

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

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SECOND APPEAL NO. 240/2009

Baliram s/o Kisan Sonewane
A/a 48 years, occu: Agril.
R/o Goghara, Tah.Tirora, Dist. Gondia.

..APPELLANT

v e r s u s

Laxman s/o Kisan Sonewane
A/a 55 years, occu: Agril.
R/o Goghara, Tah.Tirora, Dist.Gondia

..RESPONDENT

.....
Mr. R.K Borkar, Advocate for the Appellant
None for the Respondent
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CORAM: ANIL L. PANSARE, J.
DATE OF CLOSING: 20.07.2023.
DATE OF PRONOUNCEMENT: 25.07.2023.

JUDGMENT:

The appellant/original plaintiff has filed the present Appeal against the respondent/original defendant, being aggrieved by the judgment and decree dated 28.11.2008 passed by learned Ad-hoc District Judge-1, Gondia in Regular Civil Appeal No.09/2005 thereby reversing the judgment and decree dated 30.09.2003 passed by learned Civil Judge, Junior Division, Tirora, in Regular Civil Suit No.7/2002. The parties will be hereinafter referred to by their original status.

2. The plaintiff claims to be the owner and possessor of the agricultural land admeasuring 0.71 HR bearing Survey No.126, situated at Mouza Patil-tola, Tah.Tirora Dist.Gondia. According to the plaintiff, the defendant has encroached upon his land to the extent of 02R. The defendant, brother of the plaintiff, is the owner and possessor of adjoining land bearing Survey No. 127 admeasuring 0.71 HR. There is a boundary (*Shivdhura*) in between the two lands.

3. The plaintiff has come up with a case that the defendant has cut the boundary line, separating the two fields and encroached upon his field. The plaintiff measured his field on 30.12.1999 through Taluqa Inspector of Land Records (TILR),Tirora and found that the defendant has encroached upon the field to the extent of 02R. It is the further case of the plaintiff that on 02.04.2000, he went to take possession of the encroached land as per the measurement, but the defendant obstructed. Hence, the suit.

4. The defendant has resisted the claim by filing written statement. He denied the adverse allegations including encroachment. According to him, the partition between the brothers have been effected in the year 1973-74 and since then they are in possession of their respective lands. According to defendant, there is a dispute between him and the plaintiff and, therefore, a false and bogus suit has been filed.

5. The trial Court has found substance in plaintiff's case and held that the defendant has encroached upon the plaintiff's land to the extent of 02R. The first appellate court has, however, reversed the finding. One of the reasons is non-compliance of Order VII Rule 3 of the

Civil Procedure Code, 1908 (“the Code”,in short) and the other is that the plaintiff ought to have measured both the lands viz. Survey Nos.126 and 127.

6. The appeal has been admitted on the following substantial questions of law :-

“1. Was it necessary at all for the Surveyor to have measured Sur. No.127 also ?

2. Because of non measurement of Sur. No. 127 is the measurement of Sur. No.126 vitiated?”

7. Mr. S.R.Borkar, the learned Advocate for the plaintiff contended that though the plaintiff is/was under an obligation to submit sketch map, in terms of the O.VII R.3(Bombay amendment), the plaintiff has described the encroachment in the plaint sufficiently to identify it and that, therefore, non-compliance of O.VII R.3 of the Code cannot lead to dismissal of the Appeal. He submits that the defect, if any, is curable. In support, he has relied upon the judgment and order dated 25.04.2023 passed by the coordinate Bench of this Court in **Second Appeal No. 34/2022 (Motiram Hari Bramhankar and others vs. Late Shri Yashwant Sawji Waghmare (Dead) Through Lrs)**, wherein it is held that the provisions under O.VII R.3 of the Code is not mandatory and that the purpose of the provision is for identification of the encroached portion to facilitate the execution. In the said case, the Court found that the evidence of Talathi and Surveyor coupled with the measurements carried out by the Surveyor, plot no. and boundaries are sufficient to identify the property and that therefore the suit is/was maintainable.

8. The finding of the first Appellate Court that for non-compliance of O.VII R.3 of the Code, the suit is not maintainable is not in consonance with the law laid down by this Court.

9. Nonetheless, the crucial issue is of encroachment of land. The first Appellate Court has noted the admissions given by the Surveyor in the cross-examination. The first Appellate Court has noted that the plaintiff deposed that he has pointed out the spot to PW 2-Surveyor. The PW2 has admitted that if the plaintiff had shown incorrect spot, there was possibility of incorrect measurement and map. The first Appellate Court has then noted the evidence of defendant's witness Bhaiyalal, who is the third brother. He deposed that the boundary between the two fields is the same as was existing earlier.

10. Accordingly, the first Appellate Court held that the trial Court has committed an error in appreciating the evidence. It observed that the trial Court has relied upon the admission given by DW2-Bhaiyalal that boundaries between two fields is irregular in thickness, but failed to notice the evidence that the boundary was intact. Thus, the trial Court has emphasized upon the term 'irregular' used by the witness, but ignored a vital admission that the boundaries separating two fields was intact.

11. Thus, it appears that the boundary between the fields was not disturbed. If the boundary was intact, the trial Court ought to have examined, whether in the peculiar facts, the boundary will prevail over the area as held by this Court, in the case of **Kashinath Shastri vs. Haribhau Bawanthade**, reported in **2004(2) Mh.,L.J. 722**. The evidence

led before the trial Court indicates that the boundary separating two fields has not been disturbed. In such circumstances, the proper mode available for the plaintiff was to measure both the lands i.e. land bearing Survey Nos.126 and 127 which would have facilitated the parties to reveal the exact area in possession of both the sides. This would have given both, the plaintiff and the defendant, opportunity to lead evidence accordingly.

12. It is worth mentioning here that plaintiff's case is not of defendant possessing of 02R more than the area owned by him. In that sense, it was necessary for Surveyor to measure both the survey numbers i.e. Survey Nos.126 and 127. Having not done so, the measurement carried out in respect of Survey No.126 will be of no assistance to find out the truth. The substantial question of laws are accordingly answered as follows.

- (1) It was necessary for the Surveyor to have measured Survey No.127 also.
- (2) Because of non-measurement of Survey No.127, the measurement of Survey No.126 is of no assistance to find out the truth.

13. Having answered the substantial questions of law in the manner herein-above, I find no merit in the Appeal. The Second Appeal is dismissed with no order as to costs.

JUDGE