



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

SECOND APPEAL NO.17 OF 2023

APPELLANT : Sapna Santoshkumar Agrawal,
Ori. Plaintiff on R.A. aged 33 years, Occ. Household, R/o Kamal
Grih Nirman Society, New Radhakisan
Plots, Akola, Tq. and Dist. Akola.

..VERSUS..

RESPONDENT : Shriniwas Ravindra Wajpeyee,
Ori. Defendant on R.A. Aged 51 years, Occ: Business, R/o
Gorakshan Road, Akola, Tq and Dist.
Akola.

Mr R. G. Kavimandan, Advocate for Appellant.
Mr O. Y. Kashid, Advocate for Respondent.

CORAM : **M. W. CHANDWANI, J.**

DATED : **24th MARCH, 2025.**

ORAL JUDGMENT

1. Having heard both the parties, this Court finds that the substantial questions of law framed *vide* order dated 22.01.2025 needs to be reformulated. Rather, only one substantial question of law arises in this appeal, which is reproduced as under :

“Whether the learned First Appellate Court was right in non-suiting the appellant on the ground that no notice was given to the respondent for the measurement, in wake of the fact that the appellant’s application for joint measurement of the plots owned by the respective parties was rejected by the learned Trial Court ?”

2. Since the substantial questions of law which were framed earlier are reformulated and ultimately the gist of the substantial question of law formulated today is encroachment; therefore, both the parties have no objection to hear the appeal today itself.

3. Heard Mr Kavimandan, learned counsel for the appellant and Mr Kashid, learned counsel for the respondent.

4. This appeal takes an exception to the judgment and decree dated 20.10.2022 passed in Regular Civil Appeal No.140 of 2016 by the learned Principal District Judge, Akola, whereby the findings of the 6th Joint Civil Judge (J. D.), Akola, in Regular Civil Suit No.376 of 2009 have been overturned.

5. Considering the nature of the question, it is not necessary to go into the matrix of the case in detail, suffice to say that the appellant has come up with a case of encroachment by the respondent alongwith measurement report of the Cadastral Surveyor. The Trial Court decreed the suit. However, the First Appellate Court non-suited the appellant on the ground that in the said measurement, the respondent was not served with the notice of measurement. Therefore, the First Appellate Court disbelieved the measurement report of the Cadastral Surveyor and allowed the regular civil appeal of the respondent. Hence, this appeal.

6. Heard the learned counsel for the appellant as well as the learned counsel for the respondent. Having gone through the judgments impugned, it transpires that pending the trial, the appellant moved an application for joint measurement by appointing the Court Commissioner. The said application was rejected by the Trial Court *vide* its order dated 05.11.2014. The order was carried in Writ Petition No.1420 of 2015, whereby the writ petition was not entertained with an observation that it is open for the appellant to challenge the order impugned by filing regular civil appeal if the occasion arises. In spite of rejection of application for joint measurement, the Trial Court proceed to decree the suit which was overturned by the First Appellate Court on the ground of non participation of the respondent in the said measurement, which the appellant had carried out on her level. The law in this regard has been well settled by catena of judgments, more particularly in the case of *Vijay Shrawan Shende and Ors. vs. State of Maharashtra and Ors.*, *2009 (5) Bom. C. R. 306*, wherein the Bombay High Court has held as under :

“37. In the present case, the procedure, as emerging from foregoing discussion, has not admittedly been adopted.

38. The Substantial Questions of Law are answered as follows :-

(i)

(ii)

(iii)

(iv)

(v) It would not be proper to dismiss the suit simply because the Court Commissioner has not adopted a correct procedure of measurement and the exercise of re-measurement, according to rules,

will have to be got done through Court Commissioner again and again, if necessary, because failures of Cadastral Surveyors are not attributable to parties to the suit.”

7. In wake of the law settled by this Court in the case of *Vijay Shrawan Shende* (supra), the matters regarding measurement need to be remanded for trial. Therefore, the judgment and decree dated 20.10.2022 passed in Regular Civil Appeal No.140 of 2016 by the First Appellate Court as well as the judgment and order dated 28.11.2016 passed in Regular Civil Suit No.376 of 2009 by the Trial Court are set aside. Resultantly, the appeal is partly allowed.

8. The matter is remanded back to the learned Trial Court to decide the issue of encroachment afresh by reconsidering the application of the appellant for joint measurement of the plots possessed by the respective parties by appointing Cadastral Surveyor as a Court Commissioner.

9. Needless to mention that the Trial Court shall not get influenced by the order of this Court and shall decide the issue of encroachment afresh.

10. In the above said terms, the appeal is disposed of.

(M. W. CHANDWANI, J.)