



Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.407 OF 2018

Nathyaba Vishnu Malgunde And Others

...Appellants

Versus

Ganpat Khandu Chopade And Others

...Respondents

Adv. Tushar Sonawane a/w Adv. P. S. Hagare, Pooja Satpute for the
Appellants.

Adv. Rupesh Zade a/w Priyanka Gupta for Respondent Nos. 1 & 2

CORAM : SHARMILA U. DESHMUKH, J.

DATE : MARCH 5, 2024

P. C. :

1. The present Appeal is filed by the original Plaintiffs being dissatisfied by the judgment dated 4th October 2017 passed by the Appellate Court in Civil Appeal No. 30 of 2012 dismissing the Appeal thereby upholding the judgment of dismissal of suit by the Trial Court dated 17th January, 2012 passed in RCS No. 189 of 1998.

2. The facts as borne out from the record are that the Plaintiffs and Defendants are owners of agricultural land bearing Gat No. 174 and Gat No. 175 respectively. Gat No 175 is on the eastern side of Gat No. 174. According to the Plaintiffs from the year 1990 onwards the Defendants had encroached upon the suit property. It was contended that the

Plaintiffs had measured the suit property on 26th June, 1992 and found that the Defendants had encroached to the extent of six gunthas land and that the Defendants are trying to cut the trees in the area in possession of the Plaintiff and hence, the suit for removal of encroachment and permanent injunction was filed.

3. The suit came to be resisted by the Defendants claiming that the trees are standing on the property owned by the Defendant. The parties went to trial. The judgment of the Trial Court shows that the Plaintiffs and the Defendants had independently measured their respective Gat numbers and there was no joint measurements. The Trial Court discarded the measurement map of the Plaintiffs and accepted the Defendants map and dismissed the suit. As against this the Appeal filed by the Plaintiffs being Regular Civil Appeal No. 30 of 2012 came to be dismissed. The Appellate Court observed that there was no joint measurements of Gat Nos. 174 and 175, however, held that the conclusion of the Trial Court was correct that the Plaintiff had proved the case and as such, rejected the Appeal.

4. Heard. **Admit** on the following substantial question of law:

- i) Whether the Trial Court and first Appellate Court had committed an error in law by not directing measurement of both Gat No. 174 and Gat No. 175 in the absence of an agreed map?

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

5. In view of the limited controversy involved, learned Counsel for the parties agree that the Appeal can be heard finally on the substantial questions of law framed.

6. Heard Mr. Sonawane, learned counsel for the Appellants and Mr. Zade, learned counsel for the Respondents.

7. Learned counsel for the Appellant would submit that it is settled position of law that in case of encroachment, in the absence of an agreed map, it is necessary that the Court Commissioner be appointed to conduct the joint measurements of both the properties for the purpose of finding out the extent of encroachment which has not been done in the present case. He submits that the findings of the Trial Court and Appellate Court suffers from perversity as the same is contrary to the position in law about the necessity of duly drawn measurement map in boundary dispute. He submits that there are various authorities to support the remand of the matter to the Trial Court by setting aside the impugned judgment and directing the appointment of the Court Commissioner for carrying out measurements pursuant to which, the Trial Court can be directed to decide the suit afresh. He relies upon the following decisions:

(i) Hariram Tukaram Shinde vs Baliram Bapurao Washimbe [decided on 20th September, 2021 in Second Appeal No .155 of 2013].

(ii) Sulemankhan s/o Mumtajkhan & Ors vs Smt. Bhagirathibai we/o Digambar Asalmol & Anr [2014 (5) ALL MR 552].

(iii) Ushabai w/o Sharadchandra Bannore vs Wasudeo s/o Baliramji Mehare & Ors. [2004(2) Mh.L.J.]

(iv) Hemavathi & Ors vs V.Hombegowda & Another [2023 SCC Online SC 1206].

8. *Per contra*, learned counsel for the Defendants on instruction would submit that the Defendants are not averse to the joint measurements of the properties however the cost has to be borne by the Plaintiffs to which Mr. Sonawane on instructions of his client who is present in Court submits that the entire cost will be borne by the Plaintiffs.

9. Considered the submissions and perused the record.

10. The suit was filed recovery of possession of the encroached portion and for perpetual injunction. The case of the Plaintiffs was based on the measurement carried out on 26th June, 1992 which according to the Plaintiffs showed encroachment of 6 gunthas around the year 1990. This map was not admitted by the Defendants and the Defendants relied upon

measurements which was carried out on 4th July, 2008. The Trial Court accepted the map of the Defendants and dismissed the suit. The Appellate Court although found that there was no joint measurement held that the conclusion of the Trial Court was correct.

11. The admitted position is that neither the Plaintiffs nor the Defendants had given notice to each other about the measurements being carried out and the parties had individually carried out measurements. Further, Gat No. 174 and Gat No. 175 were not jointly measured. It is necessary that both the Gat Nos. are measured and boundaries fixed to determine the extent of encroachment. There ought to have been joint measurement before concluding whether there is encroachment or not. Even at the stage of First Appeal, the Appellate Court could have exercised the power under Order 26 Rule 9 of CPC to direct joint measurement, which power was not exercised by the first Appellate Court. Neither the Trial Court nor the Appellate Court exercised their powers under Order 26 Rule 9 of CPC to appoint Court Commissioner and get a duly drawn measurement map by competent Government Official. The findings of the Courts being contrary to the applicable law suffers from perversity. This Court in case of *Sulemankhan s/o Mumtajkhan and Others Vs Smt. Bhagirathibhai wd/o Digamber Asalmol and Another*, [2014(5) ALL MR 552] has held thus:

“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 the 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.”

12. The Trial Court and the Appellate Court without noticing the settled position in law and without noticing that there is no agreed map and no joint measurement of Gat Nos. 174 and 175 committed an error in law in not exercising power under order 26 Rule 9 of CPC. In absence of duly drawn up measurement map the suit for encroachment could not have been decreed. The substantial questions of law are answered accordingly. In view of the above discussion, the judgments of the Trial Court and the First Appellate Court are set aside with the following directions:

ORDER

1. The second appeal is hereby allowed.
2. The judgment and decree passed by the learned Jt. Civil Judge, Junior Division, Baramati in RCS No. 189 of 1998 dated 17th January, 2012 and judgment passed by the learned Ad-Hoc District Judge-3, Baramati, District-Pune in RCA No.30 of 2012 dated 04th October, 2017 are hereby set aside.
3. Regular Civil Suit No.189 of 1998 is restored to the file of learned Jt. Civil Judge, Junior Division, Baramati with following directions.
 - A) After appearance of the parties before the Trial Court, original plaintiff to file application for appointment of Court Commissioner under Order XXVI Rule 9 of Code of Civil Procedure, within a period of three (03) weeks, for getting the lands measured.
 - B) The Trial Court shall appoint Taluka Inspector of land Records/ (Deputy Superintendent of land Records) as Court Commissioner under Order 26 Rule 9 of the Code of Civil Procedure, 1908.
 - C) After the Court Commissioner is appointed, plaintiff to deposit the requisite charges with the concerned authority within a period of two (02) weeks thereafter.
 - D) The Court Commissioner shall prepare

measurement map showing the boundaries of the land Gat Nos. 174 & 175 and with conclusion as to whether there is any encroachment or not and submit report before the Trial Court within a period of four months, after the order is given to the Commissioner.

- 4) Failure on the part of the Plaintiffs to file such application for appointment of Court Commissioner, should be taken adversely, which may also result in dismissal of the suit.
- 5) The Trial Court to decide the suit afresh by giving opportunity to both the parties to lead evidence, if necessary and so advised.
- 6) Since the suit of 1998 is being restored today to the file of learned Jt. Civil Judge, Junior Division, Baramati the Trial Court should give priority to dispose of the suit and to decide the same within a period of one year from the production of authentic copy of the order of this Court.
- 7) Both parties to appear before the learned Trial Court on 26th March, 2024.

(SHARMILA U. DESHMUKH, J.)