

Presented on : 04 -01-2010
Registered on : 04-01- 2010
Decided on : 19 -10- 2013
Duration : Ys. Ms. Ds.
03- 09- 15

IN THE COURT OF JT.CIVIL JUDGE (JR.DIVN.) AT PATHARDI
DISTRICT : AHMEDNAGAR.

[Presided over by : D.N.Chamle]

R. C. S. No.4/2010

Exh.No. 80

- 1] Shindhubai Vinayak Deshmukh,
Age-55 Years. Occu. Agril
- 2] Vikas Vinayak Deshmukh,
Age-30 Years. Occu. Agril
- 3] Prakash Vinayak Deshmukh,
Age-28 Years. Occu. Agril & Service

All R/o Koradgaon , Tal-Pathardi
Dist-Ahmednagar

Plaintiffs

VERSUS

- 1] Chandrakala Gulab Deshmukh,
Age-45 Yrs, Occu: Agril.
R/o Koradgaon
Tal.Pathardi, Dist.Ahmednagar.

Defendant

Claim: Suit for possession of encroached area & for compensation

Ld. Adv.Shri. J.T.Batule for plaintiffs.
Ld. Adv. Shri. R.L.Nangre for defendant.

: J U D G M E N T :

[Delivered on day of 19th October 2013]

1] The Plaintiffs have instituted this suit for possession of encroached area and for compensation. Property involved in the suit is as follows:

Description of suit property :

Land Gut No. 22 situated at village Koradgaon Tal. Pathardi Dist. Ahmednagar, and its boundaries are as under:-

Gat No.	Area H-R	RS.	East	West	South	North
22	01/01/49	5.74	24	River	Gat NO. 56	Gat.No.20,21. 23

Out of this plaintiff is in possession of 1.02 R of Western side and its boundaries are as follows:

East	West	South	North
Road	River	Gat NO. 56	Gat No.20,21. 23

(Hereinafter referred as the suit property)

2] Brief facts of plaintiff's case are as under :

The plaintiffs are owner and in possession of the suit property. The defendant is owner and in possession of land Gat No. 56. The suit property and land of defendant are adjacent to each other. The land of defendant is towards southern side of the suit property. In the year 2008 defendant started committing encroachment in the suit property by breaking common bandh. Therefore plaintiffs carried out measured the suit property through Taluka Inspector of Land record (hereinafter referred as the T.I.L.R.), Pathardi on 13/02/2009. In the measurement it is found that, the defendant committed the encroachment in the suit property from Southern side to the extent of 09 R land. Accordingly Surveyor fixed the boundaries and prepared the map. Thereafter on 23/09/2009 plaintiffs issued notice to the defendant and requested to hand over the possession of encroached area. The defendants refused to accept the notice and possession is not handed over. The defendant committed encroachment in the year 2008 and since then he is taking crop in the encroached area. Therefore, plaintiffs sustained loss. Hence plaintiffs constrained to filed this suit for the possession of encroached area and for compensation of Rs. 3000/- from the defendant.

3] In pursuance of suit summons defendant is appeared in the suit. She filed her Written Statement at Exh.14. The defendant denied the entire contentions of plaintiffs and further contended that, she has no knowledge of measurement carried out by plaintiffs. In the map it is not mentioned that, how many area is acquired for the road which is proceeded from the suit property. There are various draw backs in the measurement and false map is prepared. In the map area of co-sharer is not mentioned. The common bandh between the suit property and the property of defendant is still in existence. The criminal cases are came to be filed between the plaintiff and defendant therefore, in order to prepared false record the present suit is filed. Plaintiffs are cultivating 2 to 2.5 acre alluvial land illegally. They have not obtained any permission of concern officer for cultivating the said land. Therefore, in order to grab said alluvial land the plaintiffs have filed this false

suit. Hence, prayed for rejection of suit with compensatory cost of Rs. 5000/-.

4] Heard Ld. Advocate Shri. J.T.Batule for plaintiffs and Ld. Advocate Shri.R.L.Nangre for defendant.

5] Considering the rival pleading of the parties, my Ld. Predecessor framed following issues at Exh.18. I reproduced said issues and record my findings for the reasons stated below.

ISSUES		FINDINGS
1	Whether the plaintiffs prove that, they are owner of the suit property.?	Yes
2	Whether the plaintiffs further prove that, the defendant made encroachment over land of 0H-09R from Southern of the suit property.?	No
3	Whether the suit property is properly described.?	No
4	Is the suit bad for non-joinder of necessary parties.?	No
5	Whether the plaintiffs are entitled to get/recover possession of 0H-09R land from the defendant.?	No
6	Whether the plaintiffs are entitled for Rs 3,000/- by way of compensation .?	No
7	Whether the defendant is entitled for compensatory costs of Rs.5,000/- from the plaintiffs ?	No
8	What order and decree.?	As per final order

REASONS

6] In order to establish the claim plaintiffs have examined in all two witnesses. Prakash Vinayak Deshmukh [P.W.1] is examined at Exh.20 and Sanjay Bhimrao Manvare [P.W.2] is examined at Exh.35. They closed their evidence vide pursis at Exh.56.

7] The defendant in defence examined in all two witnesses. The defendant Chandrakala Gulab Deshmukh (D.W.1) has examined herself at Exh.57 and

Balasaheb Sampat Nitnavare [D.W. 2] examined at Exh.75. She has closed her evidence vide pursis at Exh. 79.

8] Admitted facts of present suit are as under:

The plaintiffs are owner and in possession over the suit property. Plaintiffs, Narayan Deshmukh and Badrinath Lakhote are co-share of the suit property. The defendant is owner and in possession of the land Gut No. 56.

AS TO ISSUE NO 1:-

9] As per the evidence of Prakash [P.W.1] the suit property is purchased by the plaintiffs and they are owner and in possession over the suit property. Plaintiffs have filed copy of sale deed of the suit property. Upon perusal of said sale deed, it appears that, the plaintiff Nos. 2 & 3 have purchased the suit property from Bhadrinath Asaram Lakhote. Plaintiffs have filed the copy of 7 x 12 extract of the suit property. Upon perusal of said 7x 12 extract, it appears that, the names of plaintiffs and names of other two persons are recorded in 7 x 12 extract. The defendant has also not denied the ownership and possession of plaintiffs over the suit property. Therefore, I do not hesitate to hold that, plaintiffs are owner and in possession of the suit property. Hence, I answer Issue No. 1 in affirmative.

10] AS TO ISSUE NO.2 :-

Ld. Advocate for plaintiffs submitted that, the plaintiffs carried out measurement of suit property through T.I.L.R. The measurement is carried out by following due procedure. In the measurement encroachment in the suit property to the extent of 9 R. is found by the defendant. The map is at Exh. 52. Thereafter, plaintiffs issued notice to defendant through Advocate for delivery of possession of encroached are and compensation. However, plaintiffs have not handed over the possession therefore plaintiffs filed present suit. In the evidence of Sanjay (P.W.2) encroachment is proved. Hence prayed that, suit be decreed.

11] Ld. Advocate for defendant submitted that, the Surveyor has not correct measurement. Defendant has no knowledge of measurement. The defendant has also not received any notice of measurement. There are other co-sharer in the suit property. Their boundaries are not fixed. The map prepared by surveyor is not proper and it is doubtful. The surveyor has not shown the houses,

cattle shade and one water tank in the map which are in the suit property. There is difference between authorized map of the village and the map prepared by the Surveyor. The surveyor has not carried out the measurement of suit property and the property of defendant Gut No. 56 jointly. In order to find out the encroachment the measurement of both land is to be carried out. Ld. Advocate for defendant in support of his argument relied on the citation delivered by the Hon'ble Bombay High Court in Manohar Mahadeorao Pagrut Vs Sunanda Ramdas Tharkar 2008(3) Bombay C.R. 4

12] As per the evidence of Prakash [P.W.1] suit property and the land of defendant Gat No.56 are adjacent to each other. The land of defendant is towards Southern side of the suit property. Defendants carried out measurement of the suit property through T.I.L.R., Pathardi on 13/02/2009. In the said measurement encroachment by the defendant to the extent of 09R from the Southern side is found.

13] As per the evidence of Chandraala [D.W.1] she has no knowledge of measurement. The defendant has also not received any notice of measurement. The land of defendant Gat No. 56 is not adjacent to suit property. There are other co-sharer in the suit property. Their boundaries are not fixed. The map prepared by surveyor is not proper and it is doubtful. The surveyor has not shown the houses, cattle shade and one water tank in the map which are in the suit property. There is difference between authorised map of the village and the map prepared by the Surveyor.

14] In order to prove the encroachment over the suit property, the plaintiff has examined the Surveyor Sanjay [P.W.2] As per his evidence he carried out the measurement of suit property on 13.2.2009 by issuing notices to the adjacent owner on 13.2.2009. He also shown boundaries of the suit properties. Accordingly panchanama is also prepared. In the measurement encroachment to the extent of 09R land by the owner of land Gut No. 56 found.

15] Admittedly, the defendant is owner and in possession of land Gut No. 56. The plaintiff has filed measurement map at Exh. 52. In order to prove the

encroachment over the suit property the evidence of Surveyor Sanjay (P.W.2) is at most important. He further admitted that, there is difference between village map and measurement map. He also admitted that, if the said difference is not removed area of plaintiffs and defendant cannot be fixed. He also deposed that the rights in respect of removal of said difference are vested with Commissioner Nashik Division, Nashik. Sanjay (P.W.2) also admitted that, if said said difference is removed the area of plaintiffs and defendant may reduce or increase. It is evident from the record of Sanjay (P.W.2) that, there is difference in the village map and in the map prepared by him. If said difference is removed area of plaintiff and defendant cannot be fixed. It also appears that, without removing said difference the measurement of suit property is carried out. Therefore, the threshold it appears that, there is fundamental mistake in the measurement which is carried out without removing differences in the map.

16] Prakash (P.W.1) admitted in his cross examination that, Narayan Deshmukh and Bhadrinath Lakhote are co-sharer in the suit property. He further deposed that, the measurement of land Gut No. 56 and land of Shri Deshmukh and Shri. Lakota is carried out. However, Sanjay (P.W.2) admitted in his cross-examination that, he has not carried out measurement the land Gut No. 56 and area of Sheri, Lakota and Sheri Deshabille. The plaintiffs have also not filed any documents to show that, the measurement of land Gut No. 56 and land of Sheri. Lakota and sari. Deshabille carried out. If according to Prakrit (P.W.1) the land of defendant Gut No. 56 is measured then they have to file map of said measurement.

17] Upon perusal of 7 x 12 extract of suit property Ex. 6 it appears that, name of plaintiffs and other two persons Ramayana Deshabille and Ballerina Lakota are recorded on it. It means Shri Lakhote and Shri. Deshmukh has land in the suit property. However, the measurement of land of Shri. Lakhote and Shri. Deshmukh is not carried out. Sanjay [P.W.2] admitted in his cross-examination that, he has no any record to show that, where the land of plaintiffs is situated in Gat No.22. The plaintiffs have not filed any evidence to show that, the area of co-share in the suit property is filed. It also appears that, the partition of suit property between the co-sharer is not effected till today. It evident that, the measurement is carried out without any partition of land between co-sharer in the suit property.

Therefore, it is impossible to ascertain the area of plaintiffs in the suit property. Therefore, there is apparent mistake in the measurement carried out by the Surveyor Sanjay (P.W.2)

18] Prakash [P.W.1] in his cross-examination admitted that, plaintiffs are residing in the suit property by Vasti since 25 years and there are constructed houses, cattle shed and water tank. He also admitted that, there is Koradgaon to Bodhegaon road proceeded from Southern side of his house and due to said road suit property is divided in two part. Sanjay (P.W.2) deposed that, he has not measured the area which is acquired for the road towards East side of the suit property. The Surveyor Sanjay (P.W.2) cannot tell the area acquired for Vasti of plaintiffs. He also cannot tell the whether house, Water Tank and cattle fodder are in the suit property or not. Therefore, there is material discrepancies between the evidence of Prakash (P.W.1) and Sanjay (P.W.2). Upon perusal of map at Exh. 52 it appears that, land Gut No. 56 is shown in the map as adjacent to suit property. It also appears that, one road is proceeded through suit property and suit property is divided in two parts. But the Surveyor has not measured the said road. Therefore, the Surveyor has committed gross error while carrying out measurement.

19] As per evidence of Prakash [P.W.1] the defendant was present at the time of measurement and surveyor has obtained her signature. On the other hand, the Surveyor Sanjay (P.W.2) has also not deposed in his evidence regarding the presence of defendant at the time of measurement. Prakash [P.W.1] deposed in his evidence that, the signature of defendant is obtained. Plaintiffs have not filed any document regarding signature of defendant is obtained by Surveyor. Therefore, the evidence of plaintiffs is not acceptable as to presence of defendant at the time of measurement.

20] The Surveyor Sanjay [P.W.2] has filed the certified copies of application filed by plaintiff for measurement at Exh. 52, consent deed of plaintiff for the measurement, notice issued for the measurement and the statement of plaintiff. Upon perusal of said documents, it appears that, the plaintiff No.1 applied for the measurement. The other plaintiffs have given a consent for the measurement. The Surveyor has filed notice issued to the plaintiffs and defendant and other co-sharer by post for measurement of suit property at Exh.45. Upon perusal of said

notice, it appears that, it is also issued to the defendant. However, no any evidence is filed on record whether the said notice was accepted by the defendant or not. Therefore, it can not be said that, the defendant has received the said notice and she was present for the measurement of the suit property.

21] Sanjay (P.W.2) admitted in his cross examination that, he has not carried out panchanama of O.F. It means panchanma of already existing boundaries of area of suit property is not made. Upon perusal of Map (Exh. 52) it appears that, the Surveyor has also not shown boundry mark of other side and particular boundary mark which is towards the land of defendnat. The Surveyor Sanjay (P.W.2) has not carried out the measurement of suit property and the property of defendant Gat No.56. As per the evidence came on record, it appears that, Shri.Lakhote and Shri. Deshmukh are adjacent owner of the plaintiff. According to plaintiffs the land of defendant is adjacent to the suit propeprty. If the measurement of only property of plaintiff carried out and the measurement of other adjcent property is not carried out then, it is impossible to find out the encroached area. Because there is possibility that, some land from the area of plaintiffs might have in the possession of other adjacent possessor. Therefore, the Surveyor Sanjay (P.W.2) committed error in measurement.

22] Ld.Adv. Shri. Nangre for the defendants submitted that, the surveyor has not carried out the measurement of suit property and the properpty of defendant Gu No. 56 jointly. In order to find out the encroachment the measurement of both land is to be carried out. Ld. Advocate for defendant in support of his argument relied on the citation delivered by the ***Hon'blel Bombay High Court in Manohar Mahadeorao Pagrut Vs Sunanda Ramdas Tharkar 2008(3) Bombay C.R. 4***

23] I have gone through citation relied upon by Ld. Advocate for defendant delivered by the ***Hon'blel Bombay High Court in Manohar Mahadeorao Pagrut Vs Sunanda Ramdas Tharkar 2008 (3) Bombay C.R. 4***. In this case the Hon'ble Hlgh Court held that, to have correct approach for ascertaining the area of actual possession and for finding out encraochment it is necessary to measure both lands. In the present case, the surveyor has measured only the suit propeprty and not propeprty of defendant. Upon perusal of Map at Exh. 52 it appears that, the

Surveyor has not shown boundary mark of other side. Therefore, I am of the opinion that, above citation is applicable to the case in hand.

24] Prakash (P.W.1) admitted in his cross examination that, he cultivated banana tree in the suit property and there are 1000 banana trees. The defendant has examined Balasaheb (D.W.2) at Exh. 75. As per his evidence he is agriculture officer. He has filed information regarding cultivation of Banana tree and area of cultivation of 1000 banana tree. In his cross examination he admitted that, the said information is important to the field for which loan is provided by the Government. Upon perusal of documents filed at Exh. 76. It appears that, the information in respect of maximum distance between two banana tree and area acquired for 100 banana trees is given. In the documents filed at Exh. 76 three methods of cultivation is given. Two methods are in Square meter and third method is Joint line method. There is no evidence came on record regarding the plaintiffs have cultivated banana tree on the Government loan. There is no any record the plaintiffs have cultivated banana tree by which method. Therefore, the evidence of Balasaheb (D.W.2) does not help to prove that, who many area is acquired for 1000 banana tree. Therefore, the defendant has not brought any thing on record by the evidence of Balasaheb (D.W.2).

25] In view of above discussion, I do not hesitate to hold that, there are gross error in the measurement of Surveyor Sanjay (P.W.2). On the basis of wrong measurement it cannot be said that, the defendant committed encroachment over the suit property. Therefore, I hold that, plaintiffs failed to prove that, the defendant committed encroachment over the suit property to the extent of 09R. Accordingly, accordingly I answer issue No.2 in negative.

26] **AS TO ISSUE NO.3 :-**

The Ld.Adv for defendant submitted that, the plaintiffs have not given correct description of the suit property. in the 7x 12 extract of suit property there are names of plaintiff and other two person. Therefore, plaintiffs have not filed any record to show that, where is their land. The plaintiff have not given in the description anywhere amongst Badrinarayan and other persons whose names of on 7 x 12 extract. Therefore, the suit is liable to be dismissed.

Ld. Advocate for the plaintiffs submitted that, plaintiffs have given correct description of property. The defendants have not given which is correct description. Therefore, there is no any scope in the objection of defendant.

27] Admittedly, there are names of plaintiffs and Narayan Deshmukh and Badrinarayan Lakhote recorded on on 7 x 12 extract of the suit property. Prakash (P.W.1) also admitted that, there are Narayan Deshmukh and Badrinath Lakhote are co-sharer. In this suit the description of property is given as towards East side- Gat Bo.24, towards West side- river, towards South side-Gat No.56 and towards North side Gat No. 20, 21 and 23. If according to evidence of plaintiffs their names and names of other two persons are on 7x12 extract. They are also co-sharer of the suit property. Therefore, certainly the lands of one of the two co-sharer of the suit property must be towards one side of the suit property. The plaintiff has not mentioned about the land of other two persons in the description. The plaintiff also not stated in the description of property anywhere about the land of Narayan Deshmukh and Bhadrinarayan Lakhote. Therefore, the description of suit property is not properly given. Therefore, I do not hesitate to hold that, the description of suit property is not correct. Hence, I answer issue No.3 in Negative.

28] AS TO ISSUE NO.4 :-

The Ld.Adv. for defendant submitted that, in the suit property Narayan Deshmukh and Badrinath Lakhote are co-sharer. They are necessary party. But the plaintiffs have not made them party. Therefore, the suit is bad for non-joinder of necessary parties.

29] Ld.Adv. for plaintiff submitted that, though there are other co-sharer but the encroachment has been committed only by the defendant. The co-sharer are not necessary party. The defendant is only necessary party as she committed encroachment. Therefore, the suit is not bad for non-joinder of necessary parties.

30] The objection of necessary party is to be considered in the light of nature of suit. The present suit is filed for the possession of encroached area and for compensation. According to plaintiffs the defendant has only committed encroachment over the suit property. The map (52) also shows that, the owner of land GutNo. 56 committed error and defendant is owner of the said land. Therefore,

only defendant is necessary party. It is not the case of plaintiffs that, the other co-sharer in the suit property committed encroachment. The suit is for possession of encroached area and compensation. If co-sharer has not committed any encroachment than there is no necessary to recover the possession and compensation from them. Therefore, considering the nature of the suit, I am of the opinion that, only defendant is necessary party and co-sharer are not necessary parties. Therefore, the suit is bad for non-joinder of necessary parties. Accordingly, I answer issue No.4 in negative.

31] AS TO ISSUE NO.5 & 6 :-

These issues are interlinked with each other therefore, in order to avoid repetition I am discussion these issues together. I have already hold in issue No.2 that, plaintiffs have not proved that, the defendant committed encroachment over the suit property to the extent of 09R from Southern side. Therefore, plaintiffs are not entitled to recover the possession of 09R land from the defendant. If the plaintiffs failed to prove the encroachment and possession of defendant over the encroached area than there is no question of damages to plaintiffs. Therefore, plaintiffs are not entitled for compensation of Rs.3000/- from the defendant. Hence, I answer issue No.5 & 6 in negative.

32] AS TO ISSUE NO.7 :-

The defendant claimed compensatory amount of Rs. 5000/-. As per section 35 of the Civil Procedure Code, the compensatory cost can be given in false and vexatious suit. Plaintiffs filed present suit for possession of encroached area and compensation. Plaintiffs carried out the measurement of suit property before filing suit. The Surveyor also shown the encroachment by the defendant in the suit property to the extent of 09R. Thereafter plaintiffs filed the present suit. The plaintiffs also filed Map prepared by Surveyor at Exh. 52. Considering the efforts taken by plaintiff before filing this suit, it can not be said that, the present suit is false and vexatious. In absence of false and vexatious suit compensatory cost cannot be given. Therefore, defendant is not entitled for compensatory cost of Rs.5000/- from the plaintiff. Hence, I answer issue No.7 in Negative.

33] In view of above discussion, I do not hesitate that, plaintiffs are the owner of the suit property. The suit is not bad for non-joinder of necessary parties. I

further do not hesitate to hold that, the description of suit property is not proper. Plaintiff failed to prove that, defendants committed encroachment over the the suit property to the extent of 9R land from Southern-Side. Therefore, I do not hesitate to hold that, plaitniffs are not entitled to recover the possession of 9R land from the defendant. I also do not hegitate to hold that, plaintiffs are not entitled for compensation of Rs. 3,000/- from defendant and defendant is not entitled for recover compensatory cost of Rs. 5,000/- from plaintiffs. Therefore, this suit is required to be dismissed. Hence,in order to answer issue No.8, I pass the following order.

ORDER

- 1]** The suit is dismissed.
- 2]** Parties to bear their own costs
- 3]** Decree be drawn accordingly.

Pronounced in open Court

Date:- 19-10-2013
Place : Pathardi

[D.N.Chamle]
Jt.Civil Judge [J.D.] Pathardi.