



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

72 APEAL FROM ORDER NO. 26 OF 2025

GANGADHAR KESHAVRAO GHUGE DIED, THRU. LRS. SMT. NILAKSHI
GANGADHAR GHUGE

VERSUS

NARAYAN PANDURANG JAGDALE AND OTHERS

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Advocate for the Petitioner : Mr. Adwant S.V.

Advocate for Respondent nos. 1 to 3E : Mr. Namit S. Muthiyan

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CORAM : SHAILESH P. BRAHME, J.

DATE : 10.11.2025

PER COURT :

Heard both sides.

2. Appeal is directed against order of remand dated 01.08.2024 passed in Regular Civil Appeal No. 83/2020. The appellant is original defendant. The respondents' Regular Civil Suit No. 633/2008 for removal of encroachment of possession was dismissed by the Trial Court and they were in appeal in Regular Civil Appeal No. 83/2020.

3. Both parties addressed substantial question of law formulated vide order order dated 09.10.2025. By impugned order passed under Order XLI Rule 23A of the Code of Civil Procedure, the Appellate Court relegated the matter to the Trial Court for retrial having found that joint measurement by appointment of Court Commission is necessary to reveal the encroachment.

4. Learned counsel Mr. Adwant submits that when both parties had led oral and documentary evidence, there was no necessity to remand the matter. It is submitted that remand for conducting joint measurement and for elucidating the actual situation is perverse. It is further submitted that

without discussing the evidence on record on merits, the Appellate Court committed patent illegality in remanding the matter only for joint measurement through Court Commissioner. It is further submitted that respondents-plaintiffs did not advert to Order XXVI Rule 9 of the Code of Civil Procedure during the course of trial and filing of application (Exh. 31) is after thought. It is further submitted that impugned order is arbitrary because the respondent would get disadvantage of filling up the *lacunas* and that would further protract the proceedings.

5. Per contra, learned counsel Mr. Muthiyan submits that in the matters of encroachment and the boundary disputes, the consistent view is to resort to Order XXVI Rule 9 of CPC. Accordingly application (Exh. 31) was submitted in the Lower Appellate Court. There is no illegality in the impugned order. It is submitted that it is permissible to have recourse to Order XXVI Rule 9 of CPC at the appellate stage, which would be necessary for deciding the controversy involved in the matter. It is submitted that no prejudice would be caused to the appellant, as the opportunity is being given to both the parties.

6. Learned counsel for the appellant has tendered on record a copy of the plaint in Regular Civil Suit No. 633/2008. Its a suit for removal of encroachment and possession of the encroached portion of 64-Are. Plaintiffs are the owners of land Gt No. 102 and the defendant is owner of land Gat No. 101. In a measurement of 06.02.2008 conducted by the T.I.L.R., the encroachment of 60-Are of land was found to have been committed by the defendant. During the course of trial none of the parties resorted to Order XXVI Rule 9 of the Code of Civil Procedure.

7. The parties are adjoining land owners. The dispute pertains to boundaries, measurement and the encroachment. Earlier measurement conducted by the T.I.L.R. is found to be defective because of the procedural illegalities. The joint measurement would help in resolving the controversy.

Hence, I find that the Appellate Court has rightly remanded the matter by allowing the application (Exh. 31).

8. It was not necessary for the Lower Appellate Court to record findings on all the facts in issue and to deal with the oral and documentary evidence. The Lower Appellate Court went to the crux of the matter and for that purpose reliance is placed on the judgment referred in the impugned order. I find no perversity. In the given circumstances material on record would not have resolved the controversy.

9. Just because the plaintiffs did not resort to Order XXVI Rule 9 of CPC in the Trial Court, cannot preclude them from claiming appointment of Court Commissioner for joint measurement. Learned counsel Mr. Muthiyan in this regard has rightly referred to the decision of learned Single Judge in Second Appeal No. 875/2016 in the matter of Rambhau s/o Daulatrao Mule and others Vs. Balabhau s/o Pandharinath Kachre and others. The learned Single Judge has *inter alia* relied on various judgments of High Court and the Supreme Court in remanding the matter at the second appellate stage for resorting to Order XXVI Rule 9 of CPC. I propose to follow the same course. It can be said to be a consistent view when the dispute pertains to encroachment and there was no joint measurement.

10. The learned counsel for the appellant has relied upon following judgments :

(i) **H.B. Gandhi, Excise and Taxation Officer-Cum-Assessing Authority, Karnal and others. Vs. M/s. Gopi Nath and sons and others; 1992 Supp (2)Supreme Court Cases 312.**

(ii) **P. Purushottam Reddy and another Vs. Pratap Steels Ltd.; (2002) 2 Supreme Court Cases 686.**

(iii) **Zarif Ahmad (dead) Through L.Rs. And anr. Vs. Mohd. Farooq; (2015) 12 Supreme Court Cases 673.**

(iv) **Sirajudheen Vs. Zeenath and others; 2023 SCC OnLine SC 196.**

(v) K. Karuppuraj Vs. M. Ganesan; (2021) 10
Supreme Court Cases 777

(vi) Arvind Kumar Jaiswal (D) Thr. Lr. Vs. Devendra
Prasad Jaiswal Varun; 2023 SCC OnLine SC 146.

11. It is rightly pointed out by learned counsel for the respondents that in none of above matters the dispute pertained to dimension of the properties, boundaries of the subject matter, area and the encroachment. Those are the judgments laying down the scope and parameter of powers of remand of the lower Appellate Court. I am of the considered view that the judgments referred above do not enure to the benefit of the appellant.

12. For the aforesaid reasons I answer the substantial questions of law in favour of the respondents/plaintiffs. I find no case is made out to cause interference.

13. Appeal from Order is dismissed.

(SHAILESH P. BRAHME, J.)

mkd/-