



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 203 OF 2017
WITH
CIVIL APPLICATION NO. 455 OF 2017

Ravindra Dagadu Shinde (Mhetre). ...Appellant.

Versus

Shankar Dattu Raut. ...Respondent.

Mr. V. S. Talkute for the appellant.

Mr. Surel S. Shah and Mr. Saakshaf Relekar for the respondent.

Coram : Sharmila U. Deshmukh, J.

Date : February 6, 2024.

P. C. :

1. Being dissatisfied with the judgment of first appellate Court dated 5th October 2016 by which the appeal came to be allowed dismissing the suit being RCS No. 18 of 2009 decreed by the trial Court vide judgment and order dated 7th December 2012, the original plaintiff is before this Court.

2. Facts of the case are that RCS No. 18 of 2009 was instituted by the appellant for recovery of encroached portion. The case of plaintiff is that he had purchased suit property in the year 2002 and in

June 2008, an application was made for measurement of the suit property which came to be measured on 30th July, 2008. After the map of measurement was received by the plaintiff on 6th November 2008, the plaintiff learnt about encroachment of defendant in the suit property to the extent of 4 square meters and as such filed the suit for recovery of encroached portion.

3. The suit was resisted by the defendant. The defendant also instituted suit bearing RCS No. 366 of 2008 seeking decree of perpetual injunction against the plaintiff. The defence of defendant was that there is a three feet boundary in between the land of plaintiff and defendant and hut and cattle-shed which is stated to have been erected in the encroached portion is in fact situated near the common boundary. It is further contended that in collusion with the surveyor, the plaintiff got his land measured and in fact it is the plaintiff who is trying to encroach upon the land of defendant.

4. Parties went to trial. The trial Court by order dated 7th December 2012 partly decreed the suit and directed defendant to hand over possession of the encroached portion of 4 square meters. As against this, the defendant approached the appellate Court. The appellate Court considered the evidence of surveyor who had

measured the land prior to the institution of suit and on the basis of admission of surveyor held that the evidence of surveyor cannot be accepted to prove the encroachment in suit land to the extent of 4 square meters and as such dismissed the suit.

5. Heard Mr. V. S. Talkute, learned counsel appearing for the appellant and Mr. S. S. Shah, learned counsel appearing for the respondent.

6. Learned counsel appearing for the appellant would submit that as the suit was for removal of encroachment, the appointment of Court Commissioner was necessitated. He submits that the appellate Court has reversed the findings of trial Court for the reason that evidence of surveyor cannot be accepted as there were certain defects in the manner in which property was measured. He submits that the civil application has been filed for appointment of Court Commissioner and the said procedure is not unknown to law. He submits that as the suit was for removal of encroachment, the Court Commissioner be appointed by this Court and the matter be remanded to the appellate Court to be decided afresh after taking into consideration the report of Court Commissioner.

7. *Per contra* learned counsel appearing for the respondent

submits that it was the specific case of respondent that there is a 3 feet boundary between the lands of plaintiff and defendant and that hut and cattle-shed has been constructed on the boundary. He submits that it was the duty of plaintiff to make necessary application before the trial Court for appointment of Court Commissioner which has not been done as such the order of appellate Court is required to be upheld. He submits that there is no substantial question of law which arises in the present case.

8. Considered the submissions and perused the record.

9. It is not disputed that the suit is filed seeking removal of encroachment based on the surveyor's report which was obtained by the plaintiff prior to the institution of suit. The trial Court has accepted the said report and had partly decreed the suit. The first appellate Court on the basis of cross-examination of surveyor observed that the surveyor did not fix the points to start measurement of the disputed land and that the surveyor also did not cause measurement of entire City Survey No. 552. The appellate Court also held that no notices were issued to the defendants. The appellate Court held that the surveyor has not carried out the measurement as per the procedure required to be followed and as

such held that the evidence of surveyor cannot be accepted to prove the encroachment in the suit land to the extent of 4 square meters. It is settled that in case of encroachment it is desirable to appoint Court Commissioner to measure the land and ascertain the extent of encroachment, if any.

10. Considering that the appellate Court has not accepted the evidence of surveyor and the suit was for removal of encroachment, in my view, the appellate Court could have directed the appointment of Court Commissioner for the purpose of measuring the properties to find out if there is any encroachment. No such procedure was followed by the first appellate Court.

11. In view of the above, following substantial question of law would arise for consideration :

Whether the first appellate Court committed an error of law in not appointing the Court Commissioner for carrying out measurement after observing that the measurement carried out by Surveyor (PW-2) was inaccurate as the map was prepared without following the proper procedure ?

12. In the present appeal, the appellant has filed civil application seeking appointment of Court Commissioner for measurement of properties. Learned counsel appearing for the appellant submits that

in view of the substantial question of law which has arisen in the present case and considering the decision of the Apex Court in the case of ***Haryana Waqf Board v. Shanti Sarup [(2008) 8 SCC 671]***, the matter may be remanded to the appellate Court for considering the issue afresh after appointing Court Commissioner who would measure the land and would submit a report to the appellate Court.

13. Considering that the suit was for removal of encroachment and the first appellate Court has reversed the finding by not accepting the measurement of surveyor as map was without following proper procedure in view of the nature of dispute, it is necessary that a Court Commissioner be appointed who would carry out the measurement in accordance with law and submit a report to the appellate Court who would then decide the appeal on the basis of Court Commissioner's report.

14. Having regard to the discussion above, TILR, Pandharpur is appointed as Court Commissioner to measure the suit properties and submit a report to the appellate Court. TILR, Pandharpur to carry out measurement/survey of suit lands and submit a report to the appellate Court within a period of eight weeks from the date of production of a copy of this order. The appellate Court is directed to

decide the appeal afresh after considering the report of TILR and after hearing the parties.

15. The second appeal and civil application are disposed of in above terms.

[Sharmila U. Deshmukh, J.]