

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

**SECOND APPEAL NO.46 OF 2015
WITH
CIVIL APPLICATION NO.103 OF 2015**

Jagannath Balu Patil ... Appellant
Vs
Ramesh Kalu Patil ... Respondent

...

Ms. Neeta Karnik for the Appellant.
Mr. Ravindra R. Chile for the Respondent.

CORAM : SANDEEP K. SHINDE J.
DATE : 22 MARCH, 2019

P.C. :

Heard learned counsel for the parties.

2 Perused the plaint, written statement and the judgments of the Courts below.

3 This appeal is preferred by the plaintiff against the judgment and decree passed in Civil Appeal No.26 of 1011 by the District Judge-1, Palghar.

4 32M certificate issued in favour of the plaintiff on the basis of which he seeks declaration of his title to the suit land

bearing Gat No.100 part admeasuring 0-30.0 R, Old Survey No.116/5/part. Defendant's land is also part of Gat No.100. Both the lands are on the bank of river Surya. Plaintiff and defendant are adjoining lands holders. Plaintiff was apprehending obstruction to his possession in the suit land and thus, filed suit for declaration of his title and injunction. The learned trial Court decreed the suit. However, the Appellate Court reversed the decree and thus this appeal by the plaintiff.

5 It is the defendant's case that subject suit land, i.e., old survey no.116/5/part and his land, are on the bank of river 'Surya'. It is his case that due to floods, there was displacement of upper layer of the soil of Gat No.100. Thus, there are no boundaries left to identify suit land and taking advantage of this fact, plaintiff is attempting to encroach over his land. Defendant thus sought appointment of local commissioner to measure the boundaries of the suit land described in paragraph 1 of the plaint. It appears neither the Trial Court nor the Appellate Court thought it fit to appoint local surveyor to measure the boundaries and identify the suit land which

would resolve the disputes and differences between the parties.

6 Thus, in exercise of the powers under Order 41 Rule 25 of the Civil Procedure Code (“CPC” for short), the Appellate Court (against whose decree this Appeal is preferred), shall proceed to try the following issue:

“Whether the plaintiff proves that defendant has obstructed his possession over the suit land ?“

7 The Appellate Court shall appoint a Cadastral Surveyor, who shall measure the land bearing Old Survey No.116/5/part corresponding 100/part admeasuring 0-30.0 R as described in paragraph 1 of the plaint and fix the boundaries after due notice to the plaintiff and the defendant and shall comply with the procedure contemplated under Rule 10 Order 26 of CPC.

8 The report of the Commissioner shall be evidence in the suit and shall form part of the record. It is clarified that, Court or with the permission of the Court, any of the parties to the suit may examine the Commissioner in terms of the provisions of Rule 10(2) Order 26 of the CPC.

9 The First Appellate Court shall records its finding with reasons on the issue afresh, framed hereinabove on the basis of the evidence available on record and the evidence of the Cadastral Surveyor and his report and thereafter return the evidence to this Court together with its findings thereon on or before 10th July, 2019.

10 The parties to this Appeal shall appear before the learned District Judge-1, Palghar at Palghar on 9th April, 2019 in terms of the Rule 26A of Order 26 of the CPC.

Stand over to 10th July, 2019.

(SANDEEP K. SHINDE, J.)