

Sahebrao and Others Vs. Sarjerao

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Court : Mumbai Aurangabad

Decided On : May-02-2014

Judge : T.V. Nalawade

Appeal No. : Second Appeal No. 676 of 2012 With Civil Application No. 11218 of 2012

Appellant : Sahebrao and Others

Respondent : Sarjerao

Judgement :

1. **Admit.** Notice after admission is made returnable forthwith. By consent of both the sides, heard for final disposal.

2. The appeal is filed against judgment and decree of R.C.A. No. 108/2008, which was pending in the Court of Principal District Judge, Beed. The appeal was filed against judgment and decree of R.C.S. No. 222/2003, which was pending in the Court of Joint Civil Judge, Senior Division, Beed. The suit was filed for relief of perpetual injunction by present respondent and also for declaration. By making amendment, the relief of removal of encroachment was also claimed. The Trial Court held that the present appellants had made encroachment over land Gat No. 156 and 159 and encroachment is to the extent of 2 R. portion over each of these lands and it is made by the present appellants. Decree is given for the removal of this encroachment. The First Appellant Court has dismissed the appeal filed by the

present appellants. Both the sides are heard.

3. It is the case of respondent/original plaintiff “ Sarjerao that he is the owner of land Gat Nos. 156 and 159 situated in village Navgan, Rajuri, Tahsil and District Beed. It is contended that defendants/present appellants are owners of land Gat No. 157 and they have made encroachment over land Gat No. 159 from eastern side of land Gat No. 157 which is to the extent of 2 R and they have made encroachment over land Gat No. 156 from western side of land Gat No. 157 and it is also to the extent of 2 R. portion. The defendants/appellants had disputed this case of encroachment. However, it is not disputed that plaintiff is owner of Gat Nos. 156 and 159 and defendants are owners of land Gat No. 157.

4. During pendency of suit and after making amendment, plaintiff applied to Office of Cadastral Surveyor and got measured the lands. Prior to making amendment, he had applied for appointment of Court Commissioner, but in view of nature of reliefs claimed, Court Commissioner/Cadastral Surveyor was not appointed to make the measurement. Plaintiff has examined the Cadastral Surveyor to prove the encroachment. Cadastral Surveyor has proved in his evidence the two maps at Exhs. 36/C and 39/C. Cadastral Surveyor was cross examined on the point of issuing of notice before taking measurement. The Cadastral Surveyor has stated in the evidence that notices were sent to the parties including the defendants under certificate of posting. No record of such notices is produced. Plaintiffs and his witnesses have given evidence that during measurement, defendants remained present. However, no record of presence of defendants on the spot at the time of measurement was created by the Cadastral Surveyor. Defendants have denied that notice was issued to them and they were present at the time of measurement.

5. In view of the nature of evidence of Cadastral Surveyor, the learned counsel for the appellants submitted that there was no convincing evidence to prove the encroachment and the Courts below have committed error in giving decree of removal of encroachment. He placed reliance on some reported cases, which are as under.

(i) 2004 (3) Mh.L.J. 724 [Sukhdeo Parashramji Bhugul (DR.) Vs. Wamanrao Nagorao Charat],

(ii) 2009 (5) Mh.L.J. 279 [Vijay s/o. Shrawan Shende and Ors. Vs. State of Maharashtra and Ors.], and

(iii) 2003 STPL (LE-Civil) 23138 BOM [2004 (2) CIVIL COURT CASES 436 (BOM) [Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade].

In these case, the importance of evidence of Cadastral Surveyor is discussed by this Court. The desirability to appoint the Cadastral Surveyor as Court Commissioner is also discussed.

6. In view of the contentions made for the appellants/defendants following substantial question of law arises in the present matter.

(i) Whether it is mandatory on the part of Cadastral Surveyor to issue notice to all concerned and only after that, measurement will be binding on the concerned?

7. If the Rules regarding Revenue Survey and Sub Division of Survey Numbers (1969) framed under Maharashtra Land Revenue Code, 1966 are seen, it can be said that at the time of fixing of boundaries as per Rule 16, when there is the dispute, both the sides need to be heard while fixing boundaries. It is mandatory provision. Rule 4 of Maharashtra Land Revenue (Boundary and Boundary Marks) Rules 1969 shows that the boundary marks as mentioned in these Rules need to be mentioned. The evidence of Cadastral Surveyor shows that such boundary on one side was absent. Though as per Rule 13 of Boundary Marks Rules, owner of survey number can apply for fixing, demarketing the boundary marks, at the time of fixing boundary mark when there is dispute, notice to other side is must.

8. In view of the aforesaid Rules, this Court holds that the substantial question of law needs to be answered in affirmative. The evidence given by Cadastral Surveyor cannot form basis for giving decree to plaintiff as it is not proved that notice was issued to defendants to enable them to witness the measurement done on the basis of application given by the plaintiff. To enable the plaintiff and also the defendants to get the decision of the dispute on merits, this Court holds that it has

become necessary to remand the matter to First Appellate Court.

In the result, following order.

ORDER

(i) The appeal is partly allowed.

(ii) The judgment and decree of R.C.S. No. 222/2003 which was pending in the Court of Jt. Civil Judge, Senior Division, Beed and judgment and decree of R.C.A. No. 108/2008, which was pending in the Court of Principal District Judge, Beed are hereby set aside.

(iii) The matter is remanded back to the First Appellate Court.

(iv) The plaintiff is allowed to get appointment of Court Commissioner, Cadastral Surveyor for taking measurement.

(v) If he applies within one month from the date of receipt of this record of this proceeding, the First Appellate Court is to appoint Court Commissioner. The matter is remanded to ascertain the encroachment

only.

(vi) The parties to appear before the First Appellate Court on 12.6.2014.

(vii) Record and proceedings be sent back.

(viii) Civil application is disposed of.

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