

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 7278 OF 2022**

Yasin Gulab Shikalkar ... Petitioner  
Age about 36 years  
Occ. Agriculturist,  
R/at. Malik Peth, Bitle,  
Tal. Mahol, Dist. Solapur

vs.

1. Maruti Nagnath Aware  
Age about 62 years,  
Occupation : Agriculturist,
2. Limbaji Bhagwat Aware,  
Age about 60 years,  
Occupation: Agriculturist
3. Balbhim Bhagwat Aware,  
Age about 57 years,  
Occupation: Agriculturist
4. Shardabai Pralhad Aware,  
Age about 62 years,  
Occupation: Agriculturist
5. Alka Suresh Aware, ... Respondents  
Age about 47 years,  
Occupation: Agriculturist  
Nos.1 to 5 R/at : Bitle,  
Tal. Mohol, Dist: Solapur.

Mr. Dilip Bodake for Petitioner.

Mr. Samir Kumbhkoni for Respondent Nos.1 to 5.

**CORAM : SANDEEP V. MARNE, J.**

**DATED : 25 JANUARY, 2023**

**JUDGMENT :-**

1. Rule. Rule made returnable forthwith. With consent of both the sides, the petition is taken up for final hearing.

2. Order dated 15 December 2021 passed by the District Judge, Solapur rejecting Petitioner's application for appointment of Court Commissioner for measurement of lands during pendency of Appeal is the subject matter of challenge in the present Petition.

3. Petitioner / plaintiff instituted a Regular Civil Suit No.62 of 2010 for permanent injunction as well as for recovery of possession of encroached portion of land. During pendency of the Suit, Petitioner/plaintiff filed an application under the provisions of Order 26 Rule 9 of Civil Procedure Code, 1908 ("**Code**") for appointment of Court Commissioner for measurement of lands and fixing of boundaries. The Trial Court was pleased to allow the application vide its order dated 1 August 2011 and Taluka Inspector of Land Record ("**TILR**") came to be appointed as the Court Commissioner for conducting joint measurement of lands bearing Gat Nos. 137/3/A, 137/3/B, 137/2/B/1 and 122 and to indicate the boundaries of lands in possession of the respective parties. TILR conducted measurement of lands and filed his report along with a copy of map. He was examined as a witness in the Trial Court. The report of the TILR was *prima facie* in favour of

Plaintiff / Petitioner. However, during the course of arguments in the Suit, the validity of report of the TILR was questioned raising various technical objections and also about the manner in which the measurements were conducted. The Trial Court therefore proceeded to dismiss the Suit vide its judgment and order dated 24 July 2018. Plaintiff / Petitioner has preferred a Regular Civil Appeal No.189 of 2018 before the Court of District Court, Solapur. In this Appeal, Plaintiff / Petitioner filed an application for appointment of Court Commissioner for re-measurement of lands on the premise that the earlier measurements conducted were defective. The District Judge has proceeded to reject the application by the impugned judgment and order dated 15 December 2021.

4. Appearing for Petitioner, Mr. Dilip Bodake the learned counsel would submit that even though report of TILR appointed as Court Commissioner vide order of the Trial Court supports the case of Petitioner/plaintiff, the report has been discarded by the Trial Court on account of objection raised by Defendants / Respondents about the manner in which the measurements were conducted. He apprehends that even the District Court is likely to ignore the measurements report for

the very same reason. He would submit that in such a situation, it would be necessary to re-measure the lands so as to present the clear picture of the site before the Trial Court.

5. Petition is resisted by Mr. Samir Kumbhkoni, the learned counsel for Respondents. He would question the maintainability of the application filed by Petitioner / Plaintiff before the Appellate Court for re-measurement of lands. He would submit that the application was not filed as per the provisions of Order 41 Rule 27 of the Code. He would question the correctness of submission of Petitioner that the measurement report of TILR has been altogether ignored by the Trial Court and would submit that the same is actually taken into consideration while dismissing the Suit filed by the Plaintiff/Petitioner. He would further submit that allowing the application of Petitioner/Plaintiff would amount to *res judicata* as the issue with regard to measurement of lands stands concluded between the parties and cannot now be permitted to reopened. In support of his contention, he relies upon the judgment of the Apex Court in ***Satyadhyan Ghosal and Ors Versus Smt. Deorjin Debi and anr***<sup>1</sup>.

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<sup>1</sup> AIR 1960 SC 941

6. Rival contentions of the parties now fall for my consideration.

7. Petitioner / Plaintiff has filed a Suit seeking *inter alia* recovery of possession of encroached portion of land. Thus, there is allegation about encroachment over the Suit property by Defendants. Plaintiff / Petitioner's application for appointment of Court Commissioner under the provisions of Order 26 Rule 9 of the Code came to be allowed by the Trial Court vide its order dated 1 August 2011. The very fact that the application for appointment of Court Commissioner was allowed, raises a presumption that the court needed actual picture of the property at site and extent of possession of lands by the rival parties. The TILR, after carrying out the measurements, submitted his report along with a map before the Court and the same was proved by examination of TILR as witness. However, when the Suit was argued before the Trial Court, Defendants raised serious objections to the report of TILR. It was contended by Defendants that the measurement was defective as notice of measurement were not issued to the neighbouring owners. It was also contended that it was

incumbent on the part of TILR to measure the entire Gat number which apparently was not done. It is on the basis of these contention, Defendants urged before the Trial Court not to take into consideration the measurement report of TILR. The submission made on behalf of Defendants apparently found favour of the Trial Court, which proceeded to discard the measurement report of TILR. In this regard, the following findings are recorded by the Trial Court in its judgment while dismissing the Suit;

12. Be it as may be, the measurement of the suit land along with the other lands is carried out by the surveyor and accordingly he has filed the record of measurement. As mentioned above, he has duly proved those documents including the measurement map. It is one of the objection raised by the Ld. Advocate for defendants Shri. S. K. Deshpande that, the measurement is not carried out by following due procedure of law. Perusal of the cross examination of PW-2 Dhondiram, it seems that he has admitted that, he has not issued the notices to the adjacent landholders of land block no.122 and 137. He has also admitted that he has not issued the notices prior to measurement to the all landholders of land block no.137. In fact, it is to be noted that the measurement of the suit land and the lands of defendants was directed by this court vide order below Exh.5. Therefore, it was incumbent duty on the part of surveyor to issue the notices to all the adjacent land holders of suit land as well as the lands of defendants being the joint measurement. But it appears that, it is not done. Needless to mention here that, unless such notices are issued; the dispute of the encroachment can not be ended. It is well settled that, the land of which measurement is being carried out, the persons who are having adjacent lands should be heard or should be given opportunity of being heard while carrying out the measurement. In the failure to do the same, it will cause heavy injustice to such persons. At the same time such measurement can not be considered to be carried out by following due procedure.

13. The another objection raised by the Ld. Advocate by defendants is that, the encroachment over the suit land can not be determined unless there is measurement of the entire land block no.137 and fixation of boundaries of the divided block numbers

therein. Admittedly, the suit land and the land of defendant nos.1 to 3 are the part and parcel of original land block no.137. Certified copies of 7 x 12 extracts at Exhs.8 to 11 show that, though specific block number is given to those lands. Admittedly, there is no measurement of those block numbers after its division. PW-2 Dhondoram has admitted during his cross examination that, he has carried out the measurement on the basis of map of block no.137. He has carried out the said measurement without Falni Map, Tipan and Gunakar Book. He has also admitted that, the measurement of the divided block numbers out of block no.137 is not carried out up till today and no such boundaries are fixed as per the division of the block numbers. He has also admitted that, no such map of divided block numbers showing boundaries of those sub-blocks is available in their office. He has specifically further admitted that, unless the boundary of divided block numbers is fixed, encroachment can not be determined. He has further admitted that, such boundaries are not fixed in respect of land block no.137 after its division. All these admissions clearly go to show that, even if he has carried out the joint measurement of suit land and the lands of defendant nos.1 to 3, it can not be accepted for the simple reason that, such measurement can not be accepted for want of the map of measurement after division of land block no.137. In fact the plaintiff ought to have firstly applied for the fixation of boundaries of the divided block number out of block no.137.

14. The surveyor i.e. PW-2 Dhondiram has got proved the measurement map at Exh.78. He has not given any explanation as to how he determined the location of the suit land. In fact at the cost of repetition it be noted that, there is no fixation of boundaries by the Government upon division of land block no.137. The question naturally would arise as to how the surveyor decided the length and width of the suit land. What was the base for doing so. Unless there is map in the office of land record or unless there is agreed map between the parties, such measurement or fixation of location cannot be accepted. Pertinent to note that admittedly the plaintiff has not added all the land holders out of block no.137. Therefore, if such measurement is accepted which has fixed the location of suit land including length and width, it will result in injustice to those persons who are having the land in block no.137 and who are not added in the present suit. The principle of audi-alteram will not be followed.

15. Perusal of the measurement map at Exh.78, it is clear that the surveyor has shown that, the land admeasuring 8 R is in the possession of the owner of land block no.137 which is in-fact owned by the owner of land block no.137/2/B/1. This is vague description. Why because admittedly no such land block no.137 is in existence as it is divided into such block numbers. Therefore, for this reason also the credibility of said measurement becomes suspicious.

16. It is one of the objection on the part of defendants that, road passes through the suit land. The map at Exh.78 shown

that, no such road has been shown in the same. During his cross examination, he has admitted that such road passes through the suit land. However, he has admitted that, the area being used for the said road is not mentioned in the said map. He has also admitted that the said area being used for the road is not excluded in the record of the said block number. He has also not enquired to the plaintiff in that regard. This is also one of the circumstance which will certainly create doubt about the due measurement.

8. I therefore do not agree with the submission of Mr. Kumbhkoni that the Trial Court has taken into consideration the findings recorded by the TILR in its measurement report. The above findings of the trial court on contrary indicate that the report is ignored by the Trial Court questioning its credibility.

9. In the above circumstance, after dismissal of the Suit, Plaintiff / Petitioner has filed application for re-measurement of land before the Appellate Court. Mr. Kumbhkoni would question maintainability of such an application which falls beyond the purview of provisions of Order 41 Rule 27 of the Code. The provision is reproduced below;

“27. Production of additional evidence in Appellate Court - (1)  
The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -

(a) the Court from whose decree to appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the



decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

Thus, under the provisions of Order 41 Rule 27, the Appellate Court is empowered to permit the parties to adduce additional evidence if considered necessary. The Appellate Court can even direct the examination of witnesses. True it is that Plaintiff / Petitioner has failed to refer to the provisions of Order 41 Rule 27 of the Code in its application for appointment of Court Commissioner for re-measurement of land. That alone however cannot not take the application out of ambit of provisions of Order 41 Rule 27. In my view even though the provision is not mentioned in the application, the application filed by Petitioner / Plaintiff would come within the ambit of the provisions of Order 41 Rule 27. Therefore the submission of Mr. Kumbhkoni in this regard deserves to be rejected.

10. The Appellate Court now faces unique situation where the Trial Court felt it necessary to have the actual picture of the site before it for the purpose of determining the issue as to whether there is encroachment on land or not. After recording a finding to that effect, the TILR was appointed as Court Commissioner. TILR unfortunately did not follow the proper procedure at the time of conducting measurements. This has led to rejection of report of TILR. The question is whether Petitioner / Plaintiff can be made to suffer if TILR has

committed mistake while carrying out the measurement of land. The answer to this question would obviously be in the negative. True it is that Plaintiff / Petitioner can urge before the Appellate Court that the TILR followed all procedures at the time of conducting measurements. However such an exercise would involve a risk of the appellate court not accepting the contention of Plaintiff/Petitioner and the same resulting in dismissal of Appeal. The situation that exists before the Appellate Court is that the measurement report of TILR has been rejected. If the Appellate Court agrees with the finding of the Trial Court about non acceptance of report of TILR, it would have nothing before it to assess as to whether there is indeed any encroachment at the site. In these circumstances, I am of the view, it would be appropriate the Appellate Court directs re-measurement of land by appointment of Court Commissioner. Such an exercise can be undertaken by exercising power of the Appellate Court vested under the provisions of Order 41 Rule 27 of the Code.

11. This leaves objection of *res-judicata* raised by Mr. Kumbhkoni. He has placed reliance on judgment of Apex Court in *Satyadhyan Ghosal* (supra) in which it has held as under;

“7. The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a respondent is *judicata*, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter-whether on a question of fact or on a question of law-has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to

suits in S. 11 of the Code of Civil Procedure; but even where S. 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

8. The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again ?”

12. The principles enunciated by the Apex Court on the issue of *res judicata* undoubtedly is based on need of giving finality to the judicial decisions. However, the above observations of the Supreme Court would have no application to the facts and circumstances of the present case. There is no finality to the decision of the Trial Court yet as the appeal against its judgment is still pending before the Appellate Court. In cases where Court Commissioner fails to present before the court correct picture prevailing at the site, the trial court itself is empowered to appoint another court commissioner and there is no question of attracting the principle of *res judicata*. Mr. Bodke has relied on judgment of this Court in ***Vachhalabai w/o. Kundlik Gavane and ors. Vs. Chinkaji s/o. Malhari Jadhav & ors.***<sup>2</sup> wherein it is held that if there are two conflicting reports of TILR, the Court has power to direct fresh joint measurement under the provisions of Order 26 Rule 9 of the Code. The objection of *res judicata* raised by Mr. Kumbhkoni therefore deserves to be rejected.

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<sup>2</sup> 2012(3) ALL MR 91

13. Accordingly, the present Petition succeeds. The order passed by the District Court dated 15<sup>th</sup> December 2021 is set aside and appellant's application at Exhibit 18 stands allowed in terms of prayers made therein.

14. Writ Petition is accordingly allowed. Rule is made absolute.

**(SANDEEP V. MARNE, J.)**