

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No. 213 OF 1994

JUDGMENT:

The unsuccessful plaintiff in Original Suit No.49 of 1984 on the file of the Court of Subordinate Judge, Bhimavaram, West Godavari district (for short, the 'trial Court') preferred this appeal challenging the decree and judgment dated 25.10.1993, where under and whereby the suit filed by the plaintiff for declaration of title, recovery of possession, mandatory injunction and for permanent injunction was dismissed.

2. For convenience of reference, the ranks given to the parties in O.S. No.49 of 1984 will be adopted throughout this judgment.

3. The appeal against the 4th defendant was dismissed for default *vide* court order dated 22.10.2008 and dismissed as abated against defendants 2 and 3 *vide* court order dated 30.01.2014 respectively.

4. The plaintiff filed the suit for declaration of her title to the suit schedule property, shown as MGK in the plaint plan, for recovery of possession of the same after ejecting the defendants from MGK portion of an extent of Ac.0-05 cents, for mandatory injunction to remove the earth to a height of about two feet and for permanent injunction alleging that Narahariseti Challamma, mother of the plaintiff, settled Ac.1.85 cents in R.S. No.185/1 and Ac.0.38 cents in R.S. No.186/1 of Bhimavaram Town to the plaintiff with absolute rights under registered settlement deed dated 19.06.1963. The possession of the property was delivered to the plaintiff. Since then she was in possession and enjoyment of the entire property with absolute rights.

5. The 1st defendant is the sister's son of the plaintiff and her sister was the owner of the land situated to the east of FG as per the plaint plan in R.S. No.185/1. The plaintiff converted Ac.1.03 cents out of Ac.1.85 cents in R.S. No.185/1 into house sites and obtained lay-out

plan under T.P. No.5/82, dated 26.08.1982, prior to approval of lay-out, the plaintiff sold Ac.0.32 cents in R.S. No.186/1 to Chinnamsetti Das and others in the year 1973. Northern side Ac.0.82 cents in R.S. No.185/1 is not included in the lay-out and the plaintiff has sold only Ac.0.11 cents to one Yerra Kesava Rao. At the time of approval of lay-out, the Bhimavaram Municipality has included Ac.0.06 cents of R.S. No.186/1 and merged with Ac.1.03 cents of R.S. No.185/1. Thus, Bhimavaram Municipality has sanctioned lay out for an extent of Ac.1.09 cents dividing roads *etc.*, As per ABFG shown in the plaint plan, the plot for which lay-out has been sanctioned under T.P. No.5/82, dated 26.08.1982 out of which LMGH is situated as separate plot of an extent of Ac.0.10 cents. The plaintiff sold away all the plots in ABFG excluding LMGH which she kept as her own property. Thus, as per the plaint plan, LMGH is the absolute property of the plaintiff and FG is the boundary line between the plaintiff's site and 1st defendant's land *i.e.*, FXYG.

6. The 1st defendant being the owner of FXYG land shown in the plaint plan converted the same into house site by raising level. It is learnt that the 1st defendant sold FXYG land to defendants 2 to 4, delivered possession, but no sale deed was executed by the 1st defendant in their favour. While raising height of the land to construct houses, defendants 2 to 4 with the support and knowledge of 1st defendant have been stocking black soil clots in FXYG land for the last 10 days; while doing so, on 06.05.1984, defendants have shifted the boundary survey stone from G and shifted towards west up to K and have been raising level of the site MGK to a height of four feet. Despite objection raised by the plaintiff through her husband and referring the dispute to the elders by name D. Kameswara Rao and Md. Sultan of Bhimavaram, the defendants encroached MGK plot shown in plaint plan unauthorizedly. FG is the boundary line between

the land of plaintiff and 1st defendant and the 1st defendant denied title of the plaintiff over MGK plot shown in plaint plan. Hence, the plaintiff filed the suit for the reliefs stated in the earlier paragraphs.

7. The 1st defendant filed written statement denying material allegations *inte-alia* contending that in the absence of linear measurements of the plots marked as ABFG, GFX Y and LHGM the property in dispute cannot be identified and that the plaint plan does not indicate the directions obtaining in the locality, called upon the plaintiff to prove that settlement of Ac.1.85 cents in R.S. No.185/1 and Ac.0.32 cents in R.S. No.186/1 of Bhimavaram under registered settlement deed dated 19.06.1963 and that those documents were not validly executed.

8. Naraharisetty Challamma was the original owner of an extent of Ac.3.75 cents in R.S. No.185/1 lying to the south of Bhimavaram – Juvvalapalem road in Bhimavaram town, the said Challamma settled Ac.0.82 cents on the north-western side and Ac.1.03 cents of land on south-eastern side out of Ac.3.70 cents of land in R.S. No.185/1 to the 1st defendant's mother Kammula Venkata Lakshmi Narasamma under registered settlement deed dated 19.06.1963. She also settled Ac.0.82 cents on the north-eastern side and Ac.1.03 on south-western side of said Ac.3.70 cents in R.S. No.185/1 to the plaintiff, who is the sister of 1st defendant's mother. There used to be field bunds separating the plots settled to the plaintiff and 1st defendant's mother, 1st defendant's mother was in possession and enjoyment of Ac.0.82 cents plot on the north-western side and Ac.1.03 cents plot on the south-eastern side of said R.S. No.185/1. The land was devolved on the 1st defendant and his sister Brundavanam Srirama Tulasi on the death of Kammula Venkata Lakshmi Narasamma. The 1st defendant and his sister partitioned the property of their mother into two equal shares under a partition list dated 12.01.1984. In the said partition, Ac.0-82 cents of

plot and Ac.1.03 cents of plot in R.S. No.185/1 was allotted to the share of this defendant and he has been in possession and enjoyment of the land after death of his mother.

9. The 1st defendant entered into an agreement to sell the land to the 3rd defendant and Borra Satyanarayana and executed an agreement in their favour. But, the said agreement was subsequently cancelled by the 1st defendant by mutual consent and, thus, the 1st defendant is the owner of Ac.0.82 cents land and Ac.1.03 cents land in R.S. No.185/1. The 1st defendant denied approval of lay out plan for the land in R.S. No.185/1 alone, while contending that the allegation that Ac.0.06 cents in R.S. No.186/1 was merged in Ac.1.03 cents in R.S. No.185/1 is *ex-facie* false. The plaintiff already sold Ac.0.11 cents of land out of her north-eastern plot of Ac.0.82 cents in R.S. No.185/1 to Sri Yerra Kesava Rao and she own and possessed only Ac.0.71 cents in the said plot. The plaintiff sold away all her entire land in R.S. No.186/1 after obtaining approval of lay out plan and as on that day, she does not own any land in the said survey number. The plaintiff owns Ac.0.71 cents on the north-eastern side and Ac.1.03 cents on the south-western side of R.S. No.185/1, when she submitted lay out proposal to Bhimavaram Municipality. The 1st defendant came to know that, at the time of submitting layout proposal to Bhimavaram Municipality, the plaintiff has wrongly shown the extent as if she got Ac.1.80 cents in R.S. No.185/1 though she actually own only Ac.1.74 cents in R.S. No.185/1 by that time. Therefore, the plaintiff is not the owner of Ac.1.80 cents in R.S. No.185/1 by the date of filing of the suit as well as submitting layout proposal for sanction of layout for the land in R.S.No.185/1 after deducting Ac.0.11 cents already sold to Yerra Kesava Rao. Thus, the sanction of layout plan for the entire extent of Ac.1.85 cents in R.S. No.185/1 does not confer any title to the plaintiff since the Municipality has no right to sanction any layout for the entire land. Therefore, the allegation that Ac.0.06 cents of land in R.S.

No.186/1 was included in the layout is *ex-facie* false.

10. The 1st defendant specifically contended that the boundary line between the plaintiff and 1st defendant's land is 'FK', but not 'FG' as alleged in the plaint, the FKG marked plot and the land to its east forms part and parcel of the defendant's plot of Ac.1.03 cents lying on the south-eastern side of R.S. No.185/1. The western boundary of the 1st defendant's 'Q' marked land is 'FK' and the 1st defendant and his mother are having title and possession over FKYX marked land. Therefore, the plaintiff has no manner of title or possession in 'MKG' marked plot at any time. The plaintiff surrendered some land to Bhimavaram Municipality in the road widening on the south-western side plot of Ac.1.03 cents in R.S. No.185/1 and sold the remaining land and she was then in possession of Ac.0.04 cents in the said land. The plaintiff was not in possession of Ac.0.10 cents of land in R.S. No.185/1.

11. The 3rd defendant and Borra Satyanarayana, who purchased the 1st defendant's land in R.S. No.185/1 under an agreement of sale, carted some earth in the land of the 1st defendant and raised height in part of north-west portion of Ac.0.82 cents and the south-eastern plot of Ac.1.03 cents in R.S. No.185/1. This defendant never encroached the land belonging to the plaintiff, never shifted the boundary stone and that no dispute was raised before the elders questioning the encroachment. It is specifically contended that the defendants are owners of the property shown in MGK and the plaintiff cannot claim declaratory relief for the land beyond FK marked lines as per the plaint plan. Finally, he prayed for dismissal of the suit.

12. Defendants 2 and 4 filed a separate written statement almost in support of the contentions raised by the 1st defendant, claiming right

over the property through the 1st defendant, denying the alleged encroachment of MGK marked portion by carting earth in MGK portion shifting boundary stone and also denied the reference of dispute to the mediators *etc.*, while contending that the plaintiff was not in possession of ABFG marked plot and that the defendants came to know that the plaintiff did not possess or own any land beyond FK line as per the plaint plan and that the 1st defendant sold the same to the 2nd defendant and Borra Satyanarayana. As the plaintiff is the owner of the property, she is not entitled to claim declaratory relief, mandatory injunction and permanent injunction and, finally, prayed to dismiss the suit against them.

13. The 3rd defendant filed separate written statement reiterating the contentions raised by the 1st defendant and defendants 2 and 4. Therefore, it is not necessary to repeat those specific pleas urged in the written statement by 3rd defendant. However, the 3rd defendant denied the alleged encroachment of MGK plot as alleged in the plaint as shown in the plaint plan while contending that MGK plot is the part and parcel of the land purchased by the 3rd defendant and Borra Satyanarayana and, thereby, they never encroached into the land of the plaintiff. The plaintiff has neither title nor possession over MGK plot shown in the schedule property. Consequently, the plaintiff is not entitled to the relief of declaration of title, recovery of possession, mandatory injunction and permanent injunction and prayed to dismiss the suit.

14. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the plaint plan is correct?
2. Whether the plaintiff has got title to and possession of MGK marked plot as per plaint plan?
3. Whether the plaintiff is entitled for the declaration

and possession of MGK marked plot as per plaint plan?

4. Whether the plaintiff is entitled to injunctions as prayed for?

5. Whether the valuation of suit and Court Fee paid are correct?

6. To what relief?

15. During course of trial, on behalf of plaintiff, PWs.1 and 2 were examined, marked Exs.A-1 to A-8 and Exs.C-1 to C-5. On behalf of defendants, DWs.1 and 2 were examined, marked Exs.B-1 to B-9.

16. Upon hearing argument of both the counsel, considering oral and documentary evidence, the trial Court held all the issues against the plaintiff, consequently, dismissed the suit negating the relief of declaration of title, recovery of possession, mandatory and permanent injunctions.

17. Being aggrieved, the unsuccessful plaintiff therein preferred the present appeal raising several contentions. The main contentions of the plaintiff-appellant are as follows:

a) The trial Court did not frame proper issues in the suit for declaration and for recovery of possession, thereby; the finding of the trial Court is perverse and unwarranted;

b) The trial Court did not consider oral and documentary evidence Exs.A-1 to A-8 and contents of those documents to come to a just decision but swayed away with the submissions of the defendants counsel;

c) The trial Court failed to consider Exs.C-3 and C-4, especially Ex.C-4, which clinchingly proves the actual measurements taken by the 2nd commissioner, but it was totally ignored and the finding of the trial Court regarding Ex.C-4 is erroneous since it is not supported by specific

reasons;

d) The trial Court also failed to appreciate the contention of the plaintiff that Ac.0.06 cents in R.S. No.186/1 was included in the layout plan approved by the Municipality for the land covered by R.S. No.185/1 and dismissed the suit, negating all the reliefs, erroneously, and prayed to *set-aside* the judgment and decree under challenge and pass decree in favour of the plaintiff as claimed.

18. During course of argument, Sri Y. Rama Rao, learned counsel for the plaintiff-appellant, would submit that the 2nd commissioner's report is suffice to establish that the plaintiff is the absolute owner of MGK portion shown in the plaint plan which is an extent of Ac.0.05 cents, but the trial Court overlooked Ex.C-4 without assigning any legal reasoning to arrive at such a conclusion. Added to that, the oral evidence of PWs.1 and 2 and documentary evidence marked as Exs.A-1 to A-8 clinchingly established the title of the plaintiff over MGK portion shown in plaint plan. Even otherwise, the title of the plaintiff was not in dispute, but the dispute is only with regard to boundary. When the boundaries are fixed by the 2nd Commissioner in Ex.C-4, the same would have been considered by the trial Court to decide the boundary and find out the encroachment of land belonging to plaintiff, but the trial Court on erroneous appreciation rejected the report of the 2nd commissioner. In fact, the 2nd Commissioner's report is part of the record; merely because the Commissioner was not examined, it cannot be thrown out. If the entire material is considered in proper perspective, the trial Court would have granted a decree granting all the reliefs claimed by the plaintiff, but the trial Court without appreciating the facts and law dismissed the suit and, finally, prayed to *set-aside* the decree and judgment passed by the trial Court in O.S. No.49 of 1984 and grant decree in favour of the plaintiff by allowing this appeal.

19. *Per contra*, Sri. V.L.N.G.K. Murthy, learned counsel for the defendants-respondents, would contend that the evidentiary admissions of PW.1 are suffice to conclude that the plaintiff had no land beyond FK line and MGK plot is beyond FK line. Therefore, the plea of plaintiff that she own and possessed land beyond FK line is *ex-facie* false. Apart from that, the proposal for sanction of layout has to be submitted by the owner of the land *i.e.*, plaintiff and she herself submitted layout plan for approval, but the approved plan at best disclosed that it is for the land in R.S. No.185/1 not for the part of land in R.S. No.186/1. Therefore, the question of Municipality including Ac.0.06 cents in R.S. No.185/1 while approving layout plan cannot be accepted and the trial Court rightly rejected this contention. It is further contended that non-examination of plaintiff is fatal to the plaintiff's case and an adverse inference has to be drawn for her non-examination. Finally, it is contended that the plaintiff, in a suit for declaration, recovery of possession and other consequential reliefs, has to succeed on the strength of her own case and cannot be allowed to take advantage of weakness in the defence set up by the defendants, placed reliance on the judgments of the Apex Court in ***T.K. Mohammed Abubucker (dead) through L.Rs., and others Vs. P.S.M. Ahamed Abdul Khader and others***^[1] and ***Union of India and others Vs. Vasavi Co-operative Housing Society Limited and Others***^[2] and prayed to dismiss the appeal confirming the decree and judgment of the trial Court.

20. Considering rival contentions and perusing material available on record the points that arise for consideration are:

1. Whether the plaintiff is the owner of MGK plot shown in the plaint plan in an extent of Ac.0.05 cents in R.S. No.185/1? If so, whether the plaintiff is entitled to be

declared as its lawful owner?

2. Whether the defendants encroached into the MGK plot without any lawful title? If so, are they liable to be ejected from MGK plot, shown in the plaint schedule property, and whether the plaintiff is entitled to a decree for recovery of possession of MGK plot?

3. Whether the defendants raised height of the land shown in MGK plot in the plaint plan shifting boundary stone? If so, are they be directed to remove the earth carted in MGK plot by way of mandatory injunction?

4. Whether the plaintiff is entitled for permanent injunction restraining the defendants and their men from ever interfering with the possession and enjoyment of MGK plot?

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21. **POINT Nos.1 & 2:** The real dispute between the parties is with regard to boundary. Taking advantage of the boundary dispute, both plaintiff and the defendants are claiming right in the plot shown as MGK in the plaint plan. The contention of the defendants is that plaintiff does not own or possess any site beyond FK line shown in the plaint plan. Thus, both the plaintiff and the defendants are claiming title to the property shown as MGK. Admittedly, the property originally belongs to mother of the plaintiff and grand mother of the 1st defendant *i.e.*, Naraharisetty Challamma and she settled Ac.1.85 cents in R.S. No.185/1 and Ac.0.38 cents in R.S. No.186/1 of Bhimavaram in favour of the plaintiff executing registered settlement deed dated 19.06.1963 but the plaintiff's main contention is that she possessed site beyond FK line though she sold away Ac.0.11 cents in R.S. No.185/1 to one Yerra Kesava Rao and she applied for approval of layout plan dividing the remaining property into plot in R.S. No.185/1. However, the Bhimavaram Municipality, while approving layout plan included Ac.0.06 cents in R.S. No.186/1 into the layout plan and sanctioned

layout plan for Ac.1.75 cents even after sale of Ac.0.11 cents to Yerra Kesava Rao. She converted only Ac.1.03 cents out of Ac.1.85 cents in R.S. No.185/1 into house sites, obtained lay out plan T.P. No.5/82 dated 26.08.1982. She admittedly sold away Ac.0.32 cents in R.S. No.186/1 to Chennamsetty Das and others in the year 1973, but Ac.0.82 cents on the northern side of R.S. No.185/1 is not included in the lay out plan submitted to the Municipal Corporation, but sold away Ac.0.11 cents to Yerra Kesava Rao. The Bhimavaram Municipality included Ac.0.06 cents of land in R.S. No.186/1 merged with Ac.1.03 cents in R.S. No.185/1 and sanctioned layout for Ac.1.09 cents in T.P. No.5/82 dated 26.08.1982. From this admission in Para No.5 of the plaint, it is clear that the plaintiff already sold Ac.0.32 cents out of Ac.0.38 cents in R.S. No.186/1 and set apart northern part of Ac.0.82 cents in R.S. No.185/1 but obtained layout for Ac.1.09 cents.

22. It is a known fact that layout is prepared and submitted by the owner of the layout for approval by the concerned municipal authorities. Therefore, the question of including Ac.0.06 cents in R.S. No.186/1 by the Municipal Corporation while approving the lay out plan bearing No.5/82 is beyond comprehension and it cannot be accepted for the reason that Bhimavaram Municipality has no business to change the lay out and approve it. If, for any reason, the proposed lay out is not in accordance with the lay out Rules under the Andhra Pradesh Municipalities Act, 1965, the Municipality may return the lay out for compliance of certain objections in compliance of Lay out Rules. The Municipality cannot include any part of the land in other Survey number unless it is included by the lay out owner herself. In fact, it is not the case of the plaintiff that she applied for sanction of lay out plan for Ac.1.09 cents which is exclusive of Ac.0.06 cents in R.S. No.186/1 of Bhimavaram and her contention is that she applied for approval of lay out for Ac.1.03 cents but not for Ac.1.09 cents. Ex.A-2 is the lay out plan bearing T.P. No.5/82 of Bhimavaram Municipality for

the R.S. No.185, part of ward No.4 of Sreerampuram. Ex.A-2 is the crucial document to decide the real controversy between the parties. The contents of Ex.A-2 disclosed that the revised lay out plan was approved for the site covered by R.S. No.185 of Ward No.4 of Sreerampuram Town Planning Scheme. No piece of land in R.S. No.186/1 is included in the layout. However, the contention of the plaintiff that the Municipality included Ac.0.06 cents in R.S. No.186/1, while approving the plan, is *prima-facie* false, even according to the recitals contained in Ex.A-2.

23. When I advert to the evidence of PW.1, in Para No.10 of the cross- examination, he admitted that entire land covered by two settlement deeds were measured at that time. For that also no linear measurements were mentioned in the settlement deeds. In the cross-examination dated 10.11.1989 in Para No.13, PW.1, husband of the plaintiff, made categorical admissions with regard to sale of the property and the same are extracted hereunder for better appreciation:

“As per Ex.A-3, S.No.186/1 is on the southern side of S.No.185 and only S.No.104 is there on the western side of S.No.185. It was in the year 1973, we sold away the land we are having in R.S.No.186 to Chennamsetty Dass and others to some extent. Leaving 40' wide road in S.No.186, I sold away the entire remaining land. Subsequently, the Municipality also laid road in the site left by us in 40' width for that purpose.”

24. The above extracted admission clearly goes to show that plaintiff sold the entire land in S.No.186/1. PW.1 further admitted that a joint layout by Ibrahim Saheb and the plaintiff was obtained and the land of Ibrahim Saheb is lying to the east of Ac.0.38 cents, but PW.1 is not aware about passing of resolution for approving layout for the land covered by R.S. No.186/1 as house plots. Therefore, it is clear from the evidence of PW.1 that he is not aware about sanctioning of layout for the site covered by R.S. No.186/1. However, he admitted that he sold away entire land in R.S. No.186/1. Curiously, the plaintiff did not

produce the copy of the sale deed executed in favour of Chennamsetty Das and others and the extent was also not disclosed in the cross-examination. If a copy of the sale deed is produced before the Court, it is easy to find out whether any land belonging to the plaintiff is available in R.S. No.186/1 or not, but suppressed the extent sold by plaintiff to Chennamsetty Das and others for the reasons best known to her.

25. Further in Para No.14 of the cross-examination, PW.1 admitted that even before approval of layout, the plaintiff sold away Ac.0.11 cents of site to Yerra Kesava Rao in R.S.No.185/1 and it was subsequently purchased by one Nagula Koteswara Rao and from him Sri G. Ramabhadraraju purchased and it was under his occupation and constructed a house therein. Therefore, the undisputed fact is that the plaintiff sold away Ac.0.11 cents in S.No.185/1 to Yerra Kesavarao with specific measurements 80 x 60 feet plot. Admittedly, Ex.A-2 is the plan got prepared by the plaintiff mentioning the measurements of each plot and the plaintiff divided the plots and fixed boundary stones to the plots. The total extent covered by lay out is only Ac.1.03 cents in R.S. No.185/1 and left eight plots for sale in R.S. No.185/1 and sold away the entire land under registered sale deeds to different persons. The sale deeds were produced and marked as exhibits before the trial Court. In none of the sale deeds, R.S.No.186/1 was referred in the schedule of the property sold. If really, the land in R.S.No.186/1 is included in the layout, at least the survey number would have been mentioned in any one of these sale deeds but, curiously the schedule in all the sale deeds does not disclose sale of property in R.S. No.186/1. This is another strong reason to disbelieve the case of the plaintiff that the plaintiff own land beyond FK boundary line. The layout plan did not disclose the land belonging to the plaintiff on any of the sides, particularly, at MGK portion. If really, the said plot belonging to the plaintiff disclosed the land, it would have been shown by the

plaintiff in layout plan as part of the boundary. Though the layout plan was got prepared by the plaintiff, obviously for the reasons best known to the plaintiff, MGK plot was not shown in the plaint plan as one of the part of boundaries.

26. The main endeavour of learned counsel for the plaintiff-appellant is that she is the owner of Ac.0.05 cents of site and the same was encroached by the defendants but still she possessed other Ac.0.05 cents, other than the encroached portion. Ex.B-5 is the document pertaining to the plot No.14 sold to Jagga Raju by the plaintiff. The boundaries of the land are relevant to decide whether MGK land belongs to plaintiff or not. According to the boundaries mentioned in Ex.B-5, the northern boundary is the site of Kammula Venkata Lakshmi Narasamma *i.e.*, land belonging to the mother of the 1st defendant settled in her favour by her mother. If really the land on the northern side belongs to the plaintiff, it would have been mentioned in Ex.B-5 itself as land belonging to the plaintiff. In none of the documents including Exs.B-2, B-3 and B-4, there was no reference about the land belonging to the plaintiff as one of the boundaries. This is another strong circumstance to disbelieve that the plaintiff own and possessed land beyond FK line shown in the plaint plan.

27. The main endeavour of learned counsel for the plaintiff-appellant is that when the dispute was with regard to boundary, a commissioner was appointed, initially, and, later, second commissioner was appointed. If Ex.C-4 Commissioner's report is accepted, the encroachment can be find out easily, but the trial Court overlooked Ex.C-4 and disbelieved the report assigning its own reasons. No doubt, the dispute is a boundary dispute, the best method of establishing the boundary is report of the Commissioner. Here, the first commissioner was appointed to determine the boundary and encroachment, if any, and the commissioner filed his report and objections were also filed by both the parties to the suit and the same

are on record. Again, second commissioner was appointed, he also filed report, marked as Ex.C-3 and plan, marked as Ex.C-4 and the 1st defendant filed objections to Exs.C-3 under Ex.C-5. The trial Court appointed the second commissioner without passing any order on the first commissioner's report, but both the reports form part of the record. The Presiding Officer of the trial Court made every effort to reject the first commissioner's report so also the second commissioner's report. When the objections are filed on the second commissioner's report, the trial Court instead of deciding the objections on the second commissioner's report Exs.C-3 and C-4, heard argument in the suit and decided the validity of the report, disbelieved the same.

28. According to law laid down by this Court in ***Gatti Umamaheswara Rao Vs. Jarajana Simhachalam***^[3], when a commissioner was appointed for local inspection to determine the boundaries of survey numbers, which is the subject matter of the suit, a party cannot ask for another commissioner in a petition filed by the opposite party. He may seek appointing a fresh commissioner by filing a petition. When objections are filed by a party to the Commissioner's report passing an order by the Court accepting the report, overruling the objections when the trial is still pending, is not legal. Directions are given to the lower courts to answer its observations on the objections and consider those objections at the final hearing of the suit in the light of entire evidence relevant to the question that may be brought on record.

29. From the principles laid down by this Court in the judgment referred *supra*, it is clear that objections have to be considered only at the time of hearing of the appeal and decide the legality of the report filed by the Commissioner. The same procedure has been adopted by the trial Court in deciding the objections on the commissioner's report. However, the objections filed by the 1st defendant were sustained

while rejecting the report. Now, the finding of the trial Court on Ex.C-4 is under challenge raising a specific ground, but the trial Court assigned more than one reason for not accepting the plan and the report of the second commissioner *i.e.*, Exs.C-3 and C-4 so also Exs.C-1 and C-2. When second commissioner was appointed for the same purpose for which the first commissioner was appointed, it is nothing but the report of the second commissioner supersedes the report of the 1st commissioner. Therefore, I need not once again advert to the 1st commissioner's report to decide the real controversy between the parties.

30. Admittedly, Naraharisetty Challamma settled land in R.S. No.185/1 in favour of her two daughters and mother of the 1st defendant in equal shares and it is not an undisputed fact that Ac.0.82 cents in the northern part of R.S. No.185/1 as well as Ac.1.03 cents on the southern part of R.S. No.185/1 was settled in favour of the plaintiff under Ex.A-5, Settlement Deed by Challamma; similar part of the land to the 1st defendant's mother Kammula Venkata Lakshmi Narasamma. Even the land in R.S. No.185/1 was divided into two halves, Ac.1.64 cents as one plot and Ac.2.06 cents as another plot and northern half is divided into eastern and western; half of which comes to Ac.0.82 cents and the southern half was divided into two parts, each part comes to Ac.1.03 cents. As per Ex.A-5, it is evident that plaintiff was allotted east Ac.0.82 cents and south Ac.1.03 cents by her mother and the remaining land was in favour of the 1st defendant's mother. Plaintiff admitted that she applied for approval of layout for remaining land in Ac.1.03 cents leaving Ac.0.82 cents. Therefore, approval must be only for Ac.1.03 cents. However, as seen from Ex.A-2, the plaintiff applied for sanction of lay out for Ac.1.09 cents on the ground that the municipality included site of an extent of Ac.0.06 cents in R.S. No.186/1 and this contention is not based on any material for the reason that the plaintiff herself got prepared the lay out plan and

submitted to the Municipality for approval. The proposed layout also shows that the municipality sanctioned lay out for the land in R.S. No.185/1 and not for the other part of the land.

31. Ex.C-3 is the report filed by the Commissioner. Ex.C-4 is the commissioner plan pointing out the MNII1 portion. In Ex.C-4 the plan filed by the Commissioner, the encroachment by the 1st defendant is 'D' marked plot shown in red colour and the encroachment made by the plaintiff is shown as 'C' marked plot. However, the commissioner found that the 1st defendant encroached MNII1 portion on the eastern side so also EE1DD1 portion on the northern side of the plaintiff's portion. However, as per the report, plaintiff is the owner of two portions adjacent to each other to some extent in the same survey number. In fact, it is not the case of the plaintiff and defendants, at anytime, that the 1st defendant encroached the land of plaintiff at two places, triangular piece MGK was allegedly encroached by the 1st defendant. Moreover, the commissioner made out a different case than what the plaintiff pleaded and the defendants never pleaded that the plaintiff encroached any part of the plaintiff's land. Thus, the commissioner made out a total different case than what the parties pleaded and the encroachment allegedly pointed out by the commissioner under Ex.C-4 is nothing to do with the suit schedule property. The commissioner noted the measurements of MNII1 portion in Ex.C-4. In Para 5 of the Ex.C-3 report, he pointed out the total encroachment is 2 ½ cents; whereas, the alleged encroachment of MGK plot shown in the plaint plan and pleaded by the plaintiff is Ac.0.05 cents. Therefore, it is obvious that MNII1 portion of Ex.C-4 is not MGK portion of plaint plan. MGK portion is in triangular shape, whereas MNII1 portion is in rectangular shape. The commissioner took measurements of the site basing on F.M.B., and survey boundary stones. However, he made out a different case than what the plaintiff

and the defendants pleaded. The 2nd commissioner also found that the plaintiff also encroached Ac.0.03½ cents of land belonging to the defendants. It is not the case of the defendants that the plaintiff encroached any part of their land. If Ac.0.03½ cents is included to Ac.0.99½ cents, found by the learned Commissioner in Exs.C-3 and C-4, the total extent of plaintiff's land would be Ac.1.03 cents which is the extent of plot settled by Challamma, mother of the 1st defendant. However, it is noticed that it is neither the case of the plaintiff nor of the defendants that plaintiff encroached the portion of 1st defendant in the southern plot of the 1st defendant. Therefore, the report of the commissioner cannot be accepted since he found a different encroachment than what the plaintiff pleaded.

32. The trial Court minutely pointed out the difference between the plaintiff's case and encroachment found in the commissioner's report and rejected the report basing on the objections filed by the counsel for the defendants marked as Ex.C-5. The main contention of the plaintiff is that Ex.C-4 discloses the exact encroachment made by the defendants and, if it is accepted, the trial Court would have granted a decree in favour of the plaintiff. No doubt, second commissioner found some encroachments and against the report, the defendants' counsel filed objections marked as Ex.C-5. How the commissioner executed the warrant, took measurements and found the alleged encroachment was not explained before the trial Court and the plaintiff relying on the commissioner's report ought to have examined the Commissioner as a witness before the Court. The commissioner's report only contains what he found on ground but how he found is to be explained by the commissioner himself in his examination before the Court. Marking of commissioner report in the evidence of plaintiff is an unknown practice for the reason that the document prepared by a commissioner can be marked only through the commissioner, as he is available, because plaintiff is not the competent person to speak about the observations

made by the commissioner in his conclusions arrived in his report and the commissioner alone is competent to explain as to how he arrived at such conclusions. In the absence of examination of commissioner, it is difficult to believe the commissioner's report and relying on the commissioner's report the trial Court cannot pass a decree in favour of the plaintiff, as the encroachments found by the commissioner are totally distinct from the encroachment pleaded by the plaintiff. That apart, the voluminous documentary evidence produced before the Court by the defendants *i.e.*, Exs.B-1 to B-8, disclosed that the plaintiff sold only land in R.S. No.185/1, not any part of the land in R.S. No.186/1, and no boundary was shown as land belonging to the plaintiff with reference to the alleged encroached land. If really, the alleged land marked as MGK belongs to the plaintiff, there would have been a reference as boundary at least in Ex.B-5 pertaining to plot No.14. On the other hand, the boundary was mentioned as land belonging to the mother of the 1st defendant. This recital in Ex.B-5 is crucial and destroyed the plaintiff's case.

33. The major contention of learned counsel for the plaintiff-appellant is that she is the owner of the land beyond FK line, which is shown as MGK line, but the plaintiff was not examined as witness before the trial Court and her husband was examined as PW.1 on the ground that he is looking after her affairs, but, he was unable to depose as to how measurements were taken and how the plaintiff claimed right in the disputed land. Initially, PW.1 was examined and, later, cross-examined and re-examined. In the cross-examination, PW.1 made several admissions with regard to the ownership of defendants, but improved his case after recalling him and examined-in-chief vide orders in I.A. No.401/1991, dated 04.07.1991. In the initial examination-in-chief, PW.1 did not testify anything about the inclusion of Ac.0.06 cents out of the land in R.S. No.186/1 and the land allegedly retained by the plaintiff and sale of Ac.0.22 cents in R.S. No.186/1.

Admittedly, the extent of land settled in favour of the plaintiff in R.S. No.186 is Ac.0.38 cents. Ac.0.04 cents was acquired by the Government for formation of the road on the eastern side, thereby, balance is Ac.0.34 cents. Further admitted the remaining Ac.0.10 cents was sold to G. Jagannadha Raju under the original of Ex.A-6 on 30.08.1973. He sold away Ac.0.08 cents on 20.11.1973 under the original of Ex.A-7, registered sale deed, and the remaining land of Ac.0.10 cents was sold under the original of Ex.A-8, dated 09.05.1978 to Alluri Venkata Lakshmi. In the cross-examination, PW.1 admitted that the land covered by R.S. No.186/1 and 185/1 was not got measured and expressed his inability to say anything about the number and area of lay out approved by the municipality in respect of land in R.S. No.186/1 and no such plan is produced before the trial Court. He admitted that no documentary evidence is available to establish that land in R.S. No.186/1 fell in the road. Ac.0.06 cents which is part of R.S. No.186/1 was shown as plot No.14 of Ex.A-2. In fact, plot No.14 was sold to Jaggaraju under the original of Ex.B-5. When Ac.0.06 cents was sold to Jaggaraju and the boundary on the eastern side was mentioned as land belonging to the mother of the 1st defendant, it can safely be held that the land on the northern side belongs to mother of the 1st defendant. Therefore, the improvement made by PW.1 in further examination-in-chief would not help the plaintiff to establish title to the disputed land shown as MGK. The trial Court minutely discussed entire evidence on record and disbelieved the plea of the plaintiff. Even after reappraisal of entire evidence, I find no illegality in appreciation of the evidence by the trial Court, and the findings recorded by the trial Court are based on sound legal reasoning.

34. Though the plaintiff attacked the decree and judgment under challenge, on various aspects, nothing has been brought to the notice of this Court about the illegality committed by the trial Court either in

appreciation of oral or documentary evidence. It is settled law that the initial onus of proof and legal burden is on the plaintiff, who approached the Court seeking the relief of declaration, to establish her own case and she cannot be allowed to take advantage of weakness in the defence set up by the defendants. The learned counsel for the defendants-respondents, in support of their contentions, placed reliance on the decision of the Apex Court in ***Union of India***², wherein the Apex Court held as follows:

“In a suit for declaration of title, the burden is always on the plaintiff to make out and establish her case for granting such declaration and the weakness if any in the case set up by the defendants would not be a ground to grant relief of declaration. The legal position is therefore clear that the plaintiff in a suit for declaration of title and possession and possession would succeed only on the strength of its own case and that could be done by adducing sufficient evidence to discharge onus on it, irrespective of the question whether the defendants have proved their case or not. Even if the title set up by the defendants is found against them, in the absence of establishment of plaintiff's own title, the plaintiff must be non-suited.”

35. Learned counsel for the defendants also relied on another decision of the Apex Court in ***Mohammed Abubucker***¹, but it pertains to adverse possession and is not relevant for deciding the real controversy between the parties.

36. In ***Baba Kartar Singh Bedi Vs. Dayal Das and Others***^[4], the Privy Council held as follows:

“When a suit for possession against the person in possession by a person who is out of possession as on the date of filing the suit after so many years prior to filing of the suit, he can succeed only on the strength of his own title but not on the weakness of his opponents.”

37. In ***P.H. Dayanand Vs. S. Venugopal Naidu and others***^[5], the Apex Court, in Para No.11, held as follows:

"When the suit is filed for declaration and possession on the basis of title, the defendant set up his rival title, the burden is on the plaintiff to establish the title. In appreciating the case of title set up by the plaintiff, the trial court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by him, does not entitle the plaintiff to a decree."

38. Thus, the view expressed by the Apex Court and the Privy Council in the judgments referred *supra* is that when the plaintiff filed a suit for declaration and recovery of possession, the plaintiff has to establish title, independently, notwithstanding the weakness in the case of the defendants. In the instant case, the case of the plaintiff is that the defendants encroached into her site shown as MGK which is triangular in shape and failed to produce any scrap of paper to establish that she own any land beyond 'FK' line shown in plaint plan. On the other hand, the recitals of Ex.B-5, which is a sale deed for sale of Ac.0.06 cents in R.S. No.186/1, the eastern boundary was shown as land belonging to the plaintiff and the recitals of Ex.B-5 itself falsifies the plea of the plaintiff that Ac.0.06 cents in R.S. No.186/1 was included in the layout plan Ex.A-2. Even the commissioner did not identify the MGK plot shown in the plaint plan on ground, but he made certain improvements and found different encroachments than what the plaintiff pleaded. Therefore, the report of the commissioner, marked as Exs.C-3 and C-4, are of no assistance to establish the title of the plaintiff to the schedule property. The crucial admissions of PW.1 that they sold entire land covered by layout plan established that they sold entire land settled in R.S. No.185/1; even in Ex.A-2, the MGK portion was not specifically shown as the land belonging to the plaintiff.

39. The relief of declaration is purely discretionary under Section 34 of the Specific Relief Act, 1963 and according to Section 34 of the Specific Relief Act, any person entitled to any legal character, or to any right as to any property, may institute a suit against any person

denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief. But grant of relief under Section 34 of the Specific Relief Act is purely a discretionary relief and such discretion has to be exercised judiciously unless the relief claimed by the plaintiff is a legal right in an immovable property *i.e.*, plaintiff schedule property of an extent of Ac.0.05 cents shown as MGK in the plaintiff plan, having obtained under settlement deed executed by mother of the plaintiff under Ex.A-5. Such discretion has to be exercised judiciously subject to correction by the court of an appeal. But, here the plaintiff miserably failed to establish title to the property beyond 'FK' line and no iota of evidence is brought on record to establish that the plaintiff is the owner of MGK plot shown in the plaintiff plan and that the defendants encroached the same. On the other hand, the defendants produced voluminous evidence to dislodge the claim of the plaintiff and established that the plaintiff has no right in the land beyond 'FK' line shown in the plaintiff plan. The voluminous documentary evidence marked as Exs.B-1 to B-8 established that she is not entitled to claim any right in the land beyond 'FK' line, irrespective of the defence set up by the defendants or though they failed to establish their specific rival claim, the suit filed by the plaintiff cannot be decreed.

40. On overall consideration of entire material available on record, the plaintiff did produce no scrap of paper to establish that she had any right in the land beyond FK line or in MGK plot shown in the plaintiff plan and that the defendants encroached into the same by their acts. Thus, she miserably failed to establish her title to the property, consequently, the trial Court declined to exercise its discretion conferred on it under Section 34 of the Specific Relief Act, rightly, while ignoring the weakness in the defence set up by the defendants by applying the principles laid down in the above judgments.

41. Even after reappraisal of the entire evidence with reference to law laid down by the Apex Court and the Privy Council, I find that the plaintiff miserably failed to establish her case by adducing satisfactory and cogent evidence to establish her title to MGK portion, thereby, she is disentitled to claim relief of declaration of title and recovery of possession.

42. One of the contentions raised by learned counsel for the defendants-respondents is that non examination of the plaintiff as witness before the court is fatal to her case and an adverse inference has to be drawn against the plaintiff. In fact, this contention was not urged before the trial Court and the trial Court did not discuss about this contention. However, this plea is purely a legal plea. This contention is based on the law not on the pleadings of the plaintiff. According to settled law laid down by the Apex Court in ***Vidhyadhar Vs. Manikrao***^[6], it was held as follows:

“When a party to the suit did not enter into witness box testify in support of her case tendering herself to be cross examined by adversary, an adverse inference is to be drawn that what she pleaded is not correct.”

43. In ***Iswar Bhai Patel Vs. Harihar Behera***^[7], the Apex Court in Para No.17 of the judgment held as follows:

“Having not entered into the witness box and having not presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of principles contained in illustration (g) of Section 114 of the Evidence Act.”

44. According to Section 120 of Civil Procedure Code, in civil proceedings a party to the suit or the spouse are competent witnesses. But competency of witnesses is not questioned in this matter, but requested to draw an adverse inference for non-examination of the plaintiff as a witness before the Court. There is no

implied or express agency between the plaintiff and her husband PW.1.

45. In view of the principles laid down in the decisions referred *supra*, necessarily an adverse inference has to be drawn against the plaintiff that what she pleaded in the plaint is not correct for the reason that she herself contended that she own and possessed land beyond FK line, but examined her husband on the ground that he is looking after her affairs. None of the documents were signed on her behalf and not even a Power of Attorney was given by the plaintiff to her husband to act on her behalf. Therefore, on the strength of evidence of PW.1, it is difficult to pass a decree declaring that the plaintiff is owner of the property shown as MGK.

46. The learned counsel for the plaintiff-appellant would contend that non examination of the other defendants is fatal to the case and an adverse inference has to be drawn. This was also answered by the trial Court in the judgment assigning its own reasons. As discussed in the earlier paragraphs, in a suit for declaration and recovery of possession, the plaintiff has to establish her own title enabling her to claim the reliefs, but failed to establish her title to the disputed land *i.e.*, plot MGK shown in the plaint plan and the evidence of other defendants is irrelevant for deciding the real controversy, even if they were not examined, when the agreement was cancelled in view of the specific plea raised by the 1st defendant in his written statement and the same is supported by oral evidence. Therefore, non-examination of other defendants as witnesses before the trial Court is of no consequence and, on this ground, the suit of the plaintiff cannot be decreed.

47. On overall consideration of entire material available on record, and the law laid down by the Apex Court regarding requirements to grant declaratory relief, I find that the trial Court did commit no error in

dismissing the suit warranting interference by this Court. I find no legal infirmity in the findings recorded by the trial Court warranting interference of this Court. Hence, the finding of the trial court is hereby confirmed holding the points in favour of defendants and against the plaintiff.

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48. **POINT Nos.3 & 4:** In view of my finding on point Nos.1 and 2, the plaintiff is disentitled to the relief of declaration and recovery of possession, thereby, the question of directing the defendants to remove the earth carted in MGK portion by granting a relief of mandatory injunction, under Section 39 of the Specific Relief Act, does not arise as she failed to establish her title to MGK plot shown in the plaint plan. Similarly, no permanent injunction be granted restraining the defendants and their men from interfering with the possession and enjoyment of the property shown as MGK in the plaint plan after ejecting them for the reason that the relief of declaration and recovery of possession was denied in view of my finding on point Nos.1 and 2. Hence, I find no ground to grant permanent injunction and mandatory injunction as they are purely discretionary in nature under Sections 37 and 39 of the Specific Relief Act. The trial Court after elaborate discussion of the material available on record rightly declined to grant all these reliefs and the findings of the trial Court do not call for interference of this Court. Hence, these two points are held against the plaintiff and in favour of the defendants.

49. In view of my foregoing discussion, I find no ground warranting interference in the decree and judgment passed by the trial Court and the appeal is devoid of merits and deserves to be dismissed.

In the result, the Appeal Suit is dismissed confirming the decree and judgment dated 25.10.1993, passed in Original Suit No.49 of 1984 by the learned Subordinate Judge, Bhimavaram.

In consequence, the miscellaneous petitions, if any, pending in this appeal, shall stand dismissed. No order as to costs.

**M. SATYANARAYANA MURTHY,
J**

Date: 30-01-2015.
Dsh

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No. 213 OF 1994

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Date.30-01-2015

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[\[1\]](#) 2009 (14) SCC 224

[\[2\]](#) 2014 (2) SCC 269

[\[3\]](#) 1999 (3) ALT 134

[\[4\]](#) AIR 1939 PC 201

[\[5\]](#) 2009 (1) Cvl.C.C. 0493 (SC)

[\[6\]](#) AIR 1999 SC 1441

[\[7\]](#) AIR 1999 SC 1341