



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

SECOND APPEAL NO.461 OF 2006

APPELLANTS

- : 1 **Pankaj Laxman Pathare,**
aged -22 yrs, Occ.- Student
- 2 **Prashant Laxman Pathare,**
aged – 24 yrs., Occ. – Student,

Both R/o. Kavthal, tq. Morshi, Distt.
Amravati.

..VERSUS..

RESPONDENTS

- : 1 **Sindhubai Gangadharrao Wankhade,**
Age-46 yrs, r/o. Kavthal, Tq. Morshi,
Distt. Amravati.
- 2 **Mrs. Savita Shrikantrao Ahirkar,**
Age – 26 yrs, r/o. Vidarbha Housing
Board Colony, Ratanlal Plot, Akola.
- 3 **Mrs. Anita Vilasrao Chaudhary,**
Age – 28 yrs, R/o Shiralas, Tq. Morshi,
Distt. Amravati.
- 4 **Miss. Preeti Gadadharrao Wankhade,**
now Married, Married name – Sau. Preeti
Rajiv Harne, R/o. Rampur (Belaj), Tq.
Achalpur, Distt. Amravati.
5. **Vivek Gadadharrao Wankhade,**
Age – 32 yrs, R/o. Kavthal, Tq. Morshi,
Distt. Amravati.

Mr V. Dahat, Advocate for the Appellants.

Mrs S. W. Deshpande, Advocate for the Respondent Nos.1 to 5.

CORAM : M. W. CHANDWANI, J.

DATED : 18th MARCH, 2025.

ORAL JUDGMENT

1. This Court by order dated 23.01.2008 has framed the following substantial question of law.

“Whether the Courts below failed in not relying on the Commissioner’s report, when there was no objection raised by any of the parties to the Commissioner’s report, who was appointed on the direction of the Court ?

2. Having heard the learned counsel for the appellants as well as the learned counsel for the respondents and having gone through the judgments impugned and documents available on record, it is not necessary to go into the matrix of the case in detail. Suffice to say that the appellants have filed a suit for possession of an encroached land and recovery of damages on the premise that the respondents have encroached 0.24 R land from the western side and 0.04 R land from the southern side of Gat No.65/2.

3. During pendency of the trial, respondent No.5 filed an application for joint measurement of Gat Nos.65 and 67, pursuant to which the Trial Court ordered for joint measurement of these two

Gats through District Inspector Land Records (D.I.L.R.). The D. I. L. R. (Court Commissioner) filed a report of joint measurement of the land. The appellants as well as the respondents took objection to the report *vide* Exhibits-52 and 53. Thereafter, a joint application came to be filed by the appellants and the respondents submitting that the report is acceptable to them subject to fixing of boundary marks on the land. The Court Commissioner fixed the boundary marks on the land. The Trial Court thereafter, dismissed the suit on the ground that the Court Commissioner has not been examined by the appellants/plaintiffs.

4. The Appellate Court concurred with the findings of the Trial Court by observing that in wake of the objection *vide* Exhibits – 52 and 53 filed by the appellants and the respondents to the Court Commissioner's report, it was necessary for the plaintiffs to examine the Court Commissioner. Since, there was an objection to the Court Commissioner's report and the report did not include measurements of the entire Gat Nos.65 and 67, where the parties to the proceedings had encroached upon each other's land, it was incumbent upon the appellants to examine the Court

Commissioner to clarify the possession. Therefore, there is no fault with the Trial Court's findings regarding the necessity of examining the Court Commissioner.

5. Be that as it may, the Bombay High Court in the case of *Vijay Shrawan Shende and Ors. vs. State of Maharashtra and Ors.*, *2009 (5) Mh.L.J. 279*, has held in the para 36 as under :

“36. If such report of the Commissioner is proved, as rendered, keeping in view the requirements of rules relating to measurement and if it withstands the test of cross-examination, unless admitted document, alone can be the foundation as to proof of fact and of extent of encroachment.”

Since, the Court Commissioner's report reveals encroachment by the respondents on the appellant's land, it is essential to produce the surveyor for cross-examination to test the veracity of the report.

6. Considering the peculiar facts of the present case, it is common ground that the matter should be remanded back to the Trial Court thereby providing an opportunity to both the parties to examine and cross-examine the surveyor. It is to be noted here that, if the surveyor who conducted the survey is not available then the parties are at liberty to apply for joint measurement afresh. With the

aforesaid observations, the appeal is disposed of by passing the following order :

- i) The appeal is partly allowed.
 - ii) The judgment and decree of the Trial Court confirmed by the Appellate Court on 09.12.2005 *vide* Regular Civil Appeal No.304 of 2001 is hereby set aside.
 - iii) The matter is remanded back to the Trial Court for deciding the issue of encroachment in the manner mentioned herein above.
7. Since the original suit is of the year 1996, the Trial Court is requested to dispose of the suit as early as possible preferably within six months from the date of receipt of this judgment.

(M. W. CHANDWANI, J.)

Tambe