

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 22ND DAY OF OCTOBER, 2013

BEFORE

THE HON'BLE MR. JUSTICE ASHOK B. HINCHIGERI

R.F.A.No.1222 OF 2009

C/W.

R.F.A.No.1223 OF 2009

BETWEEN:

Sri Shashikanth D.Shah,
Aged about 69 years,
Son of Late D.G.Shah,
Residing at No.12,
Flat No.3A, Dr.Brahmachari
Street, Kolkata – 110 017,
Presently at Bangalore. ... Common appellant

(By Sri S.Sudindranath, Advocate)

AND:

1. Smt.R.Nalini,
Aged about 46 years.

2. Smt.R.Hemalatha,
Aged about 43 years.

3. Smt.R.Kalpana,
Aged about 41 years.

4. Smt.R.Shobha,
Aged about 37 years.

All are daughters of
Sri M.Rangashamaiah,
Residing at No.209/Y,
13th Main Road, III Block
Rajajinagar, Bangalore – 560 010,
Represented by their father
and GPA Holder.

.. Common respondents

(By Sri K.S.Chandrabhas, Advocate for R1 to R4)

These RFAs are filed under Section 96 r/w. Order XLI of CPC, against the judgment and decree dated 27.08.2009 passed in O.S.No.16729/2002 on the file of the XIII Addl. City Civil Judge, Mayo Hall, Bangalore City, decreeing the suit for permanent injunction and etc.

These RFAs is coming on for final hearing this day, Court delivered the following:

J U D G M E N T

These two appeals are directed against the judgment and decree, dated 27.08.2009 passed by the Court of the XIII Additional Civil Judge, Mayohall Unit, Bangalore, in O.S.No.16729/2002.

2. The facts of the case in brief are that the site No.644 of Kenchenahalli and Halige Voderahalli, Bangalore was allotted to the respondent plaintiffs by the Ideal Homes Co-operative Building Society Limited. In this regard, the said Society executed the lease-cum-sale agreement on 25.10.1989 and issued the possession certificate on 05.11.1989. Alleging that the appellant-defendant, the owner of the adjoining site bearing No.645 was encroaching the respondents' site on the south-western side, they filed the suit seeking the relief of permanent injunction.

3. The appellant filed the written statement, denying the encroachment on the respondents' site. He claims that he is in possession of the extent as shown in the sale deed executed in his favour in respect of his site bearing No.645. The appellant also filed the counter claim seeking the relief of permanent injunction, damages, etc.

4. Based on the rival pleadings, the Trial Court formulated the following issues:

- (1) Whether the plaintiffs prove that they are in lawful possession of the suit schedule property?
- (2) Whether the plaintiffs prove interference by the defendant, as alleged?
- (3) Whether the plaintiffs are entitled to relief of injunction?
- (4) Whether the defendant proves that he is the owner in possession of the suit property?
- (5) Whether the defendant is entitled to counter claim relief?
- (6) What decree or order?

5. On behalf of the respondents, four witnesses were examined, marking the documents at Exs. P1 to P21. On behalf of the appellant, his power of attorney holder was examined as DW1. Twenty one documents were marked in Ex.D series. The Secretary of the said Society Seethamma was examined as CW1, marking the documents at Exs. C1 to C10. The Trial Court decreed the suit and dismissed the counter claim. Aggrieved by this judgment, the defendant is in appeal before this Court.

6. Sri S.Sudindranath, the learned counsel for the appellant submits that the appellant's claim is based only on the description of the site No.645 as shown in the possession certificate, sale deed, etc. He brings to my notice, that the appellant has also obtained the Correct Dimension Report (CDR) from the BDA, which shows the measurement of the site No.645 as $\frac{101 + 111}{2} \times \frac{160.5 + 156.5}{2}$. He submits that the Trial Court has unnecessarily and baselessly disbelieved this correct extent shown in the host of documents. He submits that the CDR shows the area as 1866.77 sq.yards. As the respondents cannot claim any portion of the site purchased by the appellant, the appellant has rightly resisted the suit and advanced the counter claim.

7. Sri Sudindranath submits that the respondents have suffered the cascading encroachment from the owners of site Nos. 642 and 643, which may have resulted in the shrinkage of the site bearing No.644 belonging to the respondents.

8. Sri K.S.Chandrabhas, the learned counsel appearing for the respondents submits that in all the documents, which have come into existence at an undisputed point of time i.e., prior to the filing of the suit, the dimension of the site No.645 is shown as $\frac{160.5 + 156.5}{2} \times \frac{101 + 100}{2}$. The appellant has created some documents to show that it is actually $\frac{101 + 111}{2}$ (in lieu of 100) on one side. He submits that the khatha, sanctioned licence, etc. show the appellant's property on one side as $\frac{101 + 100}{2}$ only. There is overwriting on some of these documents subsequently. According to him, the documents are tampered; as the overwritings do not bear the signature or endorsement of anybody.

9. This is a case in which there is no dispute about the ownership of the sites. That the respondents are the owners of the site No.644 and that the appellant is the owner of the site No.645 are not in dispute at all. Whether there is an encroachment on site Nos.644 or 645 and if there is encroachment, whether it is by the owners of the site Nos.644

and 645 and/or by the occupants of the adjoining sites has to be examined.

10. The khatha, sanctioned licence, etc., relied upon by the respondents' side do not constitute the title-deeds. They may have some presumptive value. But the parties are to be given the opportunity to rebut them by producing the clinching evidence.

11. To resolve the real controversy between the parties, a case of this nature calls for the appointment of the Court Commissioner. In holding so, I am fortified by this Court's decision in the case of **SREE SREEPADARAJA MUTT vs. PYRA RAMAIAH AND OTHERS** reported in **ILR 1999 Kar.2231**, wherein it is held that if the dispute relates to the marking of boundary or nature of the property, the evidence which could be produced is only through the commission which it may give and find out about the situation of the property and facts existing on the spot so as to help the court

to arrive at a conclusion about the nature of the property along with the other evidence produced by the parties.

12. It is also profitable to refer to the Orissa High Court decision in the case of **MAHENDRANATH PARIDA vs. PURNANANDA PARIDA AND OTHERS** reported in **AIR 1988 Orissa 248**, wherein it is held that when the controversy between the parties is as to the identification, location or measurement of the land, the local investigation should be made at an early stage.

13. As the evidence placed by the parties on the record of the Trial Court is not adequate to adjudicate the lis and as the benefit of the report of the spot inspection of the Court Commissioner is not available, I set aside the judgment and decree under appeals and remand the matter to the Trial Court for fresh enquiry in accordance with law.

14. Further, the letter, dated 19.04.2003 (Ex.P19) given by the said Society clarifies that it has no authority to either allot more or less than the one submitted or approved by the

BDA. The CDR sought to be produced with IA No.1/2013 containing the specific measurements of the site bearing No.644 and 645 is also necessary for the full and effectual adjudication of the matter. I therefore deem it necessary and just to allow I.A.No.1/2013 for the production of the additional documents. The appellant is hereby permitted to produce the additional evidence before the Trial Court. The respondents are also at liberty to dispute the authenticity and/or relevance of the additional documents. Liberty is reserved to both the parties to seek the amendment of the pleadings and for the incorporation of the reliefs for declaration, for recovery of possession, damages, etc.

15. Misc.Civil Nos.7655/2010 and 7657/2010 are dismissed as not pressed. The original document produced with Misc.Civil No.7657/2010 and I.A.No.1/2013 are ordered to be returned to the appellant's side after taking their xerox copies for the record purpose. Office is directed to send back the lower court records to the Trial Court.

16. The parties and/or their respective learned advocates shall appear before the Trial Court on 06.11.2013 without waiting for any notice from the Trial Court. The parties shall cooperate with the Trial Court in the speedy disposal of this matter.

17. The parties shall maintain status-quo for a period of one month from today. If any further interlocutory orders are required, the parties may make appropriate application to the Trial Court.

18. No order as to costs.

Sd/-
JUDGE

Cm/-