

MHND060007942013



Received on : 27-11-2013
Registered on : 28-11-2013
Decided on : 27-06-2019
Duration on : Y M D
05 06 30

IN THE COURT OF CIVIL JUDGE SENIOR DIVISION AT BILOLI
(Before Shri. D.R. Deshpande, C.J.S.D., Biloli)

Regular Civil Suit No. 118/2013**(Ex. No. 120)**

Iranna Piraji Hingmire,
Age : 55 yrs, Occup : Agricultural,
R/o Hungunda, Tq. Biloli,
Dist. Nanded.

... Plaintiff***Vs.***

1. Hanmabai Nagorao Hingmire,
Age: 57 yrs, Occup : Household &
Agri,
R/o Hungunda, Tq. Biloli,
Dist. Nanded.
2. Sarika w/o Bhagwan Bukkawar,
Age: 22 yrs, Occup : Household,
R/o Hungunda, Tq. Biloli,
Dist. Nanded.
3. Laxuman Sailu Pyatekar,
Age: 60 yrs, Occup : Agricultural,
R/o Hungunda, Tq. Biloli,
Dist. Nanded.

...Defendants

Claim : Suit for perceptual injunction restraining defendants.....

<i>Shri M.G. Aralika</i>	:	<i>Adv. for plaintiff</i>
<i>Shri. A.M. Bilolika</i>	:	<i>Adv. for the defendant nos. 1 & 2</i>
<i>Ex-parte</i>	:	<i>for the defendant No. 4</i>

J U D G M E N T

(Delivered on this 27th June 2019)

This is suit for declaration of ownership of plaintiff as regards suit property Gut No. 423 to the extent of 6 H 33 R and recovery of possession of encroached portion of suit property in possession of defendants No. 1 and 2.

2- **Admitted facts** : Plaintiff is the owner of property adm. 6 H 33 R in Gut No. 423 as displayed in 7/12 extract. Defendant No. 2 is the grand-daughter of defendant No. 1, who was given land adm. 80 R out of total land adm. **30 H 79 R** in Gut No. 423 owned by defendant No. 1. Defendant No. 3 is the purchaser of another 1 H 61 R land out of Gut No. 423 from north side of plaintiff. A road from Kundalwadi to village Sangam passes through Gut No. 423 and it bisects the lands of plaintiffs and defendant No. 2 from East-West direction.

3- **Plaintiff's case** : The road trifurcated plaintiff's land into a big portion towards north, a small portion of about 1 and 1/2 acres towards south side of the road and one more small portion towards East-West as shown in the face map annexed with the plaint, wherein plaintiff's land has been shown in red colour lining; portion of defendant No. 1 has been shown in blue colour lining and land of defendant No. 2 has been shown in black colour lining. Taking mis-advantage of this peculiar trifurcation, defendants No. 1 and 2 were obstructing plaintiff's portion and damaging the crops of plaintiff so that plaintiff, in the beginning prayed for perpetual injunction. Later on defendant encroached on plaintiff's land. Hence, the suit for removal of encroachment and recovery of possession.

4- **Case of defendant No. 1 and 2** : The face map showing situation of land of plaintiff is wrong. Plaintiff has no portion of land on southern side of Gut No. 423. Plaintiff is in possession of suit land beyond the road of southern side only. Lands of defendants No. 1 and 2 are on southern side of the road and plaintiff has no concern with the piece of land beyond the road on southern side. Defendant, for

herself and on behalf of her daughter Sunita (Mother of defendant No. 2), had filed suit RCS No. 369/1981 for partition against plaintiff and his late father Piraji, which was decreed in favour of defendant No. 1. The wife of plaintiff, namely, Ahilyabai for herself and on behalf of minor children Jagdish, Madhav and Sangeeta had filed suit for partition against plaintiffs and defendant No. 1 to get the decree passed in RCS No. 369/1981 set-aside. The relief against defendant was negatived and plaintiff was declared to be entitled to claim 5/12th share i.e. that of present plaintiff. The suit being collusive, Ahilyabai did not execute decree. In RCS No. 369/1981, court had also awarded *mesne profits* in favour of defendant No. 1 and had also filed execution petition RD No. 13/1993 for recovery of *mesne profits*. Meanwhile, plaintiff along with his wife had filed Regular Civil Suit No. 59/2005 regarding plots bearing No. 258 and 258/2, in which, compromise took place on 8/04/2008 whereby plaintiff agreed that he would not disturb possession of defendant No. 1 and that both the parties would maintain and honour their respective possession by keeping boundaries intact. Defendant No. 1 relinquished her claim to plot No. 258 and 258/2; whereas plaintiff paid to her an amount of Rs.

25,000/-. The entire suit is false and is filed to harass defendants.

Hence, the prayer for dismissal of suit with costs.

5 Suit has been heard *ex-parte* as against defendant No.3.

6 **Issues** :- In view of rival pleadings and the record, issues were framed by my learned Predecessor at Exh. 30, which came to be altered from time to time. Following are the issues along with my findings thereon for the reasons ensuing :

	ISSUES	FINDINGS
1.	Does plaintiff prove his ownership on the suit land as described ?	Yes.
2.	Does plaintiff prove that defendant No. 1, with the help of her associates etc., encroached on the portion of suit land admeasuring 1 Acre 20 R to 2 Acres on 08/09/2014 ?	Yes.
3.	Is plaintiff entitled to relief sought ?	Yes.
4.	Do defendants No. 1 and 2 prove that the suit is vexatious ? If yes, are they entitled to compensatory costs ?	No. No.
5.	What order and decree ?	Suit is decreed with costs in terms of final order.

REASONS

7 **Evidence in nutshell** : In leading evidence on his behalf, plaintiff has examined himself at Exh. 59, the villagers, Shri Nagnathrao Gangadharrao Bhale (PW-3) at Exh. 81, Shri Govind Mariba Dharmapure (PW-4) at Exh. 83 and the Cadastral Surveyor from the office of TILR, Biloli Shri Mirza Shabbirali Mirza Mazharali (PW-2) at Exh. 71, who acted as a court commissioner for the measurement of land. Plaintiff has also relied upon the following documents:

- A) 7/12 extract Exh. 61 regarding Gut No. 423,
- B) The Plain Table Measurement Map Exh. 72 sought to be proved by Mirza Shabbirali (PW-2).
- C) The measurement map prepared on 05/03/2016 Exh. 73 sought to be proved by Mirza Shabbirali (PW-2).
- D) Panchnama statements and panchnama Exh. 75 sought to be proved by Mirza Shabbirali (PW-2.)

8) Defendants No. 1 and 2, on the other hand, have examined

defendant No. 1 herself at Exh. 87 and Villager Digambar Irwant Bhale (DW-2) at Exh. 91.

9 Plaintiff himself and his villager witnesses have testified that plaintiff owns land in Gut No. 423 in 3 parts trifurcated by the Kundalwadi-Sangam road and that defendants No. 1 and 2, who were obstructing plaintiff's possession since last Diwali prior to filing of the suit have encroached upon plaintiff's portion of land. The villager witnesses have stated that they have their lands in the same village near the suit property although not adjacent to it and that they usually go through the road trifurcating plaintiff's land. Similarly, defendant No. 1 and her villager witnesses have testified that plaintiff has no land on the south of the road and defendants are in possession of their own land and in no way, have encroached plaintiff's portion.

10 Mirza Shabbirali (PW-2), the court commissioner appointed by this court for conducting measurement, has testified that he has been working as surveyor in the office of T.I.L.R. since 1998 and became Nimitdar in the year 2012. According to him, he issued

notices by R.P.A.D. to the concerned possessors and went in Gut No. 423 for measurement on 22/07/2015. He has narrated that enquiry with plaintiff, defendant, land neighbors and independent holder of Gut No. 423 regarding actual possessions was made and measurement was carried out by "***Plain Table Method***", in the conclusion of which, the maps were drawn, the copy of which was sent to the court as the replica of the original under his own signature, which is at Exh. 72. The entire area of Gut No. 423, according to his evidence is 11 H 73 R with 6 H 33 R owned by plaintiff, 3 H 79 R owned by defendants No. 1 and 2 and 1 H 61 R owned by defendant No. 3, however, while drawing the map Exh. 72, the extent of encroachment upon plaintiffs' land on the part of defendants No. 1 and 2 was not shown separately, and therefore, as per the directions of the court, on the basis of the same measurement map, map Exh. 73 was drawn which is under his signature with correct contents as per the original. As per his evidence, encroachment to the extent of 1 H 75 R land upon plaintiffs' land at the instance of defendants No. 1 and 2 was found out from the map. He has particularly stated that he had also measured the area Kundalwadi-Sangam road intersecting lands of plaintiff and

defendants and testified that the entire survey and measurement of the land of plaintiff, defendant and the land acquired for road was carried out by him. According to him, panchnama was drawn under the signature of plaintiff, defendant and himself with correct contents at Exh. 74 and 75.

11 This is evidence in nutshell adduced by the parties so far.

12 **Issues No. 1 and 2 :** There is no dispute regarding the holding of plaintiff, defendants No. 1 and 2 and defendant No. 3 in Gut No. 423 as pleaded by plaintiff and shown in 7/12 extract. Defendants No. 1 and 2 are disputing the ownership of plaintiffs in particular three parts shown by him in face map annexed with the plaint and that defendants No. 1 and 2 have encroached upon the portion of land of the plaintiff. As to the fact of encroachment or no encroachment, both the parties have adduced their own testimonies and oral evidence of the villagers in support of their own cases. However, evidence of plaintiffs that part of the defendants No. 1 and 2 and their land have been trifurcated is fortified by the evidence of the

expert i.e. cadastral surveyor, namely, Mirza Shabbirali (PW-2), who has conducted the survey and measurement and prepared the map of the situation with panchnama, which are, respectively, at Exh. 72, 73, 74 and 75. As per the map, the actual area possessed by defendants No. 1 and 2 over-reaches their aggregate holding of 3 H 79 R in Gut No. 423 and that of plaintiffs under-reaches their aggregate holding of 6 H 33 R.

13 Mr. A.M. Bilolikar, the learned Advocate for defendants No. 1 and 2, has submitted that the cadastral surveyor has not conducted the measurement as per the standard norms set out by the Survey Manual and he has not brought on record as to whether defendants No. 1 and 2 had notice of the measurement. According to him, the surveyor ought to have brought on record the course of procedure adopted by him in conducting the measurement and that it was according to the standards of the Survey Manual. He has also relied upon the judgment of Hon'ble Bombay High Court in the case of Vijay Shrawan Shende vs. State of Maharashtra and others reported in 2009 (5) MHLJ 279, wherein His Lordship, in paragraph

No. 38 of the judgment observed :

“The Substantial Questions of Law are answered as follows :

Answers to Substantial Questions of Law Nos. (1) and (2) :-

- (i) Fact of encroachment may be proved partly by oral evidence;*
- (ii) The extent of encroachment cannot be proved in absence of public records and procedure emerging from section 36 and section 60 of Evidence Act;*
- (iii) It would be impermissible to record a finding as to the fact and extent of encroachment, if any, without ascertaining the fact and extent of encroachment by measurement, based on public record and undisputed and/or settled boundaries of respective lands and measurement of surrounding lands, as may be required.*

Answer to Substantial Question of Law No. (3) :-

(v) It would not be proper to dismiss the suit simply because the Court Commissioner has not adopted a correct procedure of measurement and the exercise of re-measurement, according a rules, will have to be got done through Court Commissioner again and again, if necessary, because failures of Cadastral Surveyors are not attributable to parties to the suit.”

14 Mr. Bilolikar has relied upon this judgment in order to convince the court to direct another commission for measurement on the ground that proper procedure was not adopted by the court commissioner.

15 The reliance upon the judgment is misconceived for the reason that it can not be held in the case in hand that the procedure adopted by the cadastral surveyor was irregular or inappropriate. It is true that for the want of notice to the adjoining owners measurement and the survey cannot be said to be proper, however, what ***“notice”*** means can not necessarily be equated with the meaning of ***“service of notice”*** strictly as per Order V or XVI of the Code of Civil Procedure, 1908. ***“Notice”*** as per the settled principles of law, means ***“notifying to the other party and giving him knowledge of what is being done or what he is supposed to face or combat”***.

16 The surveyor was not conducting the measurement as per the unilateral demand of the plaintiff by way of a private application; but his appointment was made by the court, of course, within the knowledge of defendants. Defendants No. 1 and 2 were fully aware of the fact that the surveyor would be coming for survey and measurement of Gut No. 423. Surveyor has testified that he had issued notices by RPAD, which is general procedure of the office. His

panchnama also reveals that defendants No. 1 and 2 were also present on the spot and their presence and themselves having witnessed the carrying out of measurement outweighs and rules out the necessity of service of notice by Post or other mode of service prescribed by the relevant procedural law. In such situation, it cannot be said that survey and measurement was conducted behind the back of defendants No. 1 and 2. Rather, the panchnama reveals that the actual boundaries as per physical possession have been set out on enquiry with defendant, plaintiffs and an independent holder. No fault can be found in the survey and measurement conducted by Mirza Shabbirali (PW-2) merely because he has not produced on record the dispatch receipts of the RPAD notices and record pertaining to service of notice.

17 Mr. Bilolikar has also argued that nothing has been stated by the surveyor as to how he had utilized public records in conducting the measurement and fixing boundaries and he ought to have stated these facets of what he has done in his evidence, more particularly, when the Hon'ble High Court, in the aforesaid case has held that without ascertaining the fact of encroachment by measurement based

on public record and undisputed/settled boundaries of respective lands, the fact of extent of encroachment can be found out.

18 It is true that observance of these modalities of the procedure has not been deposed by the surveyor during recording of his oral evidence. However, he, in the exercise of his duty as a cadastral surveyor, has formulated *memorandum* of what he has done for being diagrammed in the form of map and panchanama (Exh. 73 and 75), which, according to him, have been prepared by him under his signature after conducting due measurement. Perusal of map Exh. 73 reveals the minute particulars as to how the boundaries of the Gut numbers were found and marked, as to how boundaries of actual possessions were set out and marked and as to how the public records were utilized for that sake. In view of these notings made by the surveyor in the punchnama Exh. 75 and map Exh. 73 in due course of business, merely because he has not deposed these facts which have already noted down in *memorandum*, he cannot be said to have not followed the procedure. For these reasons, submission of Mr. Bilolikar that re-measurement needs to be ordered must stand

repelled. The case of Vijay (*supra*) stands distinguished accordingly.

19 Furthermore, the fact that defendants No. 1 and 2 have already made a prayer by filing an application for joint measurement after the aforesaid measurement at a belated stage, which resulted into rejection by my learned predecessor confirmed by the Hon'ble High Court cannot even allow the aforesaid submission of Mr. Bilolikar to be placed as the same amounts to re-agitation despite the grievance having been settled by the order of confirmation passed by the Hon'ble High Court.

20 Thus, the evidence of plaintiff that defendants No. 1 and 2 have encroached upon their land having been fortified by the expert's evidence consistent with map Exh.73 is sufficient to incline the court to believe in existence fact that defendants No. 1 and 2 have encroached upon the specified of portion of land of plaintiff as shown in the map Exh.73.

21 At the cost of repetition, it has to be recollected that the

ownership of plaintiff as to land Gut No. 423 admeasuring 5 H 33 R has never been disputed; but what has been in dispute is the situation of the land and its boundaries. By virtue the aforesaid reliable evidence, plaintiff must be held to have proved his ownership as described by the map Exh. 73, which is consistent with the view-map annexed with the plaint.

22 Accordingly, findings to issues No. 1 and 2 are recorded in the affirmative.

23 **Issue No. 3 :** In view of findings to issues No. 1 and 2, plaintiff has to be held to be entitled to relief of recovery of possession the portion of land G. No. 423 encroached upon by the defendants No. 1 and 2 to the extent shown in map Exh. 73. Accordingly, finding to issue No. 3 is recorded in the affirmative.

24 **Issue No. 4 :** In view of issues No. 1 to 3, defendants No. 1 and 2 cannot be said to have proved that the suit is vexatious and hence the next part of this issue does not survive. Accordingly,

finding to issue No. 4 is recorded in the negative.

25 **Issue No. 5 :** In view of finding to issues No. 1 to 3, and issue No. 3 in particular, suit for declaration of ownership of the suit property and for recovery of possession of the portions shown in map Exh. 73 as encroachments made by defendant No. 1 and 2, respectively, is required to be decreed. In the circumstances in which defendants No. 1 and 2 have encroached upon plaintiff's land and insisted upon their defence even after the measurement through court commissioner, there can not be any exception to the general rule of costs, *“Costs shall follow the event”*.

In the conclusion, I pass the following order:

ORDER

01. Plaintiff is declared to be owner of the suit properties shown in map Exh. 73.
02. Each of defendants No. 1 and 2 shall deliver possession of the portion of the land of plaintiff encroached by each of them, respectively, as demarcated in the Measurement Map Exh. 73.

03. **Measurement Map Exh. 73 shall form part and parcel of the decree.**
04. **Cost shall follow the event.**
(Judgment dictated and pronounced in the open Court.)

Date : 27-06-2019

(D.R. Deshpande)
Civil Judge S.D., Biloli

Dictated on : 27-06-2019
Transcribed on : 27-06-2019
checked on : 27-06-2019
Signed on : 27-06-2019

Date : 27-06-2019

(D.R. Deshpande)
Civil Judge S. D., Biloli

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 Stenographer : M.F.M. Sayyad

Court Name: Civil Judge Senior Division, Biloli.

Date: 27-06-2019.

Judgment signed by the Presiding Officer on 27-06-2019.

Judgment uploaded on : 23-07-2019.