

Presented on	: 21/07/1983
Registered on	: 21/07/1983
Decided on	: 23/01/2019
Duration	: 35Y. 06M. 02D.

IN THE COURT OF CIVIL JUDGE SENIOR DIVISION KARAD.

(Presided over by Sou V. P. Gaikwad)

R.C.S.NO. 228/1983

(CNR No. MHST05-000004-1983)

Exh.No.153

Shri. Mohan Narayandas Chandak

Age-23 years. Occu.Service.

R/o. Somwar peth, Karad,

Tal. Karad, Dist. Satara.

...Plaintiff

Versus

Sou. Pratibha Vilas Ghalsasi

Age:-38 years, Occ:- Service

R/o :- 66 D Somwar peth, Karad,

Tal. Karad. Dist. Satara.

...Defendant

Advocates :

Shri.P.M.Bahulekar, for the plaintiff.

Shri.P.H.Chavan, for the defendant

JUDGMENT

(Declared on 23/01/2019)

This is a suit for removal of encroachment.

2. Before advertng to the facts of case, here I would like to mention the backdrop of the case. Present suit was decided by my learned predecessor in office on 30/11/1988 and had dismissed the suit. Against said decision the plaintiff had preferred

Appeal before Hon'ble 4th Addl. District Judge, Satara bearing Reg. Civil Appeal No.58 of 1989. In said decision after hearing both parties, Hon'ble their Lordship had observed that,

"It is therefore, necessary, as rightly submitted by Mr. Athalye to remand the matter with a direction that the learned Civil Judge, appoint a settlement commissioner as a Court Commissioner and direct him to draw the map of the property namely C.T.S.No.66A to 66D on the basis of map drawn by Shri. Kulkarni, at the time of sub-division and thereafter, locate encroachment if any. After receipt of said commission report, in the light of his report, allow the parties if they want to lead any evidence and then dispose of the matter."

3. As per the directions of Hon'ble their Lordship, Court commissioner was appointed by my learned predecessor in office by passing order below Exh.69 on 10/01/2000. The settlement commissioner was appointed as court commissioner. However, the settlement commissioner moved Review application No.1/2005 before Hon'ble District Judge, Satara. In said review application, T.I.L.R. or Superintendent of land records was appointed as court commissioner to do superior test measurement (Nimtana) of the suit property. In consonance of said order of review, superintendent of land records carried out the measurement and submitted his report at Exh.94. After submission of said report, both parties led evidence and matter is taken for final argument and Judgment.

The Plaintiff's case, in brief, is as under :-

4. The properties namely C.T.S. No. 66-C, 66D and 66-A situated at Somwar peth, Karad, specifically described in plaint para 1 and the encroached portion mentioned in para 1C of the plaint is subject matter of present suit. These properties will be hereinafter referred as “the suit properties” for the sake of brevity and convenience.

5. It is contended that, the plaintiff had purchased C.T.S. No. 66-C and western portion of C.T.S. 66-A which is adjacent to C.T.S. No. 66-C, from Ibrahim Khairat khan under registered sale deed on 02.07.1980. From the date of said sale deed he is in possession it. C.T.S. No. 66-D is adjacent to the C.T.S. No. 66-C towards Northern side. The defendant had purchased C.T.S. No. 66-D on 15.07.1975 from one Narhar Dattatraya Dhavalikar. However, the measurements of the same mentioned in the sale deed do not tally with the city survey extract and the map.

6. After purchase of C.T.S. No. 66-D the defendant raised a construction in open space of it with the permission dt. 30.04.1977 of the municipality. However, said construction is not as per the permission of the municipality. she has made encroachment in C.T.S. No. 66-C and 66-A, by projecting gallery and laying tiles below it. Further she has let the eve's water to fall in C.T.S. No. 66-C and has fixed an iron staircase in C.T.S. No. 66-C. These encroached portions are specifically described in plaint para no. 1C.

7. Further it is contended that the plaintiff had brought it

to the notice of the municipality by application dated 13.11.1981. in accordance of it the officials of the municipality visited the suit site and directed the defendant to remove the encroachment by letter dt. 28.05.1982. Thereafter, the plaintiff applied for measurement of the suit properties and for fixing of boundaries. In response to which the maintenance surveyor measured the suit site and found that the defendant has encroached upon suit 1C property. Thereafter, on 14.11.1979 the original owner Ibrahim Khairat khan issued notice to the defendant for removal of encroachment. Thereafter, the plaintiff asked her to do so from time to time. But in vain so the plaintiff is constrained to file suit for removal of encroachment and mandatory injunction. Hence, the plaintiff, therefore, prayed for removal of the encroachment and the consequential reliefs.

8. The defendant appeared and filed written statement at Exh. 23. she has denied all contentions of the plaintiff. According to her, she has constructed the house after getting the same measured from city survey officer and by submitting a plan to the municipal corporation. At that time predecessor in title of the plaintiff was present. So the plaintiff cannot raises such objection. Further it is contended that the plaintiff has not described C.T.S. No. 66-A properly. It was an open space. She denied having encroached upon the plaintiff's property by laying tiles, projecting gallery and discharging eve's water. According to her, plaintiff's mother made encroachment in C.T.S. No. 66-A and therefore, the defendant filed a suit for removal of the said encroachment and

hence the suit came to be filed by the plaintiff to give a counter blow to the said suit. She therefore, prayed for dismissal of the suit.

9. On the basis of the pleadings, my learned predecessor in office framed issues below Exh.27. I am reproducing those issues along with my findings thereon for the reasons stated therein-after.

Sr.No	ISSUES	FINDINGS
1	Does plaintiff prove his title and possession to the suit property ?	To the extent of CTS No.66C, Yes
2	Does plaintiff prove alleged encroachment at the hands of defendant ?	No
3	Is plaintiff entitled to mandatory injunction as prayed ?	No
4	Is defendant entitled to compensatory costs as prayed ?	No
5	What order and decree ?	Suit is dismissed

REASONS

10. The plaintiff has examined himself as P.W.1 at Exh.108, Vijay Raghunath Pisal as P.W.2 at Exh.116 and Rafiq Dastgir Bhaladar as P.W.3 at Exh.120.

11. I have heard Shri. P.M.Bahulekar, the learned advocate

appearing on behalf of the plaintiff and Shri.P.H.Chavan, the learned advocate appearing on behalf of defendant, in-extenso. Both of them have submitted written argument at Exh. Nos.155 and 156, respectively.

Issue No.1 :-

12. As far as this issue is concerned, the plaintiff alleges that, suit 1A and 1B properties are owned and possessed by him, while suit 1C property is road common between the owners of suit 1A, 1B and C.T.S.No.66D.

13. At the cost of repetition here I would like to mention that, the defendant in this suit was the plaintiff in suit R.C.S.No.172/1978. The subject matter in that suit was also C.T.S.No.66. These two suits were heard together, as documentary and oral evidence in both were similar. The oral evidence was taken in suit R.C.S.No.172/1978. The plaintiff in this suit was defendant No.2 in suit R.C.S.No.172/1978 and defendant in this suit was plaintiff in suit R.C.S.No.172/1978. This suit along with R.C.S.No.172/1978 was also already decided by my learned predecessor in office. Being aggrieved by said Judgment present plaintiff had preferred appeal and in said appeal the learned advocates pointed out that, the measurements or the maps prepared by the T.I.L.Rs. were not as per the record. So, learned advocate for present plaintiff had requested to Hon'ble District and Sessions Judge Karad to remand the matter with direction to appoint T.I.L.R. for fresh measurement.

14. Further, it can be seen from the Judgment in

R.C.A.No.58/1989 that, the question of ownership or title was not at all agitated by the parties. Moreover, my learned predecessor in office discussed in detail in his Judgment how the parties owned and possessed their respective shares in the C.T.S.No.66. Therefore, in my view there is no necessity to discuss further this issue. As observations of my learned predecessor in office in his Judgment and Decree are not much challenged nor the plaintiff has led further evidence to discard those observations. So, in my view, it will be proper to adopt those observations and held that, the plaintiff has proved that he is owner and possessor of C.T.S.66C Hence, in view of this discussion I answer issue No.1 partly affirmative.

Issue No.2 :-

15. Regarding this issue it is the contention of plaintiff that, the defendant had made encroachment in C.T.S.No.66C and 66A by projecting gallery and laying tiles. She has allowed eve's water to fall in C.T.S.No.66C and had further fixed iron stair case in C.T.S.No.66C. Hence, she had made encroachment.

16. It is pertinent to note here that, the defendant had also filed a Civil Suit No.172/1978 against the plaintiff. Both parties had led common evidence in R.C.S.No.172/1978 for present suit also. However, said evidence is not available as the record and proceeding of R.C.S.No.172/1978 is not traceable.

17. Present suit was decided by my learned predecessor in office on 30/11/1988 and had dismissed the suit. In para no. 20 of

the judgment my learned predecessor in office had observed that,

“As, I already held that portion of 66A being the common portion, any permanent structure in the common portion by any co-sharer is also an encroachment. So, we shall have to see whether the encroachment was made by the defendant in the common portion 66A and some portion of 66C. The encroachment alleged is that the defendant constructed galary in portion of 66A and 66C. So, also he let rain water in the plaintiff's portion and constructed iron staircase. For that, there are in all six survey plans on record. The plaintiff mainly relies upon the plan of 09/06/1981 drawn by surveyor Bamne. The first survey was made on 09/04/1975 by surveyor Kulkarni, at the application of Indramal Chavan. That time the statement of Nandkumar, Narhar, Dattatraya Sabde and Indramal Chavan were taken. In that plan which is at page No.59 along with list Exh.116 in suit R.C.S.No.172/1978. The plan mentions that the portion of 66C ad-measures about 64.4 sq.mtrs. The northern boundary of 66D which is southern boundary of 66C is slanting down from east to west. This is the plan for the first time drawn for subdivisions of the property. Prior to that the whole C.T.S.No.66 was having common plan and it ad-

measured about 443.1 sq.mtrs. Thereafter, the plan was drawn by Malvade surveyor at the application of Nandkumar on 03/03/1978. It is at Exh.126/1 in suit R.C.S.No.172/1978. The construction in 66D is pakka one shown in vertical lines and some portion on the northern side of 66D is shown as open, which has some space on the eastern side, but no place at the western side. The vacant portion shown in that plan is triangular in shape. Before that there was a survey plan of 22/04/1977 produced at Exh.18/1 in suit R.C.S.No.228/1983. That survey was made at the application of defendant. There is no encroachment shown at the northern boundary of 66D is also slanting to the west. Intimation about showing the boundaries was given to the defendant on 22/04/1977. The copy is at Exh.18/2 in suit R.C.S.No.228/1983. The next survey plan is at Exh.126/2 dated 07/03/1979 drawn at the application of Indramal Chavan wherein plaintiff's mother and defendant were present. That was in respect of fixation of boundaries of C.T.S.No.66C. In that plan also the southern boundary of C.T.S.No.66C is shown as slanting towards west, as shown in the plan dated 03/03/1978. Last plan is dated 09/06/1981. The plan shows that some portion shown in red colour is the encroachment

made by the defendant. The southern boundary of 66C and northern boundary of 66D is shown in slanting line towards west. However, beyond that line the gallery projection is seen. This plan is agitated by the defendant on filing number of applications and complaints. Lastly, settlement commissioner, Pune, on 18/05/1988 informed defendant's husband that on actual spot inspection the boundary marks were shown in respect of 66D and those being admitted by Ghalsasi, the application of complaint was disposed of. What was admitted at that time by Ghalsasi is not shown on record. The person Shevate who lastly saw the site, is examined at Exh.115. He stated that the holder of 66D had encroached by 10 cms. In portion of 66C. The northern measurement of pot-hissa 66C is 5.60 mtrs. He has no idea as to whether any order was given in writing to him by his head of the department. He has shown the north south measurement of 66C as 8.10 mtrs. and the north south measurement on the western side was found as 8.40 mtrs. He denied the fact that the measurement on western side was shown as 8.10 mtrs. Instead of 8.40 mtrs. The plan dated 09/06/1981 shows the north south length on western side as 8.40 mtrs, while on the eastern side

8.45 mtrs. So, what was shown by Shevate on whose report the complaints of Ghalsasi were disposed, could not be said as true. The original plan dated 09/04/1975 shows that the length north south on eastern side is about 8.40 mtrs, while on western side as 8.10 mtrs. So what Shevate has said is corroborated by the first plan of sub division dated 09/03/1975. So, the showing of the fact in the plan dated 09/06/1981 by Bamne that the north south length on western side is 8.40 mtrs. Seems to be contrary to the original plan, which the basis for survey plan. So, the plan drawn by surveyor Bamne cannot be relied upon, to show the encroachment by the defendant in the present case. Similarly also, the eastern length north south in direction in the original plan appears to be 8.40 mtrs, while Bamne in the measurement dated 09/06/1981 has shown it as 8.45 mtrs. It is also material to see that Anant Bamne who is examined at Exh.40 found a gap on southern side of property 66D, which he could not measure. If that be taken into account, then the encroachment could not have noticed to Bamne in that survey plan of 09/06/1081. Bamne was also asked whether he went on the southern side of property 66D, but he stated that he could not go beyond that Bol. In the

map he has shown the space on the southern side. So what bamne did cannot be taken as the correct measurement of C.T.S.No.66C and 66D, for fixation of the boundaries. In the evidence of defendant it has come on record that the construction in 66D is exactly on the southern boundary of it. Therefore, the document on which the encroachment is shown cannot be used to believe that the defendant has encroached portion of 66C and 66A and therefore, the plaintiff would give a right to demolish that portion for possession of that portion. It is also not seen on record as to whether the holder of 66E had encroached upon 66D or vice versa, to show that southern boundary of 66D while taking the measurement was wrongly relied upon. It is further urged on behalf of plaintiff's advocate there is fencing on southern side of 66C and defendant believe that there was gap between that fencing and northern boundary of 66D, but that fencing is not the boundary line either for 66C or for 66D. Therefore, when settlement commissioner has set aside the survey plan of 09/06/1981 or earlier plans and also from the record, it can be seen that the survey plan of 09/06/1981 is not as per the original survey plan dated 09/04/1975. So, it cannot be relied upon to show the encroachment in

this case, so as to entitled the plaintiff to get possession of encroached portion.”

18. Moreover, it is pertinent to note here that, while deciding R.C.A.No.58/1989, the Hon'ble their Lordship had observed that, the first survey made by shri kulkarni on 09.04.1075 is admitted to both parties. The TILR Shri. Bamne had found gap on the southern side of property namely CTS No.66D which he could not measure. Had those measurements been taken, it could have through light whether there was really an encroachment in CTS No.66C. So, they be directed to appoint settlement commissioner and direct him to draw the map of the property namely CTS No.66A to 66D on the basis of the map drawn by Shri.Kulkarni at the time of sub division and thereafter locate encroachment if any.

19. As per the directions of Hon'ble Addl. District and Sessions Judge, Karad. My learned predecessor in office had appointed Superintendent of Land Records as Court Commissioner for carrying out Nimtana measurement and after submission of report by him parties are also permitted to lead evidence.

20. The plaintiff has alleged that defendant has encroached upon the portion of 66C and 66A. So, to prove encroachment the plaintiff relied upon his fresh testimony (Exh.108) and testimony of the witness Vijay Pisal (Exh.116) and Rafiq Dastgir Bhaladar (Exh.120).

21. In pursuance of which, the plaintiff examined himself

as P.W.1 at Exh.108. In which he has reiterated entire contents of plaint Exh.1. He has subjected to lengthy cross-examination. Further, the plaintiff examined Vijay Raghunath Pisal as P.W.2 at Exh.116. He deposed that as per the order of Hon'ble District and Sessions Judge, Satara he carried out measurement of the suit property. They used to measure the land as per the record kept with their office. However, the record of suit property was not available with their office. He further contended that, there was measurement of suit property vide measurement Register No.05/1978. As per the record of this measurement he has carried out measurement. But, he further contended that, they cannot show the encroachment by projecting gallery as it is not within their jurisdiction. He further contended that, he didn't find any encroachment over the land so he has not shown it in the map Exh.117. He further contended that, the northern wall of C.T.S.No.66D is in a straight line.

22. However, as this witness has contended that he do not have right to show the encroachment of gallery. So, the plaintiff examined Rafiq Dastgir Bhaldar (P.W.3) at Exh.120 who is Sub-divisional Engineering of Municipal Corporation, Karad. He deposed that, they have to supervise the constructions under their jurisdiction and they have to give permission for the constructions and have to issue notices in respect of illegal construction etc. From his testimony the plaintiff tried to get proved the notice dated 28/05/1982 issued by Municipal Corporation, Karad to defendant. However, this witness specifically contended that the

record of notice is not available with their office. So, he cannot state that this notice is from the office or not. However, the plaintiff got proved notice Exh.123 dated 07/01/1987. He further contended that in approved map of construction of the defendant, no balcony has been shown towards northern side of C.T.S.No.66C.

23. He has been subjected to lengthy cross-examination by the defence. During cross-examination he contended that if they received any complaint in respect of illegal construction then, they use to visit the site and issue notice to the concern. He further contended that, after measurement, if they found illegal construction then they used to issue notice to the concern by mentioning the measurements of illegal construction and they used to give 30 days time for removal of such construction they used to verify the construction with the permission or approved map of the construction. If the concern party constructs more than the permission, then, they used to issue notice. They do not have powers to carry out measurement of boundaries of C.T.S. It is to be done by City Survey Office. They have only powers to verify the construction with the construction permission. They cannot depict the encroachment. He further admitted that he had not produced any documentary to show that before issuance of notice Exh.123, whether their authority had visited the suit site and had measured it. The notices brought on record by the plaintiff are not issued by this witness nor he was serving in the concern department at the time. So, from his testimony also, plaintiff failed to prove the exact

construction permission of the defendant, excess construction of the defendant and this fact that by said excess construction how defendant encroached upon CTS No.66A and 66C.

24. Though the plaintiff has got proved the map (Exh.117) but in this map no encroachment has been shown as alleged by the plaintiff. The plaintiff has not denied this map. So, the testimony of second witness is not of any use to the plaintiff. Same is the position third witness of the plaintiff. From the testimony of this witness though plaintiff tried to bring on record that there was some dispute regarding construction of the defendant so the Nagar-palika had issued notice to the defendant. But the witness examined was not serving at the relevant time . He do not have any personal knowledge. So also except notices no other documentary evidence has been brought on record to show that the construction of the defendant was not as per plan submitted by her for getting construction permission. Even for the sake of argument it is accepted that the construction of the defendant was not as per plan submitted by her for getting construction permission than also it can not be assumed that by said construction the defendant encroached upon the property of the plaintiff.

25. Moreover, as mentioned earlier, the TILR Vijay Pisal (P.W.2) admitted that sub division map drawn by Shri.Kulkarni is not available at their office and he has contended that he has measured suit property on the basis of map register No.5/78. Pisal (P.W.2) has also deposed that he cannot state that who had

carried out measurement being map register No.5/78. It is pertinent to note here that, this witness admitted that he does not know who drew this map. So the plaintiff himself has brought on record, application made by him to the concerned department on 17/07/2017 for getting name of person who carried out map measurement register No.15/78, application moved by plaintiff to city surveyor for supply of copy of the map drawn at the time of measurement register No.15/78 dated 03.03.1978 and 09.04.1975 and reply given by city surveyor Karad dated 31.07.2017 along with list of document Exh. 125. Perusal of these documents also makes it clear that the information and documents sought for by the plaintiff was not available with the concerned departments. So in my view evidence on record is not sufficient to hold that the plaintiff has proved alleged encroachment by the defendant. Hence, in view of this discussion I answer issue no. 2 in the negative.

As To Issue Nos.3, 4 and 5 :-

26. Considering evidence on record it will be convenient to discuss these issues together to avoid repetition, so these issue are taken up together for discussion.

27. As far as issue no.3 is concerned as per discussion on issue no.2 the plaintiff has failed to prove the alleged encroachment by the defendant, so he cannot be held entitle for the relief of mandatory injunction.

28. Regarding issue no.4, it is the case of defendant that the suit being false and vexatious, she may be awarded

compensatory costs. However, this court has come to conclusion that the plaintiff has failed to prove the alleged encroachment by the defendant, then also, evidence on record shows that there is dispute regarding area of the survey number. A number of measurements have been carried out. Both parties filed suits against each other. So it cannot be said that, the suit is filed with malacious intention without any cause of action. So, in the absence of such a finding, when plaintiff bonafide relying upon the plan dated 09/06/1981, filed this suit for possession of encroached portion, cannot be said as false and vexatious. In the result, the defendant is not entitled to compensatory costs. In view of the above discussion I answer issue no. 3 and 4 in the negative and in answer to issue No.5 proceed to pass following order.

ORDER

1. The suit stands dismissed with costs.
2. Decree be drawn up accordingly.

Karad.

(Sou.V.P. Gaikwad)

Date 23/01/2019.

Joint Civil Judge Senior Division, Karad.