(2014) 02 BOM CK 0167

Bombay High Court (Nagpur Bench)

Case No: Second Appeal No. 64 of 2013

Sau Rukhmabai		APPELLANT
	Vs	
Samadhan and Sau Dwarkabai		RESPONDENT

Date of Decision: Feb. 4, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 28
- Evidence Act, 1872 - Section 83

Citation: (2014) 5 MhLj 427

Hon'ble Judges: A.P. Bhangale, J

Bench: Single Bench

Advocate: A.V. Bhide, for the Appellant;

Final Decision: Allowed

Judgement

A.P. Bhangale, J.
By order dated 17.4.2013 the notices were issued for final disposal of this Second Appeal upon substantial question of law formulated as follows:

Whether the findings recorded by the Appellate Court are vitiated on account of ignorance of material aspects considered by the trial Court?

Heard submissions advanced on behalf of Shri A.V. Bhide, learned counsel appearing for the appellant who questions the validity and legality of the judgment and order, passed in Regular Civil Appeal No. 91 of 2005, decided on 24.8.2012, whereby the judgment and decree passed in Regular Civil Suit No. 99 of 1998 was set aside and the suit was dismissed with costs.

2. The facts in a nutshell, are thus:

That the suit land i.e. Gat No. 150, situated in village Ambetakli Shivar, Taluka Khamaon, District Buldana, admeasuring 3 H 17 R, was acquired by plaintiff-Sau. Rukhmabai W/o Rambhau Bhad, under registered Sale Deed dated 14.2.1979. Defendant-Sau. Dwarkabai W/o Samadhan Ingle possessed land Gat No. 149 which was adjacent on western side to the suit land belonging to the plaintiff. The defendants on their land had removed boundary marks as well as Dhura so as to encroach the suit land to the extent of 25 R.

The plaintiff had applied to the TILR (Taluka Inspector of Land Records) for measurement of the suit land. Accordingly, on 13.1.1998 the measurement was carried out in the presence of adjoining land owners and the boundary marks were fixed by the Government Measurer on 17.1.1998. Thus, the Government Measurer found encroachment made by the defendants to the extent of 25 R.

3. In April, 1998, the plaintiff found when the defendants cultivated their lands, they had encroached upon the plaintiff"s land, hence, the plaintiff had issued notice dated 18.4.1998. The defendant falsely replied the notice and continued to retain the encroachment.

Thus, the suit was filed with a relief for declaration as to encroachment made and mandatory injunction against the defendants to remove encroachment from the suit land belonging to the plaintiff.

In such cases it is essential to get an agreed map/plan on record. In case, parties disagree Court Commissioner can be appointed to prepare an authentic plan/map upon measurement of lands to facilitate end of the real controversy between the parties by proper and effective execution of decree to be passed.

4. The trial Court upon evidence led before it held that in the suit land, area of about 25 Ares belonging to the plaintiff was encroached upon after crossing over Bund of their field. It is required to he noted that Government Measurer-Sukhdeo Sampatrao Salve was examined as plaintiff"s witness No. 3 and he also deposed as to measurement map which was exhibited (Exhibit-78). Thus, on the basis of the deposition by Sukhdeo, the learned trial Judge answered issue Nos. 1 and 2 in favour of the plaintiff. Considering the documentary evidence Exhibit-78 which indicated existing boundary to the Dhura between Gat Nos. 149 and 150 shown by dark line and also dotted line which indicated the existing possession of the defendants on the eastern side of Dhura shown by dotted lines. That being so, the learned trial Judge decreed the suit declaring that the plaintiff as the owner entitled to encroached portion of 25 R land situated in Gat No. 150 upto the common Dhura and, therefore, the defendants were directed to hand over the possession of encroached portion of 25 R land which was situated on the eastern side of common Dhura of Gat No. 150 and consequently restrained the defendants from encroaching over any portion of the land in Gat No. 150.

5. Shri Bhide, learned counsel appearing for the appellant, argued that the trial Court had rightly decided the suit by decreeing the same on the basis of the evidence of the Government Measurer and the documentary evidence deposed to by him. But, the First Appellate Court considered it necessary that A-Sheet instead of C-Sheet in respect of measurement of the suit land from the Government records ought to have been produced. According to Shri Bhide, learned counsel, if at all the First Appellate Court required additional evidence in the form of A-Sheet from the Government record to be produced on record, the First Appellate Court itself could have taken such evidence directing production of A-Sheet in respect of measurement of the suit land from the Government records. But, without adopting the course as indicated under Order 41 Rule 28 of the Code of Civil Procedure, the learned First Appellate Judge proceeded to set aside decree in the suit on the ground that A-Sheet was not produced from the Government records. In other words, the first Appellate Court considered the evidence led on record as insufficient for to maintain decree in the suit. It is urged that in order to determine the real controversy between the parties to the suit finally, the learned First Appellate Judge could have insisted upon production of A-Sheet in respect of measurement record with the TILR''s Office concerned, and could have taken additional evidence.

6. The submissions advanced by Shri Bhide, learned counsel, remained uncontroverted as counsel for respondents did not appear despite notices issued for final disposal of the appeal. The substantial question of law framed by this Court, therefore, must be answered in the affirmative as the learned First Appellate Judge could have, instead of adopting short-cut method of dismissing the suit, insisted upon production of primary evidence by summoning additional evidence, if according to the learned First Appellate Judge such evidence was essential for just decision of the case. In a suit where boundaries of the suit land is in dispute and encroachment area is required to be determined, it is in the larger interest of justice to get the disputed suit land measured by an expert to find out the extent of encroachment. Oral evidence may not help the Court to arrive at correct conclusion considering the nature of dispute. The Court can seek assistance from the competent authority from the Central or State Government Office to have a plan or map on record in respect of which presumption can be drawn u/s 83 of the Indian Evidence Act. The Court can appoint cadastral surveyor from the Government Office as Court Commissioner to take the measurement in presence of the disputing parties or their representatives. The parties may adduce further evidence if they so desire, if map or plain produced by the Commissioner is not consented by them. A map or plan duly proved can certainly assist the Court for proper, effective and meaningful execution of the decree. Considering the fact that the plaintiff had summoned expert witness from the TILR''s Office itself who had measured the land to prove encroachment, the oral evidence of PW-3 was on record along with the documentary evidence to prove that measurement was in fact carried out and the facts of encroachment was noted down by PW-3. If, at all, according to the learned First Appellate Judge, the sufficient primary evidence was not forthcoming in the form of A-Sheet from TILR''s record, learned First

Appellate Judge could have directed the learned trial Judge to take such additional evidence and send it to the First Appellate Court or instead the learned First Appellate Judge himself could have taken such evidence in view of the procedure under Order 41 Rule 28 of the Code of Civil Procedure. Since this was not done, I think in the larger interest of justice, considering the facts and circumstances of the case, the impugned judgment and order is required to be set aside by modifying the same, by following order:

ORDER

a) The appeal is remanded back to the First Appellate Court with a direction that the learned First Appellate Judge will follow the procedure under Order XL Rule 28 of the CPC for the reasons mentioned herein-above and after taking such additional evidence, as directed and as may be necessary, in the form of A-Sheet in respect of measurement of the suit land from the record of the TILR''s Office concerned, will hear the appeal expeditiously and decide it in accordance with law.

b) The appeal is, thus, allowed accordingly.

c) The parties to appear before the First Appellate Court on 24.2.2014 or thereafter on the dates fixed by the Court for hearing the First Appeal. The Record and Proceedings be sent back.