

Sushma

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 817 OF 2018
WITH
CIVIL APPLICATION NO. 12485 OF 2018

Ramdas Kushaba Chavan ... Appellant

Versus

Sominath Jotiba Dongare ... Respondent

....

Mr. N.L. Jadhav – Advocate for Appellant

Mr. S.L. Bhapkar – Advocate for Respondent

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CORAM : GAURI GODSE, J.

DATE : 27th February, 2023

PER COURT :

1. This appeal is preferred by the defendant for challenging the concurrent judgment and decree passed for possession after removal of encroachment in favour of the respondent.
2. By the judgment and decree dated 23rd October, 2012, the learned Joint Civil Judge Junior Division, Ashti, District Beed, decreed the Regular Civil Suit No. 4 of 2010 filed by the respondent. By the said decree the appellant (“defendant”) was directed to remove encroachment to the extent of 7 R from Survey No. 86/2, Village Pimpri, Taluka Ashti, and hand over

the possession of the same to the respondent (“plaintiff”).

3. The appellant being aggrieved by the said decree had preferred Regular Civil Appeal No. 2 of 2013 in the District Court at Beed. The learned Adhoc District Judge – 1, Beed, by judgment and decree dated 5th September, 2018, dismissed the appeal preferred by the appellant and confirmed the decree passed by the Trial Court. Hence, the present second appeal by the defendant.
4. Learned Advocate for the appellant submitted that the Trial Court has decreed the suit by relying upon the measurement plan bearing No. MR 363 of 2009. The learned Advocate further submitted that the said measurement plan was relied upon by both the Courts by holding that the same was under the provisions of Section 25 (2) Maharashtra Land Revenue Code. He submitted that it was the specific pleading of the appellant that notice for the measurement was never received by the appellant. However, the Trial Court has relied upon the documents produced by the Taluka Inspector of Land Records and held that as per the record the notice was refused by the appellant. Learned Advocate, therefore, submitted that in absence of any proof of service of notice to the appellant and /

or any evidence to show that the appellant had actually refused the notice, the measurement plan could not have been relied upon by the Trial Court. He relied upon Section 83 of the Indian Evidence Act to contend that the map could not have been relied upon on presumptive value without there being any proof of the notice upon the appellant. He, therefore, submitted that the Second Appeal raises a substantial question of law with respect to proper appreciation of the evidence on record for the purpose of passing decree for removal of encroachment. He submitted that considering the nature of the dispute alleging encroachment with respect to the land adjacent to the suit property, it would have been appropriate to appoint a court commissioner for the joint measurements of the land belonging to the appellant as well as the respondent. Hence, the Second Appeal also requires consideration on a substantial question of law with respect to the Trial Court not invoking the provisions of Order XXVI Rule 9 of the Code of Civil Procedure 1908 (“CPC”), for the purpose of joint measurement of the suit land and the adjacent lands. He, therefore, submitted that the Second Appeal requires consideration.

5. Learned Advocate appearing for the respondent submitted that

instead of keeping the Second Appeal pending the parties can be relegated to the Trial Court for the purpose joint measurement of the concerned lands, as well as for leading evidence on the joint measurement.

6. I have considered the submissions made by both the parties. Perusal of the impugned judgment shows that the decree for removal of encroachment and separate possession is passed by relying upon the MR plan No. 363 of 2009 produced at exhibit 31 before the Trial Court. Perusal of the reasoning given by the Trial Court as well as first appellate Court shows that there is no finding recorded with respect to service of notice upon the appellant for the purpose of measurement.
7. Considering the nature of the dispute it was necessary to appoint court commissioner for joint measurement of the lands in question. Hence, the Second Appeal raises following substantial questions of law:

“(i) Whether reliance upon the measurement plan at exhibit 31 was legal and proper in absence of proof of service of notice upon the appellant for carrying out the measurement ?”

(ii) Whether it was necessary to invoke the provisions of Order XXVI Rule 9 of CPC for carrying out joint measurement of the

lands in question ?

8. Both the parties consented for taking up the Second Appeal for final disposal on the said substantial questions of law.
9. Learned Advocates for the parties, on instructions, submitted that they are agreeable for joint measurement of the lands in question. Both the learned advocates agreed that the matter can be remanded back to the first appellate Court by directing the appointment of the Court Commissioner for the purpose of joint measurement of suit land as well as adjacent lands and submit the report before the Trial Court for the purpose of recording findings on the said joint measurement, by keeping the Regular Civil Appeal No. 2 of 2013 pending.
10. Perusal of the record of the second appeal shows that the measurement map relied upon by both the Courts cannot be accepted for want of service of notice upon the appellant. There is no dispute about the title of the respondent over the suit land. It is also not in dispute that the appellant is owner of the adjacent land. The only dispute between the parties is with respect to the measurements of the respective lands. There is nothing shown to me that joint measurement of the suit land and the land belonging to the appellant was carried out. Since the

dispute is regarding alleged encroachment on the suit land by the appellant, it was necessary to direct joint measurement by appointing court commissioner.

11. In such circumstances, I find that this is a fit case for invoking the powers under Order XLI Rule 23 A and 25 of CPC for the purpose of remanding the matter back to the first appellate Court. It is also necessary to direct appointment of court commissioner under Order XXVI Rule 9 of CPC for the purpose of joint measurement of the suit land as well as the adjacent lands. Hence, the Second Appeal is partly allowed by passing following order:

- (i) The judgment and decree dated 5th September, 2018, passed by the learned Adhoc District Judge-1, Beed, is quashed and set aside and the Regular Civil Appeal No. 2 of 2013 is restored to the file of the Ad-hoc District Judge-1, Beed.
- (ii) By consent of both the parties, the Deputy Superintendent of Land Records, Beed, Taluka Beed, District Beed, is appointed as a Court Commissioner for the purpose of carrying out survey and measurement of the suit land bearing Survey No. 86/2/AA and the adjoining lands

bearing survey nos. 86/1/3/1, 86/1/3/2, 86/1/3/3, 84, 85, 87, 88, 81, 71 of village Pimpri, Taluka Ashti, District Beed, belonging to the appellant as well as the adjacent land owners of the aforesaid lands.

- (iii) Necessary survey and measurement to be carried out after giving notice to all concerned land holders by the Court Commissioner and report to be submitted before the Court of Joint Civil Judge Junior Division, Ashti, District Beed, within a period of two months from the date of service of copy of this order upon the Deputy Superintendent of Land Records, Beed, Taluka Beed, District Beed.
- (iv) The parties will co-operate for early survey.
- (v) After the report is submitted, the parties would be at liberty to file their objections, if any and adduce evidence, if any with respect to the Survey and measurement report submitted by the court commissioner.
- (vi) After the report is submitted by the court commissioner, Joint Civil Judge Junior Division, Ashti, District Beed to record necessary findings after allowing the parties to lead evidence and after hearing all the parties. Such findings to be recorded and submitted to the Court of the

Adhoc District Judge-1 at Beed, as early as possible and maximum within a period of nine months from the date of submission of the report by the court commissioner.

- (vii) Parties to co-operate in early disposal of the procedure of recording findings on the report submitted by the court commissioner. Parties will not seek unnecessary adjournments.
- (viii) Parties will be at liberty to file necessary objections as per Rule 26 of Order XLI of CPC, to the findings that will be submitted the Court of Adhoc District Judge-1 at Beed.
- (ix) After the findings on the court commissioner's report are submitted in the District Court, the Adhoc District Judge-1 at Beed to decide the Regular Civil Appeal No. 2 of 2013 and the objections to the findings, if any, on its own merits.
- (x) In the event the court of Joint Civil Judge Junior Division, Ashti, District Beed and/or the Court of Adhoc District Judge-1 at Beed is not in existence, the Principal District Judge shall assign it to the appropriate Civil Judge and appropriate District Judge having jurisdiction.

12. Second Appeal is partly allowed in the above terms. There will be no order as to costs.

[GAURI GODSE, J.]