of “no-cross” as well as “no evidence” by the appellants. There is no submission made as to whether there was any attempt made

on behalf of the appellants/defendants for the purpose of setting aside the order of “no-cross” or “no evidence” passed against them. It was argued on behalf of the appellants that since the advocate for the appellants was appointed as Government Pleader, there was no opportunity to the appellants for producing evidence and/or cross-examination. Hence, the appeal requires to be remanded for giving that opportunity to the appellants. In support of this submission, the learned counsel for the appellants also made an argument that since the suit was for removal of encroachment, it was necessary that there should have been a joint survey carried out by appointing a court commissioner and hence for that purpose also it is necessary to remand the matter back to the trial court for the purpose of joint survey.

10. It is further argued that there is no legal evidence produced on behalf of the respondent/plaintiff in support of the theory of encroachment. Since there was already a written statement filed on behalf of the appellants thereby raising objections to the survey map relied upon by the respondent/plaintiff, there was no requirement to lead any further evidence on behalf of the appellants. The respondent had examined only the surveyor in support of the theory of encroachment. So far as the survey map

is concerned, it was submitted by the learned counsel for the appellants that in view of section 83 of the Indian Evidence Act, there is a presumption that the maps prepared by the authority of the Government are accurate but maps or plans made for the purpose of any cause must be proved to be accurate. Hence, it is submitted that the perusal of the evidence of the surveyor which is relied upon by both the courts in support of the survey map do not fulfill the criteria laid down under Section 83 of the Indian Evidence Act, hence the survey map as well as the evidence of the surveyor cannot be held to be sufficient proof of encroachment as pleaded by the respondent.

11. It was further argued that except for the survey map produced at Exhibit 29, there was no other evidence produced by the respondent. The suit land was surrounded by other lands and hence it was necessary that all the lands including the land of the appellants was required to be measured at the time of the carrying out the measurement as prayed by the respondent. For objecting to the survey map, the submission was also made that there was no notice given before carrying out the measurement and hence the objections were already filed by the appellants which were pending and, therefore, the survey map at Exhibit

29 was not sufficient evidence to hold that there was encroachment on the suit land.

12. In support of the submissions made with respect to carrying out the joint survey in the case where there is an issue of encroachment, the learned counsel has relied upon various decisions of this court as well as the Hon'ble Supreme Court. The following decisions are relied upon by the learned counsel for the appellants.

1. *Tulsabai w/o Mahadeo Bharadwaj vs. Mohan s/o Chhotu Darode and another*¹
2. *Laxman Wamanrao Nagpure vs. Shankar Haribhau Adhau and another*².
3. *Vijay s/o Shrawan Shende and others versus State of Maharashtra and others*³
4. *Harsing Kewala Rathod vs. Ramji s/o Hemla*⁴.
5. *Sukhdeo Parashramji Bhugul (Dr.) Versus Wamanrao Nagorao Charhat*⁵.
6. *Smt. Niranjambai Chandrakant Vira v. Smt. Pramila Bai Balkrishna Zade*⁶.
7. *Rambhau s/o. Daulatrao Mule & Ors. vs. Balabhau s/o. Pandharinath Kachre & Ors*⁷.

1 Second Appeal No. 241 of 2014, decided by the Division Bench of Nagpur Bench on 22nd February, 2018.

2 2014(3) Mh.L.J. 791

3 (2009) 5 Mah LJ 279

4 2009(2) ALL MR 169

5 (2004) 3 Mah LJ 724

6 (2004) 6 Bom CR 829

7 2020(2) ALL MR 555

13. There cannot be any debate on the proposition that when there is an issue with respect to encroachment, there has to be a joint survey carried out and there cannot be a decree passed for removal of encroachment before there being a joint survey map and supporting evidence with respect to the encroachment. In all the decisions relied upon by the learned counsel for the appellants, both the parties had led evidence. In the decision in the case of *Laxman Wamanrao Nagapure*, the plaint did not describe the boundaries and hence with reference to the identification of the boundaries, the decision was rendered with respect to the requirement for carrying out the joint measurement. In all the aforesaid decisions, both the parties had led evidence before the trial court. All the decisions, relied upon by the learned counsel for the appellants, are in context to the facts of those cases, where there was evidence led by both the parties, there was cross-examination conducted and thus, considering the facts and the evidence on record, the settled proposition with respect to requirement of carrying out joint measurement was relied upon and it was held that, there was a requirement of carrying out joint measurement.

14. So far as the present case is concerned, there is no dispute that the appellants had not led any evidence, the appellants never attempted to cross-examine the surveyor and/or other witnesses examined by the respondent/plaintiff. At no stage there was any attempt made for making any application for setting aside the “no-cross” order or “no evidence” order. In such circumstances, the decisions relied upon by the learned counsel for the appellants are of no assistance to the appellants. Both the courts have properly appreciated the evidence on record as well as the documents and have recorded a finding of fact that there is encroachment by the appellants on the suit land as pleaded by the respondent. There is a survey map on record and the surveyor is also examined in support of the map. The first appellate court has also taken into consideration the submissions made by the appellants with respect to getting an opportunity of being heard as their advocate was appointed as Government Pleader. However, there was never any application made for the purpose of setting aside the orders passed against the appellants and hence there was no question of first appellate court exercising the powers under Order 41 Rule 23 Code of Civil Procedure for remanding the matter back for fresh trial.

15. Even in the second appeal, there is no such application made. It was not argued that any such application for setting aside orders against the appellants, was anytime made in the Trial Court of Appellate Court and the same was not considered. The finding of facts recorded by both the courts below are on the basis of the evidence on record. There was no attempt made by the appellants to cross-examine the surveyor in support of the contention raised that no notice of survey was given to the appellants. In fact, the evidence on record as referred to by the trial court as well as the first appellate court shows that the appellants were present at the time of carrying out measurement. It was sought to be argued on behalf of the appellants that it is not disputed that the appellants were present at the time of carrying out the measurement, however, that cannot be held to be a sufficient requirement under the law which contemplates issuance of notice to all the adjacent land owners for the purpose of carrying out measurement. Hence, it was submitted that there was nothing on record to show that notice was given to the appellants and therefore the survey carried out and the survey map cannot be relied upon as against the appellants. In absence

of any evidence in support, the contention of the Appellant, that he was not given any notice of survey cannot be believed, in the wake of positive evidence led by the respondent in support of the contention that survey was carried out after following due procedure. Hence, there is no merit in the submission of the learned counsel for the appellants.

16. With respect to the submissions made by the learned counsel for appellants that in view of section 83 of the Indian Evidence Act, there is a presumption that the maps prepared by the authority of the Government are accurate but, maps or plans made for the purpose of any cause must be proved to be accurate is concerned, in my view the uncontroverted evidence on record, is sufficient to hold that the survey map is accurate. The survey map is not accepted on the presumptive value under Section 83 of Indian Evidence Act, 1872. However, both the courts have rightly relied upon the survey map on the basis of the oral evidence in support of the survey map.
17. All these questions are dealt with by the first appellate court and there is a finding of fact recorded that as per the evidence on record that there is encroachment made by the appellants. Perusal of the record shows that there was no attempt made on behalf of

the appellants, to cross-examine the surveyor to support the case of the appellants that there was no notice given for the purpose of carrying out survey. All the arguments made on behalf of the appellants are with respect to findings of fact recorded by both the courts below. I do not find that second appeal raises any question of law. Hence second appeal is dismissed. There will be no order as to costs.

18. In view of dismissal of second appeal, pending civil application is also disposed off.

[GAURI GODSE, J.]