



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

906 APPEAL FROM ORDER NO. 03 OF 2023

1. Amolkumar s/o Navinchand Patni
Age : 30 years, Occupation : Business,
R/o . Thakare Nagar, Behind Deogiri Bank,
Aurangabad – 431007
2. Komalkumar s/o Navinchand Patni,
Age : 31 years, Occupation : Business,
R/o . Thakare Nagar, Behind Deogiri Bank,
Aurangabad – 431007.
3. Shobhabai w/o Navinchand Patni,
Age : 62 years, Occupation : Household,
R/o . Thakare Nagar, Behind Deogiri Bank,
Aurangabad – 431007

...APPELLANTS
(Original Defendants)

VERSUS

Shankar s/o Dashrath Navpute,
Age : 53 years, Occupation : Agriculture,
R/o. Chikalthana, Taluka &
District Aurangabad – 431007.

...RESPONDENT
(Original Plaintiff)

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Advocate for Appellants : Mr. Swapnil S. Patil
Advocate for Respondent : Mr. Swapnil B. Patel

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CORAM : S. G. MEHARE, J.

DATE : 07.12.2023

ORAL JUDGMENT :-

1. Heard the respective learned counsels.

2. The appellants are the original defendants, and the respondent was the original plaintiff. The plaintiff had filed a suit for removal of encroachment, possession and injunction. He relied on the cadastral surveyor measurement report but did not examine the cadastral surveyor. The learned Court of the first instance held that the plaintiff failed to show that the defendants had encroached upon the disputed portion of the land. He also observed that the existence of the so-called river was also not reflected in the measurement report. The learned Court of the first instance had dismissed the appeal.

3. The plaintiff had preferred the appeal before the first appellate Court. The First Appellate Court held that there was a disagreement on the map placed on record. The Court of the first instance held in beginning the cadastral surveyor measurement map without examining the cadastral surveyor grant on the pronouncement. The Court held that the learned Court of first instance did not consider the controversy between the parties in the correct perspective. He also held that the appointment of the Cadastral surveyor for joint measurement is essential. He remitted the appeal to the trial Court. Against the judgment and decree of the first appellate

Court passed in Regular Civil Appeal No. 100/2021 dated 19.11.2022, the defendants are before this Court.

4. This Court (Coram : Gauri Godse, J.) framed the following substantial questions of law :

"(1) Whether the first appellate Court is right in remanding the matter for fresh trial by setting aside the decree of the trial court for re-trial for the purpose of appointment of court commissioner for survey and measurement of the suit land, without framing any point of consideration with respect to the title of the suit property?

(2) Whether the order of remand passed by the first appellate Court, thereby setting aside the dismissal of the suit without considering the point of the title of the plaintiff, though there was a dispute with respect to the title and the same was decided by the trial court?"

5. The learned counsel for the appellants submits that the First Appellate Court did not frame the points for determination. Therefore, the impugned judgment and decree is erroneous. Under Order 41 Rule 31 of the Code of Civil Procedure, the First Appellate Court has to frame the points for determination.

6. Per contra, the learned counsel for the respondent submits that the First Appellate Court has specifically framed the point that, "Did the plaintiff prove the defendant had made encroachment on the suit land? This was the material issue that covered the issue of the plaintiff's title. He also argued that the defendants never denied the title of the plaintiff of gut no. 261. Therefore, no specific point was required to be determined. The suit of the plaintiff itself was on the basis of the title, and the issue of the title was not before the trial Court. The plaintiff has claimed that the suit land was his ancestral property. The sale deed of the suit land was before the Court.

7. The plaintiff filed a sale deed (Exhibit 37). It was standing in the name of his father. The learned Court of the first instance referred to the recitals of the sale deed and recorded findings that the recitals of the sale deed do not disclose that the land purchased by the plaintiff's father does not include 40 R of the land on which the encroachment was made. However, the First Appellate Court categorically considered this issue and it was reproduced by the learned trial Court of first instance. However, he did not comprehensively

record the finding whether the plaintiff prima facie had proved that he had a title over the land allegedly encroached upon by the defendants. The Court of first instance recorded the finding that it is a settled preposition of law that in any case in which there is a dispute about encroachment or dimension of the side, the essential thing is to get an agreed map. If the parties cannot agree, a Court Commissioner must be appointed to prepare the same and subsequent reference in the pleading or judgment placed with a map should be referred to this map, which must be attached to the decree and signed by the judge. The learned counsel for the appellants relied on the case of *Omprakash, Gulabchand Bajoria Vs. Ramesh Ramnivas Soni, Sheikh Malang, Sheikh Husain Laws (Bom)-2003-8-43* of this Court dated **20.08.2003**. They also relied upon another case under the pronouncement of this Court passed in the case of *Vijay Shende Vs. The State of Maharashtra, 2009(5) Mh.L.J. 279*.

8. Perusal of the judgment of the trial Court shows that the issues on the title were not framed, but the learned Court of first instance recorded the finding without framing issues, i. e., whether the plaintiff is the owner of land encroached upon by the defendants. The case revolves around the encroachment.

The law is well settled that in such cases, the best solution is to appoint a Cadastral surveyor as a court commissioner under Order 26 Rule 9 of the Code of Civil Procedure for the joint measurement of the lands of the persons involved in the suit.

9. Since there was no specific issue framed in the suit about the title, the First Appellate Court has no reason to deal with the same.

10. The law is settled that nobody should suffer for the wrongs of others. The measurement map is always put in question by the opposite side. Even after having many pronouncements of this Court, the litigants do not apply to the Cadastral surveyor for joint measurement, nor the office of the Superintendent of Land Records department is taking note that in case of an application for determining the encroachment has been filed, he should have taken the joint measurement of the person is concerned. It has created a mess and given rise to many litigations and failures of litigation due to the faulty procedure adopted by the said department. No person should suffer only for the mistakes committed by the cadastral surveyor. For an agriculturist, the land is the only source of income, and the land is everything for him. No one should

violate the rights of others by committing the illegalities for setting right such illegalities. Even in this case, the learned Court of first instance, without the evidence of the Cadastral surveyor's map, read the map and recorded the finding. Therefore, the learned Court of first instance appears to have correctly recorded the finding on this point. The encroachment is to be identified by appointing the Cadastral surveyor. Therefore, by order of remand, the defendants would definitely not suffer any loss. The truth should come out to find out who is at fault; the defendants may also benefit. If the joint measurement of the suit lands is done.

11. The Court did not find any infirmities in the impugned judgment and decree. Hence, the substantial questions of law have been answered that the First Appellate Court has rightly remanded the matter for a fresh trial, and the remand of the First Appellate Court is not bad without considering the point of the title of the plaintiff as it was not the issue before the trial Court.

12. In view of the above discussion, the following order is passed :

ORDER

- (i) The appeal stands dismissed.
- (ii) No order as to costs.
- (iii) Both parties are to appear before the First Appellate Court at first instance on 15.01.2024.
- (iv) Record and Proceedings be returned to the learned Court of first instance.
- (v) It is clarified that all the points are kept open.

(S. G. MEHARE, J.)

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