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IN THE COURT OF CIVIL JUDGE, SENIOR DIVISION
(CORPORATION COURT) AT AURANGABAD.
(Presided over by S. J. Biyani)

REGULAR CIVIL SUIT NO. 36 / 2010

Exh. 89

PLAINTIFFS : 01. Haji Lal Khan S/o. Haji Abdul
Rahman Khan - Age : 53 years,
Occ : Business, R/o. Kiradpura,
Aurangabad

02. Haji Nawab Ahmed s/o. Haji
Abdul Rehman Khan, Age : 50 yrs
Occ : Business, R/o. As above

03. Haji Sher Khan S/o. Haji Abdul
Rehman Khan - Age : 47 yeas,
occ : Business, R/o. As above

VERSUS

DEFENDANT : . Municipal Corporation, Aurangabad
through its Commissioner

Mr. A.B. Bhosale - Advocate for plaintiffs
Mr. A.P. Adwant - Advocate for defendant

JUDGMENT
[DELIVERED ON 26-11-2014]

01. Present suit is filed for perpetual injunction restraining defendants from causing obstruction in the peaceful possession of plaintiff vested with 16 Gunthas land deleted from 3 acres acquired land during compromise in between plaintiffs & defendant and for using land into compound wall of Nala & drainage line more than 26.4 Gunthas of survey No. 10, situated at Jaswantpura (Kiradpura), Aurangabad, as stated in the compromise & for mandatory injunction for removal of excess construction and drainage line and its pipes for more area than 26.4 Gunthas, situated at Jaswantpura (Kiradpura), Aurangabad.

02. Facts in short of plaintiff's case are that, one Haji Abdul Rehman Khan S/o. Bale Khan was owner of survey No. 10 admeasuring 14 acres 12 gunthas. Haji Abdul Rehman Khan died on 10.04.2000, leaving behind plaintiffs alongwith another son one

Rahim as legal representatives. In the development plan of Municipal Corporation, Aurangabad, site No. 205 was declared in survey No. 10 belonging to deceased Haji Abdul Raheman. Deceased Haji Abdul Raheman gave consent for proposed site, considering public necessity. Defendant Corporation have paid only 42% amount for 3 acres land and without making remaining payment of compensation, started proceeding for taking possession, at that time, deceased Haji Abdul Raheman Khan filed civil suit bearing R.C.S. No. 714/89, against defendant & same was decreed on 16.12.1993. Defendant Corporation preferred an appeal bearing R.C.A. No. 36/94 which was dismissed on 16.01.1999.

03. Thereafter, defendant started construction of drainage line and wall to the side of Nala. Therefore, deceased Haji Abdul Raheman filed suit through General Power of Attorney, i.e. plaintiff No. 2 bearing R.C.S. No. 584/1997 against defendant Corporation, but due to absence of plaintiff, it was dismissed in default on 08.10.1998. Thereafter, with due discussion, compromise took place in between plaintiffs & defendant Corporation & same was passed in

general body meeting of defendant Corporation bearing resolution No. 203/4. During compromise, 3 acres land was fixed for acquisition as regard to Site No. 205. Out of 3 acres land, 2 acres 24 Gunthas land was decided for Primary School and Play ground and 7.20 Gunthas for development of road & 16 Gunthas have to be returned to plaintiffs, instead of making compensation amount against proposed road. Defendant have not separated 16 Gunthas, out of 3 acres. In all, totally land admeasuring 3 Acre 17.6 Gunthas, was obtained for site, out of 5 acres 35 Gunthas, except 16 gunthas was to be returned to these plaintiffs.

04. Accordingly, as per compromise, "Hakk-sod-patra" certificate was executed by plaintiffs bearing registration No. 3581 dated 13.07.1999. Defendant failed to comply conditions. As per compromise only 2 acres 24 Gunthas have been acquired after deleting 16 Gunthas land. Further, as per compromise, 26.4 gunthas land was for drainage line & compound wall from Survey No. 10 but defendant have started construction of 'Nala' & drainage line, without measuring the land & constructed more than 26.4 Gunthas

land. Plaintiff requested defendant in that regard but they have not heard the request. Defendant have made excess work than 26.4 Gunthas & thereby violated terms & conditions of compromise dated 13.07.1999. Therefore, present suit is filed.

05. Defendant failed to file written statement. Therefore, suit proceeded without written statement against defendant. Plaintiff examined himself (P.W. No.3 - Exh. 49), Mr. Haji Nawab Ahemed Haji Abdul Raheman Khan (P.W. No.1 - Exh. 21), Mohd. Abdul Hamid Mohd. Abdul Wahed (P.W. No. 2 - Exh. 28), Mr. Zubergulam Rasool Patel (P.W. No. 4 - Exh. 73) who is witness on panchanama, Mr. Sudam Pophale (P.W. No. 5 - Exh. 79) who is land measurer & filed evidence close pursis & produced notes of argument at Exh. 88. Defendant have not examined any witness.

06. Considering pleading of the plaintiff, evidence & documents, following points arise for my determination & I record my finding thereon as under :-

POINTS**FINDINGS**

- | | | |
|-----|--|---|
| 01. | Whether Plaintiff prove that defendant have used excess land in breach of the terms & conditions of compromise ? | ..In negative |
| 02. | Are plaintiffs entitled for reliefs as prayed for ? | ..Suit is dismissed
As per final order |

REASONS**AS TO ISSUE NO. 1 & 2**

07. I want to mention here the admitted position that plaintiff's father have filed R.C.S. No. 714/89 against defendant & same was decree don 16.12.1993. Defendant Corporation preferred an appeal bearing R.C.A. No. 36/94 which was dismissed on 16.01.1999. It is also admitted fact that plaintiff had filed R.C.S. No. 584/1997 against defendant Corporation, but due to absence of plaintiff, it was dismissed in default on 08.10.1998. Compromise took place for site No. 205 in between the plaintiffs & defendant Corporation, by passing resolution No. 203/04. It is the contention of plaintiff that land admeasuring 16 gunthas, from 3 acres which was reserved for acquisition, was to be returned to plaintiffs & land admeasuring 26.4 Gunthas, was to be used for drainage, 'Nala'.

Defendant have taken excess land than 26.4 Gunthas. Defendant have made encroachment over 44 Gunthas excess land of plaintiff.

08. Plaintiff Haji Nawab Ahemed (P.W. No. 1) filed his evidence affidavit & contended that defendant have made encroachment over 44 Gunthas land, over their land. In all they have used land 44 Gunthas land for drainage & pipeline & further disclosed that 3 acres 17.6 Gunthas land was given for Water Tank, Primary School, Drainage, Water pipeline.

09. In cross examination, witness disclosed that name of defendant Corporation is recorded in 7/12 extract, as per relinquishment ('Hakk-sod-patra').

10. Mr. Mohd. Abdul Hamid Mohd. Abdul Wahed (P.W. No.2) who is land measurer, disclosed about measuring the land by him and an area admeasuring 76230 Sq. ft. (7084.97 Sq. meter) from Survey No. 10, is affected for drainage pipeline & filed its map in ammonia print. In cross examination, he disclosed that no one had filed an application with him for measurement & documents of measurement, its notes, are not available & he can not file any

document about measurement of land. Evidence of this witness was discarded as witness have not disclosed about issuing notices to parties prior to measurement & no any panchanama has been filed about measurement work.

11. Mr. Haji Lal Khan S/o. Haji Abdul Raheman Khan (P.W. No. 3 - Exh. 49) have filed affidavit after remanding the matter from Hon'ble District court. He has civil suits & compromise. He has further disclosed that land admeasuring 26.4 Gunthas was fixed for drainage line & 'Nala' & compound wall, from survey No. 10. Defendant have no any right to use excess land. As per order of court, measurement was carried out on 13.03.2013 & it was found that land admeasuring 42 Gunthas was being used for drainage, 'Nala' and compound wall. Plaintiff further disclosed that as rates of lands are increasing & area involved in present case, is located in the center of the city. Therefore, as per market rate, compensation should be issued.

12. In cross examination, witness disclosed that there was bifurcation of survey No. 10 into survey No. 10/1 & 10/2. Father of

plaintiff was given land bearing survey No. 10/2. Witness replied that drainage line is underground & only chambers are on the surface or attached to earth. Witness admitted that 'Nala' passes from survey No. 10, proceeding from Survey No. 10/1 & 10/2 & there are bifurcation of survey No. 10 into Survey No. 10/1 to 10/5.

13. On perusal of compromise (Exh. 32) between defendant Corporation & plaintiffs, it shows that land admeasuring 3 Acres 17.6 Gunthas, was reserved from Survey No. 10 & same was in possession of defendant Corporation. On perusal of 'Hakk-sod-patra' (Exh. 33), executed by plaintiff in favour of defendant, shows about relinquishing their right in respect of an area admeasuring 3 Acres 17.6 Gunthas, from survey No. 10.

14. On perusal of the evidence of plaintiff, it shows that plaintiff's father was given land survey No. 10/2, but plaintiff failed to file 7/12 extract in that regard & 7/12 extract filed on record by land measurer for survey No. 10/2 does not disclose names of plaintiffs. 7/12 extract of survey No. 10/1 is filed which shows names of Abdul Raheman Khan Balekha, Haji Lal Kha Abdul

Raheman, Haji Nawab Ahemed Abdul Raheman, Haji Sherkhan Abdul Raheman for an area 2 Acre 17 Gunthas. Plaintiff though disclosed about an area 16 gunthas possession of which is alleged to be handed over to plaintiff by defendant corporation during reserving the land admeasuring 3 Acres. Plaintiff though contended but failed to file any documentary evidence showing about handing over possession of 16 gunthas land to them & reserving 3 Acres land. As per compromise between the parties, it shows that plaintiff have relinquished their right to the extent of 3 Acres 17 gunthas land, from Survey No. 10, for primary school, play ground, road, drainage line & compound wall.

15. Mr. Zuber Gulam Rasool Patel (P.W. No. 4 - Exh. 73) - witness on panchanama, in his evidence disclosed that on 13.03.2013 land bearing Survey No. 10, was measured by measurer Mr. Pophale. Initially, there was inspection of 'Nala' & after inspection, panchanama was prepared & its signature was obtained which is at Exh. 74. Another witness Mr. Nazirbeg Chandbeg was present. Plaintiff, Nawabbhai & representative of defendant / Corporation,

were also present. In cross examination, evidence of witness remained intact about preparing panchanama in his presence.

16. Mr. Sudam Trimbak Pophale (P.W. No. 5 - Exh. 79) -- land measurer, have disclosed in his affidavit that on 13.03.2013, he was serving at the office of Deputy Superintendent of Land Record & he measured the land survey No. 10/2, as per order of court. During measurement, representative of defendant Mr. Pathak & panch, were present. He has measured land by plain table measurement method & after measurement, by going through record with office, prepared the map (Exh.80) & forwarded report to court.

17. During measurement, panchanama was prepared (Exh. 74). During cross examination, witness replied that court had ordered for measuring the land survey No. 10 & he has measured the land survey No. 10/1 & 10/2 being part of survey No. 10. In his letter, there is disclosure of survey No. 10 but in other papers, there is disclosure of survey No. 10/2. He was having direction for measurement of land survey No. 10/2. Witness admitted that he has shown 'permanent mark (signs -- खुणा)' in the index(सुचि) of map, but

he has not mentioned the same in measurement map. Witness replied that in survey No. 10, there is locality. He has not found compound wall or drainage on the spot & drainage was underground. In 7/12 extract, filed with report, there is no disclosure of 'Nala' in other rights column. His office is having record about 'Nala' but he has not filed the same. Witness also replied that 'शिरस्तेदार, छाननी करणार', clerk verifying the signature, person signing on the map, were not present during the measurement After making measurement, all the papers are filed in office & after scrutinizing the map, above authority signed the map.

18. On perusal of evidence of Mr. Sudam (P.W. No.5), it shows that in his evidence, he has disclosed about measurement of land survey No. 10/2 but on the measurement map, there is no any bifurcation of survey No. 10 into Survey No. 10/1 & 10/2.

19. On perusal of measurement map (Exh. 80), it shows that land for compound wall & drainage chamber, is of 42 R land. Land measurer though disclosed in measurement map but have not categorically disclosed which portion was found excess & which

portion was given to defendant Corporation by 'Hakka-sod-patra' by plaintiffs. Evidence of Mr. Sudam (P.W. No. 5) seems to be vague because from his evidence, it cannot be inferred that which portion was handed over by plaintiffs to defendant Corporation for drainage and compound wall from 42 R land. Further more, how much portion from drainage and compound wall from survey No. 10 passes through survey No. 10/2.

20. Mr. Sudam (P.W.No. 5) - land measurer, in his cross examination, disclosed that he was having an order for measurement of survey No. 10/2 but on perusal of record, it shows that Taluka Inspector of Land Record was directed to carry out measurement of survey No. 10, as per order below Exh. 42.

21. After considering evidence of plaintiffs, it shows that plaintiffs have contended that their father was allotted land from survey No. 10/2 but plaintiff failed to file any documentary evidence of recording their names for survey No. 10/2. In present suit, plaintiffs in their affidavit of evidence, have sought relief of giving compensation of 42 R land, as per market value but on perusal of

plaint, it shows that there is no any prayer by plaintiffs as prayed, in the evidence affidavit. In pleading, plaintiff have sought relief of mandatory injunction for excess land which is not sought by plaintiffs during their evidence. On perusal of compromise & 'Hakka-sod-patra', below Exh. 32 & Exh. 33, it shows that plaintiffs have relinquished their right for land admeasuring 3 Acres 17.6 G., from land survey No. 10, for primary school, play ground, compound wall, road, drainage.

22. Mr. Sudam (P.W. No.5) - land measurer though disclosed about measurement of land survey No. 10/2 & filed map below Exh. 80, but on perusal of said map, there is no any disclosure of land for play ground, school or road. Further more, measurement map (Exh. 80) nowhere discloses how much land is possessed by defendant Corporation & plaintiffs, from survey No. 10. Plaintiff admitted that land survey No. 10 was bifurcated into Survey No. 10/1 to survey No. 10/5.

23. Measurement Map (Exh. 80) is entire map of survey No. 10 & land measurer have failed to disclose the bifurcated parts

of survey No. 10, so as to arrive on correct conclusion from which part of survey No. 10, 'Nala' is passing & for which plaintiffs are entitled. Defendant, during cross examination to plaintiff, suggested that they are not in possession for more land than 3 Acres 17.6 G, as per 'Hakka-sod-patra'. In measurement map (Exh. 80), there is no any mention in that regard.

24. Therefore, in present case, evidence of Mr. Sudam Pophale (P.W. No.5), is not sufficient for determination of dispute between the parties & in absence of specific details about 'Nala' mentioned in map Exh. 80, about the area handed over to defendant Corporation by plaintiffs vide 'Hakka - sod- patra' & excess area other than documents executed by plaintiffs in favour of defendants & in absence of total area in possession of defendant Corporation from survey No. 10 & without making disclosure of land survey No. 10/2, encroachment as alleged by plaintiff, cannot be accepted because in cross examination, plaintiff admitted that 'Nala' passes from survey No. 10/1 & 10/2.

25. After considering above discussion, it shows that

plaintiff though contended about handing over 16 Gunthas land but miserably failed to file documentary evidence in that regard & possession over 16 Gunthas land from Survey No. 10/2 & considering pleading & evidence which found inconsistent with each other as plaintiff in pleading contended about survey No. 10 & prayed for mandatory injunction, where as in evidence plaintiff replied about possessing land bearing Survey No. 10/2 by their father & in respect of prayer as in plaint, mandatory injunction is claimed whereas in evidence, there is no disclosure of mandatory injunction & prayed for awarding compensation amount which is not prayed in pleading, and evidence of land measurer itself found vague as it does not discloses specification whether area mentioned under drainage & compound wall is from survey No. 10/1 or 10/2 or any other part. Therefore, I hold that plaintiff failed to prove the using excess land in breach of terms & conditions of compromise, therefore, I hold that plaintiffs are not entitled as prayed & record my finding to points No. 1 & 2 in negative & proceed to pass following order.

ORDER

01. Suit is dismissed
02. Parties to bear their own costs.
03. Decree be drawn up accordingly.

Date : 26-11-2014

Sd/-
(S.J. BIYANI)
Civil Judge – S.D.(Corporation),
Aurangabad

CERTIFICATE

I affirm that the contents of this P.D.F. file judgment are same, word to word, as per the original judgment.

Name of the :: Sachin K. Tripure.

Stenographer

Court :: Hon'ble Civil Judge – S.D.(Corporation)

Date :: 26.11.2014

Judgment signed by the :: 26.11.2014
presiding officer on

Judgment uploaded on :: 01.12.2014