



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

SECOND APPEAL NO.647 OF 2022
WITH
CIVIL APPLICATION NO.14657 OF 2022
IN
SECOND APPEAL NO.647 OF 2022

Uttam Harishchandra Patil ...Appellant

Versus

1. Narsing Gundappa Dhanure,
2. Venkat Manohar Patil. ...Respondents

Adv. Milind Madhukar Patil for the Appellant.

Adv. B. A. Dhengle h/f. Adv. S. D. Ghayal for Respondent No.1.

CORAM : S. G. CHAPALGAONKAR, J.

DATED : 18th NOVEMBER 2024.

JUDGMENT:- (Per S. G. Chapalgaonkar, J.)

1. The Appellant/Defendant impugns the judgment and decree dated 29th April 2002 passed by learned District Judge 1, Nilanga in Regular Civil Appeal No.66 of 2014 by which the judgment and decree dated 3rd November 2014 passed by learned Civil Judge, Senior Division, Nilanga, District Latur in Regular Civil Suit No.49 of 2013 has been quashed and set aside. Resultantly, Regular Civil Suit No.49 of 2013 has been decreed directing delivery of possession of suit property Respondents/Plaintiffs.

2. Mr. D. A. Mane, learned Advocate holding for Mr. Milind Patil, learned Advocate appearing for the Appellant submits that Respondent No.1 instituted Regular Civil Suit No.49 of 2013, claiming himself to be owner of land Gat No.198 (admeasuring 1.91 Hectar) situated at village Shiur, Taluka Nilanga, District Latur. He purchased said land under the sale deeds dated 23rd January 1970 and 21st July 1971 out of Survey No.56/B, which has been merged in Gat No.198 of village Shiur. On 16th May 2012, he got it measured, report of measurement depicts that land in his possession is less than area purchased by him. Appellant is alleged to be encroacher over deficit area to the extent of 8 R. Based on such report, Respondent No.6 filed Regular Civil Suit No.49 of 2013 seeking recovery of possession. The Appellant refuted contents of suit by filing written statement. During course of Trial Respondents relied upon map of measurement dated 16th May 2012. During cross-examination, Nimitdar admitted that he measured the land of Respondent No.1 only. He further admitted that notices were not served upon the adjacent landowners. The Trial Court after appreciation of evidence dismissed the suit. However, the First Appellate Court allowed the appeal and decreed the suit directing delivery of possession of the suit land to Respondent No.1.

3. Per contra, Mr. B. A. Dhengle, learned Advocate appearing for Respondent No.1 supports the impugned judgment and decree. He would submit that the Appellate Court has rightly observed that

measurement was carried out by the public officer of land records. The measurement report with map and panchnama have been exhibited. The Plaintiff established his case based on measurement map. It was burden of the Defendant to refute the contents of the map. Consequently, appellate court decreed suit by setting aside the judgment and decree of the Trial Court.

4. By consent of learned Advocates appearing for respective parties, appeal has been finally heard on following substantial questions of law:-

“A. Whether the impugned judgment is rendered perverse for non-consideration of admissions of plaintiff as well as PW-Nimnatdar, that, adjacent land owners were not noticed nor their lands were measured and the report was prepared only by measuring the land of respondent Narsing as per the area shown in the revenue records?

B. whether the impugned decree passed by making the said measurement map and report as part of the decree is legally sustainable, more so when the plaintiff failed to apply for measurements through Court process as provided u/O XXVI Rule 9 of CPC, 1908?”

5. It is not disputed that the claim of Respondent No.1 is based on the report of measurer depicting 8 R encroachment of the Appellant on the land of Respondents. Admittedly, Respondent No.1 is the owner of land Survey No.56/B (Gat No.198, admeasuring 1 Hec. 91 R), whereas the Appellant owns land in adjacent Gat Nos.199 and 200. The measurer - Shaikh Abdul (PW3) measured the land Gat No.198 and concluded that the Appellant is in possession of 8 R land out of Gat

No.198. During his cross examination, he candidly admitted that he has not measured adjacent land of Appellant. In such circumstances, it cannot be presumed that the Appellant has encroached upon the land of Respondent No.1. It is well settled that whenever there is a boundary dispute, it can be resolved through measurement of both adjacent lands. Only by measuring land of Respondent No.1, logical conclusion cannot be drawn that the Appellant/adjacent landowner has encroached land of Respondent No1. The Trial Court had rightly appreciated the aforesaid aspect of the matter and dismissed the suit. However, Appellate Court decreed the suit relying upon the evidence of surveyor. The surveyor candidly stated that he has not carried joint measurement. The perusal of the map would show that it relates to measurement of Gat No.198 only. The Appellate Court appears to have wrongly presumed that surveyor must have measured the entire Survey No.56, which has been now divided in various Gat numbers. The presumption regarding the correctness of map and procedure adopted by measurer, particularly, in light of admission of surveyor regarding absence of joint measurement of adjacent lands, cannot be countenanced. Pertinently, adjacent land holders were not noticed before measurement was undertaken by surveyor. Eventually, finding recorded by the First Appellate Court against point Nos.1 and 3 cannot be sustained in law. Consequently, first Substantial question of law {A} needs to be answered as affirmative.

6. At this stage, Mr. B. A. Dhengle, learned Advocate appearing for Respondent No.1 submit that claim of Respondent No.1 may not be foreclosed for technical reason. Instead, matter may be remanded back to Trial Court with liberty in favor of Respondent No.1 to make fresh application for appointment of Court Commissioner for joint measurement of lands of Appellant and Respondent No.1. Mr. Mane learned Advocate appearing for appellant, on instructions, submits that appellant has no objection if matter is remitted back to trial court with liberty in favour of respondent to tender fresh application seeking appointment of court commissioner for joint measurement of lands so that controversy can be permanently set at rest.

7. At this stage reference can be given to the observations made by 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 the dispute as regards to the boundaries, it is necessary for Courts to have appoint a Court Commissioner, so as to separate demarcation of the land. Similar view is 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.

1 2008 SCC 8 671

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

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

8. Having regard to the principles of law espoused in aforesaid judgments and submissions advanced on behalf of learned Advocate appearing for Respondent No.1, second substantial question of law {B} do not survive. Resultantly, second appeal deserves disposal with following order:-

- (i) Second appeal is partly allowed.
- (ii) Impugned judgment and decree dated 29th April 2022, passed by First Appellate Court in R.C.A. No.66 of 2014 is hereby quashed and set aside. The matter is remitted back to the Trial Court in terms of Order XLI Rule 23 of Civil Procedure Code, 1908. The Trial court shall reregister suit for consideration afresh from the stage of evidence.
- (iii) The Respondent No.1 (Original Plaintiff) shall be at liberty to file an appropriate application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908, for appointment of Court Commissioner (TILR) for fresh joint measurement of subject lands of Appellant and Respondent No.1 within one month from date of this order.
- (iv) On presentation of such application, the Trial Court shall favourably consider the same and pass necessary

order appointing Court Commissioner at the cost of Respondent No.1 towards joint measurement.

- (v) The report of such measurement shall be called within stipulated time limit. On receipt of Commissioner's report, the Trial Court shall grant liberty to the parties to lead evidence if any in addition to evidence already recorded and expeditiously decide the suit preferably within a period of one year from the date of this order.
- (vi) Decree be withdrawn accordingly.

(S. G. CHAPALGAONKAR, J.)