

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.21 OF 2020
WITH
CIVIL APPLICATION NO.8 OF 2020
IN
APPEAL FROM ORDER NO.21 OF 2020

...

Ramesh Hiraji Patil & Ors.Appellants/Applicants

V/S

Jayawant Barkya Patil & Ors.Respondents

...

Mr. Drupad S. Patil i/b Mr. Balasaheb G. Ligade for the
Appellants/Applicants.

Mr. Sanjay P. Shinde for Respondent Nos.1 to 4.

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CORAM: SANDEEP V. MARNE, J.

DATE : DECEMBER 13, 2023.

PC

1 By the present Appeal, Appellants challenge judgment and order dated 25 April 2019 passed by the District Judge-3, Raigad at Alibagh setting aside the judgment and decree dated 27 September 2013 passed by the Joint Civil Judge Junior Division, Alibag dismissing the suit and remanding the same to the Trial Court for the purpose of appointment of Court Commissioner for measurement of the land bearing Gat Nos.179 and 181.

2 Plaintiff filed Regular Civil Suit No.19 of 2008 for a declaration that he, alongwith Defendant No.7 to 9, are the owners of the suit land bearing Gat No.179. Plaintiff also sought prayer for recovery of possession of encroached portion of land in Gat No.179 from Defendant Nos.1 to 6. He also sought injunctive reliefs against Defendant No.1 to 6 to restrain them from committing any encroachment on the suit property in future. The Trial Court proceeded to dismiss the suit by its judgment and decree dated 27 September 2013 by answering the issue about ownership of the suit property by Plaintiff and Defendant Nos.7 to 9 in the negative. The Trial Court also arrived at a finding that the Defendant Nos.1 to 6 did not make any encroachment in suit property bearing Gat No.179. Plaintiff filed Civil Appeal No.261 of 2013 before the District Judge, challenging the judgment and decree dated 27 September 2013. The District Judge has proceeded to partly allow the Appeal and has proceeded to remand the suit for fresh decision after appointment of Court Commissioner for measurement of land bearing Gat Nos.179 and 181 for the purpose of ascertainment of encroachment, if any.

3 The Appellants are aggrieved by the District Judge's decision dated 25 April 2019 and have filed the present Appeal.

4 I have heard Mr. Patil, the learned Counsel appearing for the Appellants. He would submit that the District Judge has committed an

error in remanding the suit for fresh decision, which was not at all warranted in the facts and circumstances of the present case. He would submit that the power of remand by the Appellate Court is in a narrow compass and that remand of the suit cannot be resorted to in a routine manner. He would place reliance on the judgment of this Court in ***Vasant Bhaskar Thakur vs. Sitaram Waman Thakur***, (Appeal from Order No.609 of 2022, decided on 29 August 2023). Alternatively Mr. Patil would submit that in the event the District Court was of the view that measurement of land bearing Gat Nos.179 and 181 was absolutely necessary, it ought to have framed an additional issue and made a limited remand to the Trial Court for answering the said issue. Alternatively, the District Court would have permitted the Plaintiff to lead additional evidence for the purpose of decision of the Appeal. That remand of the entire suit was not at all necessary.

5 Mr. Patil would further submit that alleged encroachment is not the only issue which is decided by the Trial Court. He would submit that the Trial Court has also negated the contention of the Plaintiff that he is the owner of the suit property. That the District Court has not even ventured in to the said issue and without disturbing the finding of the Trial Court on the issue of ownership over suit property by Plaintiff, the Appellate Court has proceeded to remand the entire suit which would have the effect of wiping off the finding recorded by the Trial Court on the issue of ownership as well. So far as the issue of encroachment is concerned, Mr. Patil would submit that in the peculiar facts and circumstances of the

present case, the issue of encroachment cannot be decided only on the basis of measurements. Inviting my attention to paragraph 6 of the Written Statement, he would submit that the Defendant No. 3 has specifically raised the issue of erroneous recording of area of Gat No.181 during consolidation scheme. That therefore the issue of encroachment is required to be decided not merely on the basis of measurement but by taking into consideration the contention raised by the Appellants in respect of recording of erroneous area in the consolidation scheme. He would pray for setting aside the order passed by the District Judge.

6 *Per contra*, Mr. Shinde, the learned counsel appearing for the Respondent/Plaintiff would oppose the Appeal and support the order passed by the learned District Judge. He would submit that in pursuance of the remand order of the District Judge, the Court Commissioner, (TILR, Alibaug) has already carried out joint measurement of land bearing Gat Nos.179 and 181 and to that extent, the present Appeal is actually rendered infructuous. He would submit that based on the said report of the TILR, the Trial Court is proceeding ahead to decide the issue of encroachment and that therefore there is no necessity of this Court interfering in the order passed by the District Judge. He would further submit that no prejudice would otherwise be caused to the Appellants if joint measurement of land bearing Gat Nos.179 and 181 is carried out for the purpose of ascertainment encroachment, if any. He would pray for dismissal of the Appeal.

7 I have considered the submissions of the learned counsel appearing for the rival parties and have perused the records.

8 The submission of Mr. Patil about wiping off the finding recorded by the Trial Court about ownership of Plaintiff over the suit property on account of remand of the suit, appears to be attractive in the first blush. However on a deeper scrutiny, I do not find any merit in the same. Perusal of the Plaint and the Written Statement would indicate that Plaintiff claims ownership in respect of land being Gat No.179. None of the Defendants are challenging the Plaintiff's ownership over land bearing Gat No.179. Thus, it is really questionable as to whether it was necessary for the Trial Court to decide the issue as to whether the Plaintiff is the owner of land bearing Gat No.179 or not. The Trial Court appears to have framed an issue in that regard essentially on account of a prayer to that effect being made in the Plaintiff in his suit. Be that as it may, In absence of any contest between the parties over Plaintiff's claim of ownership over land bearing Gat No.179, in my view, no prejudice is caused to the Appellants on account of remand of the suit which may result in wiping off finding recorded by the Trial Court on the issue of ownership of suit property by Plaintiff.

9 Mr. Patil's submission is that the Appellate Court could have either permitted the Plaintiff to lead additional evidence or to frame an

additional issue and directed the Trial Court to decide the additional issue. While it is true that the Appellate Court could have adopted the said course of action, in the present case, perusal of the pleadings filed by both the parties would indicate that the only core issue involved in the suit is about the alleged encroachment by Defendant Nos.3 to 6 on land bearing Gat No.181. This appears to be the only issue which is required to be decided in the suit. In that view of the matter, permitting the Plaintiff to lead additional evidence or to frame additional issue by the Appellate Court and requesting the Trial Court to decide such additional issue would virtually amount to redeciding the entire suit itself. Therefore, reliance of Mr. Patil on the judgment of this Court in ***Vasant Bhaskar Thakur (supra)*** would not assist his case in the light of the peculiar facts and circumstances of the present case.

10 Perusal of the order passed by the Trial Court would indicate that in paragraph 17 the Trial Court had actually recorded following findings:

“17. Considering the dispute between the plaintiff and defendant regarding encroachment, it was necessary for the plaintiff to measure both gat Nos.179 and 181. Without measurement of both gat Nos.179 and 181 one cannot come to the conclusion that there is encroachment made by the defendant, hence land of defendant is excess in area.”

11 Thus the Trial Court itself was of the view that both Gat Nos.179 and 181 were required to be measured for the purpose of ascertainment of encroachment, if any. However why the said course of action was not adopted by the Trial Court is beyond comprehension. In my view, the

Appellate Court has corrected the error committed by the Trial Court in not ordering joint measurement of the lands bearing Gat Nos.179 and 181. I, therefore, do not find any patent error in the approach of the District Court in ordering remand of the suit.

12 What is left now is the apprehension expressed by Mr. Patil that the Trial Court would decide the suit only on the basis of the joint measurement of the land bearing Gut Nos.179 and 181. He apprehends that specific defence taken by the Defendant No.3 in para 6 of his Written Statement would be ignored. I do not see any reason as to why the Trial Court would ignore the said defence taken by the Defendant No.3 in the Written Statement. Even if the Trial Court arrives at the conclusion on the basis of the measurement map that any encroachment is reflected, the Trial Court is bound to take into consideration the defence of erroneous indication of area of Gut No.181 in the consolidation scheme, as per law. Mr. Shinde would submit that under the provisions of Maharashtra Prevention of Fragmentation and Consolidation of Land Holdings Act, 1947 Civil Court cannot decide the issue of correctness of area recorded in consolidation scheme. This is something which the Trial Court would decide. If Defendant No.3 is indeed permitted by law to raise such defence, the said defence is bound to be considered by the Trial Court. No opinion on merits in that regard is expressed and the Trial Court would decide the said defence on its own merits.

13. I therefore do not find any merit in the present Appeal, it is dismissed without any orders as to costs. Needless to say that the Trial Court shall decide the suit uninfluenced by any of the observations made in the present order.

14 In view of the disposal of the Appeal, the Civil Application does not survive and the same is disposed of accordingly.

(SANDEEP V. MARNE, J.)