

Arjun

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.261 OF 2020
WITH
INTERIM APPLICATION NO.3380 OF 2019
IN
SECOND APPEAL NO.261 OF 2020**

Shri. Somnath Kashinath Avhad ...Appellants/
(Since deceased through legal heirs) Applicants
1(a). Mrs. Anjanabai Somnath Avhad & Ors.

V/s.

Shri. Shankar Bhimaji Avhad & Ors. ...Respondents

Mr. Bhalchandra S. Shinde, for the Appellants/Applicants.

Mr. Shivram B. Avhad, Respondent No.2 in person.

**CORAM : MADHAV J. JAMDAR, J.
DATE : 27th FEBRUARY, 2023**

P.C.:

1. Heard Mr. Bhalchandra S. Shinde, learned counsel appearing for the Appellants and Mr. Shivram B. Avhad-Respondent No.2 in person.

2. A learned Single Judge of this Court by order dated 17th February, 2020 framed following substantial question of law :

“Whether both the Courts below have committed an error apparent on the face of record by placing

reliance on Exhibit-199, the Report of Cadastral Surveyor, which was drawn without effecting notice on the Appellants and Defendant No.2.?”

The above substantial question of law appears to have been framed by a learned Single Judge as the Cadastral Surveyor who was appointed as Commissioner and who has submitted the report at Exhibit-199, stated in the cross examination that, he had sent the notices to the Plaintiff, Defendants and the adjoining land holders by U.C.P., however, he is not aware whether the said persons have received the notices.

3. Learned Single Judge of this Court framed the aforesaid substantial question of law and issued notice to the Respondents. After issuance of notice, the Respondent No.1 has filed affidavit-in-reply in IA No.3380 of 2019. In the said affidavit- in-reply, the Respondent No.1 has annexed certain documents which he has received under the Right to Information Act, 2005 which *inter alia* includes notices issued by certificate of posting and a statement dated 24th June, 2000 recorded by Court Commissioner i.e. Cadastral Surveyor, which has been signed by Maruti Khandu Avhad and Krushnaji Tulsiram Avhad and also bears thumb

impression of Kashinath Mhatu Avhad. The said statement shows that, those persons were present when the Cadastral Surveyor conducted the survey. The documents also show that, the Defendants have refused to sign on certain statements recording their presence when the survey was carried out.

4. Both the Courts after considering the evidence on record have observed about the presence of the aforesaid persons and, that, Cadastral Surveyor has carried out the survey after giving notices. Therefore, there is no substance in the substantial question of law framed in this Second Appeal.

5. Mr. Shinde, learned counsel appearing for the Appellants also submitted that, there is another substantial question of law involved in this Second Appeal. He submitted that, the reliefs sought in the Appeal is regarding encroachment and, therefore, it is mandatory that under the provision of Order VII Rule 3 of the Code of Civil Procedure, 1908 [Bombay Amendment] in case of encroachment, a sketch showing as approximately as possible the location and extent of the encroachment shall also be filed along with the

plaint.

6. Sub-Section (1) of Section 100 of the C.P.C. provides that, save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an Appeal shall lie to the High Court from every decree passed in Appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves substantial question of law. Sub-Section (4) of Section 100 of the C.P.C. provides that, where the High Court is satisfied that substantial question of law is involved in any case, it shall formulate that question. Sub-section (5) of Section 100 of C.P.C. provides that, the Appeal shall be heard on the question so formulated and the Respondent shall, at the hearing of the Appeal, be allowed to argue that the case does not involve such question. Proviso to Sub-Section (5) of Section 100 of the Civil Procedure Code provides that, nothing in this Sub-Section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the Second Appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question. Thus, Second Appeal is to be

heard on the substantial question of law framed by the Court, however, the same does not prohibit Court for reasons to be recorded to hear the Second Appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

7. Mr. Shinde, learned counsel is right in pointing out that in the plaint which has been filed with respect to the encroachment, a sketch showing as approximately as possible the location and extent of encroachment is not filed. However, in the present case, Cadastral Surveyor is appointed as commissioner and he has filed the report, showing that, there is encroachment. Therefore, there is no prejudice has been caused to the Appellants as sketch showing the encroachment is not annexed. Therefore, there is no substance in the said substantial question of law raised by Mr. Shinde assuming that the same is allowed to be raised.

8. For the above reasons, there is no substance in the substantial question of law raised by Mr. Shinde and therefore, the Second Appeal is dismissed, however, with no order as to costs.

9. In view of dismissal of the Second Appeal, nothing

survives in the Interim Application and the same is also dismissed.

10. At this stage, Mr. Shinde, learned counsel appearing for the Appellants states that, this Court has granted stay to the execution of decree by order dated 17th February, 2020 and seeks continuation of the same for reasonable period. Mr. Shivram B. Avhad, Respondent No. 2 appearing in person opposes the said request. However, as the said stay order is in operation for more than 3 years, the same shall remain in operation up to 31st August 2023.

(MADHAV J. JAMDAR, J.)