



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

925 SECOND APPEAL NO. 582 OF 2022
WITH
CIVIL APPLICATION NO. 12380 OF 2022 IN SA/582/2022

Hasan Khan Yasin Khan And Others

VERSUS

Ahmedullah Khan Faqurllah Khan And Others

...

Advocate for Appellants : Mr. M.N. Navandar

Advocate for Respondents no.1 to 6 : Mr. Faruk Patel

Advocate for Respondents no.8 and 9 : Mr. P.R. Katneshwarkar

Senior Advocate i/b Mr.A.A Khande

...

CORAM : S. G. CHAPALGAONKAR, J.

Dated : December 11, 2024

FINAL ORDER :-

1. The appellants/original respondent nos.1 to 3 impugns judgment and decree dated 8.8.2022 passed by the District Judge, Aurangabad in R.C.A. No.1 of 2021 by which the judgment and decree dated 2.12.2020 passed by the Civil Judge Senior Division, Aurangabad in R.C.S. No.1058 of 2013 has been set aside. (Parties hereinafter are referred to as per their original status).

2. Mr. Navandar, learned advocate appearing for the appellants/original defendant nos.1 to 3 submits that respondents/plaintiffs had instituted suit for perpetual

injunction against defendants. Trial Court, after considering pleadings of the parties and evidence on record, concluded that plaintiffs could not prove their settled possession over the suit property. Consequently, dismissed the suit. Plaintiff filed R.C.A. No.1 of 2021 before the District Court, Aurangabad. An application under Order 26 Rule 9 of the Civil Procedure Code was filed in appeal below Exhibit 22 seeking appointment of Court Commissioner. The Appellate Court held that real controversy between parties is as regards to boundaries of suit land. Only course open to the parties is to get measured and demarcated land. For that purpose, measurement is required to be carried through an expert. Consequently, District Court partly allowed appeal by appointment of District Inspector of Land Records, Aurangabad as Court Commissioner with direction to measure the entire land gat no.136 situated at village Satara. Plaintiff was directed to deposit costs of measurement.

Mr. Navandar, would submit that neither such measurement map was made available to the appellants nor has further direction given to measurer to produce map before Court. By inviting attention of this Court to the operative part of impugned judgment, he would submit that even decree

passed by Trial Court is not set aside or no order of remanding matter to the trial court is made in tune with the provisions Rule 23 of Order 41 of the Civil Procedure Code.

3. Per contra, Mr. Katneshwarkar, learned senior advocate i/b Mr Khande appearing for respondent nos.8 and 9 would submit that, in pursuance of the impugned judgment and order D.I.L.R. carried measurement of entire gat no.136, report of such measurement is made available to plaintiffs. However, he fairly concedes that except appointment of the Court Commissioner, no consequential orders are passed in the appeal.

4. Having considered the submissions advanced, following substantial question of law emerges for consideration in this second appeal :-

- i. Whether the First Appellate Court has failed exercised jurisdiction within the parameters of Order 41 Rule 31 of the Civil Procedure Code ?
- ii. Whether the Appellate Court failed to exercise the jurisdiction in consonance with Order 41 Rule 23, 23-A and 24 of the Civil Procedure Code ?”

5. The Respondents/original plaintiffs claimed that in pursuance of the compromise in civil suit No.7 of 2005, suit

property gat no.136 was allotted to share of the plaintiffs and their brother Asadullakh Khan. Since then, plaintiffs are enjoying peaceful possession over the suit land. It is further alleged that in the year 2009, Asadullakh Khan sold 10 Acres of land to defendant no.3. Plaintiff installed a notice board depicting his share in the suit property. However, defendants obstructed peaceful possession of the plaintiffs. On 15.10.2013, defendants attempted to take forceful possession of the suit property and claimed title through Asadullakh Khan. Plaintiff therefore claimed for decree of perpetual injunction against the defendants.

6. Defendant nos.1 to 3 i.e. appellants in this second appeal refuted claim of plaintiffs contending that plaintiffs have wrongly described boundaries of the suit property. Although, they are claiming right over 10 Acres of land, boundaries mentioned in the suit covers area of 20 Acres. Plaintiffs are in wrongful possession over 69R land from gat no.136. Defendant no.3 is having possession over 10 Acres. The suit is based on false cause of action. The Trial Court dismissed the suit holding that plaintiffs failed to prove their

settled possession over suit property or they were obstructed by defendants.

7. Aggrieved plaintiffs approached First Appellate Court vide R.C.A. No.1 of 2021. Learned District Judge, after hearing respective parties arrived at the conclusion that due to series of transactions in respect of suit properties, complications as regards to boundaries and possession of the lands held by parties have been crept up and in order to set at rest controversy between the parties, it would be appropriate to measure the land gat no.136 including land of the plaintiffs and defendants. Thereafter, referring to the law laid down by this Court in various judgments, Appellate Court proceed to pass the following order.

Order of the Appellate Court

- (1) Regular Civil Appeal No.1 of 2021 is partly allowed.
- (2) District Inspector, Land Records, Aurangabad is appointed as a Court Commissioner to measure the entire land Gat No.136, situted at village Satara, Tq. & District Aurangabad, by following the rules and procedure of Survey Manual.
- (3) The appellants/plaintiffs are directed to deposit requisite charges for measurement of land Gat No.136, situated at village Satara, Tq. & Dist Aurangabad and also to produce all the necessary and concerned documents at the time of measurement of the land.

(4) The appellants are directed to pay cost of Rs.2,000/- to the respondents/defendants and to bear their own.

(5) Draw decree accordingly.

8. Perusal of impugned judgment and order of first appellate Court it can be observed that although appeal is finally disposed off by appointing Court Commissioner to measure entire gat no.136, no consequential directions have been given for submission of report to the Court. Neither appeal is kept pending nor is matter remitted back to Trial Court. Apparently, learned District Judge merely exercised the powers under Order 26 Rule 9 of the Civil Procedure Code, allowed application filed at Exhibit-22 for appointment of Court Commissioner, but failed to pass further orders while partly allowing the appeal.

9. It is the trite that report of Court Commissioner can be used as an instrument by Court to form opinion as regards to the dispute. Parties to the dispute are entitled to either accept or dispute the report of the Court Commissioner. In case, the dispute is raised as regards to correctness of report of the Court Commissioner, evidence of Court Commissioner requires to be recorded. Parties to the dispute has always

opportunity to assail report of the Court Commissioner and cross examine him. Report of the Court Commissioner itself cannot be treated as an evidence unless its correctness is accepted by the parties and it is admitted in evidence, on consent. Court would be further required to apply its own mind to contents of report of Court Commissioner and after taking into account all attending circumstances surfaced on record, take final decision either to grant or refuse decree in the suit.

10 Operative part of impugned order passed by learned District Judge is incomplete. Appellate Court has completely ignored the procedure contemplated under Order 41 Rule 23 of the C.P.C. while disposing of the appeal. In the result, both the substantial questions of law are answered in affirmative and following order is passed.

ORDER

- i. Second appeal is partly allowed.
- ii. The impugned judgment and order dated 8.8.2022 passed by the learned Extra Joint District Judge and Additional Sessions Judge, Aurangabad in R.C.A. No.1 of 2021 is hereby quashed and set aside.

- iii. The appeal is remitted back to the District Court for hearing and disposal in accordance with the provisions of Order 41 of the Civil Procedure Code.
- iv. Regular Civil Appeal be registered.
- v. Parties to appear before the learned District Judge, Aurangabad on **20th January, 2025.**
- vi. Considering the fact that parties are litigating since year 2013, proceeding in appeal is expedited and shall be disposed off within a period of Nine (9) months from the date of appearance of the parties.
- vii. Second Appeal stands disposed off.
- viii. Pending civil application, if any, also stands disposed off.

(S. G. CHAPALGAONKAR)
JUDGE

...

aaa- (f)