



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO.69 OF 2022
WITH CA/16387/2022 IN AO/69/2022

Dhanaji Shivaji Rohite,
Expired through LRs.

1. Shivaji S/o Dariba Rohite,
Age 75 years, Occu. Nil.
2. Lakshmi W/o Shivaji Rohite – Dead.
3. Sunita W/o Dhanaji Rohite – Dead.
4. Ranjit S/o Dhanaji Rohite,
Age 24 years, Occu. Business.
5. Anjali D/o Dhanaji Rohite,
Age 21 years, Occu. Education.
6. Shruti D/o Dhanaji Rohite,
Age 19 years, Occu. Education.
7. Aniket S/o Dhanaji Rohite,
Age 17 years, Occu. Education.

Appellant No.7 is minor
U/G of his real mother
Sunita W/o Dhanaji Rohite,
Age 41 years, Occu. Household,

All Appellants R/o Mandai Peth,
Paranda, Tq. Paranda,
District Osmanabad.

... Appellants.

Versus

1. Sujitsingh Mangsingh Thakur,
Age 45 years, Occu. Argi.,
R/o Paranda, Tq. Paranda,
District Osmanabad,
Through Power of Attorney
Subhassingh Mansingh Thakur,

Age 38 years, Occu. Agri,
R/o Paranda, Tq. Paranda,
District Osmanabad.

2. Anant Baburao Hubalikar – Died.
3. Mangal Gorakhnath Hubalikar,
Age Major, Occu. Agri.,
4. Girish Gorakhnath Hubalikar,
Age Major, Occu. Business,
5. Mahesh Gorakhnath Hubalikar,
Age Major, Occu. Business,
6. Madhukar Baburao Hubalikar,
Age Major, Occu. Business,
7. Anil Baburao Hubalikar,
Age Major, Occu. Business,
8. Rajendra Baburao Hubalikar,
Age Major, Occu. Business,

Respondent Nos.3 to 8
R/o Lokhand Galli, Barshi,
Tal. Barshi, District Solapur.

... Respondents.

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Advocate for Appellants : Mr. Shoyab Shaikh.
Advocate for respective Respondents : Mr. Mahajan Sandeep Y.

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CORAM : S. G. MEHARE, J.
DATE : 05.12.2023

ORAL JUDGMENT :-

1. Heard the learned counsel for the appellants and learned
counsel for the respondents.

2. The appellants are the legal heirs of the original plaintiff. After the judgment and decree of the First Appellate Court, the original plaintiff died. Therefore, they have preferred the appeal as his legal heirs. They being legal heirs are entitled to impugn the judgment and decree of the First Appellate Court.

3. The plaintiff had filed a suit for declaration that he is owner of the suit plot and the permanent injunction for restraining the defendants from disturbing his possession of the suit plot. The learned trial court decreed the suit and declared that the plaintiff was the owner and the possessor of the suit plot and accordingly issued the injunction against the defendants.

4. The defendant had preferred the first appeal before the District Court at Bhoom. The learned First Appellate Court in Regular Civil Appeal No.334 of 2014 passed the judgment on 12.10.2022 observing that it is the boundary dispute and the identity of the lands encroached upon should be identified by the local investigation Under Order XXVI Rule 9 of the Civil Procedure Code. The First Appellate Court allowed the appeal and remitted the matter to the trial court with a direction to the plaintiff to apply for the joint measurement of N.A. plots Nos.2 and 3 out of the survey No.13-B of Paranda. The First

Appellate Court also granted the liberty to both parties to amend their pleadings and to adduce additional evidence, if any and then the Court should decide the suit afresh on the basis of evidence on record and additional evidence led by the parties, if any. He also observed that failure on the part of the plaintiff to apply for the appointment of the Court Commissioner and to deposit the Commissioner fee within stipulated period shall result in dismissal of the suit.

5. Being aggrieved by the impugned judgment and order of the First Appellate Court, the appellants are before this Court. The first question that has been raised was that the First Appellate Court has traveled beyond the case, which was not before the trial court. Hence, the impugned judgment and decree is illegal and incorrect. It has also been objected that the plaintiff never claimed that the defendants have encroached upon his plot. Therefore, there was no question to remit the matter. The Court cannot force the plaintiff to apply for the measurement. The substantial questions of law of the powers exercised by the First Appellate Court have also been involved.

6. Per contra, the learned counsel for the respondents would submit that the impugned judgment and decree of the

First Appellate Court is legally correct. The plaintiff was never in possession of the land measuring 60 X 60 feet. He did not prove the case. However, under the garb of the suit for injunction, he wanted to encroach upon the land of the defendants and on the six feet lane between the houses of the plaintiff and the defendants. Therefore, the only solution to resolve the dispute forever was the joint measurement of both plots. No illegality has been committed in remitting the case to the trial court. Therefore, no substantial question of law has been involved in this case.

7. **Admit.**

8. Hearing both respective learned counsels, the following substantial questions of law formulated.

(a) Does the First Appellate Court correctly ordered the measurement of the plots owned by the plaintiff and defendants ?

(b) Does the First Appellate Court correctly remitted the matter to the trial court by granting liberty to amend the pleading and adduce the additional evidence ?

9. Issue notice to the respondents. Learned counsel Mr. Mahajan waives the service of notice for respondents.

10. By consent heard the appeal finally.

11. The first appeal is continuation of the suit. The court in any event cannot travel beyond the evidence and material on record. The Court *suo motu* cannot grant the reliefs which were not sought. The suit of the plaintiff was for declaration that he is the owner of the suit land. The burden was on the plaintiff to prove that he was in possession of the land which he claimed to be in possession in pursuance of his sale deed dated 23.11.1995. The plaintiff did not aver in the plaint that the defendants encroached upon his land. The defendants have right to protect their land and the six feet lane which was for common use. The court has to decide the suit considering the plaint, written statement and the evidence of the respective parties. The Court cannot force any party to do a thing in such a way. The Court has to adjudicate the dispute brought before it. Admittedly, the plaintiff never claimed that the defendants encroached upon his plot. Therefore, the Court is of the view that the First Appellate Court erred in law in passing an order of measurement of the plots on the application of the plaintiff. Since the issue for which the matter is remitted was not the

question before the Court, the remittance on that point is not correct.

12. In view of the above, the substantial questions of law framed have been answered in negative.

13. The Court is of the view that the impugned judgment and decree of the First Appellate Court is illegal and incorrect and warrants the interference. The appeal ought to have decided on merits on the basis of the material on record. Hence, the following order :

ORDER

- (i) The appeal is allowed.
- (ii) The judgment and decree of the learned Adhoc District Judge-2, Bhoom, passed in Regular Civil Appeal No.334 of 2014, dated 12.10.2022 is set aside.
- (iii) The appeal is remitted to the Court of Adhoc District Judge-2, Bhoom for disposal on merit and purely on the basis of the evidence led by the parties and questions involved in the suit.

- (iv) The parties to appear before the First Appellate Court on 10.01.2024.
- (v) Civil Application stands disposed of.

(S. G. MEHARE, J.)

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