

A MATADIN SURAJMAL RAJORIA (DECEASED) THROUGH
SOLE LEGATEE LALITA SATYANARAYAN KHANDELAHAL

v.

RAMDWAR MAHAVIR PANDE (DEAD) THR. LRS. & ORS.

B (Civil Appeal No. 5847 of 2021)

SEPTEMBER 21, 2021

[R. SUBHASH REDDY AND HRISHIKESH ROY, JJ.]

C *Civil Procedure – Appeal – Second Appeal – Suit filed for
declaration, injunction and possession alleging encroachment on
land by the defendants – Suit dismissed by trial Court – Decree
affirmed by first appellate court – Second appeal by plaintiff –
On direction of High Court, a surveyor/ Court Commissioner was
appointed to measure the suit property; and on conclusion of the
survey exercise, the first appellate court was ordered by the High
D Court to certify the findings on encroachment as recorded by the
trial court, in terms of Rule 470 of the Civil Manual – First
Appellate Court reversed the findings of trial court and held that,
as per the map prepared by the Court Commissioner, the defendants
had committed encroachment – In view of such development, the
E High Court framed a substantial question of law for decision in
the Second Appeal – Plaintiff’s second appeal was however
dismissed – Held: While concurrent findings of Courts below are
not to be routinely interfered, on facts, there was a second round
in the litigation and another substantial question of law was
F formulated by the High Court for adjudication of the second
appeal – However, no specific finding on such question of law was
ever recorded in the impugned judgment – The High Court skirted
the issue and instead endorsed the findings of the courts below to
the effect that the defendants had not made any encroachment –
The High Court erred in not recording a finding on the question
G of law formulated later, to account for the Court Surveyor’s report,
vis-à-vis the legal battle over the suit land – Without the decision
on the relevant aspect which goes to the root of the dispute, the
impugned judgment fails the scrutiny of law – Matter remanded
back to the High Court to consider and render a finding on the
substantial question of law framed by the High Court itself.*

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Allowing the appeal, the Court

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HELD: 1.1. While concurrent findings of Courts below are not to be routinely interfered, it is seen that there was a second round in the litigation and another substantial question of law was formulated by the High Court for adjudication of the second appeal. However, no specific finding on such question of law was ever recorded in the impugned judgment. The High Court skirted the issue and instead endorsed the findings of the courts below to the effect that the defendants had not made any encroachment, after the plaintiff purchased the land on 28.12.1995 under the Exhibit 47 Sale deed. The conclusion in the second appeal was therefore devoid of any independent finding on the substantial question of law formulated by the Court itself on 2.5.2018. With the required finding on the additional issue, a contrary conclusion favouring the other side, can't entirely be ruled out in the second appeal. This is particularly possible because of the mismatch between the area under occupation of the defendants and the smaller area covered in their two sale deeds. The aspect of defendants occupation of certain lands, being mentioned in the plaintiff's sale deed, must also weigh with the Court, in view of the fresh evidence generated by the court appointed surveyor. [Para 10][237-E-H]

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1.2. The High Court erred in not recording a finding on the question of law formulated later, to account for the Court Surveyor's report, vis-à-vis the legal battle over the suit land. Without the decision on the relevant aspect which goes to the root of the dispute, the impugned judgment fails the scrutiny of law. [Para 11][238-A-B]

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2. The matter is remanded back to the High Court to consider and render a finding on the substantial question of law framed by the High Court itself. Regard being had for the long pendency for the case and the restricted remand, the High Court is requested to decide the second appeal expeditiously.[Para 12][238-C]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No.5847
of 2021.

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A From the Judgment and Order dated 14.08.2018 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Second Appeal No.297 of 2013

S. Niranjana Reddy, Sr. Adv., D. Abhinav Rao, Advs. for the Appellant.

B V. K. Shukla, Sr. Adv., Ms. Taruna Ardhendumauli Prasad, Rohit Pandey, Varad Dwivedi, Vaibhav Maheshwari, Ms. Vaishali Singh, Prabhu Singh, Gaurav Choudhary, Suhas Kumar Kadam M/s Black & White Solicitors, Advs. for the Respondents.

C The Judgment of the Court was delivered by
HRISHIKESH ROY, J.

1. Heard Mr. S. Niranjana Reddy, learned senior counsel for the appellant. The respondents(defendants) are represented by Mr. V.K. Shukla, learned senior counsel.

D 2. Leave granted. The appellant now (represented by his daughter) filed the Civil Suit No.332/2003 alleging encroachment by the two defendants namely Ramdwar Mahavir Pande and Sudamadevi Pande. The plaintiff's contention in the Suit was that on 28.12.1995, he had purchased land (measuring 1 Hectre 62 Acres) from Survey
E No.25 within the municipal limits of Amravati, for consideration of Rs.2,10,000/-. The sale deed (Exhibit 47) was executed through the plaintiff's registered Power of Attorney holder and it was specified therein that a portion of the purchased land is encroached by Radhwar Pande and Sudamadevi Pande. According to the plaintiff, he measured
F his land on 23.11.2002 and learnt that the defendant no.1 had committed encroachment to the extent of 35 R from the Southern side while the defendant no.2 (related to the defendant no.1), had encroached about 3 R land from the same Southern side of his land. Both defendants were asked to remove their encroachment by the plaintiff and his daughter but the defendants did not budge. Accordingly, the Suit came
G to be filed for declaration, injunction and possession.

3. In the written statement, the defendant no.1 claimed title over his occupied area on the basis of sale deed dated 17.04.1969(Exbt. 66) executed by one Vitthalrao Nanwatkar. Likewise, the defendant no.2 claimed title over her occupied area, on the strength of the sale deed dated 02.11.1977(Art.A), executed by one Shantabai Jaiswal. The
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defendants additionally contended that, M/s Edulji Dotimal Ginning and Pressing Factory Ltd. earlier filed the Civil Suit No.413 of 1979 against the defendant no.1 Ramdwar Mahavir Pande for removal of alleged encroachment to the extent of 7798 square feet. But the said Suit by M/s Edulji Dotimal was dismissed and the defendants continued in uninterrupted possession.

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4. The Trial Court on the basis of the evidence and the pleadings, dismissed the suit on 1.9.2008 with the finding that plaintiff has failed to prove that the defendants have encroached on his land and accordingly relief was denied to the plaintiff. The basis for the verdict favouring the defendants was because at the time of purchase, the plaintiff was having knowledge that some portions of the purchased land were in possession of two defendants since 1969. The learned trial Judge noted in the judgment that the plaintiff failed to annexe any sketch map indicating the projected encroachment by the defendants. On relief being refused, the plaintiff filed the Civil Appeal No.199 of 2008 but the learned Appellate Court endorsed the Trial Court's decree, favouring the defendants. The Court noted that the defendants are residing and are possessing the disputed area, with the permission of predecessor in title of the plaintiff and therefore, they cannot be categorized as encroachers.

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5. The above lead to the Second Appeal No.297 of 2013 by the plaintiff. The High Court in the said proceedings felt the necessity to appoint a surveyor to measure the suit property, as described in the respective sale deeds relied by the contesting litigants. By order dated 7.6.2016, High Court has called for a finding through Trial Court, on the allegation of Encroachment made by the defendants, after carrying out measurement on the basis of sale deeds (Exhibits 47,66), whereafter one Amol Giri was appointed as the Surveyor/Court Commissioner for joint measurement of the suit property. The Court Commissioner visited the site on 28.11.2016 in Survey no. 25/4 in Village Mhasala and prepared the measurement map (Exhibit 131), in presence of the parties. The surveyor was examined before the Court on 5.7.2017 and on his cross-examination, the following was elicited:

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“...It is correct to say that, according to the map, remaining 38 Are land is in possession of Sudamadevi. 1 Are land means 1076 Sq. Ft. 38 Are agricultural land means 40888 Sq. Ft area. As per sale deed at Exh.66, Sudamadevi Pande is owner of 2000

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- A Sq. FT. The land highlighted with Green colour in the map is in possession of Sudamadevi Pande. The land in pink colour towards northern side of the map adjacent to NMLK letters if measured from green coloured land it comes to 2000 Sq. Ft. Similarly, if the lower side of the said colour if joined to green line towards western side, it will come to 2000 Sq. Ft. It appears that, the land in Map at Exh. 31 towards southern side of the land shown in pink colour at the northern side is encroached land. The six persons shown in the Map Exh. 31 were present at the time of measurement.”
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- C 6. The High Court, on being informed of the conclusion of the survey exercise, on 22.2.2018 ordered the Appellate Court to certify the 7.6.2016 findings on the encroachment recorded by the Trial Court, in terms of Rule 470 of the Civil Manual. Both parties were directed to present themselves before the Appellate Court for the ordered exercise. Following such direction, the first Appellate Court considered
- D the matter and vide its order dated 10.04.2018, reversed the findings of the Trial Court and held that, as per the map prepared by the Court Commissioner, the defendants had committed encroachment to an extent of land measuring 38 R (40888 square feet). In view of such development, on 2.5.2018 the High Court framed the following substantial question of law for the decision in the Second Appeal:-
- E “Whether in the face of order dated 10.04.2018 passed by the appellate Court in pursuance of direction of this Court for appointment of Surveyor and carrying out measurement in the present case, the concurrent findings rendered by the two Courts below are sustainable?”
- F 7. The plaintiff’s second appeal was however dismissed and accordingly the impugned judgment favouring the defendants is challenged in this appeal.
- G 8. The learned Senior Counsel for the appellant Mr. S. Niranjan Reddy submits that the High Court failed to appropriately consider the measurement map (Exhibit 131) and the deposition of the Court appointed Surveyor and thereby rendered an erroneous finding which overlooks the encroachment by the respondents- defendants. According to the appellant the recital in the plaintiff’s sale deed dated 28.12.1995 (Exhibit 47) was misconstrued by the Court. It is also the say of the
- H counsel that the Court should have weighed the fact that the defendants

claim on the basis of the respective sale deeds (dated 17.04.1969 and 2.11.1977) mismatch with the land under defendants occupation. The area occupied measure 38R (40,888 sq. ft.) whereas this is not compatible with the extent of land mentioned in the sale deeds relied by the defendants. As such, it is argued that due credence should have been given to the finding of the Court's Surveyor that the defendants are in illegal possession of excess land.

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9. On the other hand, Mr. V.K. Shukla, learned Senior Counsel refers to the concurrent findings in favour of the defendants by the Trial Court, the Appellate Court and the High Court and argues that the appeal in the present facts, is not to be entertained by this Court. For the defendants, the counsel refers to the plaintiff's sale deed (Exhibit 47) to point out that the sale deed itself specifically mentioned the area under occupation of the two defendants in the land purchased by the plaintiff. It is therefore argued that the plaintiff on the basis of the sale deed (Exhibit 47) can have no legitimate claim on the areas under occupation of the defendants since before the sale transaction of the plaintiff.

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10. The contention advanced by the rival counsel have been considered. While concurrent findings of Courts below are not to be routinely interfered, it is seen that there was a second round in the litigation and another substantial question of law was formulated by the High Court for adjudication of the second appeal. However, no specific finding on such question of law was ever recorded in the impugned judgment. The learned Judge skirted the issue and instead endorsed the findings of the courts below to the effect that the defendants had not made any encroachment, after the plaintiff purchased the land on 28.12.1995 under the Exhibit 47 Sale deed. The conclusion in the second appeal was therefore devoid of any independent finding on the substantial question of law formulated by the Court itself on 2.5.2018. With the required finding on the additional issue, a contrary conclusion favouring the other side, can't entirely be ruled out in the second appeal. This is particularly possible because of the mismatch between the area under occupation of the defendants and the smaller area covered in their two sale deeds. The aspect of defendants occupation of certain lands, being mentioned in the plaintiff's sale deed, must also weigh with the Court, in view of the fresh evidence generated by the court appointed surveyor.

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A 11. The above has persuaded us to hold that the High Court erred in not recording a finding on the question of law formulated later, to account for the Court Surveyor's report, vis-à-vis the legal battle over the suit land. Without the decision on the relevant aspect which goes to the root of the dispute, the impugned judgment in our assessment, fails the scrutiny of law.

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C 12. In view of the forgoing, we set aside the judgment dated 14.8.2018 passed by the Bombay High Court, Nagpur Bench in the Second Appeal no.297/2013. The matter is remanded back to the High Court to consider and render a finding on the substantial question of law framed on 2.5.2018 by the learned Judge. It is ordered accordingly. Regard being had for the long pendency for the case and the restricted remand, the High Court is requested to decide the second appeal expeditiously and preferably within six months of receipt of this order.

13. The appeal is accordingly allowed without any order on costs.

Bibhuti Bhushan Bose

Appeal allowed.