



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

80 APEAL FROM ORDER NO. 72 OF 2025
WITH
CIVIL APPLICATION NO. 10565 OF 2025
IN AO/72/2025

TAREKHBIN MUBARAKBIN MAZI AND ANOTHER
VERSUS
UME HABIBA W/O ISTIYAS HASHMI

...
Advocate for the Petitioner : Mr. Hiwrekar Sanjay Dattatrya
Advocate for Respondent : Mr. Taher Ali Quadri
...

CORAM : SHAILESH P. BRAHME, J.

DATE : 29.01.2026

PER COURT :

Heard both sides.

2. Appeal from order is directed against order of remand passed by the lower Appellate Court in Regular Civil Appeal No. 116/2021. The matter is remanded to the Trial Court so as to have assistance of the Court Commissioner by resorting to Order XXVI Rule 9 of the Code of Civil Procedure (CPC). Having found that the measurement and the report of cadastral surveyor is defective, the Appellate Court relying on judgment of Supreme Court in the matter of **Ram Lal and others Vs. Salig Ram and others; (2020) 11 Supreme Court Cases 590**. preferred to remand the matter.

3. The learned counsel submits that the impugned order is unwarranted. It is exceeding of the jurisdiction and it is assisting the respondent-plaintiff. It is submitted that the respondent/plaintiff is not in physical possession of area of 82.63 square meter out of 544.80 of City Survey No. 1285.

Cadastral Surveyor was appointed at her behest. It is further submitted that no cogent reasons are assigned by the appellate court. The respondent/plaintiff was bound to make out a case of encroachment, which she utterly failed and therefore remand is not warranted. It is further submitted that adjoining holders are not party and measurement of entire city survey number is uncalled for.

4. Per contra, learned counsel Mr. Quadri supports the impugned judgment and order. It is submitted that the controversy pertains to boundary dispute and to elucidate the matter in controversy resort to Order XXVI Rule 9 of CPC is necessary. It is further submitted that this Court has been taking consistent view in relegating the party to the trial court to have recourse to appointment of Court Commissioner to resolve the controversy. Before filing suit, the respondent/plaintiff had approached Cadastral Surveyor and report is found to be unreliable. Considering the cause of action and the overt act, it can be seen that the appellants are the adjoining plot holders and they are occupying the premises from the same city survey number.

5. The report of the Cadastral Surveyor was produced at Exh. 47. He was also examined before the Trial Court. His report is faulted by the trial court by recording categorical finding in paragraph no. 10 of the judgment. All aspects of the matter are not dealt with by the Cadastral Surveyor. It is further recorded that no measurement is conducted for the neighbouring occupants from the self-same survey number. The exercise conducted by the Cadastral Surveyor is found to be incompatible.

6. The lower Appellate Court recorded that advocate for the present appellants conceded for the re-measurement. However, it is pointed out by the learned counsel that in fact no such consent was ever given by the lawyer and alleged consent was without any authorization of his client. It is informed that the appellants have lodged complaint against the lawyer for

acting beyond instructions. This Court does not wish to go into that aspect of the matter.

7. The Appellate Court has relied upon the judgment of Supreme Court in the matter of **Ram Lal (supra)**. The report of the Cadastral Surveyor is found to be defective and it is suffering from irregularities. Under these circumstances, the course adopted by the Appellate Court is appropriate and legal. I have already observed that the controversy pertains to boundary dispute and for proper elucidation of the controversy recourse to Order XXVI Rule 9 of CPC is appropriate.

8. The controversy cannot be resolved unless entire City Survey No. 1285 is measured. The submission in this regard advanced by Mr. Hiwrekar cannot be accepted.

9. Learned counsel for the appellants has relied upon judgment of **Chandrarao Hanumantrao Wable Vs. Dhondu Fula Patil; 2012(2) Mh.L.J. 847**. In that case, the issue was as to whether the order of appointment of Commissioner is legal or not. The Court Commissioner was appointed by the Trial Court in that case after initial measurement. The observations were recorded in those contexts. The facts are distinguishable. Here, no recourse was taken for appointment of Court Commissioner when matter was in the Trial Court.

10. The respondents have relied upon judgment of **Pandit Vithal Landage Vs. Vishnu Govind Pawar and Anr; in Writ Petition No. 5158/2025, dated 30.04.2025**. The coordinate bench recorded observations in paragraph no. 11, albeit while considering the challenge to appointment of commissioner. The observations would enure to the benefit of respondent.

11. I find that there is no perversity or patent illegality committed by the lower Appellate Court. The questions framed are answered against the appellants.

12. Appeal from Order is dismissed.
13. Pending Civil Application is disposed of.

(SHAILESH P. BRAHME, J.)

mkd/-