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IN THE COURT OF THE CIVIL JUDGE J. D., NANDGAON

TQ. NANDGAON, DIST. NASHIK

(Presided over by R. U. Nagargoje)

REGULAR CIVIL SUIT NO. 56 of 2007

Exh. No.

Shaukat Mansur Khatik
(Kothmire)

Age : 45 Yrs., Occ. Business
R/o. : Nyaydongari, Tq. Nandgaon,
Dist. Nashik

..Plaintiff

Versus

Rajjak Gulab Pinjari
Age : 65 Yrs., Occ. Business
R/o. : Nyaydongari, Tq. Nandgaon,
Dist. Nashik

..Defendant

Shri B. R. Chaudhari the learned counsel for the plaintiff
Shri J. K. Patil the learned counsel for the defendant

J U D G M E N T
(Delivered on 24.01.2012)

This is a suit for removal of encroachment, recover for possession and perpetual injunction.

2] The facts in brief the case of the plaintiff are as follows -

The plaintiff is owner and in possession of 3 R land out of gat no. 12 situated at village Nyayadongari, Tq. Nandgaon, Dist. Nashik. Boundaries thereof are mentioned in para no. 1 of the plaint. The defendant made encroachment 8x10 feet towards the western side of the plaintiff. Herein after this portion is referred to suit property.

3] It is the case of the plaintiff that, in the year 2003 in the month of January the defendant made encroachment over the suit property and started construction of ओटा (small construction) and toilet. The plaintiff issued notice through advocate and requested the defendant that, they would carry out measurement by depositing 50-50 measurement fees. The defendant avoided to carry out measurement. Thereafter, the plaintiff along with his family members went out from the village. Meanwhile the defendant completed construction of ओटा (small construction) and toilet which is illegal. When the plaintiff came back he inquired about the encroachment made by the defendant. The defendant refused to remove the encroachment and threatened the plaintiff. It is further case of the

plaintiff that, on 20.07.2007 the defendant threatened the plaintiff to make encroachment over the property of the plaintiff and he would construct a Pakka house. The plaintiff reported the matter to the Police Station. The police told him approach to civil court as a dispute between them is of civil nature. Hence, the plaintiff is constrained to file the present suit.

4] The defendant resisted the suit by written statement which is at Exh. 14. He controverted material plaint averments. On the contrary, he contended that, he made construction of his house on 12.12.1983 after seeking permission for construction from grampanchayat Nyayadongari. In the year 1991-92 the defendant made construction of his house in load bearing slab in cement and concrete. At that time he sought the permission from grampanchayat Nyayadongari. The defendant further contended that, in the year 1997-98 he constructed a toilet within boundaries of his house under the scheme of Rashtrya Gramin Sulabh Shauchalay. Lastly, the defendant prayed that, the present suit is filed to harass him, therefore, he prayed for dismissal of it with costs.

5] In view of the rival submissions of the parties issues came to be settled at Exh. 21. I have recorded my findings thereon for the reasons recorded in the later part of the judgment.

<u>ISSUES</u>	<u>FINDINGS</u>
1] Does the plaintiff prove that, he is owner of Gat no. 12 situated at Mauje Nyayadongari, Tq. Nandgaon ?	..Yes
2] Does the plaintiff prove that, defendant has encroached upon 8x10 feet of land towards the western side of gat no. 12 ?	..No
3] Is the suit properly valued ?	..No
4] Is the suit barred by limitation ?	..No
5] Is the plaintiff entitled for the relief of possession of suit land ?	..No
6] Is the plaintiff entitled for the relief of permanent injunction ?	..No
7] What order and decree ?	..As per final order

REASONS

6] AS TO ISSUE NOS. 2 & 5 : In order to substantiate the case the plaintiff filed an affidavit in lieu of examination-in-chief which is at exh. 29. The facts pleaded in the plaint and affidavit are in verbatim. He testified that, he is owner of 3 R land out of gat no. 12 toward western side of the gat no. 12. The defendant made encroachment upon suit property to the extent of 8x10 feet. The defendant made construction of ओटा (small construction) and toilet.

In order to prove the extent of encroachment the plaintiff examined Cadestal surveyor Dayanand Jadhav the P. W. 2 at Exh. 53. He testified that, he issued notices to the adjacent owner of the suit property prepared panchnama, recorded the statements of the witnesses and carried out

measurement, prepared the map which is at Exh. 58. He further testified that, approximately 6 square meter area found in possession of the gat no. 13.

7] As against this, the defendant contended that, he has not made any encroachment over the suit property as alleged by the plaintiff. The construction of ओटा (small construction) and toilet is within the boundaries of his land.

8] The learned Adv. for the plaintiff Shri J. K. Patil vehemently argued that, in view of testimony of plaintiff at exh. 29 and testimony of cadestal surveyor at Exh. 53 the measurement map at Exh. 58 the plaintiff established that, the defendant made encroachment to the extent of 10x8 feet upon the suit property.

9] Per contra the learned Adv. for the defendant Shri J. R. Kasaliwal submitted that, the testimony of Cadestal surveyor is not trustworthy. He prepared false documents and map. There are several complaints against the Cadestal surveyor. Inquiry thereof is pending against the P. W. 2. He is under suspension. Therefore, his testimony can not be accepted.

10] I have given my anxious thoughts to the rival submissions advanced on behalf of the parties and oral as well as documentary

evidence adduced on record. Instant case revolves around limited questions as to whether the defendant made encroachment to the extent of 8x10 feet upon the suit property. The extent of encroachment i.e. area is not matter to be adjudicated upon oral evidence of any numbers of the witnesses, who have witnessed the act of encroachment. The witness must be a person who have measured the land allegedly encroached with reference to a public record in relation to gat number, survey number or pot Hissa. Then only area of the encroachment in the length and width can be proved or certainly be proved.

In case on hand the extent of encroachment is sought to be proved by aid of Cadestal surveyor who has measured encroachment without having authenticate document of map with him. The Cadestal surveyor deposed at Exh. 53 that he issued notices to the adjacent owner prepared panchnama and recorded their statements. He did not testify whether any authenticate document of map of concerned survey number or gat number of disputed land which is measured in the process of public survey and preparation of land record under the provision of Maharashtra Land Revenue Code and law in existence prior thereof was with him. In the case in hand Cadestal surveyor did not take aid of such a public record, while carrying out the measurement, he could have to ascertain the boundary marks and boundaries of undisputed and un-encroachment area of land based on undisputed boundary marks as seen in the public record and thereafter could have proceeded to measure the extent of the

encroachment. If the measurement is carried without any authenticate map. The question of exact encroachment can not be properly adjudicated.

In view of a discussion as held above I came to the conclusion that, the plaintiff failed to prove encroachment to the extent of 10x8 feet land made by the defendant upon the suit land. Consequently, he is not entitled to recover of the possession as claimed by him. Thus I answer issue nos. 2 & 5 in the negative.

11] AS TO ISSUE NO. 6 : In view of my negative finding to issue no. 2 that, the plaintiff failed to prove the encroachment made by the defendant on the suit property. Hence, the plaintiff is not entitled to relief of perpetual injunction. Thus, my finding to issue no. 6 in the negative.

12] AS TO ISSUE NO. 4 : In view of para 12 of the written statement at exh. 14 the defendant contended that, he made construction of toilet in the year 1997-98. In view of this pleading the construction of toilet is in the year 1997-98 the present suit is filed recovery of possession of allegedly encroached area on 21.08.97 within 12 years. Therefore, the suit is filed within limitation as per the time limit prescribed by the Limitation Act 1963. Hence, I record my negative finding to issue no. 4.

13] AS TO ISSUE NO. 3 : This is a suit for recovery of possession the

plaintiff valued the suit as per section 6 clause 4(j) of the Bombay Court Fees Act. As a subject matter in dispute is not susceptible of monetary evaluation and which are not otherwise provided for by this act. However, this suit being recovery of possession case comes under section 6 clause (v) of the Bombay Court Fees Act. It is useful to refer section 6 clause (v)

V] for possession of lands, houses and gardens – In suits for the possession of land, houses and gardens- according to the value of the subject-matter; and such value shall be deemed to be, whether the subject-matter is a house or garden-according to the market value of the house or garden and where the subject-matter is land, and -

a)...

b)...

c)...

In view of clause V section 6 of the Bombay Court Fees Act in the instant case the plaintiff claims possession of encroached portion which is part and parcel of house no. 701, therefore, the plaintiff has to pay court fees as per the market value in respect of the encroached portion. In the case on hand the plaintiff assessed the court fees as per section 6 (iv)(j) of the Bombay Court Fees Act and paid Rs. 200/- court fees only which is insufficient. Hence, the deficient court fees is to be recovered from the plaintiff. Hence, my finding to issue no. 3 accordingly.

14] AS TO ISSUE NO. 1 : Dispute in the instant case is whether the defendant from the western side of the plaintiff made encroachment 8x10 feet. The defendant does not seriously dispute the title of the plaintiff over the gat no. 12 admeasuring 3 R land. Hence, I have no hesitation to hold that, the plaintiff is owner of 3 R land out of gat no. 12. Hence, my finding to issue no. 1 is in the affirmative and pass the following order.

Order

- 1] The suit stands dismissed with costs.
- 2] The plaintiff is hereby directed to pay court fees as per market value in respect of the suit property within one month. In case failure of the plaintiff to pay court fees within stipulated time. The matter shall be referred to Collector to collect the court fees as a land revenue from the plaintiff.
- 3] Decree be drawn up accordingly.

Place : Nandgaon
Date : 24.01.2012

(R. U. Nagargoje)
Civil Judge J. D., Nandgaon