



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.333 OF 2016
WITH
INTERIM APPLICATION NO.1826 OF 2024

1. Shri. Vilas Mahadev Yesugade
Aged 53 years. Occ : Agriculture,
2. Shri. Namdev Mahadev Ysugade,
Aged 50 years, Occ : Agriculture,
3. Shri Sadashiv Mahadevv Yesugade,
Aged 47 years, Occ : Agriculture,
4. Shri Mahadev Keshavv Yesugade,
Aged 73 years, Occ : Agriculture,
- 4a. Jyoti Jaysing Patil
Aged 57 years, Occ: Household,
R/at. Behind New S. T. Stand Palus
Padmavati Township at Post Tal. Palus.
- 4(b) Sharda Ashok Jadhav,
Aged 53 years, Occu: Household,
R/o. S.V..9/1/1, Samarth Colony
Road, Yashwant Nagar,
Chandan Nagar, Pune - 411 014.

...Appellants/Applicants
(Orig. Plaingiffs)

Versus

1. Ananda Dnyanu Bhosale,
(Since deceased through his heirs and
Legal representatives,)
- 1/1. Kumar Ananda Bhosale,
Aged 38 years, Occu: Agriculture,
- 1/2. Amol Ananda Bhosale,
Aged 35 years, Occu: Agriculture,
- 1/3 Ajit Ananda Bhosale,
Aged 33 years, Occu; Agriculture,

1/4 Rani Bharat Pawar,
Aged 31 years, Occu: Household,
R/o. Karoli (T), Taluka
Kavathemahankal, District: Sangli.

2. Shankar Dnyanu Bhosale,
Aged 46 years, Occu: Agriculture,

3. Baliram Dnyanu Bhosale,
Aged 43 years, Occu: Agriculture,

4. Vishnu @ Vilas Dnyanu Bhosale,
Aged 35 years, Occu: Agriculture,
Nos. 1, 1/1 to 1/3, 2 to 4 all R/o.
Palus, Tal. Palus, District: Sangli.

5. Sulabai Balcharam Pawar,
Aged 43 years, Occu: Household,
R/o. Karoli (T), Tal. Kavathemahankal
District: Sangli.

6. Pamabai Vasant Bongane,
Aged 40 years, Occu: Household,
R/o. Vitthalnagar, Nalavade Mala,
Amanapur, Taluka Palus, District: Sangli.

7. Phulabai Pandurang Sawant,
Aged 35 years, Occu: Household,
R/o. Padmale, Taluka Miraj, District: Sangli.

8. Mangal Shamrao Ghorpade,
Aged 33 years, Occu: Household,
R/o. Bahadurwadi, Tal. Walwa, District: Sangli.

9. Chintamani Dnyanu Bhosale,
Aged 40 years, Occu: Agriculture,
R/o. Palus, Taluka Palus, District: Sangli.

...Respondents.
(Orig. Defendants)

*Adv. Ajay Joshi i/b Adv. Vikas Kolekar for the Appelleants/Applicants.
Adv. Mandar Limaye for the Respondent Nos. 1/1 to 1/3, 2 to 4 & 9.*

Coram : Sharmila U. Deshmukh, J.

Date : March 15, 2024.

ORAL JUDGMENT :

1. Being dissatisfied by the judgment dated 25th August, 2015 of the Appellate Court dismissing the Appeal confirming the dismissal of the suit by the judgment of the Trial Court dated 19th July, 2007 in Regular Civil Suit No. 301 of 1995, the present Plaintiffs are before this Court.

2. Facts of the case are that RCS No. 301 of 1995 was preferred by the Plaintiff claiming that the Defendants had obstructed their use of the suit property when they had gone to the suit property for cutting trees and its branches. It was pleaded that the Defendants are wrongly claiming their land boundaries on the southern side. In the month of December, 1993 to avoid the dispute, measurement was carried out in the presence of Defendants through DILR Sangli. However, the Defendants in the collusion with the DILR got the lands measured incorrectly which showed that the Plaintiffs have encroached upon the Defendant's land. The Defendants taking disadvantage of the incorrect measurement have erected five cement poles on the southern side of the water channel of the suit land. The Plaintiffs demanded superior test of measurement which was done on 30/31 March, 1995 which showed that the Defendants have encroached upon the suit property to the extent of 2.5Are land. As

such, the suit was filed for decree of perpetual and mandatory injunction for removal of the five cement poles along with recovery of possession.

3. Suit came to be resisted by the Defendants denying any encroachment contending that the lands of the Plaintiffs and Defendants are from different survey numbers and that the Defendants' land is at higher level than the Plaintiffs' land by 5 ft. by reason of which it is physically not possible to commit encroachment. It was contended that the measurement of the year 1993 is correct. As per the said measurement they have erected the cement poles within the limits of their land.

4. The parties went to trial. The Trial Court dismissed the suit upon consideration of the measurement maps which had come on record. As against this Appeal came to be filed by the Plaintiffs. The Appellate Court considered the evidence of the cadastral surveyor who had carried out the superior test of measurement. After considering the evidence of the cadastral surveyor who admitted that he has not shown any encroachment and upon consideration of the maps on record which did not show the encroachment by any specific colour, the Appellate Court held that the Plaintiff had failed to prove the case against the Defendants and dismissed the Appeal.

5. Heard Mr. Joshi, learned counsel for the Appellant and Mr. Limaye, learned counsel for the Respondents.

6. Learned counsel for the Appellant would submit that in a suit of boundary dispute and encroachment, it is necessary that a duly agreed map being placed on record and in the absence of any agreed map Court Commissioner is required to be appointed under Order 26 Rule 9 of Code of Civil Procedure, 1908. He submits that the only reason for dismissal of the Appeal is that the map prepared by the cadestral surveyor is not as per the procedure as extent of encroachment has not been mentioned and there is no reference about encroachment if formal in the measurement map. He would submit that in the case of incorrect maps being placed on record the proper course was to remand the matter to the Trial Court for carrying out the fresh measurements through a competent government official. He submits that application has been filed in the present proceedings seeking appointment of Court Commissioner for the purpose of carrying out joint measurement of the lands of the Plaintiff and Defendant and to submit report before this Court.

7. *Per contra*, learned counsel for the Defendants vehemently opposed the admission of the Appeal as well as the Civil Application. He would submit that the topography of the plaintiffs and the

Defendants' lands would indicate that there is no question of any encroachment being carried out by the Defendant. He submits that in such a factual scenario there is no necessity of a Court Commissioner being appointed, he submits that without prejudice to the said contention, the measurements were carried out by the Plaintiffs as well as the Defendants and the Defendant's maps showed an encroachment by the Plaintiffs whereas the superior test of measurement carried out by the Plaintiffs has not been duly proved. He therefore submits that no substantial question of law arises.

8. Considered the submissions and perused the record.

9. Heard. **Admit** on the following substantial question of law.

(i) Whether the Appellate Court has committed an error in law by not directing measurement of lands of the Plaintiff and Defendant in absence of an agreed map ?

(ii) Whether the Courts below committed an error in law in deciding the suit for encroachment without a duly drawn up measurement map prepared by following due procedure ?

10. As the controversy is limited, learned counsel for the parties are ad-idem that the Appeal can be taken up for final disposal. Learned counsel would submit that the submissions advanced for admission of Appeal to be considered as submissions for final disposal.

11. Considered the submissions and perused the record.

12. The suit has been filed by the Plaintiffs seeking recovery of possession on the premise that there is an encroachment by the Defendants. The case was that there is a boundary dispute as the Defendants are wrongly claiming that their land boundaries were on the southern side. There are two maps prepared one in the month of December, 1993 and superior test of measurement map prepared in the month of March, 1995. The Appellate Court upon consideration of the evidence of the cadestral surveyor found that the measurement map was not as per the prescribed procedure since the encroachment had not been shown in any specific colour and there was an admission that the cadestral surveyor has not shown any encroachment and neither specifically mentioned the same in the map. It is necessary in case of boundary dispute and encroachment that an agreed map is placed on record. In absence of an agreed map, the proper course is to get the properties measured through competent government official to determine the extent of encroachment. Even at the appellate

stage, it was open for the Appellate Court to exercise the power under Order XXVI Rule 9 of CPC and appoint Court Commissioner and get a duly drawn measurement map. Despite holding that the maps which are produced on record are incorrect as they do not comply with the prescribed procedure, the Appellate Court has dismissed the Appeal without resorting to the course of remand of the matter for the purpose of proper measurements of the properties. This Court in case of ***Sulemankhan S/o Mumtajkhan & Ors. vs. Bhagirathibai Wd/o Digambar Asalmol & Anr. [2014(5) All MR 552]*** has held thus :

“In cases to determine encroachment, it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent. Oral evidence cannot prove such contentious issue conclusively. In a suit where parties are disputing boundaries of property and one of the parties alleges encroachment made by another party to the suit inside suit property. In such case the plaint map as evidence in respect thereof is vital document for to decide real controversy between the parties finally. This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit in which there is a boundary dispute. The Trial Court as well as 1st Appellate Court which are Court of Facts, are duty-bound to ascertain that a map is drawn to the appropriate scale by competent Government official from the office of TILR or DILR, as the case may be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed

and boundary dispute is finally settled by producing map in the Court by the plan maker who can prove its genuineness by deposing in support of such plan/map, if it is so necessary in the absence of admission for exhibiting the map.”

13. In the present case, the Appellate Court did not remand the matter to the Trial Court as no such relief was sought in the Appeal Memo by the Appellant. Even if no such relief was sought considering the boundary and encroachment dispute between the parties for the purpose of proper adjudication of the dispute, it was necessary that the Court Commissioner be appointed. The substantial questions of law are answered accordingly.

14. In view of the above, the following order is passed.

- (a) Second Appeal is hereby allowed.
- (b) The judgment and decree dated 19th July, 2007 passed in RCS No. 301 of 1995 and judgment dated 25th August, 2015 are hereby set aside.
- (c) RCS No. 301 of 1995 is restored to the file of the Civil Judge, Junior Division Palus with following directions.
 - (i) After appearance of the parties before the Trial Court, original Plaintiff to file an application for appointment of Court Commissioner under order XXVI Rule 9 of CPC within a period of three weeks for getting lands measured.

- (ii) The Trial Court is directed to appoint the TILR to carry out the joint measurement of Block No. 17 and Block No. 37 which are the respective properties of the Plaintiffs and Defendants and to carry out the measurements.
- (iii) The Court Commissioner shall prepare the measurement map showing the boundaries of Block No. 17 and Block No. 37 with conclusion as to whether there is any encroachment or not and submit report to the Trial Court after a period of eight weeks thereafter.
- (iv) The Trial Court to decide suit afresh by giving opportunities to both parties to lead necessary evidence as regards the map which will be placed on record along with report.
- (v) Considering that the suit is of the year 1999, the Trial Court is requested to decide the same expeditiously and in any event, within a period of one year from today.

15. It is made clear that no application is filed by the Plaintiff before the Trial Court for appointment of TILR, the same may entail dismissal of the suit.

[Sharmila U. Deshmukh, J.]