

Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.369 OF 2011

Shri. Antu Bhau Shedage

S/D by Heirs :-

1. Suresh Antu Shedage
Age : 40 yrs : Occu : Agriculture.
2. Pradip Antu Shedage
Age 45 yrs., Occu : Agriculture
3. Hemant Antu Shedage
Age 42 yrs., Occu : Agriculture
4. Subhadra Antu Shedage
Age : 62 yrs., Occu : Agriculture
All R/O at :-
At & Post :- Mahind, Taluka : Patan,
District : Satara
Presently R/O at :-
523, Moulana Azad Road, 9, 2nd Floor,
Goragandhi Building, Mumbai -400 003.

...Appellants

Versus

1. Hanmant Ganpati Shedage
Age 53 yrs. Occ. : Agriculturist.
2. Pandurang Ganpati Shedage
Age: 74 yrs. Occu : Agricuulturist.
3. Ganpati Maruti Shedage
Age: 74 yrs. Occu : Agricuulturist.
- 5 Ramchandra Chandru Shinde
Age : 44 yrs. Occ : Agriculturist.
All R/O at :- At & Post Mahind,
Taluka : Patan, District : Satara
6. The Manager,
Mahanubhav Math, Karanje,
Taluka & District : Satara.
7. Tukaram Ganpati Shedage

Age : 54 yrs, Occu : Agriculturist.

R/O at :- At & Post Mahind,

Taluka : Patan, District : Satara

...Respondents

Mr. Vishwanath Talkute for the Appellants.

CORAM : SHARMILA U. DESHMUKH, J.

RESERVED ON : FEBRUARY 2, 2024

PRONOUNCED ON : FEBRUARY 9, 2024

JUDGMENT:

1. The Appeal was admitted on 7th December, 2011. Office noting indicates that Respondent Nos. 1 to 7 are served, however, none appears for the Respondents. As such, the Appeal is taken up for final hearing.

2. Being dissatisfied by the judgment dated 8th March, 2011 passed by the Appellate Court in Regular Civil Appeal No. 68/2008 dismissing the Appeal and confirming the judgment and decree dated 26th February, 2008 passed by the Trial Court in Regular Civil Suit No. 100 of 2001, the original Defendant No. 1 is before this Court. For sake of convenience the parties are referred to as per their status before the Trial Court.

3. Regular Civil Suit No. 100 of 2001 was instituted seeking relief of perpetual injunction restraining the Defendant No. 1 from disturbing the possession of the Plaintiffs over the suit property described in Paragraph No. 1A of the plaint situated at Mihind, Taluka: Patan, District: Satara.

Subsequently, the suit came to be amended pleading that in the month of December, 2003 during the pendency of the suit, the Defendant No. 1 encroached on portion of suit property 1A adjacent to suit property 1B to the extent of East West 104 feet in length and North South 40 feet in width. Suit property 1A is described as part of Gat No. 906 bounded on the east by a stream, on the south by the agricultural land of Maruti Shedge, on the west by the land of Laxmibai Shedge and Keshav Patil and on the south by agricultural land of Aadik Salunkhe. Suit property 1B was described as 4 Ares out of Gat No. 906 purchased by the Defendant No. 1 bounded on the east by a stream, on the west by remaining portion of Gat No. 906 and Plaintiff's area, on the south by the Plaintiff's area out of Gat No. 906 and on the north by the remaining area of Gat No. 906 belonging to Vishnu Salunkhe. It was pleaded that the suit property is the ancestral property of the Plaintiffs and stood in the name of the father of the Plaintiffs namely Ganpati Vithu Shedge who expired in the year 1989 and subsequently, the suit property came to be recorded in the name of the Plaintiffs. It was pleaded that some area out of Gat No. 906 was alienated by Ganpati Vithu Shedge during his lifetime and after his death by the Plaintiffs in favour of Defendant Nos. 1 to 5. The suit land described in paragraph No. 1B of the plaint was alienated in favour of Defendant No. 1 by way of registered sale deed dated 11th March, 1980.

The Defendant No. 1 constructed a house on the alienated portion and some portion was kept vacant. It was pleaded that in the year 2001, Defendant No. 1 threatened to take illegal possession of suit property 1A for which police complaint was lodged. By way of amendment, it was pleaded that during the pendency of the suit, in December, 2003, Defendant No. 1 encroached on the western side of the land purchased by him to the extent of East-West 104 ft. in length and North-South 40 ft. in width and as such, the suit came to be filed for recovery of possession on the encroached portion along with decree of perpetual injunction. Alongwith the plaint rough sketch map was annexed showing the location of the suit properties.

4. Defendant No. 1 by his written statement denied the description of the boundaries of the suit property given in the plaint. It was contended that in the year 1980, Defendant No. 1 purchased 4R land out of Gat No. 906 from the southern side with the following boundaries.

Towards East- Stream/Nala,

Towards West- Remaining land out of suit property'

Towards South- Remaining land out of Gat No. 906'

Towards North- Remaining land out of suit property.

5. It was contended that the house constructed by the Defendant No. 1 was recorded in the Grampanchayat record as House No. 100. It was

contended that the father of the Plaintiffs had alienated part of Gat No. 906 to Defendant Nos. 1 to 5 under different sale deed and that the plaint map is contrary to the factual position and annexed a rough sketch of the suit properties.

6. Defendant Nos. 2, 3, 5 and 6 did not contest the suit. The parties went to trial and the Trial Court framed the following issues:

Sl.No.	Issues	Findings
1.	Whether the Plaintiff proved that he is in lawful possession of suit property 1A?	In the affirmative.
2.	Whether the Plaintiff prove the alleged obstruction?	In the affirmative.
3.	Whether the Plaintiff is entitled to the relief of perpetual injunction?	In the affirmative.
3A.	Does Plaintiff prove his title over the suit property as claimed?	In the affirmative.
3B.	Does Plaintiff prove encroachment over the suit property at the hands of Defendant?	In the affirmative.
3C.	Is Plaintiff entitled for recovery of possession of suit property?	In the affirmative.
4.	Whether the Defendants are entitled to the compensatory cost as prayed?	In the affirmative.
4A.	Is Plaintiff entitled for mesne profit?	In the negative.
5.	What order and decree?	Suit decreed with cost.

7. As regards Issue No. 3A to 3C, the Trial Court considered the sale deed dated 11th March, 1980, the plaint map, certified copy of map of Gat

No. 906 issued by T.I.L.R, Patan. From the plaint map and sale deed, the Trial Court observed that possession of Defendant No.1 is towards the northern side of Gat No. 906. The Trial Court observed that the encroachment is alleged towards the Western side of the land purchased by Defendant No. 1 and that Defendant No. 1 had specifically admitted during the cross-examination that he is in possession of 2R excess land of Gat No. 906 in respect of which he does not have any document and held that the Defendant No. 1 is in possession of area in excess of the area mentioned in the sale deed.

8. The Trial Court observed that the Court Commissioner came to be appointed for spot inspection who has filed his report at Exhibit 51 along with map giving measurement of the land possessed by Defendant No. 1 out of Gat No. 906 alongwith the four boundaries of land of Defendant No. 1. The Trial Court held that the Commissioner's report Exhibit 51 indicates that towards Eastern side of house of Defendant No. 1 there is open space admeasuring 56.10 ft. East-West up to Odha/Nala in length and 42.10 ft South-North in width and that on the western side there is an open space with fencing in triangle shape admeasuring east west 134 feet x 34 feet south north which is the disputed land. The Trial Court considered the admission of Defendant No. 1 admitting the measurements taken by the Court Commissioner and coupled with the

admission of cross-examination in respect of the excess 2R land in possession of the Defendant No. 1 and held that the Defendant No. 1 has caused encroachment to the extent of 2R land specifically admitted. The Trial Court decreed the suit and directed the Defendant No. 1 to put the Plaintiff in possession of the suit land described in the map filed along with Exhibit 51 i.e. Court Commissioner's Report.

9. As against the judgment of the Trial Court, the Defendant No. 1 preferred Regular Civil Appeal No. 68 of 2008 and the Appellate Court framed the following points for consideration :

Sr. No.	Points	Findings
1.	Whether Appellant proves that the learned Lower Court has not appreciated the evidence of map properly ?	In the negative.
2.	Whether Appellant proves that the learned Lower Court has failed to take into consideration the provisions of Standard Weights and Measurements Act?	In the negative.
3.	Whether Appellant proves that the learned Lower Court has drawn the wrong conclusions?	In the negative
4.	What order?	As per final order.

10. The Appellate Court held that the Court Commissioner's report and map is not disputed and that the Defendant No. 1 has admitted that

he is in possession of 2R land in excess of the purchase land. The Appellate Court held that the Trial Court has rightly appreciated the evidence on record while coming to the conclusion that there is an encroachment. The Appellate Court as such dismissed the Appeal.

11. Heard Mr. Talkute, learned counsel for the Appellant.

12. Mr. Talkute, learned counsel for the Appellant has taken this Court through the findings of the Trial Court as well as the Appellate Court. He submits that the case of the Plaintiffs was that the encroachment was towards the Western side of land purchased by Defendant No.1 and in case of the encroachment, the Court Commissioner has to be appointed not for the purpose of spot inspection which has been done in the present case. He submits that in the written statement, the Defendant No. 1 has denied the allegation of encroachment and as such, the findings of the Trial Court that there has been no denial to the fact of encroachment is factually incorrect. He further submits that upon reading of the cross-examination of the Defendant No. 1 what has been admitted is possession over 2R land in excess of area under the sale deed and not encroachment over the suit land which is required to be ascertained and proved. He submits that in the absence of map prepared by a competent survey officer, no reliance could be placed upon the Court Commissioner's map. He points out to the admission given by the Court

Commissioner in his-cross examination that the spot inspection of the suit property was not done on the basis of the boundaries. He submits that it was necessary to ascertain the boundaries and in the absence of permanent boundary marks, the report could not have been accepted.

13. He points out the report as well as the map prepared by the Court Commissioner and would submit that the Court Commissioner's map as well as plaint map did not satisfy the requirement of the map being drawn to an appropriate scale from an office of TILR and DILR. He submits that the Court Commissioner who was an advocate did not have the necessary expertise to determine the extent of encroachment and as such, no reliance can be placed on the Court Commissioner's map. In support, he reliance upon the following decisions.

i] Sulemankhan s/o Mumtajkhan & Ors. vs. Bhagirathibai wd/o Digamber Asalmol [2014(4) Mh.L.J.].

ii] Sukhdeo Parashramji Bhugul vs. Wamanrao nagorao Charhat [2004(3) Mh.L.J.].

iii] Isaq Nawad Shaikh vs. Maidabee & Ors. [2019 SCC OnLine Bom 351].

14. Considered the submissions and have minutely scrutinized the record and proceedings.

15. The Second Appeal was admitted on the following substantial questions of law.

(a) Whether the Courts below could have relied upon the report of the Court commissioner, who was an advocate in as much as an advocate was not competent to carry out the work of fixing the boundary of the property claimed by the Respondents?

(b) Whether the Courts below completely ignored that only a Survey Officer under the Maharashtra Land Revenue code, 1966 could have been appointed as the Court Commissioner?

(c) Whether the Court below and in particular the Appellate Court ignored the admission of the Court Commissioner in cross-examination that he has not made verification of the boundary shown in the plaint?

(d) Whether the observation of the Appellate court that the report of the Court Commissioner was not disputed is completely contrary to the record in as much as in the cross examination of the Court Commissioner, his report was seriously challenged by the Appellant?

16. The Plaintiff has come with the case of encroachment by the Defendant No. 1 on the western side of the Defendant No's. 1 land to the extent of East-West 104 ft. in length and North-South 40 ft. in length. The undisputed position is that the Plaintiffs who are the original owners of Gat No. 906 have alienated 4R land in favour of Defendant No. 1 out of Gat No. 906 in the year 1980 as well as portions of Gat No. 906 in favour of the other Defendants. The Defendant No. 1 has denied the

boundaries of the suit properties given in the plaint. By way of amendment, it was pleaded that the Defendant No. 1 had encroached upon the suit property 1A in December, 2003. As such, the suit involved adjudication of issue of boundary dispute as well as encroachment. The provisions of Order 26, Rule 9 of CPC provide for appointment of Court Commissioner for the purpose of making local investigations in cases where Court deems fit that local investigation is required for the purpose of elucidating any matter or dispute. It is settled position in law that in case where there is a boundary dispute or issue of an encroachment, it is always desirable to appoint Court Commissioner for measurement of the suit property to determine the boundaries and extent of encroachment.

17. In the present case, an Advocate had been appointed as Court Commissioner to conduct spot inspection. The requirement is not of spot inspection but of carrying out measurement by fixing of boundaries and determining the extent of encroachment by scientific method. The whole purpose of appointment of Court Commissioner, which was to assist the Court in determining the issue of encroachment is defeated by appointing an Advocate as Court Commissioner. If the report of Court Commissioner is perused, it is evident that based on the boundaries as shown by the Plaintiff and the Defendants, spot inspection has been carried out by the Court Commissioner and the map has been prepared. The Court

Commissioner has noted the boundaries of the land possessed by Defendant No. 1 as pointed out by Plaintiff and Defendant No. 1. He has thereafter measured the distances from the defendant No. 1's house to the boundaries shown. The report of the Court Commissioner and the map does not make any mention of encroachment by Defendant No. 1. The Court Commissioner has carried out spot inspection and noted the ground position as regards the land possessed by Defendant No. 1. The Court Commissioner was cross-examined at length by the learned Advocate for Defendant No. 1. In the cross-examination, the Court Commissioner has admitted that he has not inspected the suit property as per the boundaries mentioned in the plaint. In the cross-examination, specific suggestions were given in respect of the boundaries of the land of Defendant No. 1 which were shown to the Court Commissioner.

18. The Trial Court on the basis of the Court Commissioner's map and the admissions given by the Defendant No. 1, admitting the measurements taken by the Court Commissioner as also that Defendant No. 1 is in possession of 2 R land in excess of the area of the sale deed has held that the Plaintiff is entitled to get recovery of possession of encroached portion. As the Court Commissioner's map did not set out the boundary marks of the respective properties and no encroachment was shown, no reliance could have been placed on the Court Commissioner's

map.

19. In the case of *Sulemankhan s/o Mumtajkhan & Ors. vs. Bhagirathibai wd/o Digamber Asalmol [2014(4) Mh.L.J.]*, on which reliance has been placed by learned counsel for Appellants, learned single Judge of this Court has held in paragraph No. 9 as under.

“9. 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 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. The Trial Court can certainly raise presumption of accuracy and

genuineness of such map in view of section 83 of the Evidence Act if map is drawn by competent authority. (*See: Ram Kishore Sen and ors. vs. Union of India and Ors reported in AIR 1966 SC 644*) When such vital document is duly produced, proved and established, necessary detailed decree can be followed if there is any encroachment on the suit property. As held by this Court in *Vijay Shende's* case (*supra*), in such cases, fact of encroachment may be proved partly by oral evidence although the extent of encroachment cannot be proved in absence of public records without following due procedure emerging from section 36 and section 60 of the Evidence Act. In view of this recent judicial precedent referred to above, in the larger interest of justice, when it appears that the trial Court as well as 1st Appellate Court failed to follow proper procedure in this regard to ascertain the boundaries of the suit property. I must allow this appeal by setting aside impugned judgments and orders with direction to the trial Court concerned to consider appointment of Court Commissioner, who shall be competent official from the Office of Taluka Inspector of Land Records and District Inspector of Land Records, as the case may be. The Court Commissioner, if required, shall secure copies of necessary public record relating to Gat/Survey number, subject- matter of dispute for to settle boundaries of the suit property by carrying out measurement after due notice to the parties to the suit and also issuing notice to adjacent owners/possessors to the suit property. He shall submit his written report to the trial Court together with detailed map. Learned trial Court after considering such written report may allow the parties to lead additional evidence if it deems it fit and shall pass order according to law. Parties shall appear before the trial Court on 28th April, 2014. It is desirable that the trial Judge shall endeavour to get an agreed map on record

and in the absence of such agreed map/plan can depend upon evidence obtained through the Court Commissioner as indicated above.”

20. As held by the learned Single Judge of this Court in the case of *Suleman Khan* (supra), it is necessary that disputed suit property is measured by the competent surveyor to determine the boundary, ascertain the encroachment and its extent and for the said purpose to have a duly drawn measurement plan/map. In the present case, map annexed to the plaint is sketch map which is rough map depicting in general the location of the Plaintiff and the Defendants properties. The map could not have been taken into consideration for the purpose of deciding the issue of encroachment. The Court Commissioner who was an Advocate was appointed for spot inspection. An Advocate is not competent to carry out the measurements by fixing the boundaries and ascertaining the extent of encroachment. While conducting the spot inspection, the Court Commissioner has taken into consideration the boundaries as shown by the parties, which is also disputed by the Defendant No. 1 as is indicated from the cross-examination of the Court Commissioner. For the purpose of ascertaining the encroachment especially in the case where out of one gat number there are certain portions which are alienated, the boundaries have to be necessarily determined and map drawn to an appropriate scale is necessitated to adjudicate the issue of encroachment. The said

requirement is not satisfied in the present case and based on the Court Commissioner's map and the admissions, the suit has been decreed.

21. The report of the Court Commissioner cannot form the basis of decreeing a suit for encroachment even if there has been an admission on the part of the Defendant No. 1 as regards the possession of 2 R land. What the Plaintiffs seek is recovery of possession of land which according to them has been encroached by the Defendant No. 1 during the pendency of the suit. It is one thing to seek recovery of the possession of land of which possession has been taken in excess of the registered sale deed and it is another thing to say that there has been a forcible encroachment by a party beyond the land which was alienated in his favour.

22. Mr. Talkute, is right in his submission that in the absence of map prepared by the official from the office of TILR and DILR, the extent of encroachment could not be ascertained. The Trial Court has decreed the suit on the basis of the Court Commissioner's map and admissions which is legally not sustainable. The First Appellate Court was re-appreciating the evidence of the Trial Court and points had to be determined accordingly. Perusal of the points of determination would indicate that the relevant points were not framed for determination. The 1st Appellate Court ought to have considered that in absence of map drawn by survey

officer, the issue of encroachment could not have been decided in favour of Plaintiffs

23. Having regard to the discussion above, and considering the judgment in case of *Suleman Khan* (supra), the Courts below could not have relied upon the report of the Court Commissioner who was an Advocate and did not have expertise to fix the boundaries or ascertain the encroachment. As there is specific admission of the Court Commissioner that he has not made verification of the boundaries shown in the plaint, the map of the Court Commissioner could not be relied upon. For purpose of ascertaining the extent of encroachment, it was necessary to measure the suit property by fixing the boundaries to find out the encroachment and its extent and for the purpose the Survey Officer having the necessary expertise was required to be appointed. The Appellate Court wrongly observed that the report of the Court Commissioner was not disputed in as much, the evidence on record would indicate that the Court Commissioner was cross-examined at length and there was a challenge to this report. The substantial questions of law are answered accordingly.

24. Having regard to the above , the impugned Judgment and Decree passed by the Courts have resulted in miscarriage of justice. In my view the suit is required to be remanded to the Trial Court with direction to the

Trial Court to appoint the Surveyor from office of T.I.L.R, Patan as Court Commissioner within a period of four weeks from the date of production of this judgment before the Trial Court alongwith an application by the Plaintiffs for appointment of Court Commissioner. The T.I.L.R, Patan to take measurements of the property owned by the parties by taking into consideration the title deeds of the parties, if any, and shall demarcate the boundaries of the properties 1A and 1B by noting down the actual measurements in the joint measurement map itself and shall show the extent of encroachment, if any, and shall submit the map and report to the trial court within a period of two months from the date of his appointment as Court Commissioner. The Trial Court shall decide the matter expeditiously. R & P to be sent to the Trial Court immediately. It is clarified that if the Plaintiffs does not submit their application alongwith the judgment of this Court within period of four weeks from today, the suit shall stand dismissed.

25. The Appeal is allowed in the above terms.

(SHARMILA U. DESHMUKH, J.)