



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

APPEAL FROM ORDER NO.4/2023

1. Avinash S/o Govindrao Gadge,
age 68, Occu. Cultivator.
2. Rajendra S/o Govindrao Gadge,
age 63, Occu. Cultivator.

Both R/o Nara, Taluka Karanja,
Distt. Wardha.

... Appellants
(Original Plaintiffs)

- Versus -

1. Shri Sant Sakhumata Deosthan,
a registered Trust No.583(A) Wardha,
Nara, Tq. Karanja, Distt. Wardha,
through Secretary Mr. Sunil Wamanrao
Supal and President Mr. Tikaram
Gulabrao Ghagare,
age 61, Occu. Agriculturist,
R/o Nara, Taluka Karanja,
Distt. Wardha.

(Ori. Deft. No.1)

2. The Tahsildar Karanja (Gh.),
Karanja (Gh.), Taluka Karanja (Gh.),
Distt. Wardha.

(Ori. Deft. No.2)

3. The Collector, Wardha,
Wardha, Taluka Wardha,
Distt. Wardha.

(Ori. Deft. No.3)

... Respondents.

Mr. Prasad Dharaskar, Advocate for the appellants.
Mr. Deepak G. Paunikar, Advocate for respondent No.1.

CORAM: MRS.VRUSHALI V. JOSHI, J.
DATE OF RESERVING THE JUDGMENT: 10.07.2025.
DATE OF PRONOUNCING THE JUDGMENT: 30.07.2025.

JUDGMENT

Being aggrieved by the judgment and decree dated 28.7.2022 passed in Regular Civil Appeal No.11/2017 of District Judge-3, Wardha thereby partly allowing the appeal and remanding back the suit before trial Court for decision afresh against the judgment and decree dated 13.12.2016 passed by the 2nd Joint Civil Judge, Senior Division, Wardha in R.C.S. No.9/2009, the appellants have filed this appeal.

2. The facts, in brief, are as under:-

The appellants - original plaintiffs have filed suit for permanent and mandatory injunction against the respondents i.e original defendants. The plaintiffs are real brothers and owners of Field Survey No.437-A/1 and 437-A/2 of Nara, Taluka Karanja,

Ghadge, Distt. Wardha. Respondent No.1 - the original defendant No.1-Trust is a owner of the field adjacent to nala bearing Survey No.451/1. The nala flows in between the field of appellants and field property of respondent No.1 i.e. defendant No.1. The original defendant Nos.2 and 3 are the owners of said nala i.e. Government. According to the appellants it is the responsibility of defendant Nos.2 and 3 to take due care and maintenance of nala thereby not to cause any damage to the adjacent property.

3. It is the grievance of the appellants that the defendant No.1 without any right and title had started construction of well in January 2006 and dumped the debris in nala. Thereafter, in 2008 defendant No.1 had dug inside the nala from the well towards eastern direction to 100 feet without taking any permission from the competent authority and again dumped all the debris in the suit property i.e. nala. According to the plaintiffs, the defendant No.1 had encroached upon 4 meters of width of nala out of 8 meters by constructing the compound wall

and pits were constructed on the suit property. Because of the said action of the defendant No.1 the natural course of the flow of nala was disturbed and the rain water directly went into the field of appellants causing irreparable damage to the fields and crops standing therein. Therefore, Civil Suit No.9/2009 was filed by the appellants to remove the construction from the suit property. The decree in said civil suit was passed in favour of the plaintiffs and direction was given to respondent Nos.1 to 3 to remove the construction from the suit property.

4. The said judgement was challenged by the defendant No.1 in Appeal No.11/2017. The said appeal was partly allowed by the District Court and remanded the matter back to the trial Court for decision afresh directing the trial Court to appoint qualified Surveyor as a Commissioner from the office of District Inspector Land Records to measure the land of plaintiffs and defendant No.1 including nala and other adjacent property for ascertaining the fact of encroachment, if any, on the nala portion reducing its width causing obstruction to the natural flow of the

nala under the provisions of Order 41 Rule 23-A of the Code of Civil Procedure. Being aggrieved by the said order in appeal, the appellants have filed this appeal against the order before this Court.

5. The learned Advocate for the appellants has stated that the appellate Court has erred in passing the order as there is no dispute between the appellants and the defendant No.1 about the measurement of their fields. The measurement of nala is already admitted by the defendant No.1 in its written statement and admitted fact is not required to be considered again. There is no question of measurement of said nala. The Civil Judge Senior Division has rightly considered the oral and documentary evidence on record and rightly passed the judgment to remove the construction of nala and restrained the defendants to put the debris in nala. Hence prayed to allow the appeal by setting aside the order passed by the appellate Court.

6. It is submitted by the learned Advocate for the respondent No.1 - original defendant No.1 that the impugned order passed by the appellate Court needs no interference at the hands of this Court as the same is rightly passed. He has prayed to dismiss the instant appeal against order.

7. Heard both sides and perused the record.

8. The plaintiffs - appellants have stated that it is not the case of boundary dispute for encroachment in property of plaintiffs and defendants and, therefore, for Commissioner's report, remand of suit is not required. The suit property i.e. nala belongs to Government and, therefore, available evidence which includes photographs relied upon by the defendant No.1 is sufficient to prove the fact of obstruction and construction. The map is brought on record to prove the encroachment and measurements of the properties to properly establish the accuracy of the map. It is observed by the appellate Court that the order of Sub-Divisional Officer is brought on record about consolidation

and correction and change in area of property of defendant No.1. In such circumstances, in the maps which are prepared by Surveyor, the possibility of discrepancy about actual area, its measurement in previous and present width of nala varies which be there which cannot be adjudicated upon without leading evidence. This Court in case of Vachhalabai W/o Kundlilk Gavane and others V/s. Chinkaji S/o Malhari Jadhav and others reported in 2012(3) ALL MR 91 observed that under Order 26 Rules 9 and 10 appointment of Court Commissioner for joint measurement of land of plaintiff and defendant is necessary for deciding the dispute as to encroachment upon land of plaintiff where two reports from T.I.L.R. Office, one indicating encroachment by defendant and another indicating no encroachment are there, and disposal of appeal without such appointment of Commissioner is unsustainable.

9. It is, therefore, necessary for proper conclusion about the encroachment on nala which is adjacent to the properties of

both plaintiffs and defendant No.1 that Court Commissioner be appointed to measure the disputed properties properly. The existing area of nala shown in map, its consolidation and thereafter position of well whether it is constructed on the portion of nala or not, all these facts require the evidence. The available evidence is not sufficient and, therefore, the appointment of Commissioner is necessary. Whether the construction made by the defendant No.1 is on the portion of nala cannot be ascertained without verifying the actual area or measurement of construction of well made by the defendant No.1 and, therefore, the appellate Court has rightly remanded back the appeal to the trial Court to consider the evidence whether there is any encroachment on nala and as there is correction after consolidation report of the Commissioner is necessary. Hence, the appellate Court has rightly remanded back the civil suit for consideration of limited purpose i.e. for leading evidence in this regard and appointment of Commissioner to come to the conclusion whether there is any encroachment on the nala and whether it requires to be removed.

As the interference at the hands of this Court is not required, the appeal stands dismissed. No costs.

(MRS.VRUSHALI V. JOSHI, J.)

Tambaskar.