

(1) R.C.S.No. 63/2004, Judgment.

Instituted on : 23-06-2004
Registered on : 23-06-2004
Decided on : 11-12-2014
Duration Ys. Ms. Ds.
10 05 16

IN THE COURT OF JOINT CIVIL JUDGE JUNIOR DIVISION,

KANDHAR, DISTRICT NANDED

(Presided over by D. V. Kute)

Reg.Civil Suit No.63/2004

Exh. No.

Gajanan s/o Balaji Jalke

age 24 yrs., Occu:Agri

R/o. Digras (Bu) Tal.Kandhar Dist.Nanded

Plaintiffs

V e r s u s

1] Chandar s/o. Kishanrao Jadhav

Age 50 yrs., Occu: Agri.

R/o. Digras (Bu) Tal.Kandhar

2] Madhav s/o. Vaijnath Kandhare

Age 20 yrs., Occu:Agri

3) Arunabai w/o. Baburao Gangatri (Shinde) --(compromised)

Age 30 yrs., Occu:Agri

All R/o. Digras (Bu) Taluka -Kandhar,

District-Nanded.

Defendants

Suit for recovery of possession

Appearance

Advocate for plaintiff : Mr. V. V. Alabade

Advocate for defendant Nos.1&2 : Mr. B.K. Panchal

JUDGMENT

(Delivered on 11th December, 2014)

This is suit for recovery of 15 R land in block NO.35 of village Digras from defendants No.1 to 3 on the ground that they have encroached on it. During the pendency of suit plaintiff and defendant No.3 Arunabai Baburao Gangotri entered in compromise vide pursis at Exh.19 dated 16.07.2004 whereby defendant No.3 handed over possession of 6 R land to plaintiff. Separate compromise decree is passed on the basis of that compromise. Thereafter, suit is proceed only against defendant No.1 & 2 alleging that defendant No.1 has dispossessed plaintiff from 6 R land and defendant No.2 has dispossessed plaintiff from 3 R land in block No.35.

Plaintiff's Case:-

2] Plaintiff has purchased 1 H 46 R land in block No.35 of village Digras Tal.Kandhar Dist.Nanded from one Babu Kishan Kulkarni vide registered sale deed dated 08.02.2000. Since the day of sale deed plaintiff is in possession of that land. Defendants have no concern over that land, however, at the time of sowing season of 2003 defendants encroached on that land by broking the Dhura's. On asking by plaintiff, defendants asked him to measure the land, therefore, plaintiff has obtained permission of Tahsildar Kandhar vide section 85(2) of the Maharashtra Land Revenue Code, 1966 on 08.05.2004. Surveyor measured the land on 18.05.2004, he prepared the panchnama and map. It revealed in the measurement that defendant No.1 has encroached to the extent of 6 R land towards western side and defendant No.2 has encroached towards northern side to the extent of 3 R land. So also defendant No.3 had made

encroachment towards eastern side to the extent of 6 R land in block No.35. Thereafter, on 18.05.2004 plaintiff demanded the possession of encroached area from the defendants. They told that they will give the possession after 4 to 5 days, however, later on denied the same. Hence plaintiff has constrained to institute present suit.

Case of defendants:-

3] Defendants No.1 & 2 have filed their written statement at Exh.27 and admitted execution of sale deed in favour of the plaintiff, however, denied dispossession and encroachment. According to them, at the time of execution of sale deed in favour of plaintiff Babu Kulkarni was having only 1 H 33 R land in his possession in block No.35. However, in 7/12 extract entry of 1 H 46 R land was in his name. Therefore, sale deed was executed mentioning that area which was not in his possession. Prior to execution of sale deed in favour of plaintiff, said Babu Kulkarni executed sale deed of 60 R land to defendant No.1 Chandar vide registered sale deed dated 04.02.1998, prior to that since 3 to 4 years defendant was in possession of that land. The land of defendant No. 1 is on high point from land of plaintiff. Defendant No.1 installed wall of stone to his Bandh towards plaintiff's side. Defendant No.2 has purchased 60 R land from Babu Kulkarni vide registered sale deed dated 09.01.1998. There is canal in between the land of plaintiff and land of defendant No.2 Madhav. Land of plaintiff is towards southern side of canal and land of defendant No.2 is towards northern side of canal. Plaintiff has not measured land while purchasing it. In the measurement dated 18.05.2004 he has got measured extra land which was never in his possession. Accordingly, defendants have prayed

for dismissal of suit.

Admitted Facts:

- a) Original vendor of plaintiff and defendants was Babu Kulkarni.
- b) Land of plaintiffs and defendants are adjacent to each other, boundaries of land in sale deed of plaintiff are admitted.
- c) Plaintiff has measured his land on 18.05.2004.

4] Learned Predecessor of this Court has framed issues vide Exh.28. Those issues are amended with the consent of the parties. Those issues are reproduced below along with findings thereon with reasons stated below.

ISSUES	FINDINGS
1. Does the plaintiff prove his ownership over 1 H 46 R land in block No.35 of village Digras Tal.Kandhar?	Not Proved
2. Does the plaintiff prove that he dispossessed from 6 R land towards western side by defendant No.1 by encroachment in block No.35 ?	Not Proved.
2A. Does the plaintiff prove that defendant No.2 dispossessed him from 3 R land towards northern side in block No.35 by encroaching on it?	Not proved
4. Whether the plaintiff is entitled for the relief claimed?	No.
5. What order and decree?	Suit is dismissed with cost.

Evidence:-

5] Plaintiff has examined PW-1 Balaji Gangaram Jalke (Exh.39), PW-2 Arun Babarao Dhirde (Exh.40) however, this witness is not remained present for cross examination hence his evidence is not considered. Plaintiff has examined PW-3 Gurunath Gangaram Jalke (Exh.41), PW-4 Gajanan Balaji

Jalke (Exh.52) and PW-5 Panjabrao Nagorao Shinde (Exh.66). He has filed on record sale deed dated 08.03.2000 (Exh.58), notice of measurement (Exh.69), panchnama of measurement (Exh.60), map prepared by surveyor (Exh.62), 7/12 extract of gut No.35 (Exh.8), mutation entry No.286 (Exh.09).

6] Defendants No.1 & 2 have examined defendant No.1 Chandar as DW-1 (Exh.73), DW-2 Madhav Vaijnath Khandare (Exh.75), DW-3 Vaijnath Ramkishan Khandare (Exh.78), DW-4 Baburao Kishanrao Kulkarni (Exh.80) and DW-5 Sanjay Devidas Kulkarni (Exh.84). They have filed on record sale deed dated 04.02.1998 in favour of defendant No.1 vide Exh.74 and sale deed in favour of defendant No.2 Madhav vide Exh.83.

REASONS

As to issues No. 1 :-

7] At the outset it is necessary to state that defendants though not disputed execution of sale deed in favour of plaintiff, but according to them, at the time of execution of sale deed Baburao Kulkarni was having only 1 H 33 R land in block No.35 and sold that land only. However, 7/12 extract was showing the entry of 1 H 46 R land in the name of Babu. Sale deed of that area was executed. Thus, according to the defendants, plaintiff has 1 H 33 R land in block No.35 and possessed it.

8] Learned advocate for plaintiff has relied on the registered sale deed Exh.58, 7/12 extract and mutation entry and submitted that plaintiff has

proved his ownership over the 1H 46 R land in block No.35. He further relied on the oral evidence led by the plaintiff and cross examination of DW-2 Madhav and DW-3 Vajjnath and submitted that they have admitted the ownership of plaintiff over the 1 H 46 R land. He submits that in view of section 92 Indian Evidence Act, 1872, it is not open to the defendants to vary or alter or contradict the terms of registered sale deed. He submits that language used in the sale deed Exh.56 is plain in itself therefore evidence of DW-4 Babu Kulkarni is not admissible to vary the contents of sale deed. On the other hand, learned advocate for the defendants has submitted that the area in the sale deed is mentioned by mistake and therefore this mistake leads to the dispossession of the defendants from their property, therefore, the oral evidence to show that sale deed Exh.56 was only in respect of 1 H 33 R land is admissible.

9] Section 91 of the Indian Evidence Act, 1872 provides that where terms of contract, grant or any disposition of property have been reduced to the form of document or where any matter is required by law to be reduced to the form of document then the document itself or secondary evidence of its contents must be put in evidence. Thereafter, section 92 of the Act provides that when the terms of contract, grant or any other disposition of property have been reduced to the form of document or when any matter required by law to be reduced to the form of document have been proved by the production of document or by giving secondary evidence to its contents, no evidence of any oral agreement or statement shall be admitted as between the

parties to such document or their representative in interest for the purpose of contradicting, varying, adding, subtracting from, its terms. However, this section has 6 exceptions in the nature of provisos. The first proviso is relevant. It provides that any fact which would invalidate any document or entitle any person to any decree or order relating thereto may be proved such as fraud, intimidation, illegality, failure or want of consideration, mistake in fact or law. Firstly defendants No. 1 & 2 are not parties of documents of sale deed in between plaintiff Babu Kulkarni. They are not representatives in interest of said Babu Kulkarni. They have purchased their respective lands prior to execution of sale deed in favour of plaintiff. Secondly in the present case defendants are claiming that due to mistake in 7/12 extract the sale deed of the area to the extent of 1H 46 R has been got executed. Their contention is that the execution of sale deed for the area of 1H 46 R land by Baburao Kulkarni is illegal in as much as Babu Kulkarni was not owned that area. Illustration (d) appended to section 92 of the Indian Evidence Act reads as under:

“A entered into written contract with B to work certain miles, the property of B, upon certain terms. A was induced to do so by misrepresentation of B as to their value. This fact may be proved”.

10. Thereafter, illustration (e) provides that A instituted the suit against B for specific performance of contract and also prays that contract may be reformed as to one of its provision, as that provision was inserted in it by mistake. A may prove that such mistake was made as would by law entitle him for the contract reformed. Thus it is clear that in a cases wherein

illegality, mistake, absence of due execution, fraud, want of capacity is challenged oral evidence of those aspect may be tendered. So also defendants are not parties to the contract. Therefore, they are entitled to lead the oral evidence or other circumstantial evidence to show that contents of Exh.56 are incorrect to the extent of area mentioned therein. Therefore, now evidence on record is to be assessed.

11] It appears from sale deed Exh.58 that on 08.03.2000 one Babu Kulkarni has sold 1 H 46 R land to the plaintiff in consideration of Rs.1,00,000/- (Rupees One Lakh). On the basis of said sale deed, mutation entry has been effected vide Exh.09 and name of plaintiff entered to the 7/12 extract of land (Exh.08). The first aspect is that according to plaintiff he has got measured the land while purchasing it. This aspect is not mentioned in the plaint, however, PW-1 Balaji Jalke who has purchased the land in the name of plaintiff, as then plaintiff was minor, deposed that at the time of execution of sale deed, land was measured by Sanjay Devidas Kulkarni in presence of Gurunath Gangaram Jalke and Bhaurao Shankarrao Nawande. In his cross examination, he deposed that the land was measured by Gurunath Jalke & he is expert. He further admitted that it was last sale deed of Babu Kulkarni, however, PW-3 Gurunath has not stated that he has measured the land. He deposed that Sanjay Kulkarni measured the land. PW-4 Gajanan was minor at that time of execution of sale deed. Hence his evidence is not useful on this aspect. Sanjay Kulkarni is examined by the defendants as DW-5. He deposed that he has not measured the land of plaintiff at the time of purchasing it.

Nothing is transpired from his cross examination so as to show that he has measured the land of plaintiff. DW-4 Babu Kishanrao Kulkarni also denied the measurement at the time of execution of sale deed in favour of plaintiff. According to him, he gave possession of only 1 H 33 R land to the plaintiff. In his cross examination, suggestion was given to him that Gajanan and he measured the land at the time of sale deed. He accepted that suggestion, however, perusal of his whole evidence shows that he has not accepted that he has given possession of 1 H 46 R land to the plaintiffs. Thus, this is stray admission which has to be read along with his whole evidence. In view thereof this admission of DW-4 Babu is not helpful to the plaintiff. Defendant No.1 Chandar and defendant No.2 Madhav have denied the aspect of first measurement by the plaintiff.

12] Thus, after considering the evidence on record it is clear that plaintiff has not proved that he was got measured the land at the time of execution of sale deed from Babu Kulkarni.

13] Another important aspect is that perusal of document at Exh.56 shows that Babu Kulkarni has sold 1 H 46 R land to the plaintiff out of his 2 H 66 R land in block No.35. However, remaining land of Babu Kulkarni is not mentioned to any of the boundaries of the land sold. So also PW-1 Balaji who purchased the land in the name of plaintiff has admitted that the sale deed in favour of plaintiff by Babu Kulkarni was last sale deed of land of Babu. He further admitted that after execution of sale deed in favour of plaintiff Babu

Kulkarni was not having any land in block No.35. He admitted that he has no disputes with Babu Kulkarni. He admitted that there is Bandh between his land and land of defendant No.1 Chandar. He further admitted that there is Canal of 1 ½ feet between his land and land of defendant No.2 Madhav to some part. So also 7/12 extract of block No.35 does not show the name Babu Kulkarni. If this is so then where the remaining land of Babu Kulkarni has gone. This aspect not clarified by the plaintiff. It is the case of defendants that the land of plaintiff is to the lower side of land of defendant No.1 Chandar and there is Bandh which according to the plaintiff has been broken by the defendant, however, DW-1 Gangaram in his cross examination stated that he made complaint to the police, however, copy thereof is not on record. He further admitted the existence of Canal between his land and land of defendant though in some part. PW-3 Gurunath in his cross examination admitted that there is Dhura between the land of plaintiff and defendant No.1 to the extent of 2 feet. So also he stated that there was agreement to sale between plaintiff and Babu Kulkarni whereby only 1 H 26 R land was purchased by plaintiff. DW-2 and DW-3 have admitted the execution of sale deed but not the area mentioned therein. In such circumstances, it can not be held that plaintiff has proved his ownership over 1 H 46 R land in block No. 35.

14] So far as evidence of Babu Kulkarni DW-4 is concerned even if his evidence is held in admissible in respect of variation of sale deed still his evidence is enough to show that the land of plaintiff is in lower side to the

land of defendant No.1 and defendant No.1 had made Bandh of stones. So also his evidence is admissible to show that there is Canal between the land of plaintiff and defendant No.2 Madhav. If these aspects considered together it is to be held that though said Babu Kulkarni has executed the sale deed of 1 H 46 R land in favour of plaintiff, he was not having that much land in his ownership and not handed over its possession to the plaintiff. Accordingly, plaintiffs has failed to prove his ownership over 1 H 46 R land in block No.35. Therefore, issue No.1 is answered as not proved.

As to Issue No.2 & 2-A

15] These issues are arising from the same set of facts and related with the same evidence hence considered together.

16] Learned advocate for plaintiff has relied on the evidence of DW-4 Panjabrao Nagorao Shinde, measurement map at Exh.68, notice of measurement Exh.69 and panchnama at Exh.60. He submitted that defendant No.1 & 2 in their respective cross examinations have admitted the notice of measurement. Therefore, he submits that the encroachment mentioned by DW-4 is proved. On the other hand, learned advocate for defendant submitted that measurement done by the defendant No.4 is not reliable as it was done by measuring the area in the possession of defendants.

17] Learned advocate for plaintiff has relied on the case of Kondabai Laxman Maske Vs Muktabai Vinayakrao Chavan reported in 2009 (3)

Mh.L.J. 196. In that case in a suit for possession defendants were not pleaded the receipt or non-receipt of notice of measurement. The Hon'ble Bombay High Court has held that in the absence of foundation in pleading as to non-receipt of notice findings of the lower court cannot be disturbed. In the present case, defendant No.2 Madhav has admitted the measurement done by the plaintiff. So also DW-3 Vajinath has also admitted that he has received the notice of measurement. So also it appears from the evidence of DW-4 Panjabrao that he has issued the notices of measurement to defendants vide Exh.69. So also defendants in their written statement have not clearly disputed the receipt of notice of measurement. Therefore, in view of ruling (supra) it is to be held that defendants have received the notice of measurement.

18] Here it is not out of place to mention that in view of finding on issue No.1, plaintiff has not proved his ownership over 1 H 46 R land in block No.35. Therefore, question of his dispossession from 9 R land by defendants No.1 & 2 will not arise. However, as the evidence is lead on this point it requires consideration.

19] DW-4 Panjabrao, is the surveyor who measured the land of plaintiff on 18.05.2004 as per the order under section 85 (2) Maharashtra Land Revenue Code,1966. He deposed that he measured the land, prepared the panchnama Exh.60, and measurement map at Exh.69. He deposed that it is revealed in his measurement that defendant No.1 has encroached on 6 R land towards western side and defendant No.3 has encroached to the extent of 3 R land

towards northern side of block No.35. In his cross examination, following facts are came on record:-

- a) Name of no other person in 7/12 extract of block No.35 was given at the time of measurement. He has not ascertained at the time of measurement whether the block No.35 was measured previously at the time of measurement. He taken the tippen prepared by him for measurement.
- b) He can show the encroachment on the map by scale, he described the scale as 1 mm to equal to 1000 mm. However, this scale is not mentioned in the map. He further deposed that he has given the proportionate of encroachment as per the meter tape on 6 meter land.
- c) He used the chain to measure the land, he has not mentioned the availability of tape in the map or panchnama. He further deposed that he can not say whether the tips mentioned in the map are correct or incorrect and he can not say whether the scale mentioned in the map is in meter or in the feet. Thus, his evidence is not helpful to conclude that the defendants have dispossessed the plaintiff by encroaching on his land. Defendants witnesses have not admitted the encroachment and dispossession of plaintiff in their respective cross examination.

20] Learned advocate for plaintiff has relied on the case of Subhaga and others Vs Shobha and others reported in 2006(6) Mh.L.J 545 . In that case, specific boundaries of suit land have been given by the plaintiff and map was prepared by the commissioner showing that the disputed construction is laying in the suit land i.e belonging to the plaintiff. The Hon'ble Supreme Court has held that it was not necessary to survey all the adjacent lands to

find out whether encroachment was made or not?. There can not be two opinions as to the principle laid down in this ruling. However, in the present case the measurement done by DW-4 is to be rejected not because that he has not measured the adjacent land, but on the ground that his evidence is can not be relied upon as he has not given the scale and he could not stated the exact method of measurement done by him. Hence this ruling is not applicable to the facts of present case.

21] It is the case of plaintiff that defendants have broken the Dhura in the sowing season of 2003. On the other hand, it is the case of defendants that plaintiff was not in possession of 1 H 46 R land as contended by him. In the cross examination of PW-1 Balaji has admitted that he has given the police report of the incident of 2003, however, that complaint is not filed on record. So also he could not tell the nature of dispute. In order to proving the incident of dispossession plaintiff has examined DW-3 Gurunath Jalke who is uncle of plaintiff. In his cross examination, he countered the theory of plaintiff stating the existence of agreement to sale between the plaintiff and Babu Kulkarni whereby only 1 H 26 R land was purchased by plaintiff. In his cross examination, he deposed that in the year 2003 defendants broken the Dhura by Aut, however, he could not say when the defendants broken the Dhura. In the last line of cross examination, he admitted that defendants have not encroached on the land and they are in possession of their respective lands. Thus, the incident of 2003 as to encroachment and measurement of encroachment is not proved by the plaintiff. In order to prove the

dispossession by encroachment the plaintiff is required to prove the factum of encroachment and extent of encroachment. In the present case plaintiff has not proved that he was in possession of 1 H 46 R land in block No.35 till 2003. Thus, he has neither proved the factum of encroachment nor the extent of encroachment. Therefore, plaintiff has failed to prove that defendant No.1 & 2 have dispossessed him by encroachment in his land. Accordingly issue No.2 and 2-A are answered as not proved.

As to issue No.3:

22] In view of findings on issues Nos.1, 2 & 2-A plaintiff is not entitled to the relief of recovery of possession from defendant Nos. 1 & 2. Hence issue No.3 is answered in the negative and in answer to issue No.4, following order is passed:

ORDER

- 1] Suit is dismissed with cost against defendant Nos. 1 & 2.
- 2] Decree be drawn up accordingly.
- 3] Dictated and pronounced in open Court.

Date 11-12-2014

(D.V.Kute)
Jt.Civil Judge Jr. Dn. Kandhar
Dist.Nanded

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

:- Telang P. S

Court Name

:- In the Court of Jt. Civil

(16) R.C.S.No. 63/2004, Judgment.

Judge, J.D & Judicial Magistrate F.C,
Kandhar

Date :-11.12.2014.

Judgment signed by the
presiding officer on :- 15.12.2014

Judgment uploaded on :- 16.12.2014.

OPERATIVE ORDER

- 1] Suit is dismissed with cost against defendant No.1 & 2.
- 2] Decree be drawn up accordingly.
- 3] Dictated and pronounced in open Court.

Date 11-12-2014

(D.V.Kute)
Jt.Civil Judge Jr. Dn. Kandhar
Dist.Nanded

(17)

R.C.S.No. 63/2004, Judgment.