



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Appeal Against Order No. 35 of 2023

Shamrao Chimannji Koram
aged about 67 years,
occupation agriculturist,
R/o Chatgaon Taluka Dhanora,
District Gadchiroli

... Appellant

- Versus -

- (1) Sindutai Vasantrao Poreddiwar
aged about 65 years,
occupation agriculturist,
R/o Poreddiwar Complex, Near
I.C.I.C. Bank Gadchiroli,
Taluka and District Gadchiroli.
- (2) Head Master
Mahesh Sawkar Poreddiwar High
School, Chatgaon Ta. Dhanora,
Dist. Gadchiroli.
- (3) Taluka Inspector
Land Records Office, Dhanora,
Ta. Dhanora, Dist. Gadchiroli.
- (4) Superintendent, Land Records Office,
Gadchiroli, Ta. & Dist. Gadchiroli.
- (5) Sub Divisional Officer,
SDO office, Gadchiroli,
Ta. & Dist. Gadchiroli.
- (6) The Collector Gadchiroli,
Collector Office, Gadchiroli,
Ta. & Dist. Gadchiroli.

... Respondents

Mr. V. N. Morande, Advocate for the appellant
Mr. G. N. Khanzode, Advocate for respondent nos. 1 and 2
Mrs. D. I. Charlewar, AGP for respondent nos. 3 to 6

CORAM : ANIL L. PANSARE, J.

DATE : 15-02-2024

JUDGMENT

The appellant – original plaintiff is aggrieved by the judgment and order dated 31-3-2023 passed by the Principal District Judge, Gadchiroli in Regular Civil Appeal No. 21/2018. The learned Judge has partly allowed the appeal and cross objection and remanded the suit back to the trial Court under Rule 23-A of Order 41 of the Code of Civil Procedure, 1908 (for short ‘Code’).

2. The appellant is the original plaintiff and respondents are original defendants before the trial Court. The parties will be hereinafter referred to as per their original nomenclature.

3. Plaintiff filed suit stating therein that the defendant nos. 1 and 2 have encroached upon plaintiff’s land bearing Survey No. 50 to the extent of 0.14 R. The trial Court held that the plaintiff succeeded to prove encroachment of 0.10 R only. This finding has been *inter alia* recorded on the basis of the Court Commissioner’s report filed at Exhibit 181 coupled with map, Exhibit 182. The trial Court noted that both the parties have accepted and admitted the Commissioner’s report.

4. The first appellate Court took note of the fact that vide Exhibit 184, the defendant nos. 1 and 2 have raised objection to the Commissioner's report at Exhibit 182. According to the defendants, the measurement was not correctly done because technical precautions were not taken at the time of measurement. Defendants relied upon the judgment of this Court in the case of *Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade* [2004(2) Mh.L.J. 722] to contend that map prepared for the purpose of particular suit is not admissible in evidence in absence of proof of its accuracy.

5. The first appellate Court held that before looking into correctness of Commissioner's report, Exhibit 181, the trial Court ought to have taken oral evidence of Court Commissioner. Despite noting the fact that the objection raised by the defendants was not specific, the first appellate Court has then held that the Trial Judge failed to give opportunity to cross-examine the Commissioner to both the parties and accordingly set aside the judgment and decree passed by the trial Court and remanded the suit back for consideration afresh by giving opportunity to the parties to cross-examine the Court Commissioner.

6. As could be seen, the defendants have taken objection to Commissioner's report but did not summon the Commissioner for

examination in open court and accordingly, following substantial question of law was formulated.

What would be the effect of objection to Commissioner's report in absence of the application by the objectors to summon the Commissioner for cross-examination ?

7. Learned counsel for the defendants has referred to ***Kashinath's*** judgment to support the findings rendered by the first appellate Court.

8. I find this reliance to be completely misconceived. It appears that in the said case, the map was produced by the plaintiff, which pertained to measurement of his land alone. Attention of the High Court was invited to Section 83 of the Indian Evidence Act, 1873 which provides that Court shall presume the maps or plans purporting to be made by the authority of the Central Government or any State Government were so made and are accurate; but maps or plans made for the purpose of any cause must be proved to be accurate and accordingly the Court held in paragraph 6 as under.

“6. Bare reading of the aforesaid provision would reveal that the maps or plans made for the purpose of any cause must be proved to be accurate. The onus of proving that such a map is

accurate lies on the party who produced it. The maps must be proved by the person who has prepared them. They are post litem motesa and lack necessary trustworthiness. Where the maps are made for the purpose of a suit there is, even apart from fraud which may exist, a tendency to colour, exaggerate and favour which can only be countenanced by swearing the maker to the trust of his plan. Hence, there is no presumption of accuracy in respect of the map or plan which is made for a particular cause and it goes without saying that a map prepared for the purpose of a particular suit must, therefore, be duly proved and it is not admissible in evidence in absence of proof of its accuracy. In any case, in which there is a dispute about an encroachment or dimension of a site, the first essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same and/or subsequent reference in the pleadings or judgment to place the mark on a map should be referred to this map which must be attached to the decree and signed by the Judge. In the absence of such a map, the decree is probably meaningless and execution means virtually starting the case over all again. The map should be drawn with the North at the top and letters marking points should not be put inside ways or upside down.”

9. Thus, the Court held that the onus of proving the map is on the party who produced it. The Court then held that in case of dispute on the map so produced, the Court must appoint Commissioner to prepare the map. Thus, this Court has emphasized on the importance of appointment of Commissioner for preparation of map to effectively decide the issue of encroachment on lands.

10. The purpose of appointment of Commissioner can be understood by referring to Rules 9 and 10 of the Order 26 of the Code which reads thus :

9. Commissions to make local investigations.- *In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :*

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. Procedure of Commissioner. - *(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.*

(2) Report and depositions to be evidence in suit. - *The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.*

(3) Commissioner may be examined in person.- *Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.*

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11. As could be seen, Rule 9 provides that in a suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission directing him to make necessary investigation and to file report.

12. In the present case, the trial Court found it necessary to appoint Commissioner and accordingly the Court Commissioner visited the disputed fields and has prepared map in the presence of the parties. The report filed by the Court Commissioner does not indicate that the defendants have taken any objection at that time. The Commissioner accordingly filed report before the Court. The defendants raised objection vide Exhibit 184 which apparently is vague, stating that measurement was not correctly done because technical precautions were not taken. The objection is silent as to what technical precautions were to be taken and on what grounds, the measurement is said to have been not correctly done, particularly when the measurement was taken in the presence of the parties.

13. Be that as it may, the moot question that requires answer is whether filing objection is sufficient to discard Commissioner's report. The answer would be certainly in the negative for the following reasons.

Clause (2) of Rule 10 of Order 26 of the Code provides that report of the Commissioner shall be evidence in the suit but the Court or with the permission of the Court, any of the parties to the suit may examine the Commissioner personally touching any of the matters referred to him or mentioned in his report, or as to his report, or as the manner in which he has made the investigation.

14. Thus, Commissioner's report is treated as evidence and, therefore, Commissioner need not be examined to prove his report.

{Refer : *Misrilal Ramratan and others Mansukhlal and others Vs. A. S. Shaik Fathimal (dead) by LRs and others [1995 Supp (4) SCC 600]*}

The report can be thus read in evidence. However, if the Court or any party to the suit has objection to the Commissioner's report, the Court or the party concerned with the permission of the Court, may examine Commissioner as regards his report or the manner in which he has made the investigation. In the present case, the Commissioner has carried out measurement. The defendants have raised grievance against the measurement. However, defendants did not choose to summon the Commissioner to examine him on the manner in which measurements were carried out. Having failed to do so, in my considered view, the defendants have let go the objection taken by them. The defendants chose to not examine the Commissioner. The trial Court's inference that

parties have admitted and accepted the report will have to be, therefore, understood in the aforesaid background. The approach of the trial Court thus cannot be faulted with.

15. Identical issue was considered by the Single Bench of Delhi High Court in the case of ***New Miltan Timber Store and others Vs. Rattan Chand Sood (deceased) through L.Rs. [1997 SCC OnLine Del 737]***. The Court held thus :

“10. It is abundantly clear from the relevant provisions of law cited above that the report of the Commissioner under Order 26, Rule 10 CPC is a legal evidence. Hence it was not at all necessary for the Court to examine the Commissioner for the purposes of proving the said report. No formal proof is needed to prove the report when the Commissioner has been appointed under Order 26 Rule 9 CPC. As per the provisions of Order 26 Rule 10 CPC the report can be read in evidence without any formal proof of the same, though it is true that the Court suo motu or at the instance of any of the parties may summon the Local Commissioner and examine him as a witness. The appellants herein filed objections against the report of the Local Commissioner. However, for the best reasons known to them they did not choose to summon the Local Commissioner as a witness and reconciled themselves with the report as it was. Thus if the Commissioner was not summoned and examined as a witness and as such no opportunity was given to the appellant to cross examine the Local Commission they can blame none but themselves for the impasse which they find themselves in. Thus the statute has put a handle in the hands of any of the parties through enactment of the provisions of Rule 10 of Order 26 CPC. However, if they do not use the said

handle they can blame none but themselves. Hence the appellants cannot be heard to say now that the report of the Local Commissioner cannot be acted upon since the Local Commissioner was not examined as a witness and they were not given any opportunity to cross examine him.”

16. I respectfully agree with the proposition of law as narrated above. Filing objection to the Commissioner’s report without summoning Commissioner is akin to pleadings without proof. Had the defendants summoned him to examine in open Court, the Commissioner, who is Cadestral Surveyor, being expert in measurement, would have explained as to how the measurements carried by him were in consonance with the rules of measurement. As could be seen, clause (2) of Rule 10 of Order 26 of the Code makes Commissioner’s report admissible evidence. The same cannot be discarded only upon filing objection by the party, unless the party taking objection summons the Commissioner to examine in the open Court touching the matter referred or mentioned in the report or as to the manner in which he has made investigation. The defendants herein failed to do so and, therefore, Commissioner’s report, Exhibit 181 and map, Exhibit 182 is admissible evidence.

17. The first appellate Court, therefore, committed serious error in applying the law laid down in ***Kashinath’s*** judgment which, in a way, endorsed the appointment of Court Commissioner to effectively

adjudicate the cases relating to encroachment in the adjoining lands/plots.

18. At this stage, learned counsel for the defendants submits that the plaintiff has filed cross objection and has also disputed the correctness of Commissioner's report. He submits that the first appellate Court has, therefore, in paragraph no. 19 has held that both the parties ought to have been afforded opportunity to cross-examine the Court Commissioner.

19. As against, learned counsel for the plaintiff submits that he has not raised objection to the Commissioner's report and further seeks permission to withdraw the cross objection. Permission is granted. Cross objection filed in appeal before the first appellate Court stands withdrawn. The effect of withdrawal will be that plaintiff is satisfied with the findings rendered by the trial Court that the defendants have encroached on Survey No. 50 to the extent of 0.10 R and not 0.14 R.

20. The substantial question of law is accordingly answered as follows.

The effect of objection to Commissioner's report without summoning him for examination in open court would render

Commissioner's report an admissible evidence in terms of Rules 9 and 10 of Order 26 of the Code.

21. Having said so, the findings rendered by the first appellate Court that trial Court was duty bound to afford opportunity to both the parties to cross-examine Commissioner is unsustainable being contrary to law as discussed above. The first appellate Court ought not to have remanded the suit back to the trial Court. The appeal, therefore, will have to be restored on the file of the first appellate Court by setting aside the order. The first appellate Court shall, however, take note of withdrawal of cross objection and its effect, that is to say, that plaintiff is satisfied with the trial Court's judgment. Hence, following order.

ORDER

- (i) The appeal is partly allowed.
- (ii) The judgment and order dated 31-3-2023 passed by the Principal District Judge, Gadchiroli in Regular Civil Appeal No. 21/2018 is quashed and set aside.
- (iii) Regular Civil Appeal No. 21/2018 is restored on the file of the Principal District Judge, Gadchiroli for consideration afresh in the light of the observations made in the body of the judgment.

(iv) The Principal District Judge, Gadchiroli shall proceed to decide the appeal in accordance with law.

(v) The parties shall appear before the Principal District Judge, Gadchiroli on 4-3-2024.

(Anil L. Pansare, J.)

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