

MHGA070004702016



Presented on : 06/06/2016
Registered on : 06/06/2016
Decided on : 17/01/2022
Duration : Y. M. D.
05 - 07 - 11

**IN THE COURT OF CIVIL JUDGE (JUNIOR DIVISION), AHERI,
DISTRICT-GADCHIROLI**
(Presided over by S. S. Mahale)

R.C.S. No.07/2016

Exh.118

THE PLAINTIFF : Shri. Satyanarayan Ramayaji Maddiwar,
Age about - 80 Years,
Occupation – Nil,
Resident of Aheri,
Taluka- Aheri,
District – Gadchiroli.

- V E R S E S -

DEFENDANTS : 1) Shri. Dilip Madhukar Padalwar,
Age about - 55 Years,
Occupation – Trade,

2) Shri. Pankaj Kisan Padalwar,
Age about - 40 Years,
Occupation – Trade,

3) Shri. Parag Kisan Padalwar,
Age about - 37 Years,
Occupation – Trade,
All resident of Aheri,
Taluka – Aheri, District – Gadchiroli.

Appearance :-

Learned advocate Shri. U.S. Galbale for the plaintiff.
Learned advocate Shri. S.V. Jainwar for the defendants.

J U D G M E N T

(Pronounced on 17th January 2022)

The suit has been filed for seeking reliefs of declaration, recovery of possession and for perpetual injunction.

Description of the suit property:

02. Northern side 25 feet wall and space out of old survey No.250 (New Block No.591) situated at Aheri having four boundaries; towards eastern side – remaining wall of the plaintiff, towards western side – plaintiff's house on the block No.570, towards northern side – house constructed illegally by the defendants on old survey No.249 and towards southern side – courtyard and house of the plaintiff (hereinafter referred to as the “**suit property**” for brevity).

Case of the plaintiff in short is as under :-

03. He is the owner of land admeasuring 771.71 square meters in old Survey No.250 (New block No.591). He has house on the above mentioned land which was surrounded by the compound wall of 07 feet in height. 7/12 extracts show entry of said wall. Defendants are constructing house on the above land by breaking northern side's east-west 25 feet wall of his house.

04. In the month October 2015, the plaintiff came to know about said illegal construction of the defendants. They also closed his drainage adjacent to the suit wall and broke pipes. Therefore, during July 2015 till 09/05/2016 on many occasions he made complaints regarding said construction of the defendants with the Nagar Panchayat, Aheri. However, it did not take any action and on 09/05/2016 conveyed to him about approaching the Court. He also lodged reports during 13/10/2015 to 02/04/2016 against the defendants at the Police Station,

Aheri. Consequently, offences under Sections 324, 504, 34 of the Indian Penal Code, 1860 have been registered against the defendants. In spite of the same, defendants did not hand over the suit property to him. Therefore, he filed the present suit for the decree of declaration that he is the owner of the suit property, directing defendants to hand over vacant possession of the suit property and for perpetual injunction against them.

Case of the defendant Nos.01 to 03 in short is as under :-

05. They contested the suit by filing their written statement (Exh.14). They have denied all the pleadings except admitting that the plaintiff is the resident of Aheri. In their further averments, they stated that their land is on the eastern and northern side of the plaintiff's land. In the year 2014, they obtained permission for construction from the then Gram Panchayat, Aheri in the name of their close relative namely Sou. Radhakisan Padalwar and completed construction of ground floor. On the said ground floor, they have completed further construction of first floor. They have not made any encroachment on the suit property. They have made construction by obtaining necessary permission from the then Gram Panchayat, Aheri. Hence, they submitted for dismissal of the suit with costs.

06. Heard the learned advocate Shri. U.S. Galbale for the plaintiff and the learned advocate Shri. S.V. Jainwar for the defendants.

07. My learned predecessor framed issues (Exh.15). Those issues have been reproduced here under coupled with my findings and reasons thereon.

Sr. No.	<u>ISSUES</u>	<u>FINDINGS</u>
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(1)	Whether the plaintiff has proved that he is the owner of the suit property ?	...	No.
(2)	Whether the plaintiff has proved that defendants made encroachment on the suit property by breaking the wall and made illegal construction thereon?	...	No.
(3)	Whether the plaintiff is entitled for the declaration that he is the owner of the suit property and for recovery of its possession with perpetual injunction against the defendants ?	...	No.
(4)	What order and decree ?	...	The suit is dismissed with costs.

EVIDENCE TENDERED

08. In order to substantiate his pleadings, the plaintiff has examined in all three witnesses on his behalf. He examined himself by filing his examination-in-chief (Exh.20). He further examined Gajanan Sheshrao Wadekar (P.W. 02) by adducing his examination-in-chief (Exh.65) and surveyor namely Samayya Ramayya Bomanwar as (P.W. 03) at Exh.78. The plaintiff closed his oral evidence as per the pursis (Exh.81). In documentary evidence, he adduced below mentioned documents.

<u>Serial No.</u>	<u>Nature of document</u>	<u>Exhibit No.</u>
1)	Certified Copy of record of right.	Exh.21.
2)	True copy of Gav Namuna 8A in the name of the plaintiff.	Exh.22
3)	Certified copy of 7/12 extract of survey Nos.249, 277/02 of village Aheri for the period of 1977-78 to 1986-87.	Exh.23

4)	Certified copy of 7/12 extract of survey No.250 in the name of the plaintiff of village Aheri for the period of 1987-88 to 1999-2000. (In total 05 extracts of same period).	Exhs.24, 89, 90, 96, and 97.
5)	True copy of map of survey No.250 (New block No.591).	Exh.25
6)	Akhiv Patrika of Sheet No.17 of block No.570 in the name of the plaintiff.	Exh.26
7)	Akhiv Patrika of Sheet No.17 block No.591 in the name of the plaintiff.	Exh.27
8)	Office copy of complaint dated 13/10/2015 lodged by the plaintiff against the defendants at the Police Station, Aheri.	Exh.28
9)	Office copy of complaint dated 14/10/2015 lodged by the plaintiff against the defendants at the Nagar Panchayat, Aheri.	Exh.29
10)	Certified copy of printed first information report dated 24/03/2016 lodged by the plaintiff against the defendants at the Police Station, Aheri.	Exh.30
11)	Office copy of complaint dated 25/03/2016 given by the plaintiff against the defendants to the President, Nagar Panchayat, Aheri.	Exh.31
12)	Office copy of complaint dated 21/04/2016 given by the plaintiff to the President, Nagar Panchayat, Aheri against the defendants.	Exh.32

13)	Original copy of report dated 02/04/2016 regarding registration of non-cognizable offence at the Police Station, Aheri on the report lodged by the plaintiff against the defendants.	Exh.33
14)	Original copy of reply dated 22/04/2016 given by the Chief Officer, Nagar Panchayat, Aheri to the plaintiff.	Exh.34
15)	Office copy of complaint dated 24/04/2016 given by the plaintiff to the President, Nagar Panchayat, Aheri against the defendants.	Exh.35
16)	Original copy of reply dated 09/05/2016 given by the Chief Officer, Nagar Panchayat, Aheri to the plaintiff.	Exh.36
17)	Original copy of house tax receipt of property No.94 in the name of the plaintiff.	Exh.47
18)	Original copy of house tax receipt of account No.502 in the name of the plaintiff.	Exh.48
19)	Original copy of house tax receipt of account No.488 in the name of the plaintiff.	Exh.49
20)	Original copy of letter dated 28/11/1998 given by the Sarpanch, Gram Panchayat, Aheri to the plaintiff.	Exh.50 (Exhibited for the purpose of identification only)
21)	True copy of action report dated 09/11/1998 given by the Secretary, Gram Panchayat, Aheri.	Exh.51

22)	'C' sheet of measurement map of the suit property regarding the measurement dated 23/04/2019.	Exh.79
25)	Certified copy of 7/12 extract of survey No.250 in the name of the plaintiff of village Aheri for the period of 1997-98. (Two copies)	Exhs.91 and 92.
26)	True copy of P.11 Khasara five years form.	Exh.93
28)	True copy of P.11 Khasara five years form of survey No.250 in the name of the plaintiff. (Two copies)	Exhs.94 and 95.

09. In order to resist the suit claim, defendants have examined the defendant No.01 by filing his examination-in-chief (Exh.82). They closed their oral evidence as per the pursis (Exh.112). They have not furnished any documentary evidence on record.

REASONS

AS TO ISSUE NO.01:-

10. The plaintiff reiterated averments in the plaint by way of his examination-in-chief (Exh.20). He deposed that he is the owner of land admeasuring 771.71 square meters in old survey No.250 (New block No.591) which comprises the suit property. He has house on the said land. To substantiate his version, he has filed Record of right (Exh.21), Gav Namuna 8A (Exh.22), 7/12 Extracts (Exhs.24, 89 to 92, 96 and 97), Akhiv Patrika (Exh.27), Tax receipts (Exhs.47 to 49) and P.11 Khasara five years forms (Exhs.93 to 95).

11. Per contra, defendants denied ownership of the plaintiff on

the suit property.

12. It is argued by the learned advocate of the plaintiff that the suit property comprises in old survey No.250 (New block No.591) which is owned by his client. Record of right and other documents transpire that the plaintiff is the owner of the suit property. Defendants have not filed any oral or documentary evidence depicting their ownership on the suit property.

13. Conversely, it is argued by the learned advocate of the defendants that the plaintiff has failed in establishing his ownership on the suit property.

14. Before moving towards the oral and documentary evidence adduced by the plaintiff on record for proving his ownership on the suit property it is pertinent to go through his pleadings in that regard. It reads is as under.

“वादी हा मुळचा खास अहेरी येथील रहिवासी असून जुना भुमापन क्रमांक २५० आणि त्याचा नवीन भुमापन क्रमांक ५९१ आराजी ७७१.७१ चौरस मीटर जमीनीचे मालक आहेत”.

15. The supra sentence is reproduced as it is in his examination-in-chief (Exh.20). The plaintiff has filed the suit for declaration of his ownership on the suit property. Usually relief of declaration is sought when there is cloud on the title. Importantly, when the plaintiff on his own came before the Court for the relief of declaration of his ownership on the suit property, then it was incumbent on him to at least give necessary pleadings and evidence explaining how he became owner of the suit property. Whereas, perusal of above sentence as well as other material on record nowhere show any mode of getting ownership rights

of the suit property by the plaintiff. Further, specific issue has been framed by my learned predecessor and burden was put on the shoulder of the plaintiff to prove his ownership on the suit property. In spite of the same, no pain appears to have been taken by the plaintiff in that regard.

16. To prove his ownership on the suit property the plaintiff has relied on record of right (Exh.21), Gav Namuna 8A (Exh.22), 7/12 extracts (Exh.24, 89 to 92, 96 and 97), Akhiv Patrika (Exh.27), Tax receipts (Exhs.47 to 49) and P.11 Khasara five years forms (Exhs.93 to 95).

17. Firstly, perusal of record of right (Exh.21) transpires that all the properties enlisted therein alongwith the suit property is Abadi land, seen to be under the control of Government. Thus, apparently this document nowhere supports version of the plaintiff that he is the owner of the suit property. This document is useful to the plaintiff for pointing out that the land in old survey No.249 is Abadi land.

18. Apart from the record of right (Exh.21) as it is completely against the case of the plaintiff all the other documents mentioned in paragraph number 16 come under the ambit of revenue record. At this stage it is necessary to go through the settled legal position which is recently reiterated by the Hon'ble Supreme Court in the case of *The Commissioner of Bruhath Bangalore Mahanagara Palike and another Verses Faraulla Khan and another*, SLP (C) No.5743/2020 decided on 25/01/2021, wherein it is observed by the Hon'ble Supreme Court as under.

“It is well settled that mutation entries do not by themselves confer title which has to be established independently in a declaratory suit”.

19. It is apparently clear from the supra settled legal position that entries in mutation and revenue record is useful only for the fiscal purpose and they cannot confer any title. Accordingly, those documents adduced by the plaintiff on record are not useful for ascertaining his ownership on the suit property.

20. Interestingly, Akhiv Patrika (Exh.26) shows that land in block No.570 is ancestral one of the plaintiff. However, Akhiv Patrika (Exh.27) which shows 771.71 square meters area in Block No.591 in the name of the plaintiff which comprises the suit property, no where shows how the plaintiff's name is recorded in said property. Importantly, this document transpires reference of mutation entry No.165. Said mutation entry could have thrown some light on the nature of right plaintiff possessed in the suit property. However, the plaintiff has not filed said document on record for the reasons best known to him.

21. Shri. Bomanwar (PW.03) is the Cadesteral Surveyor examined by the plaintiff for pointing out encroachment made by the defendants on the suit property. Undisputedly, he is the independent witness being a public servant examined for specific reason. Importantly, the said witness stated in his examination-in-chief (Exh.78) that there is compound wall adjacent to the Gavthan land of block No.591 of Aheri. As mentioned earlier, it is the case of the plaintiff that he is the owner of the suit property which consists in block No.591. Now in view of evidence given by Shri. Bomanwar (PW.03) land in block No.591 seen to be a Gavthan land.

22. Though the defendants have merely denied ownership of the plaintiff on the suit property and have not filed any documentary evidence showing their ownership on the same, in view of the case put

up by the plaintiff and Issue framed in that regard, he was duty bound to prove his ownership on the suit property. The oral as well as documentary evidence adduced by the plaintiff on record is not sufficient to establish his ownership on the suit property. Hence, I answer issue No.01 in the negative.

AS TO ISSUE NO.02:-

23. Though I have answered issue No.01 in the negative, issue at hand being of encroachment is independent one. Therefore, it has to be dealt with accordingly.

24. It is the case of the plaintiff that defendants are constructing house by breaking northern side's east-west 25 feet wall of his house. They also closed down his drainage and broke pipes. Further, Gajanan (PW.02) also deposed that in absence of the plaintiff, defendants broke compound wall of the plaintiff's house and constructed wall of their house on the same.

25. Shri. Bomanwar (PW.03) stated in his examination-in-chief that on 23/04/2019 he measured land in block No.591 situated at Aheri and prepared 'C' sheet (Exh.79). There is 14 meter old wall on the northern east-west side of the said land. After said 14 meter wall, there is 07 meter wall of new construction. The said 07 meter new constructed wall is on the boundary of block No.591. As per the case of the defendants they have not encroached on the suit property.

26. The learned advocate of the plaintiff strenuously argued that the land in old survey No.249 is Abadi and Gavthan land which is on the northern side of the suit property. In 2015, defendants started construction on the northern side. Their construction is 07 feet in width

and 25 feet in length. They have not obtained permission for the said construction. 7/12 extracts show compound wall. Measurement map (Exh.79) shows wall constructed by the adjacent person in the suit property. The testimony of surveyor Shri. Bomanwar (PW.03) depicts 07 meter wall of new construction in block No.591. The said version is in consonance with the plaintiff's case. The defendant No.01 gave material admissions during the cross-examination. The plaintiff is law abiding citizen which is seen from the documents (Exhs.50 and 51). On the contrary, defendants conduct is totally opposite. The surveyor misconceived the encroachment as only 0.23 millimeters. However, if line of measurement is matched then it comes to 14 meters.

27. Conversely, it is argued by the learned advocate of the defendants that northern side boundary of the suit property shows that his clients have constructed house on the Abadi land of old survey No. 249. The said fact apparently transpires that construction of the defendants is not on the suit property. The plaintiff has not filed record regarding old survey No.249. Measurement map (Exh.79) nowhere shows old survey No.249. The evidence of Shri. Bomanwar (PW.03) did not show any encroachment by the defendants. In his voluntary submission, he stated that as the encroachment is of 0.23 milimeters there is no need to give report in that regard as per his office rules. Whereas, case of the plaintiff that defendants broke their wall and constructed house thereon is not acceptable one. There is gross delay in approaching the Court by the plaintiff. He has not taken any prompt action after alleged encroachment. The plaintiff has not complained against the Police as well as concerned Nagar Panchayat personnel for not taking action against the defendants. The plaintiff has failed to prove encroachment by the defendants on the suit property.

28. In cases of encroachment to boundaries the material witness is the Cadesteral Surveyor and his measurement report. If such report of Commissioner is proved as rendered, keeping in view the requirement of rules relating to measurement and if it withstands the test of cross examination, this alone can be the foundation to proof of facts and of extent of encroachment.

29. The Hon'ble parent High Court (Nagpur Bench) in the case of *Vijay Shrawan Shende Versus State of Maharashtra, 2009 (5) Mh.L.J 279* observed as under.

“The fact of encroachment is a matter of three aspects together, namely which can be 1) seen, 2) Perceived by sense by taking aid of measurement devices, and 3) an information based thereon.”

30. As mentioned in paragraph number 25 examination-in-chief of the surveyor does not point out encroachment by the defendants on the suit property. Most importantly, measurement map (Exh.79) reiterates same fact. Contrary, said map reveals that the portion in green colour i.e. 40 square meters and the portion in blue colour i.e. 12 square meters of block Nos.592 and 593 respectively, is possessed by the plaintiff. Measurement map (Exh.79) further shows that the portion in pink colour i.e. 25 square meters and the portion in yellow color i.e. 05 square meters of block No.591 respectively, is possessed by the owners of block Nos.590 and 571. Thus, the plaintiff as well as persons having properties adjacent to block No.591 appears to have been in possession of each others properties.

31. Shri. Bomanwar (PW.03) voluntarily stated during the cross-examination that defendants encroached on the boundary of block

No.591 and as the said encroachment is of 0.23 millimeter area there is no need to give report as per office rules. However, he could not tell said rule. Again, he voluntarily stated that line put up for the measurement is of 0.5 millimeter and wall of the compound was of 0.23 millimeter. Therefore, encroachment is unable to point out through report. Importantly, he admitted that measurement map (Exh.79) did not show that he measured width of wall. He specifically admitted that he did not measure compound wall of the plaintiff's house at the time of measurement. He also admitted that measurement of concerned space can be done after confirming three or four permanent marks.

32. It is the settled legal position that for getting the actual encroach portion both the survey numbers need to be measured by the Cadesteral Surveyor. However, it is seen that the plaintiff has not taken efforts of measuring land in old survey No.249 alongwith the land in old survey No.250. Moreover, though measurement map (Exh.79) shows that the surveyor conducted measurement as per the city survey map, permanent marks and occupancy shown by the plaintiff and adjacent persons, however evidence of surveyor nowhere points out that he conducted measurement on the basis of necessary public documents and permanent marks.

33. Perusal of the evidence of surveyor reveals that the measurement is full of flaws. It is seen that he does not conducted the measurement as per the rules. Again, his testimony seen to have been shaken during the cross-examination.

34. Besides the above mentioned flaws, the plaintiff admitted that there is compound wall between his and defendants land, there is Nagar Panchayat road on the eastern side of their lands, there are

drainage on both sides of said road. Importantly, he admitted that defendants had constructed plinth by leaving 04 feet space from his compound wall and on the said plinth defendants made construction of their house. The plaintiff voluntarily stated that defendants broke compound wall of his house and made construction up to 09 inch inside. However, he could not state as to whether said fact has been stated by him to his advocate while preparing the plaint. The plaintiff's own submission of construction of 09 inch inside his property by the defendants goes against his case. He also admitted that Nagar Panchayat had not taken any action on his complaint. Importantly, he also stated that since 2015 till today he did not get measure his land through the Government. Again, he volunteered that he did not feel it necessary. Perusal of record shows appointment of Cadesteral Surveyor for the purpose of measurement of the suit property after completion of the evidence of plaintiff and Gajanan (PW.02). In the said situation, above admissions given by the plaintiff raises doubt on the fact as well as extent of encroachment on the suit property by the defendants.

35. Furthermore, Gajanan (PW.02) admitted that contents in his examination-in-chief has been written as per the say of the plaintiff. He did not know how many houses plaintiff has in Aheri, his examination-in-chief is regarding which house of the plaintiff. He could not state four boundaries of the house where he resided. He admitted that he did not know where the plaintiff goes and what he does. He did not know regarding which land dispute is going on. He also admitted that he made signature on the affidavit as per the say of the plaintiff. These admissions depict that evidence of this witness is completely shaken in the cross-examination and thus not a reliable one.

36. The cross-examination of the defendant No.01 transpires that he did not know who owns old survey No.249, he did not know survey number of his disputed construction, how much space he has left while making construction, how much space had to be left while making construction, whose land is adjacent to the disputed house, their survey numbers, measurement useful symbols and houses around the disputed house. He also stated his inability to file documents regarding ownership of the suit property. There is east-west wall adjacent to the suit property.

37. Undisputedly, cross-examination of the defendant No.01 shows that he is unaware about many material things. Further, record shows that they have not filed any documentary evidence. Nonetheless, said discrepancies were not much helpful to the plaintiff as he has to stand on his own legs. In the above situation, principle laid down in section 102 of the Indian Evidence Act, 1872, becomes applicable and the plaintiff would fail if no cogent evidence were given by the either side. Again, Issues framed specifically put burden on the shoulder of the plaintiff to make out his case. In the said premise, unawareness of the defendant No.01 about material things and non-filing of any documentary evidence from their side do not lend confirmation to the case put up by the plaintiff. In the backdrop of above discussion, I come to the conclusion that the plaintiff has failed to prove alleged encroachment of the defendants on the suit property. Thus, I answer issue No.02 in the negative.

AS TO ISSUE NO.03 :-

38. In view of my findings recorded below issue Nos.01 and 02, the plaintiff is not entitled for the relief of declaration, recovery of possession and perpetual injunction against the defendants as claimed

by him. Accordingly, I answer issue No.03 in the negative. Lastly, in answer to issue No.04, I pass the following order.

ORDER

- 1) The suit is dismissed with costs.
- 2) Decree be drawn up accordingly.

Dated : 17/01/2022
Place : Aheri.

(S. S. Mahale)
Civil Judge (Junior Division),
Aheri, District - Gadchiroli.

CERTIFICATE

I affirm that the contents of this PDF file order are same word to word as per the original Judgment or Order.

Name of the stenographer	:- J.A. Gadekar, Grade -III.
Name of the Court	:- C.J.J.D. & J.M.F.C. Aheri,
Judgment / Order dictated on	:- 15/01/2022 and 17/01/2022
Judgment / Order delivered on	:- 17/01/2022.
Judgment / Order signed on	:- 18/01/2022.
Judgment / Order uploaded on	:- 18/01/2022.