

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1277 OF 2003

Girdharilal Dindayal Agarwal & Anr. .. Appellants
vs.
M/s. Sarvodaya Builders Pvt. Ltd.
& Ors. .. Respondents

Mr. Mahendra Deshmukh for Appellant. (appointed as Amicus Curiae).

Mr. Rajiv Chavan – Senior Advocate with Mr. Ashish Ghadge i/b. Tamhane & Co. for Respondent No. 1.

Mr. M. U. Pandey for Respondent Nos. 2 to 4.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 30 January 2017

Date of Pronouncing the Judgment : 22 February 2017

JUDGMENT :-

1] This appeal is directed against the judgment and decree dated 9 June 2003 in S. C. Suit No. 3667 of 1989 made by the learned City Civil Court at Bombay (impugned judgment and decree).

2] The appellants are the original defendants and the respondent no. 1 is the original plaintiff in S.C. Suit No. 3667 of 1989, in which, the impugned judgment and decree came to be made on 9 June 2002. Therefore, for sake of convenience, the appellants shall be referred to as the defendants and the respondent no. 1 shall be referred to as the plaintiff. This is the

description of the parties before the learned trial court.

3] In the plaint, the suit property has been described as plot of land bearing Survey No. 5A, Hissa No. 1, Survey No. 58, CTS Nos. 1 and 2 to 1/18 of Kurar Village admeasuring 10570.40 sq. meters or thereabouts situate at Datta Mandir Road, Malad (East), Mumbai 400097. In the plaint as originally instituted, the plaintiffs had applied for the following main relief :

“(a) That the defendants by themselves, their servants, agents, representatives and any other persons claiming through them be permanently restrained by an order and injunction of this Hon'ble Court from disturbing and entering or trespassing and/or encroaching upon and/or interfering with the Plaintiffs' exclusive use, occupation, possession and enjoyment of the said plot of land bearing Survey No. 5A, Hissa No. 1, Survey No. 58, C.T.S. Nos. 1 and 2, 2 (1-18) of Kurar Village admeasuring 10,570.40 sq. mtrs. or thereabouts situate at Datta Mandir Road, Malad (East), Bombay 400097; or taking any steps which may amount to encroachment and/or trespass in any manner whatsoever.”

4] However, in the year 2001, the plaint was amended, to seek *inter alia* the following additional relief :

“(aa) that in the event of the Hon'ble Court holding that the Defendants have dispossessed the plaintiffs from the part of the suit land the Defendants No. 1 and 2 and all person / persons claiming through, under or by them be ordered and decreed to vacate and hand over the vacant and peaceful possession of the land admeasuring about 450 sq. mtrs. or thereabout bearing Survey No. 5-A, Hissa No. 2-B part CTS No. 2 part of Village Kurar, Taluka Borivli, Bombay Suburban District as shown within red colour boundary lines on the plan Exhibit 'F' annexed hereto to the Plaintiffs.”

5] By the impugned judgment and decree, learned City Civil Court has decreed the suit in terms of the aforesaid prayer clauses (a) and (aa). The defendants, were accordingly ordered to vacate and hand over possession of the portion of the suit property admeasuring 450 sq. meters to the plaintiffs. In effect, the real dispute in this appeal relates to this portion of the suit property admeasuring 450 sq. meters which, the defendants have been directed to hand over to the plaintiffs.

6] Mr. Deshmukh, learned counsel for the appellants has made the following submissions in support of the appeal :-

(A) That there are several errors in the findings of fact recorded in the impugned judgment and decree, which is accordingly, required to be set aside;

(B) In the documents referred to and relied upon by the plaintiffs in the suit, the area of the property acquired by them is stated to be 11,800 sq. yards, which corresponds to 9,864 sq. meters. Despite such clear position, the plaintiffs, chose to *mala fidely* describe the suit property as admeasuring 10,570.40 sq. meters. In such circumstances, the plaintiffs, having approached the court with a patently false case, were not entitled to be awarded any relief in the suit;

(C) The plaintiffs, in the suit as originally instituted in the year 1989, claimed to be in possession of the entire suit property admeasuring 10,570.40 sq. meters. On this basis, a decree of permanent injunction was applied for to restrain the defendants from interfering with the plaintiffs possession. However, in the year 2001, it was conceded that the plaintiffs were not in possession of area of 450 sq. meters admeasuring Survey No. 5A, Hissa No. 2B. On such basis, the plaint was amended to belatedly seek recovery of possession. This also indicates that the plaintiffs had approached the learned City Civil Court with a patently false case and it is only upon the detection of the falsity, that, belated motion was taken out seeking leave to amend the plaint. The order granting leave to amend was improper. In any case, the plaintiffs were not entitled to any reliefs, for having approached the learned City Civil Court with a patently false case;

(D) The learned City Civil Court has seriously erred in appreciating the oral as well as documentary evidence on record. Besides, learned City Civil Court failed to appreciate that burden was entirely upon the plaintiffs to prove its case and the plaintiffs, were not entitled to rely upon any alleged

weakness in the case of the defendants. If the impugned judgment and decree is perused, the learned City Civil Court has approached the matter, as if, it is the defendants who were the plaintiffs and it is the plaintiffs who were the defendants in the suit. The basis of the impugned judgment and decree is the plan annexed to the sale deed dated 29 / 24 June 1912, which is, no doubt, the basic title document of the defendants. However, the learned City Civil Court has erred grossly in interpreting this document and the plan annexed to it. The finding that the entire properties acquired by the predecessor-in-title of the defendants in pursuance of the sale deed dated 24 June 2012 were essentially on the southern side of the river / nalla, is a patently erroneous finding.

(E) The plaintiffs did attempt to make out a case in the plaint that as per the title documents of their predecessor-in-title, the suit property acquired by them was entirely towards the north of the river / nalla. However, no sooner, the inconsistency in such position was detected, the plaintiffs purported to give up claim towards portions of the suit property to thee south of river / nalla. If, in terms of the title documents relied upon by the plaintiffs, some portion of the

suit property was found to be on the southern side of the river / nalla, then, there was absolutely nothing wrong in the defence of the defendants that some portions of the property acquired by them vide sale deed dated 24 June 1912 was towards the North of the river / nalla. In fact, upon conjoint reading of the sale deed and the plan appended to the same, such a conclusion was irresistible. The finding recorded in the impugned judgment and decree that no part of the property acquired by the defendants vide sale deed dated 24 June 1912, was towards the North of the river / nalla is a patently erroneous finding, which warrants interference in this appeal;

(F) The title documents on basis of which the plaintiffs claim right or title to the suit property itself indicate the area of 11,800 sq. yards which corresponds to 9,864 sq. meters. In the plaint however, the plaintiffs described the suit property as admeasuring 10,570.40 sq. Meters. This additional area includes the area of 450 sq. meters surveyed under No. 5A, Hissa No. 2B. Such claim to an additional property beyond 9,864 sq. meters was required to be rejected, relying upon the documents produced by the plaintiffs. Instead, the learned City Civil Court, has directed restoration of

possession of this additional area to the plaintiffs, by purporting to misinterpret the defendants sale deed dated 24 June 1912 and the plan annexed to such sale deed. This is an erroneous approach and the impugned judgment and decree therefore warrants interference.

(G) In case of any conflict between what is stated in the sale deed dated 24 June 1912 and what is depicted on the plan annexed to the said sale deed, it was necessary for the learned City Civil Court to examine the oral evidence and other documentary evidence, which would establish very clearly that the property purchased by the defendants vide sale deed dated 24 June 1912 was not restricted only to the South of the river / nalla. The learned City Civil Court has applied the incorrect principles and consequently finding to this effect stands vitiated.

(H) The learned City Civil Court failed to appreciate that the survey records and the entries in revenue records very clearly supported the defence that the property bearing Survey No. 5A, Hissa No. 2B was owned and possessed by the defendants. This position continued till the year 1961 when, the survey records and the entries in revenue records

were surreptitiously and without any notice to the defendants altered, taking advantage of the defendants visits to their native place. In case of any ambiguity in the title documents, the learned City Civil Court was duty bound to appreciate evidence in form of long standing entries in the revenue records or in the survey records. To the extent, no due credence has been given to this material, the impugned judgment and decree is vitiated and is liable to be set aside.

7] Mr. Chavan, learned Senior Advocate appearing for the plaintiffs, at the outset submits that the plaintiffs categorically restrict their claim to the area of 11,800 sq. yards which corresponds to 9,864 sq. meters, even though, in the plaint, the suit property was described as 10,570.40 sq. meters. Mr. Chavan however submitted that in terms of the evidence on record, both documentary as well as oral, it is quite clear that the suit property claimed by the plaintiffs is towards North of the river / nalla and the property of the defendants, as acquired by them, vide sale deed dated 24 June 1912, is, entirely towards South of such river / nalla. Such conclusion is irresistible not only from the reading and analysis of the sale deed dated 24 June 1912, but also from the description of the boundaries of the property as set out in the sale deed dated 24 June 1912 and further, and significantly, the plan annexed to this

sale deed dated 24 June 1912. The boundaries and the plan make it clear that the property acquired by the defendants vide sale deed dated 24 June 1912, was, in its entirety, towards the South of river / nalla. On basis of such sale deed dated 24 June 1912, therefore, there was no question of the defendants laying any claim to any portion of the property beyond or to the North of river / nalla. Mr. Chavan made reference to several decisions to submit that in case of conflict between area and boundaries, it is the boundaries which ought to prevail. Similarly, in case of conflict between survey records and boundaries in the title documents, it is the boundaries which ought to prevail. In this case, Mr. Chavan submits that since the description of the boundaries is clear, not only in the text of the sale deed dated 24 June 1912 but further, in the plan annexed to this sale deed dated 24 June 1912, no ambiguity remains as to whether or not the defendants had any property beyond or towards the North of the river / nalla. The finding to the effect that the defendants property was restricted in its entirety towards the South of the river / nalla. Is therefore, a finding of fact, very well supported by the material on record and the same, warrants no interference whatsoever. Mr. Chavan, learned Senior Advocate submitted that in a suit of this nature, which is based upon the title documents produced by either parties, survey documents or revenue entries are hardly significant. The learned City Civil Court was, therefore,

entirely justified in giving greater credence to the title documents, rather than some entries in the revenue records, which in any case, support the plaintiffs version, at least from the year 1961. For these reasons, Mr. Chavan, learned Senior Advocate for the plaintiffs submitted that there is no case made out to interfere with the impugned judgment and decree.

8] On due consideration, the rival contentions and due analysis of material on record, it does appear that the entire controversy relates to the true and correct boundaries of the suit property as claimed by the plaintiffs. It is the case of the plaintiffs that the suit property, in its entirety, located to the North of the river / nalla and the defendants property, acquired by the defendants by sale deed dated 24 June 1912, in its entirety, is located towards the South of the river / nalla. It is the case of the plaintiffs that no portion of the property acquired by the defendants or their predecessors-in-title by sale deed dated 24 June 1912 is located beyond or towards the North of river / nalla and therefore, any claim of the defendants towards any portion of land beyond or to the North of the river / nalla on basis of sale deed dated 24 June 1912, is completely untenable. The basic point which therefore arises for determination in this appeal is whether the plaintiffs are right in its contention that the defendants have no right, title or interest of whatsoever nature

in any portion of the property beyond or towards the North of the river / nalla in terms of the defendants title documents i.e. sale deed dated 24 June 1912 and the plan annexed to the same.

9] Based upon the pleadings of the parties, learned trial Judge framed and answered the issues in the following manner:

1. *Whether the defendants prove that the suit is not maintainable and is liable to be dismissed for the reasons stated in paras 1 and 3 of the written statement?* ..No.

2. *Whether the plaintiffs prove that they are lawful owners and in exclusive use, occupation and possession of the suit property?* ..Yes.

3. *Whether the plaintiffs prove that defendants are owners only of the adjoining plots of land on the souther side beyond the Nala as shown in the sketch Ex. B?* Yes.

4. *Whether the plaintiffs prove that the said plots of land are separated by natural boundary in the nature of the said Nala?* Yes.

5. *Whether the plaintiffs prove that the defendants have no right over the suit plots of land and also that they do not have any right to disturb plaintiffs' use, occupation and possession of the suit land?* ..Yes.

6. *Whether the defendants prove that this Court has no pecuniary jurisdiction to entertain and try the suit as alleged in para 23 of the additional written statement?* ..No.

7. *Whether the plaintiffs are wrongfully dispossessed of 450 sq. mtrs. of land as shown in red colour boundary lines on the plan Ex./ E to the plaint?* ..Yes

8. *Whether the plaintiffs are entitled to recover the possession of the said 450 sq. mtrs. of land from the defendants?* ..Yes.

9. *Whether the plaintiffs are entitled to recover*

possession of the said 450 sq. mtrs. of land from the defendants? ..Yes.

10. Whether the defendants prove that they have become the owners of the 450 sq. mtrs. of land shown surrounded in red colour boundary lines on the plan Ex. E to the plaint by adverse possession as alleged in the additional written statement in para 19 (c) ? ..No.

11. What relief, if any, are the plaintiffs entitled to ? .. As per final order."

10] On behalf of the plaintiffs, Vajubhai D. Govind, Director of plaintiff No.1 deposed in the matter and was duly cross-examined on behalf of the defendants. The defendants also examined themselves and were duly cross-examined on the behalf of the plaintiffs. Yet another witness (D-3) was examined by the defendants as a defence witness. Learned Trial Judge, in the impugned judgment and decree, has observed that the oral evidence in this suit is of a little value and since, the main issues have to be determined on the basis of documentary evidence produced by the parties.

11] There is no dispute between the plaintiffs and the defendants that their respective title to the respective properties, which they claim, has its source in the Deed of Conveyance dated 16 January 1899, by which Janaji K. Desai sold conveyed and transferred in favour of Keshavlal Arjunlal the following two properties:

a] Property ad-measuring 3 Acres and 9 Gunthas Survey

No.2, Plot No.1, at Kurar Village, Mumbai; and

- b] Property ad-measuring 3 Acres and 7 Gunthas, Survey No.5, Plot No. 1.

12] There is also no dispute between the parties that Keshavlal Arjunlal vide Deed of Conveyance dated 02 July 1907 sold, transferred and conveyed, a part of the property bearing Survey No. 5, Plot No.1 to Rangnath Pathare. There is no mention of specific area or measurements in this Deed of Conveyance.

13] By Deed of Conveyance dated 29 June 1912, Keshavlal Arjunlal sold the following two properties to Pandit Brijvallabh Hariprasad and Champalal Dindayal, the predecessors-in-title of the defendants;

- a] Property ad-measuring 3 Acres and 18 Gunthas bearing Survey No.2, Plot No.1; and
- b] Property bearing Survey No.5, Plot No.1, after excluding the portion sold to Rangnath Pathare (vide Conveyance dated 2 July 1907).

14] To the Deed of Conveyance dated 29 June 1912 is annexed a plan, stated to be plan of the entire property with its boundaries delineated in red colour. This Deed of Conveyance dated 29 June

1912 and the plan annexed to it is most vital document to determine whether any portion of the property purchased by the defendants, can be said to fall beyond or towards the North of river/nullaha. This document, therefore, will have to be considered in greater detail, in the course of this judgment and order.

15] On 21 October 1925, the property purchased by Rangnath Pathare vide Deed of Conveyance dated 2 July 1907 was attached and sold by the Court Receiver, Bombay High Court to one Gangadas Dayabhai vide Deed of Sale dated 21 October 1925. In pursuance of execution of decree in Suit No. 2420 of 1921 as evidenced by probate dated 21 July 1939, this property devolved upon Smt. Shanta Gauri, wife of Gangadas Dayabhai, upon later's demise. By Deed of Conveyance dated 8 February 1945 and Deed of Rectification dated 28 January 1946, Shanta Gauri sold the property to Dayabhai U. Patel. By Deed of Conveyance dated 19 October 1949, Mr. Dayabhai U. Patel sold, transferred conveyed the property to Indrakumar @ Bachoobhai Ranchhudas Shroff, who is ultimately, the predecessor-in-title of the plaintiffs. By Deed of Conveyance dated 10 January 1961, said Indrakumar Shroff sold this property to HUF comprising members of Shroff family. Vide agreement dated 28 August 1986, the HUF agreed to sell this property to the plaintiffs. After the impugned judgment and decree

was made on 9 June 2003, by Deed of Conveyance dated 2 September 2003, the plaintiffs have purchased this property from Shroff HUF. This appeal against the impugned judgment and decree was instituted on 6 September 2003 and interim orders obtained only thereafter. Obviously, therefore, the Deed of Conveyance date 2 September 2003, was not or could not have been a part of the record before learned Trial Judge, at the time when the impugned judgment and decree was made on 9 June 2003. However, the Deed of Conveyance dated 2 September 2003 has been placed on record along with affidavit dated 6 February 2017 in this court for sake of completion of record although, nothing significant really turns upon the same.

16] Mr. Chavan, learned senior advocate for the plaintiffs, very clearly states that the plaintiffs restrict their relief to the property ad-measuring 11,800 sq. yards which corresponds to 9,864 sq. meters only, and not to the area of 10,570.40 sq.meters as pleaded in the plaint. Mr. Chavan, also agrees that the claim of the plaintiff is to be adjudicated upon basis of the following title documents:

- a] Deed of Conveyance dated 16 January 1899, by which, Janaji Desai sold two properties to Keshavlal Arjunlal;
- b] Deed of Conveyance dated 2 July 1907, by which Keshavlal Arjunlal sold part of the property bearing Survey No.5, Plot No. 1 to

Rangnath Pathare;

c] Deed of Conveyance dated 21 October 1925, by which, the Court Receiver, who was placed possession of Pathare's property, sold the same to Gangadas Dayabhai;

d] Deed of Conveyance dated 8 February 1945 and Deed of Rectification dated 28 January 1946, by which, Shanta Gauri, the wife of Gangadas Gauri, in pursuance of probate dated 21 July 1939, sold property to Dayabhai U. Patel ;

e] The Deed of Conveyance dated 19 October 1949, by which, Dayabhai U. Patel sold the property in favour of Indrakumar @ Bachoobhai Ranchhodas Shroff;

f] The Deed of Conveyance dated 10 June 1961, by which the aforesaid Shroff conveyed the property to HUF comprising members of Shroff family;

17] Mr. Deshmukh, whist not seriously, disputing that the title of the defendants is required to be traced to the Deed of Conveyance dated 29 June 1912, submitted that the plan annexed to this Deed, does not reflect in entirety the property purchased by the predecessors-in-title of the defendants. Therefore, he submits that plan appended the Deed of Conveyance dated 29 June 1912 cannot be regarded as conclusive, in determining extent of the property acquired by the predecessors-in-title of the defendants. In

order to determine the true and correct extent, reference is required to be made to the title documents of the plaintiff, which are referred to earlier, as well as evidence in the form of survey records, entries in revenue records etc. Mr. Deshmukh submits that in the Deed of Conveyance dated 2 July 1907 , by which, Keshavlal Arjunlal sold only a portion of the property bearing Survey No.5, Plot No.1 to Rangnath Pathare, there was no area or measurements mentioned.

18] On perusal of the deeds and documents on basis of which the plaintiffs claim title, it does appear the suit property which they claim, is located towards the North of the river / nalla. Some ambiguities, undoubtedly remain. However, applying the test of preponderance of probabilities, it does appear that the property, which is the subject matter of deeds of conveyance now listed at paragraph 16 (b) to 16(f) is towards the north of river / nalla. Although, much credence need not be given to the survey documents or to the revenue records, since, it is always preferable to ascertain the boundaries on the basis of title documents, which are available in the present case. Even the survey records, to some extent, support the plaintiffs in establishing that the property which is the subject matter of the deeds of conveyance referred to at paragraph 16(b) to 16(f) are located towards the North of the river / nalla. But, the crux of the matter is the deed of conveyance dated

29 June 1912, which is the title document of the defendants. This deed of conveyance, together with the plan annexed to it, makes it quite clear that the properties of the defendants is towards South of the river / nalla and no part of such property is beyond or towards the North of such river / nalla. This is not a case of the plaintiffs trying to rely upon any alleged weakness in the case of the defendants. This is a case where the plaintiffs assert that from the title documents of the defendants, it is quite clear that the defendants have no property beyond or towards the North of the river / nalla.

19] The original deed of conveyance, in Marathi language, dated 29 June 2012 is on record. The authorized translation is also on record. There was no dispute raised as regards the translation. The original plan which is referred to and annexed to this deed of conveyance is also on record. The deed of conveyance contains the following writing :

“The immovable property lying within the boundaries of the Government village Kurar, under Malad, registration sub-District – Malad; Taluka – Salsette, District – Thane, was purchased by us with our own monies from Janaji Keshavji and others of Malad on the date 16 January 1899 and till this day, it is in the possession and management, and I myself are enjoying the same by virtue of ownership. Excluding a part of the varkas land thereof which I had sold to Rangnath Janardan Pathare of Bombay, rest of the property was agreed to be sold by me to you for the price of Rs.5000/- rupees five thousand and an agreement of sale was made on the date 19th June 1912, whereby I have

received Rs.350/- rupees three hundred and fifty of earnest money from you. The balance viz. Rs.4650/- in words rupees four thousand six hundred and fifty are paid by you to us today. In all Rs.5000/- rupees five thousand have been received and in consideration thereof the property is sold to you and possession and management thereof are delivered to you.”

20] The deed of conveyance dated 29 June 1912 also contains the particulars of the four boundaries, which are described thus :

“The particulars and four boundaries thereof are as under:

One agricultural land bearing Survey No. 2 sub-division No. 1, admeasuring acres 3-18-5 out of which Kharaba land admeasures ... Gunthas; it is assessed at Rs.24-8-0 and contains five / 5 pieces of paddy land; (the same) and a varkas land, bearing Survey No. 5, sub division No. 1 out of which land admeasuring acres 0-26 Gunthas and Kharaba 0-6 Gunthas and assessed at rupees one. The aforesaid lands together, are bounded on the east-the land of Shamrao Pandurangi and a river and a land forming part of Survey No. 5; on the west by the land of Shamrao Pandurangji, on the north the river and land forming part of Survey No. 5 and on the South land of Manu Lodes and the land of Ismail Data. A plan of the said entire property is annexed to this Deed. Its boundary is delineated in red colour.”

21] The Northern boundary is clearly referred to as the river and the land forming part of survey No. 5. The deed in terms stated that the plan of '*said entire property*', is annexed to this deed, its boundaries delineated in red colour. Mr. Deshmukh's contention that the plan does not refer to the entire property but only refers to the property bearing survey no. 2, cannot be accepted. The deed itself states that the plan of the entire property is annexed to the deed. Besides, it would make no sense to give such detailed

particulars of the four boundaries followed by the plan of the entire property which is the subject matter of deed of conveyance dated 29 June 1912 but, in reality, to include only a portion of the property sold or rather to exclude any portion, which was also sold from the plan. This is not either a reasonable or logical manner to interpret either the deed of conveyance or the plan annexed to it. From the perusal of the plan and the boundaries delineated in red colour, it is very clear that the defendants property in its entirety is towards the Southern side of the river / nalla and no part of the defendants property is on the Northern portion of such river / nalla. The impugned judgment and decree has also considered the documents on record in great details whilst recording such conclusion.

22] The contention of Mr. Deshmukh, if accepted, would amount to permitting the defendants to alter or vary the terms of the deed of conveyance dated 29 June 1912 (which is the written and registered document). The oral or other documentary evidence on record, is not at all sufficient to sustain any such inference of variation or alteration. In any case, in the light of provisions contained in section 92 of the Evidence Act, the defendants cannot seek to vary the terms of a written document on basis of any oral evidence. In this regard, reference can usefully be made to

illustration (c) to section 92 of the Evidence Act, which reads thus :-

“(c) An estate called “the Rampure tea estate” is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.”

23] In this case, the contention of Mr. Deshmukh is somewhat similar to the position clarified in aforesaid illustration (c) to section 92 of the Evidence Act. Mr. Deshmukh contends that the deed of conveyance dated 29 June 1912 states that the 'entire' property sold, is shown in the plan annexed to the deed with its boundaries delineated in red colour, yet, there exists further or additional property, which is also sold by the deed of conveyance dated 29 June 1912, but the same is not shown or reflected in the plan annexed. Such a contention, if accepted, would run in conflict with the principle set out in section 92 of the Evidence Act as explained clearly in illustration (c) above. Accordingly, it is not possible to accept such contention of Mr. Deshmukh.

24] Mr. Deshmukh attempted to draw some sustenance on the basis of entries in survey records or revenue records prior to the year 1961. Similarly, the plaintiffs seek to draw sustenance from survey records or entries in revenue records post the year 1961. Since, the matter is being decided on basis of title documents, and since, the boundaries of the properties have been clearly described

in the title documents, there is no question of adverting to survey records or entries in revenue records. If there is a conflict between entries in survey records or revenue records and title documents, then, it is title documents which will have to be given a precedence. Similarly, if there is a conflict between area of the property and the boundaries of the property, then, it is the boundaries which will have to be given a precedence.

25] In this case, attempts were made by the defendants to create some conflicts by reference to the area. Such attempts were also made by the plaintiffs to demonstrate that the defendants, by now, have sold properties much in excess of what they had acquired under the deed of conveyance dated 29 June 1912. However, since the principle is that in case of conflict between area and boundaries, it is boundaries which must prevail, there is no necessity to be drawn into such disputes as regards the area, measurement or for that matter entries in survey records or revenue records.

26] Upon examination of the title documents of the plaintiffs and the title documents of the defendants, it does transpire that no part of the defendants property extends beyond or to the North of the river / nalla. Similarly, Mr. Chavan, learned Senior Advocate for the

plaintiffs has also made a categorical statement that the suit property in its entirety can be taken to admeasure 9,864 sq. meters and further that no part of the suit property extends to the South of the river / nalla. The clincher in this case is the description of the boundaries in the defendants title deed dated 29 June 1992 and the plan annexed to this deed, which makes it abundantly clear that the defendants do not have any property beyond or North of the river / nalla.

27] In ***Sheodhyan Singh & Ors. vs. Mst. Sanichara Kuer & Ors***¹., the Hon'ble Supreme Court has held that in case of conflict between boundaries and khata numbers, it is the boundaries which must prevail.

28] In ***Subhaga & Ors. vs. Shobha & Ors.***², the Hon'ble Supreme Court has held that a property can be identified either by boundary or by any other specific description. In a case where property is identifiable by boundaries, then, even if there was any discrepancy, normally, a boundary should prevail. There was no occasion to spin a theory that it was necessary to survey all the adjacent lands to find out whether an encroachment was made.

1 AIR 1963 SC 1879

2 (2006) 5 SCC 466

29] In ***Dina Malar Publications vs. The Tiruchirappalli Municipality***³, the learned Single Judge of the Madras High Court after referring to a number of decisions, has held that it is established legal position that boundaries would prevail over measurements in case there is a conflict. The principles underlining the concept have been set out in the said decision in the following manner :

“16. It is established legal position that boundaries would prevail over measurements in case there is conflict. In Dina Malar Publications v The Tiruchirappalli Municipality (1984 II MLJ 306) = (1984) 97 L.W. 365) R. Sengottuvelan, J. after referring to a number of decisions set out the principles underlying the concept.

(1) in case of doubtful or varying extents in the documents of title relating to the property, boundaries should be preferred to the extent;

(2) Only in the absence of definite material to show the actual extent intended to be sold the boundaries should outweigh the doubtful extent mentioned in the document;”

30] In ***Roohnisha Beevi & 15 Ors. vs. A.M.M. Mahudu Mohamed & 29 Ors.***⁴ another learned Single Judge of Madras High Court, S. S. Subramani, J. has held where there is an element of doubt with reference to the extent, the statement of area is to be rejected as false demonstratis. The learned Single Judge has observed thus:

“The evidence supplied by boundaries, extent survey numbers and pymash numbers are the determining factors when the identity of the property is put in issues. In case of

3 1984 II Mh.L.J. 306

4 1998 1 L.W. 244

conflict boundaries predominate and the rest is regarded as erroneous or inaccurate descriptions. Erroneous survey numbers or omission to state them should be rejected as false demonstratis."

31] In this case, it cannot even be said that there are any major discrepancies as regards areas or measurements. The discrepancies are well within reasonable bounds. In any case, such discrepancies, are by no means, sufficient to dislodge the plaintiffs case, particularly when the boundaries recorded in the title documents of both the parties, support the plaintiffs case.

32] This is also not a case where it can be said that the plaintiffs ought to have been declined reliefs for having approached the court with a false case to begin with. It must be remembered that in this case, both the parties, trace their respective title to deeds and documents between the years 1899 and 1946. No doubt, there are deeds and documents even post the year 1946, but, the basic documents in this case are the deed of conveyance dated 2 July 1907, which is the basic title document of the plaintiffs and the deed of conveyance dated 29 June 1912, which is the basic title document of the defendants. There are changes in numbers and descriptions of the revenue records or survey records from time to time. There are changes in area statements as well. The plaintiffs have offered explanation with regard to their claim that the suit

property admeasured 10,570.40 sq. meters. The explanation, may ultimately be wrong. That by itself, does not mean that the plaintiffs had approached the court with any false or dishonest plea. It is to be noted that in this court, at the very outset, the plaintiffs made it clear that their claim is restricted to the extent of 11,800 sq. yards which corresponds to 9,864 sq. meters and not to 10,570.40 sq. meters. This is also not a case of there being any admission on the part of the plaintiffs that some portion of the property purchased by them lies to the South of the river / nalla. All that is stated is that assuming such an inference is to be drawn, then, the plaintiffs declare that they have no claim whatsoever to any property towards the South of a river / nalla and the right, if any, is to be deemed as waived or given up by them. On such basis, it can certainly not be said that the plaintiffs have approached the court with any false case and therefore, the plaintiffs were required to be non suited upon the said ground.

33] This is also not a case where the leave granted to the plaintiffs to amend the plaint in the context of seeking recovery of possession of property admeasuring 450 sq. meters is required to be interfered with. The material on record makes reference to the incidents of interference. In such circumstances, there was nothing wrong in seeking relief in terms of prayer clause (aa) of the plaint.

The suit as initially filed was for permanent injunction simplicitor. By advertent to certain incidents, if the plaintiffs felt that their possession in respect of a portion of the suit property measuring 450 sq. meters, from out of 9,864 sq. meters, is suspect, the plaintiffs were, right in seeking leave to amend and pray for recovery of possession of such portion, should, the court come to the conclusion that in respect of such portion, the plaintiffs have not been able to prove its possession. Taking into consideration the material on record, it cannot be said that the plaintiffs had approached the civil court with any patently false case and therefore, were not entitled to any leave to amend the plaint or relief in terms of the amended plaint.

34] This is also not a case where the burden of proof was incorrectly placed by the learned trial Judge upon the defendants, rather than the plaintiffs. In this case, both the parties have laid evidence. This is a case where documentary evidence is required to be given credence. In such a situation, the issue of burden of proof, is not the most important of the issues. The boundaries in the present case, came to be determined by the learned trial Judge by reference to the title documents of both the parties. Therefore, there is no merit in the submission of Mr. Deshmukh that the plaintiffs have been awarded a decree, relying entirely, upon some

weaknesses in the case of the defendants. Rather, this is a case where the learned trial Judge, upon considering the title documents of both the parties has recorded a finding that it is the river / nalla, which separates the properties of the plaintiffs and the defendants. This means that no portion of the plaintiffs property is towards the South of the river / nalla. Similarly, no part of the defendants property is beyond or towards the North of the river / nalla. Such finding of fact, is quite sufficiently borne out from the material on record.

35] Upon cumulative consideration of the aforesaid, there is no case made out to interfere with the impugned judgment and decree, save and except, to modify the same by clarifying that the suit property admeasures only 9,864 sq. meters and not 10,570.40 sq. meters as claimed in the plaint.

36] Accordingly, except for above modification, there is no case made out to interfere with the impugned judgment and decree. The modification is necessary because the relief in terms of prayer clause (a), which is granted in the impugned judgment and decree, refers to the suit property as admeasuring 10,570.40 sq. meters. However, now, it is conceded by the plaintiffs that the true and correct area of the suit property is 11,800 sq. yards which

corresponds to 9,864 sq. meters. This means that the claim of the plaintiffs stand allowed to the extent of 11,800 sq. yards which corresponds to 9,864 sq. meters and not 10,570.40 sq. meters. The title documents of the plaintiffs i.e. the deed of conveyance dated 2 September 2003 will have to be therefore, construed accordingly.

37] Save and except the modification as aforesaid, there is no case made out to interfere with the impugned judgment and decree.

38] The appeal is therefore partly allowed to the aforesaid extent only. The impugned judgment and decree is modified and the area referred to in prayer clause (a) of the impugned judgment and decree shall be read and construed as 9,864 sq. meters instead of 10,570.40 sq. meters. Save and except such modification, the impugned judgment and decree is confirmed.

39] The parties shall bear their own respective costs.

(M. S. SONAK, J.)

Chandka