

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 868 OF 2022
WITH
INTERIM APPLICATION NO.10452 OF 2022

Mr. Bhaskar Yashwant Kandekar ...Appellant

Versus

Mr. Dhondiram Bhimaji Kandekar ...Respondent

...

Mr. Bhushan Deshmukh a/w Mr. Vedant Bende, for Appellant.

Mr. Girish Agarwal a/w Ms. Naina P. Boraste, for Respondent.

...

CORAM : SANDEEP V. MARNE, J.

DATE : OCTOBER 17, 2023.

P.C.:

1. The challenge in this Appeal is to the Judgment and order dated 15 December 2021 passed by the District Judge-9, Nashik in Regular Civil Appeal No.110 of 2018. The District Court has allowed the Appeal and while setting aside the judgment and decree dated 2 May 2018, has remanded Regular Civil Suit No.48 of 2011 for deciding it afresh. The Lower Appellate Court has also directed the trial Court to conduct fresh measurement regarding the suit property and all adjoining properties.

2. I have heard the learned counsels appearing for the Appellant and Respondent. The main reason that has weighed the mind of the lower Appellate Court is the difference in the area of encroachment between the two measurements. In the year 2008, the encroachment was shown in respect of area admeasuring 4R, whereas in the fresh measurement conducted in the year 2018, in pursuance of the order of this Court dated 27 September 2017, there is increase in the area of encroachment from 4R to 8R. The lower Appellate Court has also found certain other discrepancies in the measurement conducted in the year 2018. For this reasons, the lower Appellate Court has remanded the suit for conduct of fresh measurements.

3. The learned counsel for the Appellant would submit that the lower Appellate Court is empowered under provisions of order 41 Rule 27 of the Code of Civil Procedure to take additional evidence. He would submit that instead of remanding the suit for retrial, the Appellate Court would have directed the parties to lead such additional evidence as is necessary. While he may not be entirely incorrect in contending that the lower Appellate Court is vested with jurisdiction to direct parties to lead additional evidence, in the present case the additional evidence is in the nature of a fresh measurement to be carried out by a surveyor, on which the entire suit hinges. The party against

whom the measurement report is submitted, is entitled to cross examine the surveyor. Instead of carrying out this entire exercise before the lower Appellate Court, it would be appropriate if the exercise of carrying out fresh measurements and recording of evidence of surveyor is carried out before the trial Court.

4. The learned counsel appearing for the Appellant would express an apprehension that direction No.4 of the lower Appellate Court in Judgment and order dated 15 December 2021 would be construed by the Cadastral Surveyor as a threat. He would submit that on account of directions issued in Paragraph No.4 of the order, the Cadastral Surveyor may not show any encroachment though actually found during the course of measurement. In my view this apprehension expressed by the learned counsel for the Appellant is totally baseless. The lower Appellate Court has not guided the Cadastral Surveyor to carry out the survey and measurement in a particular manner. All that the Cadastral Surveyor is directed is to precisely measure the land by giving all the necessary details. There is no reason for the Cadastral Surveyor to feel apprehensive while carrying out the survey and measurement. The Cadastral Surveyor would be at liberty to measure the lands in question and submit his report as per the factual position. If indeed the surveyor finds any

encroachment, he must include the same in his map and the report. Thus, the apprehension sought to be raised by the learned counsel for the Appellant about threat given to the Cadastral Surveyor by the lower Appellant Court appears to be totally misplaced.

5. I therefore do not find any patent error in the impugned judgment and order dated 15 December 2021 passed by the lower Court. The Appeal being devoid of merits, is rejected without any order as to costs.

6. Considering the long pendency of the suit, the Trial Court is requested to make an endeavour to decide the Suit as expeditiously as possible, preferably within a period of six months by carrying out the exercise of fresh survey as directed by the lower Appellate Court.

7. The parties to appear before the trial Court on 23 October 2023 and obtain necessary directions.

8. In view of disposal of Appeal, Interim Application does not survive and stands disposed of.

(SANDEEP V. MARNE, J.)