

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

MISC. CIVIL APPLICATION (REVIEW) NO.261/2023
IN
SECOND APPEAL NO.378/2022(D)

Ramu s/o Shyamrao Raut
Vs.
Dattatraya Shikshan Sanstha

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Ms Nisha Gajbhiye (Wasnik), Advocate for applicant

CORAM : SMT. M.S. JAWALKAR, J.
DATED : 09/03/2023

The present application is filed for Review under Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908. It is contention of the learned Counsel for applicant that this Court has committed an error by upholding the order passed by the learned First Appellate Court by which matter was remanded back to the learned Trial Court for allowing the applicant/plaintiff to move an application for measurement.

2. It is her contention that plaintiff has not made MHADA or Gram Panchayat as necessary party. The contention of defendant is that he has not encroached land of plaintiff as he has encroached the land of MHADA.

3. The learned Appellate Court on the basis of law position, quashed and set aside the judgment and decree passed by learned Trial Court and remanded

the suit. The learned Trial Court for fresh hearing with giving opportunity to the appellant (plaintiff) to file application to get measured the suit property within three months.

4. This Court already considered the judgment passed by learned Trial Court as well as Appellate Court and concluded that there is no error in remanding the matter back to the learned Trial Court. It is contention of the applicant that the plaintiff has not filed any application during the pendency of the suit and therefore, he is not entitled to file said application.

5. The learned Counsel for applicant relied on *Shantaram Dattatray Kekan and others Vs. Bhausahab Karbhari Kekan and another, reported in 2023 (1) ALL MR 437*, however facts involved in the said matter are distinguishable. In the same matter, the substantive prayer for measurement of suit land was virtually granted by directing appointment of Court Commissioner. In earlier litigation, between same parties over same land, possession of defendants is already established. Therefore, this Court held that appointment of Court Commissioner at least at this stage, is not warranted. However, in the same judgment, it is made clear that no hard and fast Rule that Court Commissioner can be appointed, only at particular stage. It all depends upon facts and circumstances of each case.

6. The learned Counsel for applicant also relied on *Shri Bajrang Sales Corporation and others Vs. Nagpur Improvement Trust, Nagpur and others, reported in 2022(2) ALL MR 379*, in support of her contention that while considering the review jurisdiction, it is held that in Second Appeal, restriction cannot be on count that error must relate to substantial question of law. Review application can be entertained when statutory parameters laid down under Order 47 read with Section 114 of the Civil Procedure Code are satisfied.

7. Thus, in my considered opinion, there is no case made out to review the order passed by this Court. By remand and by granting opportunity to measure the land would not cause any prejudice to the defendant and as per her contention that defendant encroached the land of MHADA. The report will definitely show the exact position of encroachment. If it is revealed that there is no encroachment on the land of plaintiff, the defendant would succeed. At any rate, without measurement, one can not come to the conclusion about encroachment. As such, the review is rejected.

JUDGE

R.S. Sahare