

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 80 OF 2016

1. Raosaheb s/o Dadarao Nimbalkar
age 55 years, occ. Agri.
r/o Pangardarwadi, Tq. Tuljapur
Dist. Osmanabad.

2. Nanasaheb s/o Dadarao Nimbalkar
age 59 years, occ. Agri.,
r/o Pangardarwadi, Tq. Tuljapur
Dist. Osmanabad.

Appellants

Versus

1. Chandrashekhar s/o Sandipan Nimbalkar
age 44 years, occ. Agri.,
r/p Pangardarwadi, Tq. Tuljapur,
Dist. Osmanabad.

2. Prabhakar s/o Sandipan Naimbalkar
age 29 years, occ. Service (Teacher)
r/o Top, Tq. Hatkangale
Dist Kolhpuar
Shivraj Bal Vidya Mandir
Top, Tq Hatkanagale
Dist. Kolhapur.

Respondents

Mr. K. K. Kulkarni, Advocate for the appellants.
Mr. Mukul S. Kulkarni, Advocate for respondent No. 1.

CORAM : R. M. JOSHI, J.
RESERVED ON : 24th MARCH, 2023.
PRONOUNCED ON : 31st MARCH, 2023.

JUDGMENT :

1. In this appeal from order, this Court is called upon to decide whether the First Appellate Court exceeded jurisdiction in remanding the case for retrial with direction of appointment of Surveyor to measure the land of plaintiffs and surrounding lands and also to join third party as defendant to the suit.

2. Original plaintiffs/appellants herein filed suit for perpetual injunction against the defendants contending that there is encroachment made by defendants to the extent of 64 R from Gat No. 281. It is also averred that the land Gat No. 281 is situated to the western side of Gat No. 282 belonging to Balasaheb Dongre. It is specifically contended that since the plaintiffs have no concern with this land, said Balasaheb Dongre is not made party to the suit. It is alleged that on 10th August, 2012, defendants obstructed the possession of plaintiffs and hence the suit came to be filed.

3. Defendants No. 1 and 2 by filing written statement opposed the contentions of plaintiffs and denied encroachment. It is contended that on account incorrect measurement and map, the plaintiffs have filed the present suit.

4. The learned Trial Court, after conclusion of trial, decreed the suit and restrained defendants perpetually from causing obstruction to plaintiffs' possession over the suit property.

5. This order was carried by defendants to the First Appellate Court in Regular Civil Appeal no. 21/2016 wherein the judgment and decree passed by the Trial Court was set aside with the direction of appointment of DSLR, Tuljapur to measure the suit land including the land purchased by Balasaheb Dongre. It is further directed to join said Balasaheb Dongre as party defendant to the suit.

6. Being aggrieved by this order of remand of case for trial with aforesaid directions, present appeal from order came to be filed.

7. It is the contention of learned counsel for appellants that the First Appellate Court has exceeded its jurisdiction by enlarging the scope of the suit which is not permissible in law. It is submitted that the suit is for perpetual injunction and not for recovery of possession of any alleged encroached portion of the land of plaintiffs. In such circumstances, there was no propriety for the First Appellate

Court to issue direction for fresh measurement of the land of plaintiffs and surrounding land. He further argued that it is the right of the plaintiffs against whom to sue. Thus, learned counsel for the appellants invoked the rule of *dominus litis* in order to challenge the directions issued by the First Appellate Court.

8. Learned counsel for the respondents/original defendants opposed the said contention with a submission that infact the present appeal has become infructuous as the appellants have already carried out amendment by joining Balasaheb Dongre as party defendant and that the matter has proceeded further before the Trial Court on merit. He submits that the directions issued by the First Appellate Court do not enlarge the scope of the suit but in the aid for proper adjudication thereof the direction of measurement is given. With regard to joining of Balasaheb Dongre as party defendant, it is submitted that under Order I Rule 10 of the Code of Civil Procedure, it is within the powers of the Court to join any person as party who is necessary for proper adjudication of the case.

9. At the outset, the contention of appellants about the challenge to the appointment of measurer to measure the land of

plaintiffs as well as surrounding land is met with. It is pertinent to note that the plaintiffs have filed suit with a specific averment that there is encroachment done by the defendants over 65R land from Gat No. 281. He further avers that towards eastern side of Gat No. 281, Gat No. 282 belonging to Balasaheb Dongre is situated. With these averments, the suit for perpetual injunction is filed against the defendants. In this regard, observations made by the First Appellate Court indicate that there were two reports of measurement of the suit property before the Trial Court and that both the experts have given divergent opinion. It is in this context observed that in order to decide the controversy in question, measurement of land afresh by DSLR is necessary. In the facts of the case, the said finding recorded by the First Appellate Court cannot be faulted with.

10. The next argument is that the First Appellate Court has committed error in directing to join Balasaheb Dongre as party defendant to the suit. *Dominus litis* is the rule on the principle that plaintiff is the master of his suit. The Court should not add any person as defendant in the suit when plaintiff opposes for such addition. However, Order I Rule 10 of the Code of Civil Procedure makes it clear that the rule of *Dominus litis* cannot be overstretched

in the matter of impleading the parties as it is the duty of the Court to ensure that if for deciding real controversy, a person is necessary party, the Court can order his impleadment. Only because plaintiff chooses not to implead him as party is not sufficient for not exercising powers under Order I Rule 10 of the Code of Civil Procedure. The provisions of Order I Rule 10 of the Code of Civil Procedure are wide enough to add any person as party at any stage of the proceeding even *suo moto*. The powers of the First Appellate Court to add Balasaheb Dongre as party cannot be disputed. The question arises as to whether the First Appellate Court was justified in directing him to be made as party defendant. As recorded above, there is specific averment in the plaint that Gat No. 281 is abutted by Gat No. 282 owed by Balasaheb Dongre. In the light of this fact, averred in the plaint, the learned First Appellate Court has observed that in order to bring finality to the dispute between the parties, it is justifiable to appoint DSLR for measurement as well as direction to join Balasaheb Dongre as party defendant is necessary. In view of the fact that Balasaheb Dongre is having adjoining land and there is a dispute about encroachment allegedly committed by defendants, though this is not a suit for recovery of possession, however for the purpose of issuing perpetual injunction against the defendants, it is

just and necessary that the factual aspect about ownership of respective parties over particular portion of land is brought on record. In view of this fact, no perversity can be found in the directions issued by the learned First Appellate Court in joining Balasaheb Dongre as party defendant.

11. In view of above discussion, this Court finds no reason to cause interference in the impugned order. Appeal from order is dismissed with costs.

12. Pending civil application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

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