

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.C.C.A.No.203 OF 2008

JUDGMENT:

The appellant Smt.M.Shakuntala Sagar W/o Dr. M.Vidhyasagar owner-cum-resident of sub plot No.D of main plot No.55 of Shaikpet village, Road No.12, Banjara Hills, Hyderabad is the unsuccessful plaintiff in O.S.No.362 of 2015 on the file of the III Addl. Chief Judge, City Civil Court, Hyderabad filed against the defendant Nos. 1 and 2 by names Shafaat Hussain and his son Salamat Hussain respectively, who by impugning the legality and correctness of the dismissal judgment and decree in the suit supra dated 16.06.2008, maintained the present appeal.

2. The defendants 1 and 2 are undisputedly owners of sub plot No.C of main plot No.55 supra which is the northern boundary of plaintiff's sub plot No.D(in the plaint cause title wrongly described the northern boundary as sub plot B for C though in the plaint schedule, it is correctly described as sub plot No.C, equally as per Ex.A.3 rough plan and the Ex.A.2 approved lay out plan). The suit filed was for the reliefs of declaration of title of the plaintiff over the plaint schedule property viz; the site of 15 X 118 admeasuring 200 sq. yards which is the northern portion of the plaintiff's 1027 sq.yards of sub plot No.D in main plot No.55 in Sy.No.129/49 as indicated in the Ex.A.3 plaint plan and for possession of the same after removal of the compound wall constructed by the defendants by encroaching the plaint schedule site of 200sq.yards supra by mandatory injunction relief and for such other just reliefs.

3. The sum and substance of the plaintiff's claim with source of title to the reliefs supra as per the plaint before trial Court is that, the plaintiff being the absolute owner of the 1027 sq.yards covered by the sub plot No.D of main plot No.55, by virtue of the Ex.A.1 registered sale deed No.1595/30-4-1986 from the vendors and since then in

possession and enjoyment of the same. The background of source of title referred in the plaint was that one Miss Qubra Fatima, originally purchased under sale deed, dated 19.10.1962 from her vendors and became absolute owner of vacant land bearing plot No.55 admeasuring Ac.1-23 guntas=5806 sq.yards as per Ex.A.2(approved plan)=A.7(Blue print of lay out of plot No.55) in Sy.No.129/49 supra. While so, she sold it to Dr.Jacob Kurivilla under Registered sale deed dated 06.01.1964, said Jacob died intestate in 1965 and his wife Smt. Mary, who succeeded the property, divided the same into plots A to F as per Ex.A.2=A.7 and alienated to different persons of which the plaintiff purchased sub plot No.D containing 1027 sq.yards under Ex.A.1 registered sale deed and thus absolute owner and enjoyer of the same. It is further averred that the defendants also purchased the sub plot No.C of main plot No.55 of 1100 sq. yards subsequently under Ex.A.6 registered sale deed No.321/92, dated 25.01.1992, which is towards north of the plaintiff's sub plot No.D; that the plaintiff and her husband were away from Hyderabad till 1989 having stayed in Canada and thereafter at Bangalore till July, 2000. They came back to Hyderabad to reside by constructing a house in the vacant land of 1027 sq.yards in sub Plot No.D and pursuant to which in the year 2003, the plaintiff applied to the GHMC for sanction of plan to construct house in the sub plot No.D and obtained the same, that the southern boundary holder to the plaintiff viz; sub plot Nos. E and F as per Ex.A.3=A.7 and A.2 (though wrongly described in the plaint schedule as if part of plot No.D), already constructed house and are residing, that plaintiff before commencement of construction in her sub plot No.D of 1027 sq.yards, cause measured on 05.08.2005 and found that instead of 1027 sq.yards, the area available is only 827sq.yards, that for starting construction and for making marks out of the site for the area to be constructed pursuant to MCH sanctioned plan and from the shortage of site found when plaintiff cause measured entire plot No.55, to ascertain where her land was actually merged and thereafter found

200 sq.yards of her in the northern out of the 1027sq.yards is lying under the defendants' encroachment with compound wall and having noticed the encroachment from the elders advised to proceed the house construction in the available area to avoid expiry of the sanctioned plan period, the plaintiff when tried to contact the defendants to get the encroached wall being removed, the defendants not agreed to settle and having no other alternative, the plaintiff is constrained to file the suit from the cause of action arisen on 05.08.2005 when the plaintiff noticed part of her property supra in encroachment of defendants and thereafter till filing of the suit.

4 . The 1st defendant filed written statement dated 14.09.2006 adopted by his son-the 2nd defendant, with the contentions, while denying the plaintiff's suit claim specifically, that the defendants are absolute owners of sub plot C of plot No.55 admeasuring 1100 sq.yards purchased under Ex.A.6 registered sale deed and since the date of purchase, they are in possession and enjoyment of the same and it is to protect their property, they constructed the compound wall and engaged a watchman by erecting a gate within their site of 1100 sq.yards of sub plot No.C and the alleged construction by encroachment of plaintiff's site of 200 sq.yards and plaintiff so found on cause measured in 2005 August are thereby untrue, that the 2nd defendant is studying in USA and the 1st defendant is resident of Mumbai and no suit summons served to them, that it is through their well-wishers who are residents of Hyderabad, the defendants came to know about the plaintiff cause filed the suit and cause appointed *ex parte* Advocate-Commissioner, applied for certified copy of report and plan filed by the Commissioner, could not even obtained the same, appeared in the matter and therefrom filed written statement with right of filing additional written statement later, that the 1100 sq.yards in their possession covered by sub plot No.C is of them under sale deed dated 25.01.1992 and the plaintiff has no cause of action and the

alleged cause of action from 05.08.2005 is imaginary, that the Court has no jurisdiction, that the reliefs sought for are untenable, that the valuation of plaint is incorrect, that the suit claim is barred by limitation and therefrom sought for dismissal of the suit claim.

5. It is pursuant to the above contest, the trial Court framed the following issues:-

1. Whether the defendants are in possession of any extent
of land averred by the plaintiff and if so what is its area?
2. Whether the plaintiff is entitled for declaration,
mandatory injunction and possession of suit property?
and
3. To what relief?

6. Pursuant to the issues and pleadings, in the course of trial, the plaintiff herself was examined as P.W.1, her husband as P.W.2 and their car driver one Gundula Sreenivas as P.W.3 and the plaintiff placed reliance upon Exs.A.1 to A.12 viz; the plaintiff's sale deed dated 30.04.1986(Ex.A.1), sanctioned plan(Ex.A.2), rough sketch(Ex.A.3), release deed No.731/1992 executed on 24.02.1992 by Mrs. Mary Abraham of USA represented by the GPA Jacob Candy of Madras in favour of Smt.Sara Abraham W/o late P.Z.Abrahim of Bangalore and others referring to sub plot No.A of plot No.55 mentioned as if consistent of 1000 sq.yards however, as per Ex.A.2= A.7, it is only 982 sq.yards as per the Ex.A.2= A.7 within the measurements of north: 62, South: 60, East and west : 135 only(Ex.A.4) and Ex.A.5 sale deed No.227 dated 20.01.1989 executed by Mally Abraham W/o Dr.P.D.Abraham of Malaysia represented by G.P.A. of Sara Abraham of Bangalore in favour of Raeesa Hussain D/o M.F.Hussain of Madras for plot No.B. of main plot 55 referring as if of 1000 sq.yards though as Ex.A.2= A.7 speaks of only 982 sq.yards and Ex.A.6 copy of sale deed of defendants No.321 dated 25.01.1992, Ex.A.7 blue print of lay out of plot No.55 which is equal to Ex.A.2 supra

and Ex.A.8 to A.12 are the photo prints with relevant negatives and on behalf of the defendants, Abrar S.Penwalla-the G.P.A.holder of 1st defendant was examined as D.W.1 and the document of GPA is marked as Ex.B.1 and first Court Commissioner by name M.Venkata Ramana Reddy was examined as C.W.1 and his report and warrant are marked as Exs. C.1 and C.2. Ex.B.1 is the unregistered and notarized GPA dt. 26.07.2007 shows executed on stamp purchased in the name of 1st defendant at Hyderabad, referring to his address at Mumbai appointing Mr.Abrar S.Penwalla(D.W.1) as Power of Attorney saying the 1st defendant is the owner of plot No.C of 1100 sq.yards of Shaikpet village, Banjara Hills, Road No.12 and plaintiff Shankuntala Sagar filed O.S.No.362 of 2005 herein which is pending and the G.P.A. is given to look after said property to safeguard the right, to engage advocate, to settle the fees, to receive the summons, file documents, to settle or compromise the matter, to sign, to verify plaint, written statement, affidavits, petitions etc., and to give evidence and the same filed with Rule 33 of the C.R.P. to recognize and the GPA holder's particulars also referred as residing at Mumbai.

7. Ex.C.1 report of 1st Commissioner speaks, in the presence of plaintiff her advocate, the Commissioner cause measured entire lay out with the assistance of mandal surveyor from south to north except sub plot Nos. D and C for the dispute in relation to existence in sub plot Nos. D and C and the constructed area of sub Plot No.D in the occupation of plaintiff is only 827 sq. yards and remaining 196.6 sq.yards out of the said plot of 1027sq.yards is in the occupation of the defendants and with rock stone compound wall constructed therein. The Commissioner pursuant to the report examined as C.W.1 deposed that it is the *ex parte* commission executed by him with Mandal surveyor. There is no cross-examination by the plaintiff but for by the defendants counsel where the C.W.1 deposed that he sent notices to the defendants' address through post and those were returned later for

no such addressee and he sought mandal surveyor's help as per the Ex.C.2 warrant to cause measure the property and he deposed that within the compound wall there are huge trees and the compound wall appears to be new but he could not give its age and there was nobody on behalf of the defendants present at the time of execution of the warrant and the measurements mentioned in the Ex.C.1 as encroachment is from the measurements taken by surveyor. He denied the suggestion that plot No.B is merged in plot C the Pink marked lands denote plot D of his plan enclosed to the report Ex.C.1 and that the entire extent of Plot C is 1100 sq.yards. He denied the suggestion of he refused to execute the warrant on re-entrustment and thereby in his place another Commissioner was appointed. He deposed that according to the surveyor's sketch plan he concluded in his Ex.C.1 report of 196.6 yards is less in extent of Plot D of plaintiff and it may be true plot No.C of 1100 sq.yards. He denied the suggestion of Ex.C.1 report filed is with incorrect findings.

8. After closure of the evidence, the trial court found mainly from paras-10 and 11 of the judgment in dismissing the suit while answering issues 1 and 2 supra that the main dispute is with regard to the alleged encroachment of the plaintiff's site, from the say by the plaintiff of during the plaintiff's absence, the defendants encroached the plaintiff's extent which is part of the plaintiff's property and constructed compound wall whereas, the contest of defendants is that they never encroached upon the site of plaintiff and they constructed the house in the site purchased by them, the report of the Commissioner marked as Ex.C.1 and the evidence of Commissioner as C.W.1 shows the site of the defendants was found to be 1100 sq. yards only when measured and P.W.1 admitted the defendants are neighbours of plaintiff and the 1st defendant purchased sub plot C under sale deed for 1100 sq.yards and when the site of 1st defendant cause measured by Commissioner C.W.1, the extent found was 1100 sq.yards and nothing more and the 1st defendant constructed a house

and his entire property is surrounded by compound wall and the plaintiff's evidence could not show the date when alleged encroachment made by the defendants by constructing a compound wall and hence, the plaintiff miserably failed to prove that she got title over the suit property and when the property said to have been encroached by the defendants and thereby plaintiff is not entitled to the relief of declaration and mandatory injunction or possession in respect of the plaint schedule site.

9. It is impugning said dismissal judgment and decree, the unsuccessful plaintiff filed the appeal with contentions in the grounds of appeal that the trial Court erred in holding that the appellant/plaintiff admitted the total extent of defendant in plot-C is 1100 sq.yards and as to when cause measured through Advocate-Commissioner same is available on land and thereby the plaintiff failed to establish title over the plaint schedule, instead of considering her contention that the defendants under the guise of 1100sq.yards in plot C acquired, encroached the plaintiff's site out of plot-D in extent of 200 sq.yards and by claiming as if part of their own and the Advocate-Commissioner instead of accepting the request of the plaintiff, proceeded basing on the extent shown in main sale deed ignoring actual measurement mentioned in the plan attached to the sale deed and submitted incorrect report that resulted miscarriage of justice and Court below ought to have cause measured the entire plot No.55 of the extent of Ac.1-23guntas to demarcate the sub plots A to F individually by metes and bounds to arrive as to whether or not of the 200 sq.yards site of plaintiff encroached by the defendants contended by the plaintiff that, the Court below should have seen that the lay out plan attached to other sale deeds among plot Nos. A to F reveal some of the respective extents and in the cross-examination of D.W.1 when it is put to the D.W.1 that there is variance with the approved plan to the defendants' sale deed that could not be even explained by the D.W.1 and the trial Court should not have relied upon the so called Commissioner's report

Ex.C.1 of C.W.1 and ought to have been directed the survey of entire plot No.55 by cause issuing notice to the owners of the respective sub plot Nos. A to F, even they are not parties to the suit to determine the suit claim of plaintiff regarding encroachment of the plaintiff's site by the defendants and what the defendant examined is the Power of Attorney Holder of D.1 as D.W.1 by name Abrar S.Penwalla who has no basic knowledge as to the facts and not even resident of Hyderabad but for Mumbai and who deposed nothing for not acquainted with the facts by personal knowledge but for any of the defendants and the Court committed wrong by placing reliance on the Advocate-Commissioner's report and evidence. The learned counsel for the appellant reiterated the same in the course of hearing.

10. The learned counsel for the respondents, on the other hand, contended that in a suit for declaration of plaintiff, the plaintiff could win or lose his/her case on own strength and not on weaknesses of the case of defendants and when the plaintiff could not show the defendants are in possession beyond 1100 sq.yards and even the Ex.A.6 sale deed of defendants filed by the plaintiff shows 1100sq.yards and when there is no encroachment, remedy of plaintiff is elsewhere and not against the defendants and the other submission is originally *ex parte* Commissioner appointed examined as C.W.1 that he executed the warrant without service of notice to the defendants and in view of that and from the defendants were set *ex parte*, on came to know they filed application and came on record and filed written statement and also filed application for re-entrustment of the warrant to the Commissioner-C.W.1, who expressed his disinterest and thereby another Commissioner by name Sri Madhukar was appointed who filed his report and that is form part of the record and even therefrom there is nothing in favour of the plaintiff's claim and thereby sought for dismissal of the appeal with costs also by believing the C.W.1 1st Commissioner's report as if there is encroachment of 196.6sq.yards site of plaintiff by the defendants and that cannot be looked into and

cross-examination of C.W.1 by the defendants also substantiates the same of no basis to his conclusions.

11. Heard at length and perused the material on record.

12. Now the points for consideration are:-

1. Whether the plaintiff got title to the extent of 1027 sq.yards pursuant to Ex.A.1 sale deed from their vendors covered by sub plot No.D of main Plot No.55 of Shaikpet, Banjara Hills, Road No.12 in Sy.No.129/49 out of the total extent of Ac.1-23guntas equally to 5806 sq.yards under A to H sub plots and if so the plaintiffs are in actual possession of the extent and if not it is in the encroachment of any others or in the defendants encroachment as claimed by the plaintiff?

2. If so, whether the plaintiff is entitled to the relief of declaration of title and consequential mandatory injunction for removal of the compound wall or vacant possession of the so called encroachment area as part of plaintiffs sub plot No.D 1027sq.yards out of plot No.55 under Ex.A.1 sale deed with reference to Ex.A.2=A.7 approved lay out plan cause approved by vendor of plaintiff and defendants among others?

3. If so, the trial Court's dismissal judgment and decree is unsustainable and requires interference by this Court while sitting in appeal and to what extent and with what observations?

and

4. To what result?

Point Nos.1 to 3:

13. As the points 1 to 3 are inter-related, those are taken up together to avoid repetition of facts and for sake of convenience in disposal of the matter. There is no need of repetition of the facts covered by plaint, written statement and issues and memo of evidence.

14. It is not in dispute by the defendants of the plaintiff's title under Ex.A.1 for sub plot-D 1027sq.yards out of main plot No.55 which is based on Ex.A.2=A.7 approved lay out of cause made by the common vendor of plaintiff and defendants. As per the defendants and

also it is the case of the plaintiff with reference to Ex.A.6 sale deed dated 25.01.1992 of defendants exhibited by the plaintiffs that the defendants mentioned as purchased as if 1100 sq.yards. Once the defendant did not dispute the lay out plan covered by Ex.A.2=A.7, and when it clearly speaks the entire Ac.1-23guntas Sy.No.129/49 of Shaikpet village, Road No.12, Banjara Hills, covered by plot No.55 sub divided into sub plots A to H viz; sub plot-A 982 sq.yards and sub Plot-B 982 sq.yards which are shown at the northernmost out of the main plot No.55 and thereby the extents mentioned for sub plot Nos. A. and B in Exs. A.4 and A.5 as if each 1000 sq.yards is incorrect and beyond the extents covered by Ex.A.2=A.7. It is besides sub plot Nos. H and G of 368 and 455 sq.yards respectively which are on the southernmost, within main plot No.55 and the sub plot Nos. C and D are in the middle i.e. of the defendants and plaintiff and among which the defendants sub plot No.C is to the north of plaintiff's sub plot No.D and to the North of defendants plot No.C and to north of sub plot C, there are sub plots A and B supra. Likewise, to the south of defendants sub Plot C, the sub plot D of plaintiff lies and to the south of the plot of the plaintiff, the sub plot Nos.E and F are lying of 421 and 493 sq.yards respectively, if at all there is no encroachment of the site of the plaintiff among 1027 sq.yards of the approved lay out and the Ex.A.1 sale deed dated 30.04.1986 which is first in point of time of the alienation by the common vendor of the plaintiff and the defendants as the purchase by defendants was subsequent to the plaintiff, vendor of the plaintiff and about 6 years later particularly under the original of Ex.A.6 dt.25.01.1992.

15. The Ex.A.1 original registered document No.1595 of 1986 clearly speaks the same was executed by Mrs. Desiraju Komala Rao W/o. Dr.Desiraju Krishna Rao, of Bombay represented by her husband-cum-GPA Krishna Rao, in favour of M.Shakuntala Sagar-the plaintiff W/o Dr. M.Vidyasagar of Canada and it speaks that the sub

plot-D in main plot No.55 in survey No.129/49 admeasuring 1027 sq.yards of Shaikpet, Road No.12, Banjara Hills, Hyderabad as per the plan annexed to the sale deed which is Ex.A.2=A.7 approved lay out plan showing one Miss. Qubra Fatima D/o Qalunder Hussain purchased and became owner of the vacant plot No.55 under Sale deed No. 1577 dated 19.10.1962 of sub Registrar, Khairatabad executed by Mr. Khaiser Mohiuddin, s/o Ghulam Mohiuddin who originally purchased from Mr. Mohammad Ali on 23.03.1948 of the said plot No.55 total Ac.1-23guntas and from Miss. Qubra Fatima, one Dr. Jacob Kurivilla S/o P.V.Kurivella purchased under registered sale deed dated 06.04.1964 registered document No.492 of 1964 in the office of the Sub Registrar, Khairatabad, and after death of said Jacob on 06.05.1955, his wife Mari Kurivilla succeeded the property subsequently as per the letters on administration granted by the Sub Judge and the District deligate of Nilgiris at Ootakamand, Tamilnadu state in O.P.No.30 of 1995 dated 17.09.1966 and subsequently she sold the plot No.D as per the plan attached to the sale deed on 20.07.1981 bearing document No.1533 of 1981 before the Sub Registrar, Khairatabad and Mary Kuruvilla divided the said property into ABCDEF sub plots etc. of the plan attached and said Mary Kuruvilla granted G.P.A. to Sara Abraham w/o P.Z. Abraham of Madras to sell aforesaid plot No.55 covered by notarized GPA and said Sara Abraham conveyed the sub plot No.D, shown in red colour in the plan annexed admeasuring 1027 sq.yards to the vendors of the plaintiff by sale deed No.1595 of 1986 viz; smt. Desiram Komala Rao represented by her husband-cum-GPA Desiram Krishna Rao and pursuant to which they have taken possession from GPA holder of Mary Kuriville of the sub plot D of 1027 sq.yards supra with other warrantees for consideration of Rs.1,64,320/- with other recitals and the schedule description of Ex.A.1 sale deed dated 30.04.1986 bearing No.1595 of 1986 for sub plot No.D is that are described in the plan appended to the sale deed as per Ex.A.2=A.7 that is that of 1027

sq.yards Viz; North 118, South: 113, West and East: 80 total 1027 sq.yards.

16. The Ex.A.1 sale deed recitals with the appended plan Ex.A.2=A.7 said description shows the sub plot No.C is to the North of plaintiff's sub plot No.D out of main plot No.55 and sub plot No.E and F to the South of plaintiff's sub plot No.D under Ex.A.1 sale deed with reference to A.2 lay out approved plan. It is important therefrom to note that said Mary Kuriville Wife of Jacob Kuriville represented by GPA holder, sold even plot No.D describing as 1027 sq.yards in 1981 and said vendee, in turn, sold as vendor to the plaintiff herein in 1986 under Ex.A.1 and the recitals clearly speak the sub plots A to H were made with respect to existence out of plot No.55 and confirms from Exs.A.2=A.7 as Ex.A.2 appended to Ex.A.1 in conformity to it equally of description of plot No.C, A and B to its north also and EFGH towards south of plaintiff's plot No.D of 1027sq.yards. This confirms further plot Nos.A and B are only 982sq.yards each and not 1000 sq.yards as described wrongly in Ex.A.4 and A.5 equally plot No.C of defendants is owner 1078 sq.yards and not as wrongly described in original of Ex.A.6 of 1100 sq.yards.

17. Thus Ex.A.2=A.7 is the basis to ascertain what are the respective extents of plot No.55 sub divided as sub plot Nos. A to H in finding out what is the encroachment with reference to it, by any of the respective sub plot owners of one over the other and in particular of the plaintiff. The surveyor who assisted the first Commissioner whose report is invalid for executed without service of notice on defendants and thus his evidence also cannot be looked into as C.W.1 including from Ex.C.1 report, however shows there is encroachment as claimed by the plaintiff, out of the plaintiff's sub plot D of 1027sq.yards nearly 200sq.yards. The encroachment to be decided is whether by the defendants of northern side portion of the plaintiff's extent or from owners of the sub plot Nos.E and F on southern side of the plaintiff's extent is the crux.

18. From the above and as such the plaintiff ought to have been impleaded the owners of the southern side sub plot Nos. E and F also, if not also of sub plot Nos.H and G, A and B respectively for complete adjudication of the lis in their presence and after survey and demarcation by re-entrustment of the warrant to the 2nd Commissioner appointed. Needless to say the first Commissioner's report is invalid and equally not to look into the evidence of C.W.1 with reference to Ex.C.1, leave about 2nd Commissioner by name Sri Madhukar who went and executed, however, did not measure and demarcate the entire plot No.55 respectively with reference to Exs.A.2=A.7 sub plots A to H extents and without which he could find out any encroachment and he is also supposed to take into consideration the earlier report observations and also supposed to take into consideration the actual extents with reference to the Ex.A.2=A.7 and not with reference to Ex.A.6 or Ex.A.4 and A.5 regarding the sub plot Nos. C,B and A.

19. Thus the plaintiff got title over the plaint plan property under Ex.A.3 with reference to Ex.A.2=A.7, Ex.A.1 sale deed is proved from the evidence of P.Ws. 1 to 3. Besides the fact that it is not the case of the defendants with Ex.A.2=A.7 that is part of appended to Exs. A.1 sale deed in referring the sub plot D of plot No.55 with the extent as the basis from Ex.A.2 not in dispute as defendants also got source of title from the same vendor with reference to Exs.A.2=A.7 for whatever they could purchase the sub plot-C. On perusal of Ex.A.6 original sale deed of the defendants bearing No.321/dated 25.01.92, it clearly speaks one S.V.Sista S/o V.Sista, 2)Apu V.Sista S/o S.V.Sista of Bombay represented by GPA Mrs. Sara Abraham of Bangalore executed the said sale in favour of defendants 1 and 2 and the D.2 was minor represented by D.1 of Bombay saying the vendor was the absolute owner of the sub plot marked 'C' in the main plot No.55 of Road No.12, Banjara Hills Shaikpet, admeasuring 1100 sq.yards under registered sale deed dated 21.07.1981 of Sub Registrar, Khairatabad selling and delivering possession showing description of boundaries North: plot A

and B, i.e. substantiating by Exs.A.2=A.7, South: plot D that is also substantiating by Exs.A.2=A.7 and also Ex.A.3 and the plaintiff's suit claim and west: 30feet wide road and East: land belongs to Pioneer Cooperative Society.

20. In fact, extent referred as 1100 sq.yards in the original of Ex.A.6 sale deed as North and South: 83, west and East: 106.4, Ex.A.2=A.7 shows the plot D as North: 121.6, South: 118 and East: 81 and West: 82 respectively but the description in the sale deed Ex.A.6 for 1100 sq.yards is not correct from that Ex.A.2=A.7 description of the 4 boundaries extents and measurements as it comes only 1078sq.yards. Beyond the Ex.A.2=A.7 the original owner when could not get more than sub plot C of main plot No.55, they could not convey anything more even wrongly referred as if 1100 sq.yards but for on land what they could convey is 1078 sq.yards. that is the deficiency in the original of Ex.A.6 sale deed of defendants from Ex.A.1 to A.3 and A.7 and also from the evidence of P.Ws. 1 to 3.

21. In this background, coming to the cross-examination of plaintiff and her two witnesses i.e.P.Ws.1 to 3 by the defendants concerned. there is nothing practically that could be explained by defendants much less from the evidence of D.W.1 GPA holder of 1st defendant. In fact, the GPA holder cannot speak by stepping into the shoes of the original party but for anything within the exclusive personal knowledge of GPA holder and the GPA holder-D.W.1 is resident of Bombay and he is not acquainted with the sale transaction of the actual extent at all and also of in possession by vendors of defendants to defendants under original of Ex.A.6. Thereby, the D.W.1's evidence is also no way helpful to the defendants, much less to disprove the case of the plaintiffs or to rebut the evidence, vide decision **RVEE Gounder Vs RVS Temple** ^[1] holding that where the plaintiff could make out a case by preponderance of probabilities to the claim in a suit for declaration of title, burden shifts on the defendant to rebut and disprove more so

also of any positive case of defendant to establish to non-suit the plaintiff. It is besides not even to propound any positive case to found 1100 sq.yards or any extent beyond 1078 sq.yards covered by Ex.A.2=A.7 with reference to Exs.A.1,A.4 to A.6 referred supra.

22. From this, it is important to say that once the total extent of Ac.1-23guntas covered by Sy.No.129/49 plot No.55 is sub divided into sub plots A to H of the total area under original of Exs.A.2=A.7 as 5806 sq.yards of which sub plot D sold to the plaintiff's vendors first in point of time in 1981 and in turn 1984 itself is 1027 sq.yards described in Ex.A.1 in support of it by relying on Ex.A.2=A.7, what all the vendor can convey, out of sub plots A to H to others is the remaining with reference to Ex.A.2=A.7. Coming to the sale deed of the defendants what described is sub plot No.C and not further any extents towards North among plot Nos. A and B and in fact A and B are covered by Ex.A.4 and A.5 supra, thereby the defendants got only 1078sq.yards of sub plot No.C with specific measurements as described in Ex.A.2=A.7, equally the plaintiff for sub plot No.D 1027 sq.yards as described in Ex.A.2=A.7 for conveying the title under Ex.A.1 original of A.6 to the plaintiff and to the defendants by the common vendors from source of title.

23. Once these facts are not in dispute, what the defendants could claim is only 1078sq.yards of plot No.C and nothing beyond much less 100 sq.yards. Further it is needless to say it is out of the total availability of the site with four boundaries are described it is easy to find out, encroachments of the respective four boundaries of each sub plot to be fixed by fixing the total plots with reference to respective measurements covered by Ex.A.2=A.7 by demarcation of each sub plot to find out the encroachments respectively that is not done even by the second Commissioner appointed and leave about the first Commissioners report invalid, as it is not mere entrustment of warrant but giving of fresh warrant, that too, when earlier Commissioner C.W.1 covered by Ex.C.1 report based on Ex.C.2 warrant executed the same

without proper notice to the defendants as per Order XXVI Rule 18 of C.P.C. the report is void and it is practically by setting aside the first warrant and report in issuing the second warrant though it is not so specifically stated by the trial Court as it is not original warrant with correction and incorporation of another name deleting the original name for re-entrustment, but for fresh warrant by fresh entrustment. Thus, the Ex.C.1 report is invalid equally the examination of the first Commissioner whose report impugned by the defendants was as without notice since void under Order XXVI Rule 18 of C.P.C. even examined as C.W.1 is evidence of no use for the defendants or plaintiff much less to rely by any of them or even by the Court.

24. Even from the second commissioner's report to form part of Court record to say with reference to Ex.A.6 and A.2=A.7 the defendants in their possession 1100 sq.yards site is not correct but for 1078sq.yards as discussed supra. In fact, second Commissioner even should have been directed if necessary by re-entrustment of the warrant to cause measured through surveyor's assistance, the total extents of plot No.55 with reference to Exs.A.2=A.7 for the sub plots A to H and found out the encroachment of any extent out of the plaintiff where lies, if on field there is no 1027sq.yards site of plaintiff as it is easy to find out said encroachment of any of the four sides of sub plot D of plaintiff either with northern by defendant in sub plot C or southern by other vendees in sub plot Nos. E and F, if not on western road or eastern other neighbour's land from measurements on west to east of 118 and 118 on southern boundary of plaintiff existing or not, besides of 80 on western and of 80 on eastern boundary of the plaintiff's plot and anything deficit is practically with the encroachment of either defendants on north of sub plot No.C or on south of owners of sub plot Nos. E and F or the like. Thus, without such demarcation of entire extent with reference the Exs.A.2 and A.7, to ascertain by giving notice to all concerned, it is difficult to ascertain the encroachment, if any, and also by adding as co-defendants of the A to H sub plot owners to the

suit from the very contest of the defendants of the plaintiff's site under encroachment is not by them but elsewhere by others, if any, and so to decide, those other abutting and boundary holders must be necessarily parties to the suit and this Court also even got power to add, the address particulars are not before the Court and as such this Court feels just to leave to the plaintiff to implead by filing application if he chooses. It is also difficult to decide and the trial Court did not advert to it in the shipshod disposal of the suit.

25. Though, this Court is conscious of the fact that remand of the case is giving life to the litigation, inevitably it is constrained to order for remand of the matter for fresh disposal as early as possible without any timeframe by directing the trial Court to restore the suit and to decide by re-entrustment of the 2nd commission warrant to the same Commissioner and if not willing, by entrusting to another Commissioner, for cause measuring the entire plot No.55 of Ac.1-23guntas that is sub-divided into plot Nos. A to H for the respective extents total 5806 sq.yards and in particular plot Nos. ABCDEF and to find out the sub plot D extent of 1027 sq.yards of the plaintiff and the sub plot C extent of only 1078 though sale deed speaks as if 1100 sq.yards of defendants, and as if 1000 each of A and B sub plot owners though if each 982 sq.yards only, to decide any encroachment either in sub plot Nos. A and B of the defendants, and consequently therefrom any portion of plaintiff with defendants or the southern boundary E and F sub plot owners after ascertaining by respective surveyor with reference to Ex.A.2=A.7 plots, the entire A to H sub plots of Plot No.55 of the total area 5806sq.yards and to find out the encroachments and therefrom for the trial Court to decide afresh if necessary by cause examining the Commissioner with any objections to arrive an independent finding.

26. It is for such purpose, while remanding the matter, directed the plaintiff if chooses to implead the ABEFGH sub plot owners also as parties to the suit as co-defendants for such impleadment is necessary

as discussed above more particularly of EF sub plot owners to find out any encroachment of the extent of the plaintiff out of 1027sq.yards over and above existing on land either with C sub plot owners, the defendants or the E and F sub plot owners, as the case may be, to avoid further litigation by separate proceedings and to put an end to the lis by complete and efficacious adjudication in the presence of the respective parties is thus necessary to decide of the same. It is in the event of plaintiff's filing such application for the trial Court to implead by virtue of this order and after hearing and receive any written statement or additional written statement as the case may be after serving amended plaint copies and opportunity for adducing fresh evidence and disposal as the original suit is of the year 2005, the trial Court to make endeavour for early disposal though in view of the requirement of the impleadment of the parties and appointment of a Commissioner by re-entrustment or otherwise as per the remand order for localization and for survey with reference to A.2=A.7 approved lay out plan of respective extents of plaintiff and defendants and thus to find out encroachment and for grant of further reliefs, this Court is not in a position to fix timeframe.

27. The additional evidence application of plaintiff in the appeal covered by I.A.No.4472 of 2006 is disposed of by giving liberty if necessary to file such application before the trial Court. Needless to say the approved lay out plan proposed to be filed is already covered by A.2=A.7 with no necessity of again its marking by receiving as additional evidence, but for the calculation of the dimensions of the approved plan, the particulars of four boundaries itself mentioned of width and length in the said Ex.A.2=A.7 already but for to furnish to the Commissioner if not as a work memo with reference to it viz; Ex.A.2=A.7 for cause measuring and demarcation of the respective extents. Accordingly, these points are answered.

Point No.4:

28. Accordingly and in the result, the appeal is allowed in part while

setting aside the trial Court's dismissal judgment and decree and by remanding the matter in restoring the suit before trial court, with a direction to the plaintiff, if chooses to file an application before the trial Court to hear and to implead the neighbouring owners of sub plot Nos.AB,EF & GH of Ex.A.2=A.7 sketch plan and thereform by re-entrustment of the 2nd Commissioner warrant to same Commissioner and if not willing, to another Commissioner for survey and demarcation of sub plot Nos.ABCDEFGH respectively as per the extents shown in Ex.A.2=A.7 and to find out where the plaintiff's site lies and under whose encroachment and submit report and thereform and with reference to additional pleadings as directed Supra to receive, re-formulate issues by amendment or addition, as the case may be, and with opportunity to parties to adduce further evidence and to examine the Commissioner if necessary with reference to the report and objections if any and find out where the encroachment lies and with whom of the remaining site of plaintiff than the existing in the plaintiff's possession out of the 1027 square yards of sub plot 'D' of Ex.A.2=A.7 out of the main plot No.55 and to decide and dispose of the suit on merits. There is no separate order as to costs in the appeal. The costs before trial Court shall depend upon final result of the suit as per this remand order.

29.Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:22-12-2015

Vvr

[\[1\]](#) 2003(8)-Supreme Today-194 at 196