

Presented on	11-6-2014
Registered on	24-6-2014
Decided on	14-3-2016
Duration	1Y 8M 20D

In the court of 5th Addl. Judge, Small Causes Court, Pune At Pune.

(Presided over by Ms. C.P. Jain)

Spl.C.S.No.797/2014
Exh.

Shri. Vijay Dinkarrao Karanjawane
Age 61 yrs, Occ. Business and Agri.
R/at 328, Nana peth, Pune – 2.

... **Plaintiff**

Vs

Shri. Khandu Devram Argade
Age 55 yrs, Occ. Business and Agri.
R/at Flat no.3, Vishakha Apartment,
Near Rajwada Hotel, Someshwarwadi,
Pashan, Pune.

... **Defendant**

Suit for Possession of suit
encroached land and damages.

Appearance :-

Adv. Shri. A.K.Pawar for plaintiff.

Adv. Shri. C.Y.Shinde for defendant.

JUDGMENT

(Delivered on 14th March 2016)

1] This is suit for getting possession of suit encroached land and damages.

2] Case of plaintiff in brief is as follows :-

Agricultural land situate at Mouje Nande, Tal. Mulshi, bearing S.No.71/2, totally admeasuring 67 R out of it eastern side 34 R land, which is more particularly described in para 1A of plaint, is subject matter in present judgment and therefore, referred as "suit land" for sake of brevity in this judgment.

3] Agricultural land admeasuring 67 R was ancestral land of the plaintiff and Chandrakant Bhausahab Karanjawane and others. Suit land admeasuring 34 R came to share of the plaintiff in partition in RCS no. 414/97. The plaintiff was cultivating and enjoying the suit land. His name was entered on 7/12 extract of suit land. The remaining 33 R land of Chandrakant Karanjawane and others is sold out by them. Land bearing S.No.71/3 of the defendant is situated towards eastern side of suit land. The defendant taking disadvantage of fact that the plaintiff is residing out of Mouje Nande, encroached upon suit land. The defendant did not pay heed to enquiry made by the plaintiff with respect to encroachment. The plaintiff got measured suit land from TILR office by applying on 12-8-10. TILR in collusion with the defendant has shown false measurement dtd. 9-3-11 and prepared false map. Therefore, the plaintiff applied for Nimtana measurement on 9-3-12. Nimtana measurement was done on 18-4-13. In said measurement, it revealed that the defendant has encroached to extent of 7 R land, which is more particularly described in para 1B of plaint, is hereinafter referred as "suit encroached land" for sake of brevity in this judgment. The plaintiff demanded possession of suit encroached land from the defendant. The defendant refused to give possession of suit encroached land. Therefore, the plaintiff issued notice on 20-2-14. The defendant received notice but neither replied nor handed over possession of suit encroached land.

Therefore, the plaintiff is constrained to file this suit for possession of suit encroached land and total amount of Rs. 5,01,000/- from the defendant (damages Rs. 5 lakhs and notice expenses Rs. 1,000/-).

5] The defendant has resisted the suit by filing his written statement at exh. 15. He has specifically denied all the averments in plaint, except those which are specifically admitted by him. He has admitted that he is owner of land S.No.71/3, which is situated towards east side of S.No.71/2. S.No.71/3 is purchased by him by registered sale deed dtd. 19-8-96. Since then, he is in continuous, settled, peaceful possession for more than 18 years as is delivered by Mr. Rohidas Shrihari Karanjawane and Bhanudas Shrihari Karanjawane, the erstwhile owners of land S.No.71/3. He has sold out 10 Ares land out of 50R land to Mr. Vijay Arjun Dange vide registered sale deed dtd. 24-12-2007. The plaintiff has not correctly described the suit land and suit encroached land. The plaintiff has made serious and defamatory allegations against Government officials. Furthermore, defendants no. 6 to 9 in RCS no. 414/97 are also co-owners of property mentioned in para 1 of the plaint. Therefore, all the aforesaid i.e. Vijay Arjun Dange, Government officials of TILR office, co-owners in S.No.71/2 are necessary parties in suit. The plaintiff has failed to array them as parties in this suit. Therefore, suit is bad for non-joinder of necessary parties. He has specifically denied that taking disadvantage of non-residence of the plaintiff in suit land, he has encroached in suit encroached land and that on enquiry by the plaintiff, he did not pay heed and further had hand in gloves with authorities of TILR in getting earlier measurement map of year 2011. According to him, earlier demarcation in year 2011 is not set aside by concerned authority. Therefore, demarcation of 2013

cannot be considered and relied upon. Suit is barred by law of limitation. For all aforesaid reasons, he has prayed for dismissal of suit.

5] Heard Adv. Shri. A.K.Pawar learned counsel for plaintiff and Adv. Shri. C.Y.Shinde learned counsel for defendant. On considering the rival contentions of both the parties, going through the documents filed on record and arguments advanced by both the learned counsels, I have framed issues at Exh. 16, which are reproduced below with findings there upon and for reasons to follow :-

<u>ISSUES</u>	<u>FINDINGS</u>
[1] Does plaintiff prove his title in suit land i.e. suit property 1-A ?	Yes.
[2] Does plaintiff prove that the defendant has encroached in suit encroached land i.e. property 1-B ?	No.
[3] Is plaintiff entitled to recovery of possession of suit property 1-B from the defendant ?	No.
[4] Is plaintiff entitled to future mesne profits as prayed ?	No.
[5] What order and decree ?	As per final order.

REASONS

6] The plaintiff in order to prove his case, has filed his evidence affidavit at exh.18 as PW1 and affidavit of evidence of PW2 Raju Chhaganrao Rokade at exh. 28 and closed his oral evidence vide evidence close pursis at exh. 40.

7] The defendant in order to substantiate his defence has filed his evidence affidavit at exh. 42 and closed his oral evidence vide evidence close pursis at exh. 52.

8] Before discussing the evidence in detail, the admitted facts between the parties are as follows :-

[1] The plaintiff along with other co-owners is in possession of area out of S.No.71/2 and the defendant is in possession of area out of S.No.71/3, is factum not in dispute.

[2] S.No.71/3 is situated towards east side of S.No.71/2 is also factum not in dispute.

AS TO ISSUE NO. 1 :-

9] The testimony of PW1 Vijay that they along with other co-owners in S.No. 71/2 are owners of suit land is lending corroboration, from the 7/12 extract of suit land exh.46. Name of the plaintiff and other co-owners is shown in ownership column in aforesaid 7/12 extract exh.46. Further testimony of PW1 Vijay that he and other co-owners were allotted suit land in partition in RCS no.414/97, is lending corroboration from the certified copy of compromise pursis in RCS no. 414/97 dtd. 12-10-99 exh.24. On perusal of pleadings in compromise pursis in RCS no. 414/97, it reveals that area admeasuring 34 R in S.No. 71/2 was allotted to the plaintiff and others. There is nothing on record that the said compromise pursis have been further challenged and set aside at any point of time. The recitals in compromise pursis exh.24 is having clear recitals that suit land is allotted to the plaintiff and other co-owners. Accordingly the name of the plaintiff and other co-owners is revealing in 7/12 extract of suit land exh.46. It was also suggested in cross-examination of PW1 Vijay that he and other co-owners are owners of suit land which is admitted by PW1 Vijay. DW1 Khandu has also admitted this fact in his cross-examination. If all the aforesaid evidence

is taken into account, one can safely conclude that the plaintiff and other co-owners are owners of suit land. Therefore, the arguments of learned counsel for plaintiff Shri. Pawar that the plaintiff has proved his title in suit land, has substance.

10] One of the co-owners can file suit is settled legal position as on today. It is observed in citation of *Shivangouda Lingangouda Vs Gangawwa Basappa reported in AIR 1965, Karnataka, 143* that,

“One of the co-owner can bring suit for ejecting a trespasser from the property owned by him and others either jointly or as co-owners, the basis being that he has a right to hold every inch of the joint property until a division takes place.”

There is catena of decisions on this point. Therefore, though it was argued by learned counsel for defendant Shri. Shinde that other co-owners are not arrayed as parties in present suit, has no substance. In light of settled legal position on this point that one of the co-owners can file suit, the arguments of learned counsel for defendant Shri. Shinde, cannot be accepted. The observations in citation of *Shivangouda cited supra*, squarely applied in this case. Therefore, this point is not fatal to the plaintiff. I accede with learned counsel for plaintiff Shri. Pawar on this point.

11] As the plaintiff has proved his title in suit land i.e. suit property 1-A, I answer issue no.1 in affirmative.

AS TO ISSUE NO.2 :-

12] The plaintiff in order to prove the factum of encroachment in suit encroached land, has adduced the evidence of PW1 Vijay and PW2 Rokade. Both PW1 Vijay and PW2 Rokade have adduced evidence

in court that the defendant has encroached in suit encroached land.

13] In cross-examination PW1 Vijay has admitted that he has not given the area of encroached portion by the defendant, so also direction of suit encroached land, in description of suit property 1-B. The description of suit encroached land described in plaint is having mention about area of encroached portion, but, is not having mention about the location of encroached portion by the defendant. The entire pleadings in plaint are also silent on this factum. It is important to note that in evidence of PW2 Rokade, who is surveyor has not stated that the defendant has encroached in 7R of suit encroached land. In his examination in chief, PW2 Rokade testified that the holders of S.No. 71/3 are in possession of 14 R of land out of suit land. He has not specifically deposed that the defendant is in possession of 7R of suit encroached land, which belongs to the plaintiff. PW2 Rokade is the surveyor who had measured the suit land as per case of the plaintiff. Therefore, the evidence of PW2 is crucial and important to throw light on the factum as to whether there is encroachment in suit encroached land by the defendant. As discussed above, PW2 Rokade has not specifically stated that the defendant is in possession of suit encroached land. As per his version, the holders of S.No. 71/3 are in possession of 14R of suit land.

14] As per pleadings of the plaintiff and ample evidence has come on record that prior to preparation of measurement map exh.29 by PW2 Rokade, there was earlier measurement in year 2011 i.e. on 9-3-11. It is also further pleaded by the plaintiff and has amply come on record that in said measurement dtd. 9-3-11, no encroachment by the defendant had revealed. As per the testimony of plaintiff, he was

suspicious about this fact and about measurement and therefore, he had applied for Nimitana measurement on 9-3-12. On application of Nimitana measurement by the plaintiff, Nimitana measurement was done on 18-4-13 upon issuing notice by PW2 Rokade as per his version and measurement map exh.29 was drawn. As per further version of PW2 Rokade in said measurement, it revealed that there was encroachment by holders of S.No.71/3 to the extent of 14R.

15] It is settled legal position as on today that under sec. 83 of Evidence Act, there is presumption with respect to maps or plans made by the authority of Central or State Government about the accuracy, but, the maps or plans which are made for purpose of any cause must be proved to be accurate. No presumption of law can be drawn that maps or plans are accurate, which are at instance of parties for purpose of cause. The aforesaid settled legal position is observed in citations of *Ram Kishore Sen and ors Vs Union of India and ors reported in AIR 1966 Supreme Court, 644(1)* and *Niranjanabai Chandrakant Vira Vs Pramila Bai Balkrishna Zade and anr. reported in 2004(6) Bom. C.R.829*, relied upon by learned counsel for defendant Shri. Shinde.

16] It is further settled legal position that “in case of boundary dispute, there should be authentic measurement map from competent Cadastral surveyor” as is observed in *Bhupendra Bhagwat Turkar Vs Homraj Zituji Meshram reported in 2015(1) Bom.C.R. 456* and *Manikrao Ramji Chawake Vs Ashok Ambadas Gawande and anr reported in 2014(4) Bom.C.R. 852*, relied upon by learned counsel for defendant Shri. Shinde.

17] It is further settled legal position that report of court commissioner will not be conclusive and if any of the parties are

aggrieved by same, such a party would always be entitled to cross examine the court commissioner, so as to challenge the veracity of the report as is observed in case of *Kolhapur Bandu Lakade Vs Yallappa Chinappa Lakade reported in 2011(3) BCR 807* relied upon by learned counsel for defendant Shri.Shinde. In present case, PW2 Rokade was examined by the plaintiff and opportunity was given to the defendant for cross-examination to challenge the veracity of measurement map exh.29.

18] The learned counsel for defendant Shri. Shinde has further relied upon the observations in *Kashinath Chindhuji Shastri Vs Haribhau Nathuji Bawanthade reported in 2004(2) Mh.L.J. 724*, wherein it is observed that,

“When there is dispute about encroachment or dimensions of site, court commissioner must be appointed by court to take correct measurement. The measurement map drawn for purpose of any cause must be proved to be accurate. The map should be drawn with the North at the top and letters marking points should not be put inside ways or upside down.”

19] It is further observed in case of *Sukhdeo Parashramji Bhugul (DR.) Vs Wamanrao Nagorao Charhat reported in 2004(3) Mh.L.J. 724* that,

“When Cadestral surveyor has not sweared that he had noted down the measurements of land in his report and when no actual measurements are noted down in map, measurement map, will not be admissible.”

20] It is observed in *Laxman Wamanrao Nagapure Vs Shankar Haribhau Adhau and anr reported in 2014(6) Bom.C.R.195* that,

“For ascertaining encroachment, land has to be measured by a Cadestral surveyor concerned on basis of permanent boundary marks, to be carried out before owners and those in possession of

encroached land.”

21] It is observed in *Manohar Mahadeorao Pagrut Vs Sunanda Ramdas Tharkar reported in 2008(3) Bom.C.R. 4* that,

“The correct approach for ascertaining area of actual possession and then finding whether there was an encroachment, it is necessary that both lands should be measured exact divided boundary line should be located and it can be found out whether party against whom encroachment is alleged has excess land in possession.”

22] It is observed in case of *Sahebrao Rama Yadav and ors Vs Sarjerao Rama Yadav reported in 2014(6) Mh.L.J. 553* that,

“Notice to all concerned is necessary and is mandatory provision under Maharashtra Land Revenue (Boundary and Boundary Marks) Rules 1969.”

23] In light of aforesaid observations, it needs to be seen as to whether the measurement map exh.29 drawn by PW2 Rokade is accurate and that it is drawn after following due procedure.

24] In his version, PW2 Rokade has not deposed in detail as to how he had done the measurement of suit land. Neither from his evidence, the notice issued to plaintiff, defendant as well as adjacent land holders are proved. The procedure which he has done on the suit land during measurement is also not deposed. Vague evidence has come on record about procedure followed. Neither the panchanamas or statements recorded at the time of measurement and fixing the boundaries are also proved on record. In cross-examination when defendant had asked as to whether he is ready to file the same, at that time the documents of panchanamas and statements are filed on record, as is rightly argued by learned counsel for the defendant Shri. Shinde. The notice of measurement and fixation of boundaries issued to

plaintiff, the defendant and other land owners, statements of aforesaid persons, panchanama of measurement as well as fixation of boundaries is not duly proved. Mere exhibiting the document is not the proof of the document, is settled legal position as on today. When defendant is denying to have received the notice of measurement as well as fixation of boundaries, it was burden of the plaintiff to prove them on record. As discussed above, the notices issued to plaintiff, defendant and adjacent land owners are not duly proved on record. In further cross-examination, PW2 Rokade has admitted that without making any verification or enquiry, he had issued notices to adjacent neighbourers or land holders, whose names were given by plaintiff. When PW2 Rokade was going to carry out measurement of suit land, it was the duty of him to verify as to which land holders needs to be intimated for their presence at the time of measurement. How PW2 Rokade can issue notices on the basis of names which are given by the plaintiff. He further admits that in measurement map exh.29 in the column of persons who are present, the name of only plaintiff is shown. Though he deposed that the plaintiff and Mr. Bhelke were present, there is no such mention in measurement map exh.29. In panchanamas, exhs.37 and 38 and other documents, it is recited and therefore, evident that the defendant was not present at the time of measurement and while fixing of boundaries. As discussed above, when the factum of issuing notices to the plaintiff, the defendant and other adjacent land holders is not duly proved and when the documents at exh. 34 to 39 are not duly proved, as required under Evidence Act, it cannot be concluded that mandatory notice required for measurement and fixation of boundaries, as is observed in citation of ***Sahebrao Rama Yadav and ors cited supra*** and

Laxman Wamanrao Nagapure cited supra, are duly complied by PW2 Rokade.

25] As discussed above, PW2 Rokade has not deposed the procedure which he has followed while doing measurement of suit land in his evidence before court. In his cross-examination he has admitted that here are pot-hissas no.1 to 10 in S.No. 71. He further stated that on 18-4-13, he had measured the entire S.No.71, but further stated that there is no document to show that he had measured the entire S.No.71. He further admitted that in measurement map exh.29, there is no mention about the area measured out of S.No.71/2. He also admitted that there is no mention of area of plaintiff in measurement map. He further admits that measurement map exh.29 is not revealing the marks “ON” and “OF”, neither there is such mention in tippan in measurement map exh.29. He further admits that the aforesaid marks needs to be seen while measurement or else map cannot be drawn.

26] When there are pot-hissas no.1 to 10 in Hissa no.71, unless and until, all the pot-hissas are measured, how can PW2 Rokade conclude on encroachment in measurement. It is not appearing from his evidence or measurement map exh.29 that he had located any permanent measurement marks or permanent fixed marks, during measurement. The measurement map exh.29 is not showing the “ON” and “OF” marks. Unless and until minimum 2 permanent fixed (measurement) marks are located, the measurement map cannot be prepared. From the evidence of PW2 and measurement map exh.29, nowhere it is revealing that PW2 Rokade has shown the “OF” or “ON” marks. When he himself admits that without locating such marks, a map cannot be drawn, how measurement map exh.29 is drawn when no such

marks are located by him. As is admitted by PW2 Rokade, neither it is appearing from his evidence that the entire area of S.No.71/2 is measured. Though PW2 Rokade admits that he has measured the entire S.No.71, there is no document on record as is admitted by him to believe his version. Neither there is evidence on record that PW2 Rokade had taken all record maintained in their office with respect to measurement or that map was superimposed etc. The measurement map exh.29 is nowhere showing the dimensions, area of plaintiff, the actual area of the plaintiff, the area in possession of the plaintiff or the suit encroached land in possession of defendant either in Tippan or map. On basis of vague evidence, it cannot be concluded that the measurement is accurate. As is observed in citation of ***Kashinath Chindhuji Shastri cited supra***, the marking of North at the top and letters marking points should not be put inside ways or upside down. As is observed in this citation, in present case, oral evidence of PW2 Rokade and measurement map exh.29 if perused, it is not revealing that such rules are followed by PW2 Rokade while drawing measurement map exh.29. It is further important to note that Nimtana measurement has to be done in presence of Deputy Superintendent, which is admitted by PW2 Rokade himself, but, nowhere PW2 Rokade in his evidence had deposed that Dy. Superintendent Shri Krishna Shinde was present at the time of measurement, nor there is such recital of presence of Dy. Superintendent Shri Krishna Shinde, noted in measurement map exh.29. The measurement map exh29 is not having signature of Dy. Superintendent Shri. Krishna Shinde. Though he has stated that Dy. Superintendent Shri. Krishna Shinde was present, PW2 Rokade has admitted that he has no document to show that Dy.Superintendent Shri.

Krishna Shinde was present. If all the aforesaid evidence is taken into account, it cannot be concluded that the measurement map exh.29 drawn by PW2 Rokade is accurate and free from doubt. As discussed above, measurement map drawn for purpose of cause by parties, needs to be proved that same is accurate. There is no presumption to such maps. Therefore, it was bounden duty of plaintiff to prove the accuracy of measurement map exh.29. But, if all the aforesaid evidence is taken into account, I cannot conclude that measurement map exh.29 is accurate.

27] From all the aforesaid evidence, it cannot be concluded that plaintiff has proved the factum of encroachment in suit encroached land. It is further important to note that there are co-owners in S.No.71/3. Assuming for moment that version of PW2 Rokade is genuine that there is encroachment to the extent of 14R land from the holders of 71/3, then also, how it can be concluded that plaintiff has encroached to the extent of 7R and other co-owners in S.No71/3 have encroached in remaining area. As discussed above, PW2 Rokade has not specifically testified the area of encroachment by defendant. The measurement map exh.29 is not accurate is concluded. Therefore, even if we assume the version of PW2 Rokade as genuine for sake of arguments, then also, it cannot be concluded that plaintiff has proved the factum that there is encroachment at the hands of defendant in suit encroached land. All the observations in citations relied upon by learned counsel for defendant Shri. Shinde in *Union of India and ors Vs Vasavi Co-op Housing Society Ltd and ors reported in (2014) 2 SCC 269* and *Tata Chemicals Ltd., Bombay Vs Sadhu Singh s/o Baljeet and ors reported in AIR 1994 Allahabad 66*, are squarely applicable in present

case. For all discussion above, I conclude that the plaintiff has failed to prove by cogent evidence the factum of encroachment at the hands of the defendant in suit encroached land.

28] I do not dispute the legal position enunciated in the citation of *Union of India and ors cited supra*, that the plaintiff has to establish its case on his own footings. Even if the defendant fails to set out his defence, weakness of the defendant cannot be ground to grant relief to the plaintiff. In present case, the plaintiff has failed to prove the factum of encroachment. Therefore, only because the defendant has not set out his defence, cannot be ground to give relief to the plaintiff, as is observed in aforesaid citations. For all aforesaid discussion, I cannot countenance the arguments of learned counsel for plaintiff Shri. Pawar. I accede with the arguments of learned counsel for defendant Shri. Shinde. Therefore, I answer issue no.2 in negative.

ISSUE NOS. 3 & 4 :-

25] As issue no.2 is answered in negative, the plaintiff is not entitled to recover possession of suit encroached land i.e. suit property 1-B from the defendant. As issue no.2 is answered in negative, question of entitlement of damages to the plaintiff does not arise. Therefore, I answer issue nos. 3 and 4 in negative.

26] In the backdrop of legal position, facts and circumstances and having arrived at aforesaid findings, suit of plaintiff deserves to be dismissed with costs. In result, I proceed to answer issue no.5 by following order.

ORDER

[1] Suit is dismissed with costs.

[2] Decree be drawn up accordingly.

Judgment is dictated and pronounced in open court.

Pune.
Dt. 14-3-2016.

(Smt. C.P.Jain)
5th Addl. Judge,
Small Causes Court, Pune.

CERTIFICATE

I affirm that the contents of this PDF file judgment are same word for word as per original judgment.

Name of steno	:	M.U.Bandiwadekar
Name of Court	:	Ms. C.P.Jain, V Addl. Judge, Small Causes Court, Pune.
Date of dictation	:	14-3-2016
Date of transcription	:	15-3-2016
Judgment checked & signed by PO on	:	19-3-2016
Judgment uploaded on	:	21-3-2016