

MHKO050043612019



Sarda Export Corporation

Vs Ramesh & others

Order below Exh. 5

(Passed on 10/10/2019)

1) Plaintiff has invoked the jurisdiction of this Court vide Order XXXIX, Rule 1 of the Code of Civil Procedure (for short 'CPC') for restraining defendants and everybody on their behalf from causing obstruction to 0 H. 29.33 R portion of C.T.S.No.858 situated at village Shahapur, Tal. Hatkanangale, Dist. Kolhapur (hereinafter referred to as 'the suit property').

2) According to the plaintiff, he purchased suit property from its erstwhile owner on 4/4/2005. Since then suit property is in his possession. Defendant no.1 and 2 purchased north side 0 H. 11.35 R portion of suit property and defendant no.4 and 5 purchased 0 H. 12.50 R south side portion of suit property. Now defendant no.1 to 4 are erecting fencing toward south and north side of the suit property and encroached in the suit property. The plaintiff tried to persuade the defendant, but they continued the construction in the suit property and caused obstruction to the possession of the plaintiff. They are not in a mood to listen. Therefore, the

plaintiff prayed to restrain defendant no.1 to 4 from making further construction.

3) Defendant No. 1 and 2 filed written statement at Exh.19. According to them, the entire area of Block No.858 is 2 H. 27 R. and suit property is not identifiable in it. Further contention of defendant is that he erected fencing in his 11.35 R portion in Block No.858 and constructed the latrine and bathroom and he does not making any construction in the suit property. He prayed to dismiss the suit.

4) Defendant no.4 and 5 filed written statement at Exh.21. According to them, suit property has not been described properly. They purchased south side 0 H. 12.5 R portion of suit property from erstwhile owner of Block No.858 and since then it is in their possession. They have not made any encroachment in the suit property. They prayed to dismiss the suit.

5) From the foregoing pleadings and after hearing the submissions advanced by the parties, following points arise for determination. My findings are mentioned against each point for the reasons given further.

Points	Findings
1) Whether the plaintiff has made out <i>prima-facie</i> case for grant of temporary injunction ?	.... Yes

- 2) Whether the plaintiff would suffer irreparable loss if temporary injunction as prayed is refused ? .... Yes
- 3) Whether the balance of convenience lies in favour of the plaintiff ? .... Yes
- 4) What order ? .... Both parties shall maintain status-quo till filing report of cadastral surveyor.

### REASONS

#### AS TO POINT NO.1 :-

6) 7/12 extracts and sale deeds on record discloses that plaintiff and defendant no.1 to 4 purchased respective portions from Block No.858. In other words, portion of plaintiff, defendant no.1 and 2 and defendant no.3 and 4 are adjacent to each other. In other way, it can be said that the portion of defendant no.1 and 2 is toward north side of suit property and portion of defendant no.3 and 4 is toward south side of suit property. In simple language, situation clearly discloses that portion of plaintiff is correctly in between portion of defendant no.1 and 2 and defendant no.3 and 4. It is also admitted fact that both parties are erecting the fencing on the respective portions and it is claim of the plaintiff that defendants are making encroachment in the suit property. However, defendant denied this fact and submitted that they

are making construction in their portion and not in the suit property.

7) The sequence of event discloses that all three portions of plaintiff and defendant are in one line. Both parties have a dispute on the alleged encroachment in the suit property. It is record that plaintiff purchased suit property in the year 2005. Defendant no.1 and 2 purchased their portion in the year 2018 and defendant no.3 and 4 purchased their portion in the year 2017. It is admitted fact that the entire area of C.T.S.No.858 is very large and even it is not the contention of the all parties that they first got measured their respective portion, got it fenced and thereafter, they purchased the same. Even it is not the contention of all the parties that they purchased their respective portion and immediately they erected the fencing after measurement. In other words, defendants started work of fencing and further construction before measurement and before permission from the competent authority. So, it is crystal clear that defendants started fencing without the measurement of their respective portions. Therefore, at this juncture, the contention of the defendants that they are erected fencing or making construction in their portion cannot be accepted. On the contrary, plaintiff stated on affidavit that defendants are making encroachment in his portion and when it is the situation that all three portions are abutting to each other and

all three portions have not been measured, then, possibility cannot be ruled out that portions of plaintiff and defendant no.1 to 4 are not identifiable. But work of fencing and further construction is continued without measurement and therefore, plaintiff has a serious and arguable case. Before conclusion, it is necessary to discuss the decisions cited by defendants.

8) Defendants relied on the decision of Hon'ble Bombay High Court in Manohar Mahadevrao Pagrut Vs Sunanda Ramdas Tharkar, 2008 (3) Bom.C.R. 4, in which fact is that both parties were disagreed on the report of court commissioner and therefore, fresh measurement had been directed. In Laxman Wamano Nagapure Vs Shankar Haribhau Adhau, Laws (Bombay) 2014 (4) 65, in it, it is held that it is desirable in case of disputed boundary marks to carry out the measurement and to determine the boundaries. In present case, both parties have a dispute on the boundary marks and suit is in initial stage. So, ratio in the judgment cited supra is not rightly applicable to the case in present suit. Here, it would be apposite to mention observation of Hon'ble Apex Court in Donadulu Umadevi Vs Girika Katamaiah CRP No.6370 of 2012, in which it is held that when there is dispute or issue with regards to identity of a property in a litigation it is necessary to appoint a commissioner for localizing the property which may be even by taking necessary assistance

from a qualified surveyor and which will not amount to collecting evidence.

9) Considering the pleading of parties, respective allegation and factual and legal aspect I am of the considered opinion that plaintiff established prima facie case. Hence, I answer this point in favour of plaintiff as affirmative.

**AS TO POINT NO. 2 :**

10) To see the balance of convenience it is necessary to compare the case of parties. Comparative mischief or inconvenience which is likely to sue from withholding the injunction will be grater than which is likely to arrive from granting it. It is a matter of record that plaintiff established prima facie case in his favour. The plaintiff also produced copy of order of Tentative Approval for Demarcation of land layout. In other words, plaintiff is in a mood to develop the suit property. Other side is that it is not the contention of the defendants that either they are residing in their respective portion or they became shelterless if the process of work of fencing or further construction has been stayed, they may become shelterless. So, it is crystal clear that refusing of injunction would result in inconvenience of the plaintiff and it may suffer in irreparable loss of the plaintiff. On the contrary, allowing the relief of injunction no way result in inconvenience of the defendant. Therefore, balance of convenience is tilt in favour of plaintiff and he may suffer irreparable loss in case if

relief of injunction is refused. Therefore, I have answered point No.2 and 3 as affirmative.

11) Before parting, it is necessary to mention that defendants denied the contention of plaintiff and they further contended that they are not making any construction in the suit property, but they are erecting fencing to their portion and defendant no.1 and 2 contended that his construction of latrine and bathroom is also over. In such situation, granting relief of temporary injunction till the decision of the suit would be not just and proper. So, it will be just and proper to direct the cadastral surveyor of Taluka Inspector Land Record, Hatkanangale to measure suit property and respective portions of plaintiff and defendant and till filing his report both parties shall maintain the status-quo. In the result I proceed to pass following order -

#### ORDER

1) Taluka Inspector Land Record, Hatkanangale is hereby directed to measure following portions.

A] Suit property i.e. 0 H. 29.33 R (31878 sq.ft.) portion in C.T.S.No.858 bounded as towards East – 60 ft.Road, West – boundary of village Korochi, South – portion of Block No.857 and North – portion of Block No.858.

B] Portion of defendant no.1 and 2 i.e. 0 H. 11.35 R portion in C.T.S.No.858 bounded as towards East – 60 ft.Road, West – boundary of village Korochi, South – portion of Mr.Koik and North – portion of Block No.858 (suit property).

C] Portion of defendant no.3 and 4 i.e. 0 H. 12.5 R portion in C.T.S.No.858 bounded as towards East – 60 ft.Road, West – boundary of village Korochi, South – portion of Block No.858 and North – portion of Mr.Kapase.

2) T.I.L.R.shall report the exact location of all three portions in Block No.858, whether all these portions are abutting to each other ? Whether plaintiff and defendants erected the fencing to their respective portion or they made encroachment in each others portion ? If there is any encroachment then who made encroachment in whose portion, its four boundaries, its measurement ?

3) Plaintiff shall provide copy of plaint, certified copy of this order, all sale deeds and other documents to T.I.L.R.,Hatkanangale on or before 17/10/2019.

4) Plaintiff shall deposit necessary charges in the office of T.I.L.R., Hatkanangale on or before 17/10/2019.

5) T.I.L.R.Hatkanangale shall submit the report of measurement on or before 18/11/2019.

6) Both parties shall maintain status-quo till filing of report of T.I.L.R., Hatkanangale.

7) Concern clerk shall issue writ immediately.

Date: 10/10/2019  
Ichalkaranji

(P.S. Bhandari)  
3<sup>rd</sup> Jt. Civil Judge Junior Division,  
Ichalkaranji