



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO. 232 OF 2019.

Shridhar Bhadu Patil

Age: 72 Years, Occu.: Agriculturist,

R/o. Anvarde Budruk, Taluka Chopda, District Jalgaon .. **Appellant.**

VERSUS

1] Baliram Zaga Patil

Since deceased through LRS

1A] Yuvraj Baliram Patil

Age: 54 Years, Occu.: Agriculturist,

1B] Ashok Baliram Patil

Age: 50 Years, Occu.: Agriculturist,

1A & 1B Both R/o. Ghodgaon, Taluka Chopda,
District Jalgaon

2] Dhudku Bhila Patil

Since deceased through LRS

2A1 Sakhubai Dhudku Patil

died Age: 70 Years, Occu.: Household,

R/o. Kusumbe, At Post Ghodgaon,
Taluka Chopda, District Jalgaon

2A] Sakhbai Dhaku Patil,

Age 70 years, Occ. Household, At Post Ghodgaon, Taluka Chopda,
District Jalgaon.

2B) Jijabai Bhanudas Patil

Age: 52 Years, Occu: Household

R/o. At Post Kurakwade, Taluka Shindkheda, District Dhule

2C] Meenabal Vishwas Patil

Age: 50 Years, Occu.: Household,

R/o. Borole Nagar, Near Pankaj School, Chopda, Taluka Chopda,
District Jalgaon

2D] Sarlabai Vikas Patil

Age: 48 Years, Occu.: Household R/o. Takewade,

Taluka Chalisgaon District Jalgaon

2E] Janabai Bapu Desale

Age: 46 Years, Occu.: Household, R/o. Chinchkheda,
Taluka & District Dhule

2F] Ranchhod Dhudku Patil

Age: 44, Occu.: Service,
R/o. Aasaram Nagar, Near HP Gas Agency, Yawal, District Jalgaon

2G] Sambhaji Dhudku Patil

Age: 35 Years Occu.: Agriculturist,

2H] Vishwas Dhudku Patil

Age: 32 Years, Occu.: Agriculturist,
2G & 2H Both R/o. Kusumbe,
At Post Ghodgaon,
Taluka Chopda, District Jalgaon

3] Shriram Baliram Patil

Age: 55 Years, Occu.: Agriculturist,

4] Vimalbai D/o. Baliram Patil

Age: 48 Years, Occu.: Household
3 & 4 Both R/o. Kusumbe, At Post Ghodgaon,
Taluka Chopda, District Jalgaon

...Respondents.

(Org. Defendants (Respondents in First appeal)

.....

Mr. Subodh Shah, Advocate for appellant

Miss Devika Patil, Advocate holding for Mr. N.L. Chaudhari, Advocate for respondents.

CORAM : S.G. CHAPALGAONKAR, J.

DATE : 18TH DECEMBER, 2024.

JUDGMENT . :-

The appellant (original plaintiff) impugns the judgment and decree dated 28.11.2017 passed by learned district Judge, Dhule, in

R.C.A. No. 91 of 2008, thereby upholding the judgment and decree dated 25.7.2008 passed by Civil Judge (J.D.), Shirpur, in R.C.S. No. 12 of 1988, by which suit of the plaintiff seeking possession and removal of encroachment has been dismissed.

2. For sake of convenience, parties are referred to, as per their original status.

3. Mr. Subodh Shah, learned advocate for the appellant submits that plaintiff is owner of western portion of land Gat No. 290/1 situated at Mouje Bhabhe, Taluka Shirpur, Dist. Dhule. The defendant's land bearing Gat No. 301 is abutting the western side of Gat No. 290/1. There is a common bandh between two lands. Plaintiff asserted that since 1982 defendant No.1 gradually damaged, destroyed common bandh and encroached upon land of plaintiff. On 23.5.1986, measurement was caused by plaintiff through cadastral surveyor. It was revealed that 70R land out of Gat No. 290/1 is encroached by defendant No.1. Accordingly, suit was instituted for possession of encroached portion against defendant No.1.

4. Defendants refuted plaintiff's claim. They asserted that there is private Bandh between his land and land of the plaintiff. There are old trees grown up on Bandh between two lands. The claim as regards to encroachment made by plaintiff is fallacious. Consequently, defendants sought dismissal of the suit.

5. During pendency of the suit, a Court Commissioner was appointed. Mr. Murlidhar Hole, TILR caused measurement and

submitted his report on 20.8.2002. He was examined as witness on behalf of plaintiff. However, Trial court observed that measurement map prepared by TILR cannot be relied upon since whole Gat Numbers 290 and 301 are not measured. The exact area of two lands is not discernible from the measurement map. Further, Nadipad area is not counted for. The trial court recorded serious defects in the measurement carried by the TILR and consequently, discarded plaintiff's claim.

6. Aggrieved plaintiff approached learned District Judge by filing R.C.A. No. 91 of 2008. He raised a specific ground that he is ready to go for fresh measurement and bear necessary cost of such measurement. The gist of submissions before first appellate court was that, if there is no reliable measurement map on record of the court, the appellate court may exercise jurisdiction under Order 26 Rule 9 of CPC and after getting fresh measurement map, take final decision as regards to the rival claims. However, learned District Judge finding very same defect in the measurement map already on record, concurred with trial court.

7. Mr. Subodh Shah learned advocate for appellant, after taking this court through findings recorded by courts below, pressed into service the following substantial question of law

- I] Whether there is failure on the part of learned District Court to exercise the power under Order XXVI, Rule 9 of the Civil Procedure Code, 1908. Section 75 and specifically clause (b) thereof empowers the Court to make local investigation. Rule 9 of Order XXVI enable the Court where it provides that local investigation is requisite or proper for the purpose of elucidating any mater in dispute, to issue a commission to

such person at it thinks fit to make such investigation and report thereof to the Court.

The learned District Court failed to appreciate the principle laid by Hon'ble Supreme Court and the High Court in various judgments that, in case of dispute of an encroachment or dimension of a site, the first essential is to get an agreed map and if the parties cannot agree on one, a commissioner must be appointed to prepare the same.

II] Whether the learned 1st appellate Court has committed a manifest error of law, in not appointing the court commissioner, for the measurement of the land Gat No. 290 & 301?

III] Whether the learned District Court failed to exercise the jurisdiction under Order 26 R/w Section 75 of the Code of Civil Procedure, 1908, which ultimately resulted in miscarriage of justice?

8. Learned advocates appearing for both sides, requested this court to decide appeal at the stage of admission and advanced respective submissions on aforesaid substantial questions of law. Learned advocate for the respondents submits that plaintiff failed to prove his case. Earlier, he relied upon the measurement map of 1986; thereafter, map prepared by the Court Commission in the year 2002, but failed to prove his case of alleged encroachment of 71 R land by defendant No.1. The Courts below have concurrently recorded finding that plaintiff failed to prove his case. Hence, no case for interference is made out.

9. Per contra, Mr. Shah learned advocate relying upon judgment of this Court in the case of *Bento Antonio Gomes alias Antonio Bento Gomes vs. Basario Salvador Carneiro and others reported in (2014) 4 Mh. L.J. 366*, submits that when evidence is found unreliable

due to technical defects and no cadastral expert's evidence is available on record, the appellate court should have remanded the matter to the trial court by appointing an expert as Commissioner for doing local inspection, instead of non-suiting plaintiff for technical defects in the measurement carried out by the Court Commissioner.

10. There cannot two opinions about the law laid down by this Court, which is derives support from observations of the Supreme Court of India in the case of *Haryana Wakf Board vs. Shanti Prasad (2006) 8 SCC 671*.

11. In the present case, plaintiff instituted suit on the basis of private measurement, later on Court Commissioner was appointed and his report was placed before trial court, which prima-facie depicts encroachment by defendant No.1. True, that entire gat number was measured by TILR while acting as Court Commissioner, which makes his report technically unacceptable. In fact, when technical error is committed by survey officer, plaintiff can not be blamed. The Plaintiff was faced with such situation for reasons beyond his control, therefore, a specific contention was raised by him before appellate court that he is ready to bear the cost of re-measurement and sought reappointment of Court Commissioner. In this background, it would have been appropriate on part of learned District Judge to exercise powers under Order 26 Rule 9 of CPC and grant an opportunity to plaintiff to bring on record defect free spot inspection by which lis can be finally decided. Apparently, jurisdictional error at the hands of learned district judge is discernible in exercise of jurisdiction under Order 26 Rule 9 of CPC.

12. In that view of the matter, the substantial questions of law pressed into service will have to be answered in affirmative and second appeal needs to be partly allowed, thereby remanding matter back to trial court, with direction to consider plaintiff's prayer for appointment of Court Commissioner for spot inspection and measurement of land. Hence, the following order :-

O R D E R

- [i] Second appeal is partly allowed;
- [ii] impugned judgments and decrees passed by trial court and first appellate court are hereby quashed and set aside;
- [iii] The matter is relegated back to the trial court at the stage of evidence.
- [iv] Parties shall appear before the trial court on 28.1.2025. Plaintiff shall be at liberty to make an application seeking appointment of Court Commissioner / TILR for measurement of suit lands so as to find out encroachment, if any, which shall be favorably considered by trial court.
- [v] Parties shall be at liberty to lead additional evidence, if they wish, on issues which are already framed;

[S.G. CHAPALGAONKAR, J]

grt/-