

(2003) 12 BOM CK 0019
In the Bombay High Court
Case No : Second Appeal No. 216 of 2000

Kashinath Chindhuji Shastri	Vs	APPELLANT
Haribhau Nathuji Bawanthade		RESPONDENT

Date of Decision : 15-12-2003

Acts Referred:

Evidence Act, 1872 — Section 83
Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9

Citation : (2004) 2 ALLMR 40 : (2004) 2 CivCC 436 : (2004) 2 MhLj 722 :
(2004) 4 RCR(Civil) 99

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : M.R. Joharapurkar, for the Appellant; A.M. Deshmukh, for the Respondent

Final Decision : Allowed

Judgement

S.T. Kharche, J.

1. Heard finally with the consent of the learned counsel for the parties.
2. This appeal is directed against the judgment and decree dated 9-12-1999 passed by the learned Additional District Judge, Achalpur, in Regular Civil Appeal No. 88 of 1996 confirming the judgment and decree dated 12-7-1996 passed by the learned Civil Judge, Jr. Dn., Achalpur, in Regular Civil Suit No. 431 of 1992 by which the suit was partly decreed and the appellant/defendant was directed to deliver the possession of 4 gunthas of land which is said to be under encroachment as shown in the measurement map (Ex.25) drawn by the surveyor.
3. The learned counsel for the appellant/defendant contended that the agricultural land bearing Survey No. 5/1-B is owned by the plaintiff whereas agricultural land bearing Survey No. 5/1 is owned by the defendant. He further contended that the appellate Court clearly recorded a finding that there is no dispute between the parties as regards the area of the land respectively held by

them. He contended that reliance was placed by both the Courts below on the map (Ex.25) drawn by the cadastral Surveyor after taking the measurements of the plaintiff's land only. He contended that the said map cannot be said to be accurate in view of the provisions of Section 83 of the Indian Evidence Act, 1872 and, therefore, the matter may be remanded to the trial Court for fresh decision in accordance with law after making an appointment of Cadastral Surveyor for taking the joint measurements of the land owned by the respective parties.

4. Mr. Deshmukh, learned counsel, for the respondent/plaintiff contended that both the Courts below have recorded concurrent finding that the defendant has made encroachment to the extent of 4 gunthas of land and there is no reason for this Court to disturb that finding. He contended that no substantial question of law arises in this Appeal and the same may kindly be dismissed.

5. I have given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. Section 83 of the Indian Evidence Act, 1872 lays down that the Court shall presume that the maps or plans purporting to be made by the authority of the Central Govt. or any State Govt. were so made and are accurate; but maps or plans made for the purpose of any cause must be proved to be accurate.

6. Bare reading of the aforesaid provision would reveal that the maps or plans made for the purpose of any cause must be proved to be accurate. The onus of proving that such a map is accurate lies on the party who produced it. The maps must be proved by the person who has prepared them. They are post litem motesa and lack necessary trustworthiness. Where the maps are made for the purpose of a suit there is, even apart from fraud which may exist, a tendency to colour, exaggerate and favour which can only be countenanced by swearing the maker to the trust of his plan. Hence, there is no presumption of accuracy in respect of the map or plan which is made for a particular cause and it goes without saying that a map prepared for the purpose of a particular suit must, therefore, be duly proved and it is not admissible in evidence in absence of proof of its accuracy. In any case, in which there is a dispute about an encroachment or dimension of a site, the first essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same and/or subsequent reference in the pleadings or judgment to place the mark on a map should be referred to this map which must be attached to the decree and signed by the Judge. In the absence of such a map, the decree is probably meaningless and execution means virtually starting the case over all again. The map should be drawn with the North at the top and letters marking points should not be put inside ways or upside down.

7. I may usefully refer the decision of our High Court in the case of Krishnarao v. Mahadeorao 1953 N.L.J. 230 wherein it has been observed that under Order XXVI, Rule 9 of the Code of Civil Procedure, the Court has the discretion to order local investigation or not. The object of the local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from

its pecuniary nature can only be had on the spot. The cases of boundary disputes and disputes about the identity of lands are instances, when a Court should order a local investigation under Order XXVI, Rule 9 of CPC - 12 I.C. 347 Foll. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the area encroached upon. Oral evidence cannot conclusively prove such an issue.

8. However, reference may also be had to the decision of the Supreme Court in the case of Ram Kishore Sen and Others Vs. Union of India and Others (UOI), wherein it has been held in para 12 that, "it is true that Section 83 of the Evidence Act provides that the Court shall presume that the maps or plans purporting to be made by the authority of the Central Govt. or any State Govt. were so made and are accurate, but the maps or plans made for the purpose of any cause must be proved to be accurate. The presumption of accuracy can thus be drawn only in favour of the maps which satisfy the requirements prescribed by the first part of Section 83. Exh.A-1 obviously does not fall under the category of the said map and so there can be no question of drawing any presumption in favour of the accuracy of the said map. In fact, as we have already indicated, the learned Judge has given very good reasons for showing that the map does not appear to be accurate. Therefore, even if the map is held to be relevant its accuracy is not at all established; that is the conclusion of the learned Judge and Mr. Mukherjee has given us no satisfactory reasons for differing from the said conclusion." 9. In view of this legal position, it appears to be absolutely necessary that the Cadastral Surveyor ought to have been appointed by the trial Court for taking joint measurements of the properties owned by the respective parties. It is not in dispute that the plaintiff is the owner of agricultural field survey No. 5/1-B whereas the defendant is the owner of agricultural field survey No. 5/1. The appellate Court in its judgment clearly recorded a finding that there is no dispute between the parties as regards the area of the land held by the respective parties. But then it would reveal that neither the trial Court nor the appellate Court had appointed a Commissioner under Order XXVI, Rule 9 of the CPC for taking the joint measurements and, therefore, this Court is satisfied that this is a fit case for remand to the trial Court for fresh decision in accordance with law. The impugned judgment is set aside and the matter is remitted to trial Court for fresh decision in accordance with law. The trial Court shall appoint the Cadastral Surveyor from the office of T.I.L.R./D.I.L.R. as a Commissioner in the light of the observations mentioned above in this judgment. The learned counsel for the defendant is ready to bear all the expenses for taking the joint measurement of the land owned by the respective parties. Hence, the Appeal is allowed and the matter is remanded to the trial Court for fresh decision according to law. The trial Court is also directed to give opportunity to both the sides to lead evidence after receipt of the report as well as the joint measurement map drawn by the Commissioner. This Court expects that the trial Court shall decide the suit expeditiously, as far as possible within six months from the date of appearance of the parties before it. The parties are directed to

appear before the trial Court on 12-1-2004.