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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.362 OF 2016

with

CIVIL APPLICATION NO.467 OF 2016

Vasant Narayan Pawar & Ors.

... Appellants

Versus

Rangrao Govind Pawar

...Respondent

Mr.S.G.Deshmukh with Mr.Ramdas A. Shelke, for the Appellants.
Mr.Sachin K. Hande, for the Respondent.

CORAM: G. S. KULKARNI, J.
DATED: JANUARY 04, 2023

P.C.

1. Heard learned Counsel for the parties. This appeal from order is directed against the judgment and order dated 22 February 2016 passed by the learned Principal District Judge, Sangli whereby the appeal of the appellants has been partly allowed by the following order:-

“ORDER

1. The appeal is partly allowed.
2. The judgment and decree dated 29.12.2008 passed by the Civil Judge, J.D., Tasgaon, in Regular Civil Suit No.197/1991, is hereby set aside.
3. The suit is remanded to the trial Court. The plaintiff is directed to examine the surveyor Shri. P. S. Ambhere to prove the measurement map dated 28.07.2008. After recording the evidence, the trial Court is to decide the suit afresh.
4. Parties to bear their own costs.
5. The original suit being very old, the trial Court is directed

to decide the same within two months from the receipt of R & P.

6. R & P be sent to the trial Court forthwith.

7. Decree be drawn accordingly.”

2. The respondent/original plaintiff filed the suit in question (Civil Suit No. 197 of 1991) against the appellants-defendants inter alia asserting that the appellants-defendants have encroached upon the land belonging to the respondent-plaintiff being land block No. 325. The said Civil Suit on a second remand was decreed by judgment and order dated 29 December 2008 whereby the learned Civil Judge, Junior Division, Tasgaon granted a declaration in favour of the respondent/plaintiff that the appellants-defendants had encroached on the respondent-plaintiff's land to the extent of 8 Ares and directed to hand over the possession of the encroached portion to the respondent-plaintiff within a period of two months. Such judgment and order was set aside by the learned Principal District Judge in an appeal as filed by the appellants/defendants and again the proceedings were remanded to the Trial Court for fresh adjudication of the suit.

3. The respondent-plaintiff is now aggrieved by such order which sets aside the judgment and decree dated 29 December 2008 passed by the learned Single Judge, Junior Division, in the manner as directed by the Appellate Court. Thus, the suit at the behest of the respondent now would be required to be re-adjudicated.

4. Mr.Deshmukh, learned Counsel for the appellants-defendants, however, has limited grievance. His objection is that during the pendency

of the appeal, the appellants-defendants had moved an application dated 2 July 2015 for a review measurement of the land in question. He submits that such an application was rejected by a reasoned order dated 15 October 2015 passed by the learned Principal District Judge, Sangli. He submits that, however, as now there is final adjudication on the appeal by virtue of which the suit is required to be decided afresh, an opportunity to the appellants-defendants for review measurement in terms of the prayer clause made in such application ought to be made available to the appellants-defendants. He submits that if such application was to be taken up for hearing when the appeal itself was being decided, possibly the conclusion could have been different on the said application.

5. On such submission of Mr. Deshmukh, Mr. Hande, learned Counsel for the respondent-plaintiff submits that the said application dated 2 July 2015 as moved on behalf of the appellants-defendants stood dismissed by an order dated 15 October, 2015 passed below 'Exhibit 29'. He submits that such order ought to have been challenged by the appellants/defendants and as the said order was not challenged by the appellants/defendants, it is not open for the appellants-defendants now to raise any contention to correct the measurement. He submits that the scope of the present proceeding is limited to the challenge to the judgment and order dated 22 February 2016 whereby the appeal itself has been decided.

6. Having heard learned Counsel for the parties and having perused the record and more particularly, the judgment and order passed by the learned Single Judge decreeing the suit, as also the impugned judgment

and order passed by the learned Principal District Judge, in my opinion, it is quite clear that by the judgment and decree dated 29 December 2008 passed by the learned Civil Judge, Junior Division, has been set aside by the impugned judgment and order and the suit is now remanded to the Trial Court for adjudication afresh. However, while remanding the suit for fresh adjudication, learned Principal District Judge permitted the respondent-plaintiff to examine the Surveyor Mr. P. S. Ambhere to prove the measurement map dated 28 July 2008 and that after recording the evidence, the Trial Court was directed to decide the suit afresh.

7. There is, however, some substance in the contention of Mr.Deshmukh that if suit is to be now decided afresh and by virtue of the order dated 15 October 2015 the prayer of the appellants/defendant for a review measurement although was rejected, considering the nature of the order passed on the appeal, the learned District Judge ought to have permitted the appellants/defendants to raise such issue before the learned Trial Judge.

8. Considering the complexion of the dispute, in my opinion, if the said application (Exhibit 29) as filed by the appellants/ defendants was to be taken up for hearing alongwith the appeal, more particularly, considering the nature of the order passed in the appeal, there was quite a possibility that once an opportunity was being made available to the respondent-plaintiff to lead additional evidence, the opportunity as prayed for by the appellants-defendants for a review measurement can also be made available to the appellants-defendants. Thus, in my opinion, the present appeal is required to be disposed of by keeping open all

contentions of the appellants-defendants as also that of the respondent-plaintiff on such application which is permissible for the appellants/defendants to move before the learned Trial Judge for 'Nimtana Mojani'. The appeal is accordingly disposed of by the following order:-

ORDER

(i) The appellants-defendants are permitted to make an application before the learned Trial Judge in regard to any 'Nimtana Mojani'. If such an application is filed, it would be permissible for the respondent-plaintiff to oppose the same on all permissible grounds.

(ii) The learned Trial Judge shall pass appropriate order on the said application as per law and further proceed to adjudicate the suit as per the directions of the learned Appellate Judge in the impugned order.

(iii) As the suit itself is of the year 1991, the same be adjudicated as expeditiously as possible, in any event, within a period of six months from the date this order is presented by the parties before the learned Trial Judge.

(iv) All contentions of the parties on fresh adjudication, subject to the orders passed by the District Judge, are expressly kept open.

9. Disposed of in the above terms. No costs.

10. As the appeal itself is disposed of, pending Civil Application would not survive, the same also stands disposed of.

(G. S. KULKARNI, J)