

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 324 OF 2023****WITH****INTERIM APPLICATION NO.13178 OF 2023**

Irfan Ahmad Khalil Ahmed Shaikh

...Appellant

Versus

Irfan Shauqat Shaikh

...Respondent

....

Mr. Sachin Gite, for Appellant.

....

CORAM : SANDEEP V. MARNE, J.**DATED : 25 JANUARY 2024.****P.C. :**

Challenge in the present Appeal is to the Judgment and Order dated 27 December 2022 passed by the Extra Joint District Judge, Niphad dismissing Appellant's Regular Civil Appeal No.104 of 2016 and confirming decree dated 30 July 2016 passed by Civil Judge, Jr. Division, Chandwad.

2. Plaintiffs instituted Regular Civil Suit No.123 of 2011 seeking removal of encroachment on suit property bearing City Survey No.1418. In the suit, Deputy Superintendent of Land Records was appointed as Court Commissioner to carryout measurement. The Court Commissioner carried out measurement and submitted report with map which indicates encroachment by Defendants on Plaintiff's land bearing City Survey No.1418. Defendants attempted to dispute measurement map before the Trial Court on

the ground that the Court Commissioner did not measure Defendant's land. The Trial Court, however, repelled that objection on the ground that Defendant did not raise any objection at the time of measurement and did not insist that their land should also be measured. Trial Court accordingly accepted measurement map and proceeded to decree the suit directing Defendants to remove the encroachment. The Appellate Court has confirmed decree of the Trial Court, hence the present Appeal.

3. Mr. Gite, the learned counsel appearing for Appellant would strenuously urge that the Trial Court had directed conduct of joint measurement in respect of Plaintiff's property bearing City Survey No.1481 as well as Defendants property bearing City Survey No.1391 and 1393. Contrary to the said direction of the Trial Court, Deputy Superintendent of Land Records measured only Plaintiff's property bearing City Survey No.1481. He would submit that inference of the encroachment could not have drawn on the basis of such faulty measurement. He would rely on the Judgment of this Court in **Rambhau Daulatrao Mule & Ors. Vs. Balabhau Pandharinath Kachre & Ors.**, 2020 (2) Bom. C.R. 17 in support of his contention that carrying out joint measurements of properties of both Plaintiffs and Defendants is necessary in every suit for removal of encroachment.

4. I have considered submissions canvassed by Mr. Gite. Non-conduct of measurement of Defendant's property bearing City Survey No.1391 and 1393 is the issue raised by the Appellant in the present Appeal. It appears that said objection was raised by Appellant before the Trial Court, which came to be rejected in paragraph No.17 of the Judgment holding that Defendant did not raise objection about non-measurement of their property

at relevant time. However when the Trial Court's decree was challenged by the Appellant before District Judge, perusal of the Appeal memo would indicate that, the issue of non-conduct of measurement of Defendant's land bearing City Survey No.1391 and 1343 was not even pleaded in the Appeal memo. Thus, Defendant did not urge before the First Appellate Court that measurement of land bearing City Survey No.1391 and 1393 was of vital importance for drawl of inference of encroachment. Now at the stage of Second Appeal, the said objection is sought to be raised when the First Appellate Court did not have the benefit of considering the same. In my view, on account of failure on the part of Appellant to raise the issue of non-conduct of measurement of land bearing Survey No.1391 and 1393 before the First Trial Court, the Appellants are precluded from raising the same in the present Appeal, considering the facts and circumstances of the case. In this case, the Deputy Superintendent of Land Records has measured Plaintiff's property bearing Survey No.1481 and has fixed boundaries thereof. While fixing the boundaries, the Deputy Superintendent of Land Records has observed that some portion of land bearing Survey No.1481 is actually in possession of Defendant. Based on the said map prepared by the Deputy Superintend of Land Records, Trial Court has proceeded to decree the suit.

5. Mr. Gite's reliance on the Judgment of this Court in **Rambhau Daulatrao Mule** (supra) would not cut any ice. In that case, the measurement map prepared by Cadastral Surveyor prior to filing of the suit was relied on. No notice of conduct of survey was given to the Defendants. Apparently joint measurement was not carried out. These are the factors why this Court proceeded to reject the measurement conducted by the Cadastral Surveyor and directed that the Surveyor from the office of T.I.L.R. to be appointed for

conduct of joint survey for hearing both the parties. In the present case, though the Plaintiff had relied upon survey prepared prior to filing of the suit, Trial Court directed conduct of fresh measurement through Deputy Superintend of Land Records. Measurement were conducted by the Deputy Superintend in presence of both the parties. Therefore Judgment in *Rambhau Daulatrao Mule* would have no application to the facts of the present case.

6. Considering overall conspectus of the case, no substantial question of law is involved in the present Appeal. Appeal is accordingly rejected. Since the Appeal is rejected, nothing survives in the Interim Application and it is also disposed of.

SANDEEP V. MARNE, J.

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