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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

928 SECOND APPEAL NO. 74 OF 2019

**BHIMRAO KISAN DHOBLE THRO. POA HOLDER-TANAJI
BHIMRAO DHOGALE**

....Appellant

VERSUS

ANJANABAI DURGADAS BANDGAR

.....Respondent

Mr. S. V. Natu, Advocate for the appellant

Mr. D. P. Deshpande, Advocate for the respondent

CORAM : KISHORE C. SANT, J.

DATE : 01st AUGUST, 2024

P. C.

1. Heard the parties for sometime.
2. Parties have shown readiness to argue the appeal even in absence of R & P, as the point involved is very short.
3. This appeal is by the original defendant against whom there is a decree directing him to hand over possession of 90-R from East-North Corner of Block No. 155/2 to the plaintiff.

It is the case of the plaintiff that she purchased the land block No. 155/2 in the year 19-08-1997. In 1998 she purchased total 1.14 R. In 1998 she found that there is encroachment to the extent of 90-R made by the defendant who happens to be adjoining owner. She therefore filed a suit for possession. During proceeding of the suit, the court appointed a Commissioner for measurement o land. However, said report is not proved. Suit was filed on the basis of measurement carried prior to lodging of the suit. It is now the case of the appellant-original defendant that court has relied upon the Surveyor's report which has shown an encroachment to the extent of 90-R. He submits from the record and from the notes of evidence that Surveyor in his deposition accepted that he had not carried measurement in presence of both the parties. He further points out that only the land of the plaintiff was measured instead of entire gut No.155. In the evidence of Surveyor he has categorically admitted that he is not having receipts of notice to the defendant for carrying the measurement. The learned advocate thus, submits that such report should not have been relied upon by the courts below. In

support of his submission, he relies on the judgment reported in 2019 (6) Mh.L.J. 287 in the case of Sudhakar Baburao Kulkarni Vs Gorabai Thansing Marag and others.

4. Learned Advocate Mr. Deshpande vehemently opposed the admission of the appeal stating that evidence is rightly appreciated by both the courts. Suit itself is filed only after getting the measurement done by the Surveyor by making an application Exh.49. There was also an order passed by the learned Tahasildar Exh.50. Thus it is only on getting the measurement done, suit was filed. In both the courts there is no dispute about title over the property or sale deed in favour of the plaintiff etc.

5. On this Mr. Natu, learned advocate points out that application for measurement was made only in respect of property of the plaintiff and not for the entire gut number. Unless entire gut number is measured, no proper findings can be recorded and both the courts have failed in appreciating this

aspect.

6. Learned advocate for respondent further submits that if this court comes to a conclusion that fresh measurement is necessary then in that case findings be called from the concerned court by undertaking necessary exercise and same be considered by keeping the present second appeal pending.

7. It is submitted by Mr. Natu, in that case he will loose an opportunity to challenge the said findings before the first appellate court. If the finding recorded by the learned trial court is produced before this court, this court may not be in a position to appreciate the evidence as can be done by the first appellate court.

8. After hearing the parties, this court finds that instead of admitting the second appeal and keeping it pending, it would be in the interest of justice to remand the matter back to the learned trial court only for the purpose of recording of finding

on measurement, after measurement is carried out by giving notice to both the parties and of the entire Gut No.155 of Bhosa, Tq. & Dist. Latur in view of the judgment in the case of Sudhakar Kulkarni (supra). Hence, the following order:-

ORDER

- i] Second appeal is partly allowed.
- ii] The judgments and decree passed by the courts below are hereby set aside and suit is restored to file of learned CJJD, Latur in RCS No. 215/2000.
- iii] The learned trial court after restoration of the suit shall appoint the Surveyor from the office of TILR or DILR, Latur having jurisdiction of village Bhosa.
- iv] Parties are directed to remain present before the learned trial court on 16-08-2024. If any of the parties failed to remain present, learned trial court to issue notice for securing the presence of the parties.
- v] The plaintiff shall make fresh application for

appointment of the Commissioner before the learned trial court within two weeks from the date of appearance.

vi] The learned Commissioner shall conduct local investigation in accordance with provision of Order 26 Rule 9 of the Cr. P. C. After making compliance of giving notices to the parties and shall take measurement of entire gut No.155 and for that purpose shall also issue notices to other owners in the said gut number.

vii] After report is submitted, the learned trial court shall record findings only on the point of measurement without touching the findings on any other issue which are already recorded and to give fresh decision.

viii] Entire exercise be completed within four months from today.

ix] Measurement be carried out within two

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months.

x] The suit be disposed off within four months or at the most by 31-12-2024.

xi] Let the parties bear the expenses in equal proportion.

xii] Parties to act upon authenticated copy of this order.

[KISHORE C. SANT, J.]

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