



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.42 OF 2017
WITH
CIVIL APPLICATION NO.11544 OF 2017
IN
APPEAL FROM ORDER NO.42 OF 2017

Kalyan Keshav Adhav

...Appellant

Versus

1. Karbhari Natha Jadhav,

2. Natha Sakharam Jadhav,

3. Deepak Ramrao Adhav,

4. Pushpa Ramrao Adhav.

...Respondents

Mr. L. B. Palod for the Appellant.

Mr. S. R. Andhale for Respondent No.1.

CORAM : S. G. CHAPALGAONKAR, J.

DATED : 12th NOVEMBER 2024.

P.C.:-

1. The Appellant-Original Defendant has filed this appeal impugning the judgment and order dated 3rd April 2017 passed by District Judge, Ahmednagar in Regular Civil Appeal No.528 of 2012 by which the judgment and decree dated 18th July 2012 passed by Civil Judge, Junior Division, Shevgaon in Regular Civil Suit No.180 of 2010 has been set aside and the matter is remanded for the trial under Order XLI Rule 23 of the Code of Civil Procedure, 1908.

2. Mr. L. B. Palod, learned Advocate appearing for the Appellant submits that the Respondents had instituted suit for removal of encroachment and delivery of possession of 19 R land, situated in Gat No.50/1, 50/2 contending that the defendants / owners of adjacent land from Gat No.51 have destroyed the common band and encroached over suit land out of Gat No.50 from their ownership. The Trial Court after considering the pleading and evidence dismissed suit. However, the Appellate Court remanded the matter back for retrial ignoring the mandate of Order XLI Rule 27 of the Code of Civil Procedure, 1908. He would, therefore, urge to quash and set aside the impugned judgment and order passed by the Appellate Court.

3. Per contra, Mr. S. R. Andhale, learned Advocate appearing for the Respondents vehemently submits that the suit was instituted for recovery of encroached area based on the measurement carried by TILR. However, Trial Court finding some faults with procedure adopted by surveyor, particularly, absence of joint measurement of Block Nos.50 and 51, discarded report and dismissed the suit. The Appellate Court took the pragmatic view of the matter and remitted the matter back to the Trial Court, so that fresh measurement can be undertaken, and dispute is set at rest. He would submit that no prejudice would be caused, if the Trial Court reconsiders the dispute after parties are given opportunity to place on record best possible evidence. Mr. Andhale

would further submit that, in fact Respondent Nos.1 and 2 had filed an application before the First Appellate Court seeking appointment of Court Commissioner for joint measurement of the lands. However, the said application was disposed of giving liberty to them to approach TILR or its Appellate Authority. Now joint measurement has been carried out by the surveyor, the report of measurement will have to be tested by the Trial Court. In that view of the matter, the rigors of Order XLI Rule 27 of the Civil Procedure Code, 1908 would not attract.

4. Having considered the submission advanced, it is apparent that Respondent Nos.1 and 2 instituted Suit for removal of encroachment and possession of 19 R land alleged to have been encroached by the adjacent land holders from Gat No.51. It is not in dispute that Respondent Nos.1 and 2 are owners of the land Gat No.50, the Appellants are owners of adjacent land in Gat No.51. On 24th March 2010, Respondent Nos.1 and 2 caused measurement of the land through TILR, Shevgaon and report of such measurement was made available to Respondent Nos.1 and 2 which discloses encroachment of 19 R land in Gut No. 50 by owners of Gat No.51. In suit for removal of encroachment, Respondent Nos.1 and 2 examined TILR at Exhibit-46 before the Trial Court and placed measurement report at Exhibit-56. However, the Trial Court discarded this evidence for want of joint measurement of Gat Nos.50 and 51. Consequently, dismissed the suit.

The Respondent Nos.1 and 2 filed Regular Civil Appeal No.528 of 2012 before District Judge-6, Ahmednagar. They moved application for appointment of Commissioner at Exhibit-12 for joint measurement of the lands in Block Nos.50 and 51. The Appellate Court, however, granted liberty to them to approach TILR or Nimtandar for joint measurement. The Respondent Nos.1 and 2 approached TILR who caused joint measurement and forwarded report to the Court. It appears that the Appellate Court thought it fit to set aside the judgment and decree passed by the Trial Court and remanded the matter back in terms of Order XLI Rule 23 of the Code of Civil Procedure, 1908.

5. At this stage, the reference can be given to the judgment of the Supreme Court of India in the case of *Haryana Waqf Board Vs. Shanti Sarup & Ors.*¹, wherein, it is observed that in case of demarcation of disputed lands, it is appropriate for Court to direct the investigation by appointing local Commissioner as provided under Order XXVI Rule 9 of the Code of Civil Procedure, 1908. Similar view has been reiterated by this Court in the case of *Kolhapur Bandu Lakade Vs. Yellappa Chinappa Lakade, Deceased, through Pooja @ Poojari Y. Lakade & Ors.*² and *Bento antonio Gomes Alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro & Ors.*³. This Court has consistently opined that wherever, there is boundary dispute, the local

1 2008 SCC 8 671

2 2011 (3) Mh.L.J. 348

3 2014 (4) Mh.L.J. 366

Commissioner should be appointed for purpose of demarcation in respect of the suit land. Apparently, Respondent Nos.1 and 2 had made an application for appointment of Court Commissioner before the Appellate Court. Although, the request of Respondent Nos.1 and 2 was not directly accepted, they were permitted to approach the concerned authorities for joint measurement of the lands and procure the report. The Respondent Nos.1 and 2 followed the directions of the Appellate Court. The report of joint measurement is now available. The veracity of such report needs to be examined after recording the evidence of measurer. Even it would be open for Respondent Nos.1 and 2 to take any further steps to establish their claim. Similarly, the Appellant would be at liberty to controvert the claim. In the facts and circumstances of the case, the Appellate Court is justified in exercising powers under Order XLI Rule 23 of the Code of Civil Procedure, 1908. Eventually, no substantial question of law is made out in this appeal.

6. Appeal from order stands dismissed.

7. In view of dismissal of appeal from order, civil application does not survive and it is also dismissed.

(S. G. CHAPALGAONKAR, J.)