

R.C.S. NO. 64/2015
Balkrushna Bhandare V/s
Raosahab Bhandare
MHNS130005682015



Order below Exh. No. 44

The present application is filed by the plaintiff for framing of / recasting additional issues. Application is opposed by the defendant by filing his say.

2. Ld. Advocate for the plaintiff submitted that, the defendant had filed an application bearing no.2/11 in court of S.D.O. Niphad U/Sec.138 of the Maharashtra Land Revenue Code. This being summery proceeding S.D.O. allowed the said application without examining the surveyor and the defendants at that time did not get an opportunity to cross examine the said surveyor. Section 138(4) of the Maharashtra Land Revenue Code gives statutory rights to file civil suit in respect of title, accordingly the plaintiff has filed this suit for declaration that measurement carried out by defendant on 05/10/2010 as per MR No.1017/2010 is illegal and the portion of alleged encroachment is part and parcel of plaintiff land Gat no.210.

3. He further submitted that, as per the pleading the alleged encroached portion on today's date is merged in the plaintiff's land i.e. in Gat no.210 which is own by the plaintiff. Therefore, he submitted that it is for the defendant to prove the alleged encroachment first. Hence, burden is on defendant to prove the alleged map wherein the encroachment is revealed. The Ld. Advocate for plaintiff submitted that, issue no.1 below Exh.No.32 need to be recasted keeping burden on defendant to prove the alleged measurement. He submitted that following issues are required to be framed;

- 1) Do defendants prove that the plaintiff has need encroachment in 65 R land in his Gat no.209 ?
- 2) Is the measurement carried out by defendant is legal and correct ?
- 3) Does plaintiff prove that, alleged area of 65 R is part and parcel of his land Gat no.210 ?
- 4) Do defendant prove that, he became owner of encroached area by adverse possession?

4. Ld. advocate for the defendant submitted that, since the year 2005-06 plaintiff has started encroaching upon the land of the defendant and had acquired certain portion of land of the defendant through such encroachment. Therefore, the defendant had moved an application for measurement of land i.e. MR No.850/2008. Accordingly measurement was done on 08/06/2008. From this measurement it revealed that, plaintiff has acquired / encroached upon the land of the defendant to the extent of 69 R. To recover the possession of said encroached portion of the land from the plaintiff, defendant approach S.D.O. Niphad and moved an application i.e. MR No.17/2009 U/Sec.138 of the Maharashtra Land Revenue Code. The same was heard and decided on 28/04/2010 at that time the land of Gat no.209, 210 and 208 were measured to find out the encroached portion of the land of the defendant.

5. The defendant got measured the above Gat numbers at his own expenses in the year 2010. By this measurement boundaries were fixed from 23/10/2010. In this second measurement also it discovered that plaintiff has encroached upon the land of the defendant to the extent of 65 R. After joint measurement defendant moved an application bearing no.2/2011 to recover the possession of encroached portion of the land U/Sec.138 of the Maharashtra Land Revenue Code. He submitted that, decision on this application was part of the previous application in which encroachment by the plaintiff upon land of the defendant to the extent of 65 R was revealed. The plaintiff then preferred an appeal i.e. R.T.S. Appeal no.89/2010, which he withdrawn on 08/11/2010 and filed this suit.

6. The Ld. Advocate for the defendant submitted that, the alleged encroachment in the plaint is already proved by the defendant in earlier matter heard and decided by the competent revenue courts. It is the contention of the plaintiff that the survey measurement proved by the defendant in the revenue court is wrong. Therefore, plaintiff is the one who is to prove his contention that survey measurement is wrong. Therefore, burden of proving lies on the plaintiff. Hence, he prayed to reject the application.

7. Perused the application and say. Heard both the sides and considered their submissions. I have carefully gone through the pleadings of both the parties and issues framed at Exh.No. 32. On perusal of record it appears that, the suit is filed in the year 2015. Defendants have filed their W.S. on 19/08/2015 and issues are framed on 15/11/2017. The plaintiff is cross examine and the matter is for further evidence of the plaintiff. On careful reading of the pleadings of both the parties it appears that plaintiff is seeking declaration that measurement carried out by the defendants as per MR No.10/17 is illegal. It is also pleading of the plaintiff that alleged portion of encroach area of 65 R is part an parcel of plaintiff's land.

8. As per the rule of law he who asserts shall prove, it means when the person is bound to prove the existence of any fact it is said that the burden of prove lies on that person. In present case plaintiff has come up with the case that measurement done by the defendants through competent revenue authority is wrong and the alleged area is part an parcel of the plaintiff's land. Therefore, burden of proving these facts is on plaintiff as to how the said measurement is illegal, how the alleged portion / area 65 R is part and parcel of his land. At the same time it is necessary to note that as per Sec.83 of the Evidence Act the court shall presume that map or plans for purporting to be made by the

authority of Central and State government were so made, and are accurate but maps or plans made for the purpose of any cost must be proved to be accurate. In present suit defendants have come up with the map on the basis of which they were claiming possession. Therefore, to presume the said map to be accurate one, it must be proved and as the map is produced on record by the defendant, burden of proving accuracy of said map is on the defendant.

9. As per Order XIV of Code of Civil Procedure issues can be framed on the basis of allegations made on oath by the parties, on the basis pleadings etc. So also issues can be recasted, altered or additional issues can be framed at any stage of the suit till the pronouncement of the judgment. It is also pertinent to note that all the controversy between the parties requires to be disposed of. So also, it is necessary to avoid multiplicity of proceedings. Having regard to the pleading of the parties and nature of the suit I found certain proposed issues are required to be framed. Accordingly, the application deserves to be partly allowed. Hence, I pass the following order;

ORDER

1. The Application at Exh.No. 44 is partly allowed.
2. I proceed to recast and frame additional issues at Exh.No.32.

Sd/-xxx

Date :- 08/05/2025

Place :- Pimpalgaon (B).

(V. W. Khendad)
2nd Jt.Civil Judicial Junior Division
Pimpalgaon (B)