

HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

AS.No.2202 of 1998

And

Cross Objections (Sr).No.5907 of 1999

ORDER :

This appeal is filed challenging the judgment and decree dated 05.08.1998 in OS.No.62 of 1985 passed by the Senior Civil Judge, Kadapa.

As this is a first appeal, the parties are referred to as the plaintiff and defendant only.

The brief facts of the case are that suit OS.No.62 of 1985 is filed for a declaration of plaintiffs right and title to the suit site marked as A B G H in the plaint plan and to direct the defendant Nos.1 and 2 to restore the vacant possession of the same to the plaintiffs and for costs of the suit.

The averments of the plaint are that the father of plaintiff No.1 and the grandfather of plaintiff Nos.2 and 3 is one Marella Venkata Ramanaiah, who purchased the lands comprised in S.Nos.3/B-3, 941/2 and 4-A situated in Chinnachowk Village, Kadapa Taluk measuring to a total extent of Ac.5.31 cents under a registered sale deed dated 18.05.1927. The survey numbers purchased by Venkata Ramanaiah are contiguous and adjacent to each other. Late Marella Venkata Ramanaiah had two undivided brothers by name Narayana and Vengaiah. In the year 1943, the three

brothers got separated and partitioned the properties including the lands covered by the said three survey numbers and each one of them got undivided 1/3rd share. The partition was also reduced into writing and a registered partition deed dated 29.03.1943 was executed in between them. Each brother was allotted an extent of Ac.1.77 cents in the total extent of Ac.5.32 cents. Venkata Ramanaiah has got his share on the northern portion of the lands and the second brother Narayana has got his 1/3rd share of an extent of Ac.1.77 cents on the southern portion of the lands, while the last brother Vengaiah got his 1/3rd share of Ac.1.77 cents. Marella Venkata Ramanaiah died leaving behind two sons namely plaintiff No.1 and Chinna Narasimhulu. The plaintiff Nos.1 and 2 had been in joint possession of the portion of K A B G H L. Subsequently, Chinna Narasimhulu also died leaving behind his surviving two sons namely plaintiff Nos.2 and 3. Thus plaintiff Nos.1 to 3 have become the owners of the portion of K A B G H L situated in S.Nos.3-B/3 and 941/2. Marella Narayana also died and his sons Penchalaiah, Kondaiah and Narasimhulu, who became entitled to the C D M N portion after their father's death, sold away the same to one Shaik Khadar Basha, who in turn sold the same to plaintiff No.1. The last brother Vengaiah also died. The defendant Nos.1 and 2, who are the sons of Kadiri Subbarayudu living jointly and also running on Oil Mill under the name and style of Raghavendra Oil Mills in Kadapa town,

and they purchased an extent of Ac1.77 cents from defendant Nos.3 and 4 for construction of a factory. The defendant No.1 under a registered sale deed dated 16.02.1981 to an extent of Ac.0.88½ cents and defendant No.2 purchased to an extent of Ac.0.881/2 cents from defendant Nos.3 and 4. The defendant Nos.1 and 2 after their purchase constructed the factory and they are running an Oil Mill factory. Defendant Nos.1 and 2 have started further construction on the site by way of improvements and while doing so, they encroached into the plot of the plaintiffs situated to the North of the same. They have also been making attempts to further encroach the site of the plaintiffs K A B G H L. The plaintiffs have got their site measured and found that the defendant Nos.1 and 2 had already encroached to an extent of nearly Ac.0.23 cents which is shown in red colour and denoted letters A B G H in the plaint plan. The defendant Nos.1 and 2 nor their vendors defendant Nos.3 and 4 have no manner of right and title to the site of A B G H of the plaint plan. The plaintiffs have filed this suit for declaration of their title to A B G H site and for the restoration of the said encroached site.

Defendant Nos.1 and 2 filed a written statement and defendant Nos.3 and 4 adopted the same.

The contents of written statement of defendants are that defendant Nos.1 and 2 are admitting the land purchased by late Marella Venkata Ramanaiah under a registered sale deed

dated 18.05.1927 and also admitted the partition between Venkata Ramanaiah and his two brothers namely Marella Narayana and Marella Vengaiah and also admitted that each brother has got Ac.1.77 cents of their 1/3rd share but denied that defendant Nos.1 and 2 have encroached the plot of plaintiffs situated to the North of the defendants plot and also denied the protests made by the plaintiffs for the encroachment made by the defendants. The defendants also denied that the plaintiffs got measured the site and found an extent of Ac.0.23 cents shown in the red colour denoted by letters A B G H is encroached by the defendants. The defendants contends that they have been in possession and enjoyment of their respective shares and plots purchased by them and denied that they have encroached a cent upon the site of plaintiffs. The plot of Ac.1.77 cents was in possession and enjoyment within specified boundaries of the defendants' vendor namely late Marella Venkata Subbamma alias Chinnakka wife of Narasimhulu.

These defendants after their purchase under two registered sale deeds fenced the same with stone and barbed wiring in the year 1981 and raised coconut trees all along the border fencing. The plaintiffs never raised any objection then or at the time when the factory was being constructed. In addition to it, the defendants laid an approach road into the factory from the eastern side and this road is abutting to the northern side fencing besides construction. Now on account

of difference of opinion between them owing to local politics, the plaintiffs have filed the suit to harass these defendants. Hence, the suit is to be dismissed.

On the above pleadings, the following issues were framed.

- (1) Whether the plaintiff A B G H portion is a portion of K A E G H L that fell to the share of plaintiffs at the partition in 1943 and whether plaintiffs are entitled to the declaration of title for A B G H site or recovery of possession?
- (2) Whether the defendants encroached into A B G H site after purchased from defendant Nos.3 and 4 and if so to what extent?

In support of the case of the plaintiffs PWs.1 and 2 were examined, Exs.A.1 to 6 and Exs.C.1 and C.2 are marked. On behalf of the defendants DWs.1 to 4 are examined and Exs.B.1 to B.14 are marked.

After the trial, the lower Court held that the defendants have actually encroached into Ac.0.13 cents and not Acs.0.23 cents. Therefore, the Court held that the plaintiffs are entitled to a declaration of their right from A B G H property described in the plaint and defendants 2 and 3 were directed to deliver Ac.0.13 cents occupied by them.

Questioning this judgment, the appeal is filed and a cross-objection is also filed by the plaintiffs questioning the

order against the rejection of the claim for Ac.0.10 cents of land since the plaintiffs' case is that the defendants have encroached into Ac.0.23 cents also.

This Court has heard Sri K.G.Krishna Murthy, learned senior counsel for the appellants and Sri G. Ramesh Babu, learned counsel for the respondents.

The case of the learned senior counsel for the appellants is that the available documents do not show the encroachment at all. It is his contention that as the suit is filed for declaration of title and for removal of the encroachment, the burden is cast upon the plaintiffs to clearly plead and prove the alleged encroachment. It is the submission of the learned senior counsel that the basis on which the encroachment is supposed to have made is not spelt out. The counsel points out that the plaint is filed on the basis of four documents which are merely sale deeds and a partnership deed. Learned counsel points out that the measurement of the encroached site which was purportedly done is not spelt out in any document. He drew the attention of this Court to para 9 of the plaint, wherein it is pleaded that the plaintiff got their site measured and came to a conclusion that they have encroached into the site. Learned senior counsel took this Court to the plaint schedule and explained that the alleged encroachment is described with great clarity but there is no supporting document to prove the case. He

also points out that the Commissioner who was appointed in this case did not give a report of the alleged encroachment. Therefore, it is his contention that the plaintiffs failed to prove their case.

On the other hand, learned counsel for the respondents in the appeal and the plaintiff in the suit states that the order passed by the Court below is a reasoned order passed after considering all the facts of the case. He points out that very fact of the Court came to a conclusion that there is only encroachment of Ac.0.13 cents shows that there is application of mind by the Court below. Learned counsel relies upon the judgment and supports the same.

This Court, after considering the facts, exhibits, evidence and the submissions made notices that the plaintiffs have filed Exs.A.1 to A.6 documents in their evidence. Ex.A.5 is the partnership deed and the other five documents namely Exs.A.1 to A.4 and A.6 are title deeds. Plaintiffs did not file any document to prove the alleged encroachment. Similarly, exhibits filed by the defendants also are of similar nature and do not prove the alleged encroachment. Neither the extents of the parties in possession nor the alleged encroachment within that land is borne out by record.

The plaint schedule which mentions the alleged encroachment is described as follows:

SCHEDULE

Vacant site situate in S.Nos.3-B/3 and 941/2A situate in the village limits of Chinna Chowk, Cuddapah taluk, marked in red colour and denoted by letters A B G H in the plaint plan, measuring 0-23 cents or 0-063 Hectors in extent and with the following boundaries:-

East: Devuni Cuddapah road, West, Ayacut Banjar in S.No.741/1, North – Plaintiffs site in S.No.3-B/3 and South-site property of defendants in S.Nos.941/2A, 3-B/3 and 941/2B. (the measurements are shown in links, and the encroached site measures 30 links North-South 762 links, East-West on the North and 780 links East-West on the South-Area -023 cents or 0-093 H).

As the other evidence in this case is not very germane to decide this issue of encroachment the crucial documents being considered are Exs.C.1 and C.2.

Ex.C.1 is a report/memo filed by the Deputy Inspector of Survey who was appointed as a Commissioner to inspect the site and note down the physical features. Ex.C.2 is the plan prepared by him. The report of the Commissioner clearly states that he could not arrive at the correct area of enjoyment of the defendants and the petitioners in the above survey numbers. He returned the warrant with the endorsement that he could not arrive at a final conclusion. Even the plan prepared by him merely shows the petitioners land and the respondents land. There is absolutely no evidence of any encroachment.

The Commissioner who is also the Deputy Inspector of Surveys was also examined as a witness. He is PW.2 in the

suit. In his cross-examination, he clearly admits that he cannot say from the survey work done by him whether defendant Nos.1 and 2 have encroached into the land of the plaintiffs, the land of the plaintiffs and its extent.

This Court notices that other than this, there is no other evidence either oral or documentary available to show the alleged encroachment.

In addition, this Court also notices that PW.1 deposes that other surveyors called Muthuswami and Ramachandra Naik (Municipal Surveyors) also surveyed the land. The plan filed with the plaint was prepared by a surveyor. However, neither Muthuswami nor Ramachandra Naik were examined as witnesses.

As mentioned earlier, the alleged encroachment is spelt out with very great clarity in the plaint and the plaint plan. But there is no supporting evidence for the same. As both the parties trace their title through common predecessors and as the suit is one for declaration, the duty was always cast on the plaintiffs to prove their title. This is settled law and it requires no repetition. The burden always lies on the plaintiff in such a suit to prove his title and the weakness of the defendant will not entitle the plaintiff to a declaration.

In the case on hand, this Court finds that the plaintiffs did not prove the alleged encroachment at all. Despite this, the lower Court granted a decree. The lower Court failed to

notice that the encroachment is allegedly on one side. The measurements are specifically given. The alleged encroachment is allegedly demarcated and described in the plaint schedule, but no documentary evidence is filed to support the same. The plaint plan which was prepared prior to the suit through a surveyor is not proved by examining the surveyor.

In view of all of the above, this Court is of the opinion that the decree and judgment passed by the lower Court are not correct. Therefore, the impugned judgment and decree is set aside. The plaintiffs/respondents have failed to prove the encroachment.

Hence, the appeal is allowed. Consequently, the cross objections which are filed by the appellants/respondents are also dismissed. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S.SOMAYAJULU, J

Date: 26.09.2018

KLP