



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 44 OF 2009

1. Balasaheb s/o. Raghunath Deshmukh
2. Ankush s/o. Raghunath Deshmukh
3. Tanaji s/o. Raghunath Deshmukh
4. Umaji s/o. Raghunath Deshmukh
5. Netaji s/o. Raghunath Deshmukh (died)
 - 5-1. Ulka w/o. Netaji Deshmukh
 - 5-2. Abhishek s/o. Netaji Deshmukh
 - 5-3. Aishwarya d/o. Netaji Deshmukh
6. Sojarbai d/o. Raghunath Deshmukh
Through G.P.A.
Netaji s/o. Raghunath Deshmukh

... APPELLANTS

(Original Plaintiffs)

VERSUS

1. Satish s/o. Vaijanath Deshmukh
2. Sahebrao s/o. Bajirao Deshmukh (died)
 - 2-A. Shobha Sahebrao Deshmukh
 - 2-B. Shankar Sahebrao Deshmukh
 - 2-C. Gangadhar Sahebrao Deshmukh
 - 2-D. Damodar Sahebrao Deshmukh
 - 2-E. Chaturabai Sahebrao Deshmukh

3. Shivaji s/o. Bajirao Deshmukh
4. Murlidhar s/o. Hanmant Deshmukh
5. Ramrao s/o. Bajirao Deshmukh (*died*)
 1. Shakuntala Ramrao Jadhav
 2. Sow. Kamal Kashiram Mane
 3. Sow. Sunanda Suresh Mundhe
 4. Harishchandra Ramrao Jadhav (Deshmukh)
 5. Deepak Ramrao Jadhav (Deshmukh)
 6. Madhv Ramrao Jadhav (Deshmukh)
6. Kalinda w/o. Ashok Deshmukh
7. Ranjit Ashok Deshmukh

... RESPONDENTS

(Original Defendants)

...
Mr. S.S. Manale – Advocate for Appellants
Mr. S.S. Halkude – Advocate for Respondents
....

CORAM : SANDIPKUMAR C. MORE, J.
RESERVED ON : 08.08.2024
PRONOUNCED ON : 22.10.2024

JUDGMENT :

1. Heard learned Counsel for the rival parties.
2. The present appellants who are original plaintiffs in Regular Civil Suit No.184 of 2005 have challenged the judgment and order dated 16.12.2008 passed by the learned Ad-hoc District Judge-2, Latur (*hereinafter referred to as “the learned First Appellate Court”*) in Regular

Civil Appeal No. 110 of 2008 whereby the judgment and decree passed by the learned Jt. Civil Judge, Junior Division, Latur (*hereinafter referred to as “the learned Trial Court”*) in the aforesaid civil suit dated 02.05.2008 has been set aside and the matter is remanded back to the learned Trial Court with direction to appoint commissioner for joint measurement of the lands of the parties to the suit.

3. Background facts of the case are as under :

The appellants/plaintiffs are the owners of land survey No.12/2 at village Kaneri, Tq. and Dist. Latur, admeasuring 03H 42 R and the present respondents/defendants are the adjacent land owners. The appellant No.5 i.e. original plaintiff No.5 had applied for T.I.L.R., Latur for measurement of the disputed lands on 22.04.2003 and 29.05.2004, the land was measured in presence of the defendants and panch. It was found that, there was an encroachment of 36 R over the land of plaintiffs as shown in measurement map (Exhibit – 34) and therefore, the suit was filed for possession and mesne profits. On the contrary, the defendants/respondents resisted the suit and denied the measurement carried out by T.I.L.R., Latur since it was not done in their presence. They also disputed the map of measurement and prayed for dismissal of the suit. The learned Trial Court then conducted the trial and decreed the suit of the plaintiffs/appellants. However, the learned First Appellate Court found that, the measurement was not done properly by the concerned cadastral surveyor and finding faults in his evidence, remanded the matter back as mentioned above. Hence, this appeal.

4. Learned Counsel for the appellants/plaintiffs submits that, the surveyor i.e. P.W. - 2, Govind Suryawanshi had properly carried out the measurement and as per the map drawn by him, it was established that the respondents/defendants had made an encroachment as shown in the map. According to him, there was no interference required at the hands of the learned First Appellate Court as the finding of the learned Trial Court was based on the evidence. In support of his submissions he relied on the following judgments :

- (a) Hon'ble Supreme Court in the case of **Subhaga and Ors. Vs. Shobha and Ors.**, reported in *2006 DGLS (SC) 522*
- (b) This Court in the case of **Balkrishna Dattatraya Butte and Ors. Vs. Dattatraya Shankar Mohite and Ors.**, reported in *1997 BCI 53*
- (c) This Court in the case of **Shaikh Isak s/o. Shaikh Amir Vs. State of Maharashtra and Anr.**, reported in *2011(3) ALL MR 361*

5. On the contrary, learned Counsel for the respondents supported the judgment of the learned First Appellate Court directing the remand and he pointed out various faults in the evidence of P.W. – 2, surveyor and the map prepared by him. According to him, the surveyor should have measured the lands of the concerned parties to ascertain encroachment. He also relied on the following judgments :

- (i) This Court in the case of **Yasin Gulab Shikalkar Vs. Maruti Nagnath Aware and Ors.**, in *Writ Petition No. 7278 of 2022* delivered on 25.01.2023

(ii) This Court in the case of **Manohar Mahadeorao Pagrut Vs. Sau. Sunanda Ramdas Tharkar**, reported in *2008 (3) AIR Bom R 337*

(iii) This Court in the case of **Sukhdeo Parashramji Bhugul (Dr.) Vs. Wamanrao Nagorao Charhat**, reported in *2004 (3) MhLj 724*

6. Heard rival submissions and also perused the documents on record alongwith record and proceeding of the original suit.

7. It is significant to note that, this Court as well as Hon'ble Apex Court have settled the issue that, if there is dispute over the boundaries then the best solution is joint measurement. The learned First Appellate Court has in fact directed the joint measurement at the cost of the appellants/plaintiffs. Therefore, considering this aspect the only question involved in this matter is that, whether the surveyor (P.W. – 2) had in fact carried out the measurement properly ?

8. The learned First Appellate Court has made following observation in respect of the measurement carried out by the said P.W. - 2, surveyor :

“However, the witness did not disclose in his examination – in – chief which method he adopted either second or third at the measurement in question. To be more clear his evidence disclose that what is required during measurement but, he failed to explain what he actually did. His evidence further disclose that, he has only ascertained and fixed the boundaries of Sy. No.12 but, was not able to explain in what manner he has traced out encroachment on which side, how much encroachment was there on the land of plaintiffs. The evidence of P.W. No. 2 is deficient about material particulars,

technicalities and how he measured and what was the area found encroached and traced out in what manner. Without such material in the form of evidence disclosed by P.W. No.2, his evidence cannot be self contained, to believe him as to the measurement made by him on the date of measurement is accurate, proper and correct.”

Thus, the aforesaid observation has to be tested in the light of evidence of this witness alongwith map drawn by him. On going through the evidence of this witness it appears that, one of the adjacent land owner was not given notice. Moreover, the sub divisions of survey No.12 are not shown in the map prepared by this witness. On going through the said map it appears that, only the area in possession of the plaintiffs out of total survey No.12 is shown. Further, sub division of the said survey number as per the pleadings of the parties are also not shown in the said map (Exhibit-34). Though the learned Counsel for the appellants/plaintiffs had relied on the judgments as mentioned above but on careful reading of the same it is clearly evident that, those judgments differ with the present case on facts. On the contrary, this Court in the case of **Manohar Mahadeorao Pagrut** (*supra*) has observed that, to have correct approach for ascertaining the area of actual possession and then finding whether there is an encroachment, it is necessary that the lands of plaintiff and defendant both should be measured. In the instant case, it does not reflect in the map (Exhibit – 34) that the surveyor had in fact measured the lands of the defendants.

9. It is extremely important to note that, to determine the encroachment only the evidence of expert person i.e. surveyor is required and the said

measurement should be a joint measurement carried out in presence of the disputing parties. However, in the instant case the evidence of the surveyor suffers from latches and therefore, the observation of the learned First Appellate Court that there is requirement of joint measurement, is absolutely proper in the given circumstances. Thus, no fault can be found in the impugned judgment and order of the learned First Appellate Court and therefore, the present Appeal from Order stands dismissed.

10. The Appeal from Order is accordingly disposed of alongwith pending Civil Application, if any.

[SANDIPKUMAR C. MORE]
JUDGE