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Registered on : 05.09.2006

Decided on : 03.05.2012

Duration : Yrs. Ms. Ds.
5 7 28

IN THE COURT OF THE JOINT CIVIL JUDGE JUNIOR
DIVISION SANGLI DISTRICT SANGLI.

(Presided over by Miss. R.N.Merck)

Regular Civil Suit No. 262/2006

Exhibit No. : 82

1) Srirang Shankar Patil)

age– 41Yrs. Occu. - Agriculture)

)

2) Shridhar Shankar Patil)

age– 39Yrs. Occu. - Agriculture)

)

3) Shrikant Shankar Patil)

age– 37Yrs. Occu. - Agriculture)

)

All R/O -- Karnal, Tal. - Miraj,)

Dist. - Sangli.)

)

Plaintiffs

Versus

1) Shri. Laxman Dnyanu Patil.)

Age – 75Yrs., Occu. Agriculture)

Defendants

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2) Shri. Rajaram Dattu Patil)
Age 35 Yrs., Occu. - Agriculture.)

3) Shri. Santosh Balaso Patil Age)
24 Yrs., Occu. - Agriculture)

4) Shri. Jagganath Vishnu Patil,)
Age 40 Yrs., Occu. - Agriculture.)

5) Shri. Sagar Balaso Patil Age)
22 Yrs., Occu. - Business.)

6) Sou.Vijaya Balaso Patil, Age)
43 Yrs., Occu. - Household. R/0)
— Bisur, Tal. - Miraj, Dist. -)
Sangli.)

7) Shri. Vijay Dnyanu Patil Age)
— 38 Yrs., Occu. - Agriculture.)
)

Deft. Nos. 1 to 5 and 7 R/0 —)
Karnal, Tal. Miraj, Dist.- Sangli)
)

Defendants

**Suit for removal of
encroachment and
possession.**

Shri. P.N.Pol, Advocate for the plaintiffs.

Shri. M.N.Kore, Advocate for the defendant. No. 1

Shri.R.B.Salunkhe, Advocate for defendants no. 2 to 7.

J u d g m e n t

(Delivered on 3.5.2012)

1. The case of the plaintiffs in brief is that they are the

owners of agricultural land admeasuring 83 Ares bearing block no. 270 situated at Karnal, Dist. Sangli. The said property is bounded as under :

towards the east	:	Block no. 266 and 269
towards the west	:	Block no. 271
towards the south	:	Block no. 288 and 289
towards the north	:	Block no. 236

(here-in-after referred to as the 'suit property' for the sake of brevity).

2. It is averred that the plaintiff pays the cess of the suit property. Defendants 1 to 7 have no right and concern in the suit property. Towards the east of the suit property is the property of defendant no. 1 bearing block no. 266 admeasuring 1.49 Ares. Similarly towards the south of the suit property is the property of defendants 2 to 7 bearing block nos. 288 and 289 admeasuring 47 Ares. It is alleged that defendant no. 1 has unlawfully encroached in the eastern side of the property owned by the plaintiff in the "bandhpad area". So also defendants 2 to 7 have encroached unlawfully in the southern side of the plaintiff's property. Therefore, the plaintiffs filed an application for the Nimtana measurement of his property. On 7.3.2000 vide

measurement register no. 17, the property was measured and it was revealed that the encroached area is part and parcel of block no. 270 and that the owner of block no. 266 i.e. defendant no. 1 and the owners of block no. 288 and 289 i.e. defendants 2 to 7 are in its possession. Defendants no. 2 to 7 have encroached to the extent of 1½ Ares while the defendant no. 1 has encroached in the bandhpad area. In spite of the request of the plaintiff, defendants failed to remove the encroachment. Hence, this suit.

3. Defendant no. 1 has filed his written statement below Exh. 24. It is contended that in the measurement register no. 17 dated 7.3.2000 no encroachment has been shown. Hence, on the basis of the said measurement, the suit filed by the plaintiff is not maintainable. The said measurement map is false and no notices were issued to these defendants. The father of the plaintiff has filed a suit for removal of encroachment bearing Reg.civil suit no. 464/2000 which is pending. Hence, this suit has been filed only with a view to harass. Therefore, prays for dismissal of the suit.

4. The defendants 2 to 7 have filed their written statement below Exh. 28 denying the averments in the plaint. It is contended that unless and until the adjoining block numbers are measured, the question of encroachment will not arise. The defendants have never changed their occupancy in blocks no. 288

and 289 from past 20 to 25 years. In fact while purchasing block no. 270 the plaintiff has not got the boundaries fixed through the original owner. Therefore, the original owner was not actually in the possession of the entire area from block no. 270. Hence, the say of the plaintiff that he is in the actual possession of 83 Ares, merely relying upon the 7x12 extract of block no. 270, is entirely hollow.

5. It is contended that block no. 288 and 289 are their ancestral property owned and possessed by them. From past 35 to 40 years the predecessor-in-title of the defendants are in its occupancy without any changes being made thereto. There are huge dikes in between their properties upon which there are grown trees of nilgiri. The predecessors of the plaintiff were well aware of this fact and therefore, till the year 2000 the plaintiff had never raised any objection. It is alleged that in collusion with the measurement officers, with a view to harass these defendants, the contrary map has been drawn showing encroachment. In fact it was necessary to measure entire survey no. 70. Till then the conclusion of the encroachment cannot be arrived at. Hence, prays for the dismissal of the suit.

6. My learned predecessor has framed the issues below Exh. 30 which are reproduced below along with my findings

thereon as under -

ISSUES

FINDINGS

1) Whether the plaintiff proves that the defendant has carried out encroachment in the suit property ?

In the negative.

2) Whether the plaintiff is entitled to the removal of encroachment and the possession of the encroached portion ?

In the negative.

3) Whether the plaintiff is entitled to the mesne profit ?

In the negative.

4) Whether the suit is within limitation ?

In the affirmative.

5) What order and decree ?

As per final order.

REASONS

7. In support of his case, Shridhar Patil, plaintiff no. 2 has filed his evidence affidavit at **Exh. 33**, Madhukar Kulkarni, P.W. 2 (**Exh. 58**). Plaintiff has also relied upon the documents i.e. map of Measurement register no. 17/2000 (**Exh. 8**), 7x12 extracts (**Exhs. 9 to 12**), notices and U.C.P. receipts (**Exhs. 60 to 63**), statements (**Exh. 64 and 65**), Nimtana measurement application (**Exh. 59**), map of M.R. No. 2626 (**Exh. 70**),

application of Superintendent, D.I.L.R. Ti T.I.L.R. (**Exh.80**), 'A'sheet of Nimtana measurement register no. 17/2000 (**Exh. 66**), court commissioner's report collectively (**Exh.81**), evidence close pursis of the plaintiff (**Exh. 71**),

8. Power of attorney holder of defendant no. 1 Madhukar Patil, D.W. 1 filed evidence affidavit (**Exh. 75**), Vijay Patil D.W. 2 (**Exh. 77**), Jagannath Patil, defendant no. 4, D.W. 3 (**Exh. 78**), evidence close pursis of the defendant is at (**Exh.79**) .

AS TO ISSUES NO. 1 to 3 -

9. As these issues are interlinked, its evidence is considered in common.

The learned advocate for the plaintiffs submitted that the plaintiff had filed a Nimtana measurement application bearing measurement register no. 17/2000 for measuring his block no. 270. Accordingly the measurement was carried out wherein it was revealed that owners of blocks no. 288, 289 and 266 had encroached in the plaintiff's property. In order to prove the encroachment, plaintiff has examined the T.I.L.R. who has categorically deposed about the Nimtana measurements done by him and the encroachment therein. There is no reason to discard his evidence. As such, the plaintiff has proved the encroachment

at the hands of defendants. On the other hand, the learned advocate for defendants no. 2 to 7 submitted that they are the owners of block no. 288 and 289. There is no pleading that at the time of the sale-deed of the plaintiff, they had received the possession of the area as specified in 7x12 extract and that thereafter the defendants have encroached. In fact, the date of encroachment is also not pleaded. To prove the encroachment, area in the possession of the defendants is excess, must be shown. So also holding of the plaintiff and defendants should be measured. Lastly, the less area of the plaintiff must be in excess with the defendants. However, there is no such evidence on record. Further, the area shown in the crop cultivation column in 7x12 extract of the plaintiff is in their possession. Lastly, the measurement is not seen to have been done as per the falani map. It is in this background that the evidence is to be considered. Shridhar, plaintiff no. 2 has filed evidence affidavit (Exh.33). His evidence is in consonance with the pleadings in the plaint. The sum and substance of his evidence is that the encroachment is in their block no. 270 as follows : (1) encroachment by owner by block no. 266 in bandhpad area, defendant no. 1, (2) encroachment by owner of block no. 288, (3) encroachment by owner of block no. 289.

10. In the cross examination by defendant no. 1 he could not state the encroached area is shown as 72 inches in the measurement. He could not state the encroached area but admits that the area which, he asking for is, "bandhpad" and there is no crop cultivation in it. In the cross examination by defendants 2 to 7 he admitted that while purchasing the property Shankar Patil had not got it measured. He admits that measurement was done of block no. 270 and no old boundary marks were existing over southern boundary. He admits that such is the position since when they have purchased the properties. He also admits that marking was done as shown by him and accordingly measurement was carried out. Thus, his evidence is clear to the extent that there were no old boundary marks on the southern boundary and that measurement was done as per the marking shown by him. Lastly, that the property was not measured at the time of purchasing it.

11. Being a suit for encroachment the evidence of T.I.L.R. Madhukar Kulkarni, P.W. 2 (Exh.58) is very material. He deposed that upon the Nimtana measurement application of Shrirang Patil (Exh.59) he issued notices through U.P.C. to the adjoining owners (Exhs. 60 and 61). On 30.5.2000 he visited the property and verified the measurements. He noticed that the

falani map of M.Reg.No. was not correct. Thereafter as per the "A" sheet he fixed the boundaries of block no. 270. He again issued notices (Exhs. 62 and 63) and on 23.4.2002 fixed the boundaries. He has put the remark on the map (Exh.66) that."boundaries fixed as per the 'A' sheet of falani map". He has explained that as in the measurement registration no. 2626 the measurement was done as per 'B' sheet of falani map of block no. 70 and as there was inconsistency in falani 'B' sheet map and 'A' sheet of measurement map, there was difference. Thus, according to T.I.L.R. as the measurement of M.R.No. 2626 was done on the basis of "fair sketch" i.e. 'B'sheet of falani map, there was difference in measurement register no. 2626 and Nimtana measurement.

12. In the cross examination by defendant no. 1 it is brought on record that Nimtana application was against measurement register no. 2626. It is pertinent to note that defendant no. 1 is the owner of block no. 266. He denied that as per the survey manual the encroached area of 1 Are is marginal error. In respect of issuing notices to the adjoining owners, he stated that he had issued notices only to the persons whose name were written on measurement application. He admits that he has not issued notices to defendants 2 to 7. As far as the

encroachment by owner of block no. 266 is concerned, on perusal of map (Exh.66) there is no specific note that the owner of block no. 266 has encroached to the extent of certain area. However, a marginal encroachment is shown in map by owner of block no. 266 in bandhpad area, but the area is not specified. However, the power of attorney holder of defendant no. 1, D.W. 1 admitted that his father had received the notices by U.P.C.

13. In the cross examination by defendants no. 2 to 7 P.W. 2 specifically stated that there are no documents on record to show that notice was issued to Vijay Dnyanu Patil. He also admitted that in the measurement application it is not written that to the south of block no. 270 is block no. 289 of Vijay Dnyanu Patil. At this juncture, on perusal of 7x12 extract of block no. 289 (Exh. 12) it is exclusively standing in the name of Vijay Dnyanu Patil. However, no notices are issued to him of measurement. So also U.C.P. receipts (Exhs. 61 and 63) disclose that notices are not issued to Vijay Dnyanu Patil. It has specifically come in the evidence of Dnyanu Patil, D.W. 2 that he has not received the notices. Thus, there is the technical and procedural error committed and the measurement carried out without issuing the notices cannot be relied upon. Therefore, there is no alternative but to arrive at the conclusion that encroachment by owner of

block no. 289 has not been proved. Further, he stated that there is a dyke on the east of the block no. 270 but from the map the bandhpad and pad area cannot be stated. It is to be noted that as per the evidence of this witness, the reason of difference in measurement of M.R.No. 2626 and Nimtana measurement was due to the reason that the 'B' sheet falani map was the basis for measurement of M.R. no. 2626, and therefore, the difference was noticed. In these circumstances, he stated that generally 'C' sheet and 'B' sheet of falani map are same. So also generally no difference is caused if measurement map is drawn on the basis of 'A'sheet or 'B' sheet falani map. Then the question arises why in this case there was such difference because 'B' sheet of falani map was used. A vital admission in his evidence is that it was necessary to measure entire survey number as the area of block no. 270 was less. Though he voluntarily stated to measure entire survey number, however, on the perusal of measurement map (Exh.62) the boundaries of block no. 270 is shown in black line with the specific note. However, there is no explanation at all as to why the boundaries of block no. 288 and 289 are not shown. In the notes of the map, there is a specific note that the boundaries of the block are shown in black line. However, the boundaries in the black line are not shown of the encroaching block number. It

is equally material to note that the old boundary marks of block no. 288 and 289 are also not found and by fixing the new points encroachment is shown especially under the circumstances that notices are not issued to the owner of block no. 289. Thus, in my view, if the measurement is carried out in the absence of the owner of block no. 289 by fixing the new points, definitely the conclusion of encroachment to that extent is not justified.

14. Jagganath Patil, defendant no. 4 has deposed by way of evidence affidavit (Exh.78). On behalf of defendants 2 to 6, according to him, with the consent of the plaintiff in the year 1981-82 the dyke was kept in between their properties. However, in the cross examination admits that grandfather of the plaintiff had purchased block no. 270 in the year 1996.

15. In this background, in respect of encroachment, the learned advocate for the defendants relied upon the case **Harsing Kewala Rathod Vs. Ramaji Hemala** reported in **2008 B.C.I. 111-** where in a suit for removal of encroachment made by the defendant adjacent owner of survey no. 74. The D.I.L.R. Office measured only survey no. 75 of the plaintiff and concluded the encroachment. The suit was decreed by the lower court which was confirmed by the appellate court. In these circumstances, it

is held that unless both survey numbers are measured it is not possible to come to the conclusion that there is encroachment by the defendant over the plaintiff's land. Second appeal was allowed.

16. In the present case for proving encroachment, it was necessary to measure blocks no. 270, 288 and 289 by specifically showing its boundary lines in the map. In para 12 of the judgment, it is observed, " The fourth point i.e. without measuring both the survey numbers whether inference can be drawn on the basis of the measurement of only plaintiff's land that the defendant has made encroachment, in my considered view, the surveyor D.I.L.R. Should have measured both the survey numbers i.e. survey no. 74 and survey no. 75. Unless both the survey numbers are measured, it is not possible to come to the conclusion that there is encroachment by defendant over the plaintiff's land, the D.I.L.R. Should have measured survey nos. 74 and 75 and after measurement of both survey numbers should have submitted report to the court. On the basis of measurement of both the survey numbers belonging to plaintiff and defendant, the court should have adjudicated the point in issue. "

17. It is to be noted that there is no specific evidence of the

T.I.L.R. that the adjoining block number 288, 289, 266 or the entire survey number was measured. The learned advocate for the defendant has also relied upon the case **Manohar Mahadevrao Pagarut Vs. Sunanda Ramdas Tharkar** reported in **2006 (3) Bom. C.R.4** wherein in para 8 it is observed that "admittedly, in the present case, when the cadestral surveyor admits that on two sides, which are, in fact, the sides of the then alleged, encroachment, the boundary marks are not found. To have a correct approach for ascertaining the area of actual possession and then finding whether there was an encroachment, it is necessary that both the lands should be measured, exact dividing boundary line should be located and it can be found out whether the party, against whom encroachment is alleged, has excess land in possession. If the finding could be otherwise, the story of encroachment would not be proved may be that the plaintiff has lost her land and the said loss could be due to encroachment by any person owning land surrounding the plaintiff's land. " In the present case the old boundary marks of blocks no. 288 and 289 are not found. So also it is necessary to measure the holdings of the plaintiff and defendants, exact boundary line is to be located so as to see whether the defendants were holding excess land. There is absolutely no evidence that

the boundary marks of the defendant's property were found and that they were holding excess land.

18. Considering the above evidence and the discussion, it can be safely concluded that the plaintiff has failed to prove that the defendant has encroached into the suit property. Therefore, issues no.1 to 3 are answered in the negative.

AS TO ISSUE NO. 4-

19. The plaintiff carried out the Nimtana measurement while M.R. No. 17 on 7.3.2000 wherein the encroachment was revealed. Hence, the suit filed on 31.8.2006 for possession of the encroached portion is within limitation. Therefore, issue no. 4 is answered in the affirmative.

AS TO ISSUE NO. 5 -

20. As the plaintiff has failed to prove the alleged encroachment at the hands of the defendants in to the suit property, in my view, the suit deserves to be dismissed. As a result, in answer to issue no. 5, the following order is passed.

ORDER

1) Suit stands dismissed with costs.

2) Decree be drawn accordingly.

Sangli.

Date : 3.5.2012

(R.N.Merck.)

Joint Civil Judge J.D.,
SANGLI.