

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

APPEAL FROM ORDER NO.47 OF 2021
WITH CA/13612/2021 IN AO/47/2021

1. Radhakrishna Kashinath Shinde,
Age : 70 Years, Occ. Agriculturist
2. Vithabai Panduang Shinde,
Age : 60 Years, Occ. Agriculturist
3. Pandurang Kashinath Shinde,
Age : 65 Years, Occ. Agriculturist
4. Sau. Muktabai Radhakrishna Shinde,
Age : 65 Years, Occ. Agriculturist

All Resident of Sanvastar, Taluka Kopargaon,
Dist. Ahmednagar.

.. Appellants
(Original Def. Nos. 2 to 5)

VERSUS

1. Tukaram Nana Shinde,
Age : 65 Years, Occ. Agriculturist,
R/o. Lonkar Vasti, Taluka Kopargaon,
District Ahmednagar.
2. Rambhau Nana Shinde
Deceased Through His Legal Heirs
- 2-A] Smt. Sitabai Rambhau Shinde,
Age : 77 Years, Occ. Nil
- 2-B] Babasaheb Rambhau Shinde,
Age : 50 Years, Occ. Agriculturist
- 2-C] Rajendra Rambhau Shinde,
Age : 43 Years, Occ. Agriculturist

Respondent Nos.2-A to 2-C
All R/o. Near Janta English School, Sanvatsar,
Taluka Kopargaon, District Ahmednagar.

2-D] Hirabai Daulat Sadafal,
Age : 60 Years, Occ. Household,
R/o. Ekhurke, Taluka Rahata,
District Ahmednagar.

2-E] Lahanbai Macchindra Waghe,
Age : 44 Years, Occ. Agriculturist,
R/o. Belwad, Taluka Rahata,
District Ahmednagar.

2-F] Sajabai Bajirao Samberao,
Age : 45 Years, Occ. Agriculturist,
R/o. Manori (bk) Taluka Niphad,
District Nashik.

.. Respondents
(Resp. No.1,Org. Plaintiff,
Resp. No.2 Org. Deft No.1)

...
Advocate for Appellant : Mr. P. B. Shirsath

...

CORAM : S. G. MEHARE, J.

DATE : 27.09.2023

PER COURT :

1. The appellants have impugned the judgment and decree of the First Appellate Court passed in Regular Civil Appeal No. 35 of 2015 dated 27.11.2021 wherein the judgment and decree for removal of encroachment of the 3rd Civil Judge, Junior Division, Kopargaon in RCS No. 260 of 2009 dated 04.03.2015 was impugned.

2. The impugned judgment and decree of the learned district Judge-2 Kopargaon has been mainly assailed on the ground that Order XLI Rule 23 of the Code of Civil Procedure has not been strictly followed and the order of remittance is not within four corners of the law.

3. The respondents were served but they did not appear. Hence, the matter was heard finally.

4. The facts of the case were that suit was filed by the respondents for removal of encroachment against original defendant No.1/respondent No.2. However, present appellants were made party as they are the co-sharers in the suit field survey No.5. After filing the suit they had applied before the court for appointment of cadastral surveyor for the measurement of the land and to find out the encroachment. The cadastral surveyor was accordingly appointed. After measurement, by way of amendment, the reliefs were claimed against the present appellants though earlier there was a specific pleading that they have been made formal party without claiming relief against them.

5. Parties led the evidence. The learned trial court held that plaintiff/present respondent No.1 failed to prove the encroachment of the original defendant Nos. 1 to 5 ad-measuring 34 R of the land in

the suit property, sub division 1-A and consequently recorded negative findings on the remaining issues. The cadastral surveyor was the star witness. It has been observed by the learned trial Court that there was a difference in area in 7/2 extract and Fhalani map of survey No.5. Hence, cadastral surveyor showed 34 R of the land excessive in the possession of defendant Nos. 2 to 5. The Cadastral surveyor has candidly admitted that 34 R land was not on encroached portion. He did not find encroachment; hence, there was no mention about the same in the map prepared at Exh.15. The learned trial Court also observed that present appellants were absent when the measurement was done. The cadastral surveyor was unable to say how much land was encroached by which defendant. In sum and substance, he recorded the finding that the burden to prove the map accurately under Section 83 of the Indian Evidence Act was not correctly discharged. Hence, he dismissed the suit of the plaintiff/respondent No.1.

6. The present respondents preferred the appeal. The first appellate Court recorded the finding that the Cadastral surveyor has not correctly measured the suit property and incorrect measurements of the suit property by Cadastral surveyor were not sufficient to dismiss the suit. To fortify his view, the first appellate court relied upon the

case **Vijay Shivram Shende Versus State of Maharashtra 2009(/5) Mh. L. J. 279** wherein the substantial question of law No.3 was answered as follows :-

Answer to substantial question of law No.(3).

(v) it would not be 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 rules will have to be done through Court commissioner again and again, if necessary, because failures of Cadastral surveyors are not attributable the parties to the suit.

39. Impugned Judgments are, thus, erroneous being rendered contrary to law as to proof of facts.

40. In the premises, the appeal deserves to be allowed and remanded back to the trial Court.

7. The above proposition was again followed in the case of **Shamsundar Satyanaran Bhoot Vs. Prabhakar N. Bhakare in Second Appeal No. 166 of 2015 decided on 4.1.2017**. In the above cases it was consistently held that whenever there is incorrect measurement, the best reason is to remand the suit, rather than dismiss it because the parties should not suffer for the errors of Cadastral surveyor. It appears that the remand order of the learned District Judge was based upon the law laid down by this court in the above cases.

8. The learned counsel for the appellants has vehemently argued that unless the requirement under Order XLI Rule 23 and 23-A of the Code of Civil Procedure is strictly complied with, the appellate Court has no powers to remit the matter back to the trial court.

9. The learned counsel for the appellants has vehemently argued that initially the appellants were added as a formal party with a specific pleading that the plaintiff/ respondent No.1 did not seek any relief against them. However, after the measurement, the plaint was amended and relief was sought against them. He also submitted that earlier in Regular Civil Suit No. 25 of 2002 wherein the present appellants were parties, the lands were measured and that was the best evidence which was correctly considered by the learned trial Court under Section 33 of the Indian Evidence Act. He has vehemently argued that how many times the land should be measured. He has also argued that a specific ground was raised in the appeal memo before the first appellate court (ground No.8) that in alternate, leave may be granted to file a suit on the same cause of action by withdrawing the suit and get the land of the plaintiff/respondent no.1 and defendant duly measured through the learned lower court. When it was a specific prayer, the Court ought to have granted leave according to the law. He also referred to an application at Ex. 17 filed

before the first appellate Court by the present respondents making same prayer for leave to withdraw with a permission to file a fresh suit. However, that application was not pressed.

10. He has also assailed the impugned Judgment and decree of the first appellate Court on the ground that the learned first Appellate Court exceeded its jurisdiction saddling the cost of measurement upon the present appellants when the suit was filed by the present respondents. He has also argued that in the absence of any omission to frame the issue or determine the dispute is illegal. To bolster his argument he relied on the case of *Hiya Associates and others Versus Nakshatra Properties Private Limited 2018 DGLS (SC) 943* and *P Purushottam Reddy Versus Pratap Steels Limited 2002 DGLS(SC)111 (Supreme Court)* The Supreme Court considered was the scope of order XLI Rule 23, Order XLI Rule 23(A), Order XLI Rule 25 of the Code of Civil Procedure and it has been observed in the case of Hiya Associates in paragraph No. 18 that in our opinion, the remand of a case to the Subordinate Court is considered necessary when the Superior Court while exercising its appellate or revisionary jurisdiction find that the Subordinate Court has failed to decide some material issues arising in the case or there is some procedural lacuna noticed in the trial, which has adversely affected the rights of the parties.

11. In the case of *P. Purshottam Reddy Versus Pratap Steels Limited* *2002 DGLS(SC)111* it has been held that in view of express provisions of Rule 23-A and Rule 23 of Order XLI of the Code of Civil Procedure, the High Court cannot have recourse to its inherent powers to make a remand because, as held in *Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati 1964 SCR(7) 267* it is well settled that inherent powers can be availed of ex debito jlistitiae only in the absence of express provisions in the code. It is only in exceptional cases where the Court may now exercise the powers of remand dehors Rules 23 and 23-A.

12. The suit for removal of encroachment requires the map and proof of encroachment. Therefore, the assistance of the Cadastral surveyor is invariably taken either before the suit or even after the suit. Under Order XXVI, Rule 9 of the Code of Civil Procedure the Court has the power to make the local investigation and direct the investigator to submit the report. Here in the case, the Cadastral surveyor was appointed by the Court order. For measurement of the land through the Cadastral surveyor various procedures have to be followed. The findings of the trial Court reveal that the Cadastral surveyor failed to follow the procedure. When the suit was filed the plaintiff/present respondent No.1 did not know, that the present

applicant also had encroached upon his land. However, after the measurement he learnt that the relief is to be sought against the present appellants. Accordingly, the plaint was amended. The order allowing amendment was not challenged. Both the parties went ahead with the suit, lead the evidence and argued the case finally.

13. Only for the errors committed by the Cadastral surveyor in the procedure of measuring the land, the suit was dismissed. For the mistake of the Cadastral surveyor, the plaintiff/ respondent No.1 has lost his right over the encroached portion of the land. This Court in the case of Vijay (cited supra) has answered the substantial question No.3 that it would not be 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 rules, will have to be done through the Court Commissioner again and again, if necessary, because failure of the Cadastral surveyor is not attributable to the parties to the suit.

14. The Hon'ble Supreme Court in case of *Hiya Associates and other* relied upon by the applicant in paragraph No.18 has observed that

"In our opinion, the remand of a case to the Subordinate Court is considered necessary when the Superior Court while exercising its appellate or revisionary jurisdiction

finds that the Subordinate Court has failed to decide some material issues arising in the case or there is some preedural lacuna noticed in the trial, which has adversely affected the rights of the parties while prosecuting the suit/proceedings or when some additional evidence is considered necessary to decide the rights of the parties which was not before the Trial Court etc. (See: Order 41, Rules 23, 23A, 24 and 25 of the Code of Civil Procedure, 1908). Such was not the case here."

15. The Hon'ble Supreme Court in the case of *P. Purshottam Reddy Versus Pratap Steels Limited 2002 DGLS(SC)111* in paragraph No. 10 third line from the bottom has observed that;

"To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order XX, Rule 3 or Order XLI, Rule 31 of the Code of Civil Procedure and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect the valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 of the Code of Civil Procedure."

16. This Court, in the case cited supra, has taken the consistent view that it would be inappropriate to dismiss the suit simply because the court commissioner i.e. the Cadastral surveyor has not adopted the

correct procedure of measurement and court fails to exercise the powers under Order 26 Rule 9 of the Code of Civil Procedure such matter should be remitted back to the trial Court to correct the procedure and make the justice.

17. As far as the earlier Regular Civil Suit No. 25 of 2002 is concerned, admittedly the present respondents were not parties. To attract Section 33 of the Indian Evidence Act the first condition is that the earlier proceeding shall be between the same parties or their representative in interest. Secondly, the adverse party in the first proceeding had the right and opportunity to cross examine the witnesses and lastly the questions in issue were substantially the same in the first as in the second proceeding.

18. None of the conditions to attract Section 33 were available before the Court; hence, the learned trial Court has erred in applying Section 33 of the Indian Evidence Act and believing the cadastral surveyor's map from Regular Civil Suit No. 25 of 2002.

19. In view of the above discussion, the Court is of the view that the impugned Judgment and order is correct. However, a mistake has been committed to saddle the cost of the measurement upon the

present appellants. Hence, the appeal is liable to be partly allowed.

Hence, the following order :-

ORDER

- (i) The appeal is partly allowed.
- (ii) The order directing appellants to bear the equal costs for measurement is quashed and set aside.
- (iii) The remaining Judgment and order of the learned District Judge-2 Kopargaon is maintained, with modification that, the present respondents shall apply for measurement of the field Survey Nos. 5, 6 and 7 at their cost.
- (iv) Pending Civil Application stands disposed of.
- (v) Record and proceeding be returned to the trial Court.

(S. G. MEHARE)
JUDGE