



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 27 OF 2024
WITH CIVIL APPLICATION NO. 6819 OF 2024 IN AO/15/2024

1. Murhari s/o. Vishwambhar Nikam

2. Shrihari s/o. Vishwambhar Nikam

... APPELLANTS

(Ori. Defendants)

VERSUS

1. Ganesh s/o. Gopalrao Nikam

2. Dattatraya s/o. Gopalrao Nikam

... RESPONDENTS

(Ori. Plaintiffs)

...

Mr. Satish S. Manale – Advocate for Appellants

Mr. Sachin S. Panale – Advocate for Respondents

....

CORAM : SANDIPKUMAR C. MORE, J.

DATE : 4th October, 2024

ORDER :

1. Heard finally with consent of the parties at admission stage.

2. The present respondents have challenged the judgment and decree passed by the Principal District Judge, Latur (*hereinafter referred to as “the learned First Appellate Court”*) in Regular Civil Appeal No. 196 of 2015 on 16.03.2024.

3. **Background facts of the case are as under :**

The appellants are the original defendants in Regular Civil Suit No. 2 of 2010 which was filed by the present

respondents/plaintiffs for getting possession of encroached portion of 18 R out of land Gat No. 112 to the extent of 1 H 49 R situated at village Mohadal, Tq. Chakur, Dist. Latur, which according to them encroached upon by the present appellants/defendants. The learned Civil Judge, Junior Division, Chakur, Dist. Latur (*hereinafter referred to as “the learned Trial Court”*) by conducting the trial dismissed the same. However, the respondents/plaintiffs preferred an appeal bearing Regular Civil Appeal No. 196 of 2015 before the learned First Appellate Court and vide judgment and decree the learned First Appellate Court on 16.03.2024 set aside dismissal of the suit of the plaintiffs and remanded the matter back to the learned Trial Court with direction that the plaintiffs and defendants should file an application for measurement of land Gat No. 112 by depositing the proportionate measurement fees. Feeling aggrieved with the said order of remand the original defendants who are the present appellants have filed this appeal.

4. Learned Counsel for the appellants/defendants submitted that, the learned First Appellate Court has definitely erred in remanding the matter back to the learned Trial Court. According to him, despite appointment of surveyor the respondents/plaintiffs could not establish the alleged encroachment of 18 R land against

the defendants. He pointed out that, the learned First Appellate Court could have dismissed the matter by discussing the evidence of plaintiffs and their witnesses without remanding the matter back to the learned Trial Court. In support of his submissions he relied upon the following judgments :

- (i) This Court in the case of **Vij Kamagar Sahakari Patsanstha Ltd. Vs. Ramkrushna Dhondiram Thorat and Ors.**, in Writ Petition No. 4974 of 2008 reported in *2009 (3) ALL MR 389* decided on 07.10.2008
- (ii) This Court in the case of **Madhukar Dashrath Bhila Patil and Ors. Vs. Avinash Bhila Patil and Anr.**, in Appeal From Order No. 54 of 2010 reported in *AIROnline 2023 BOM 920* decided on 13.06.2023

5. On the contrary, learned Counsel for the respondents supported the impugned judgment of the learned First Appellate Court. He pointed out that, the learned First Appellate Court has properly considered the evidence on record and then came to the conclusion that, the surveyor made so many mistakes in carrying out the measurement and therefore, a joint measurement is required to settle the dispute between the parties once for all.

6. Heard rival submissions and also perused the documents on record alongwith the impugned judgment and citations relied upon

by the appellants.

7. It is significant to note that, the learned Trial Court while dismissing the suit of the respondents/plaintiffs had categorically held that, the surveyor had measured only the land which was in possession of the plaintiffs and erred in not measuring the land of entire Gat No. 112, wherein the possession of the rival parties according to their areas is in existence. The measurement map at Exhibit – 36 was considered by the learned Trial Court and same according to it demonstrated that the measurement was not properly done. It is further observed by the learned Trial Court that, to ascertain encroachment made by the adjacent land holder joint measurement is necessary. Further, the learned Trial Court has also observed that he did not consider the area of Nala present at northern side of the disputed land. Moreover, one canal is flowing from western side of the suit property having width of 10 to 15 feet also does not appear in the map Exhibit – 36. Thus, the learned Trial Court has dismissed the suit of the respondents/plaintiffs as the map Exhibit – 36 does not disclose the true situation of the suit property.

8. Learned Counsel for the appellants relied on the judgment of

this Court in the case of **Madhukar Dashrath Bhila Patil** (*supra*) wherein it is observed that, *“an order of remand cannot be passed only on the ground that the trial court has not properly appreciated the evidence; as the appellate court itself has the jurisdiction to enter into the facts and appreciate the evidence”*. Admittedly, the Appellate Court can independently appreciated the evidence on record but the said evidence must be sufficient to decide the real controversy between the parties. In the instant matter it appears that, the surveyor who carried out the measurement has made many mistakes and did not consider vital aspect i.e. existence of Nala/canal and their respective areas which are missing from the measurement map Exhibit – 36. Thus, it appears that the surveyor did not conduct proper measurement therefore, the observation of the learned First Appellate Court that upon such illegal measurement a complete and substantial justice cannot be done, is definitely a correct observation. It is settled by various judgments of this Court as well as the judgments of the Hon’ble Apex Court that in case of dispute over the boundaries best remedy is to carry out the joint measurement. Therefore, the order passed by the learned First Appellate Court remanding the matter for fresh joint measurement cannot faulted with.

9. Learned Counsel for the appellants vehemently argued that, the learned First Appellate Court has unnecessarily cast financial burden on the appellants by directing that the plaintiffs and defendants shall deposit the measurement fees proportionately. As against this the learned Counsel for the respondents/plaintiffs made submission that, the plaintiffs alone are ready to bear expenses of measurement. Admittedly, the burden to prove alleged encroachment was upon the plaintiffs and therefore, it would rather be harsh to ask the appellants/defendants to bear proportionate expenses of measurement. Thus, only modification to that effect is required in the operative part of order passed by the learned First Appellate Court. As such, the present Appeal From Order stands dismissed at admission stage, however clause – 4 of the operative order of learned Principal District Judge, Latur, Dist. Latur, dated 16.03.2024 is modified as below :

4. The plaintiffs shall deposit the measurement fees in respect of land Gat No. 112 as directed.

10. Appeal from Order is accordingly disposed of alongwith pending Civil Application No. 6819 of 2024.

**[SANDIPKUMAR C. MORE]
JUDGE**