

JUDGMENT

Hiremath, J.

1. This appeal is directed against the judgment and decree of the Court of the Civil Judge, Mangalore, in R.A.No. 33 of 1976, dismissing the suit of the plaintiff, reversing the judgment and decree of the Court of Munsiff, Buntwal, South Kanara in Original Suit No. 170 of 1973, decreeing the suit of the plaintiff for permanent injunction against the defendants from interfering with his possession of the suit land especially on the portion to the west of rain water channel called 'kani'.

2. The plaintiff-appellant brought this simple suit for injunction alleging that he purchased the suit land from defendant-1 under a registered sale deed dated 16-11-1938 and at the time of the purchase the extent of this A schedule property was not clearly known, the approximate extent was noted in the sale deed but, the boundaries were specifically shown to identify the property and the boundaries have been clearly stated in the sale deed. While there is no dispute with regard to other three boundaries, the eastern boundary is contested by the parties. In the sale deed it is stated that the eastern boundary is a rain water channel and the areca garden of defendant-1. He then alleged that somewhere in August 1972 the defendants trespassed into his land and cut two trees. Therefore it was necessitated to file a suit for this relief.

The defendants in their written statement referred to an earlier Original Suit No. 221/1946 for rectification of the sale deed and that suit was dismissed and secondly they denied the averments made in plaint para 3(2) and as the plaintiff cut the tree growth inspite of objections, they complained to the police and at the request of the police the plot was measured by the Taluk Surveyor who found the tree growth situated in S.No. 183/bC which is not owned by the plaintiff. The defendants cut removed only the branches near their house and the main tree remained there. In short, it was the contention of the defendants that they did not trespass on the land of the plaintiff. It is significant that nowhere they disputed that the land sold to the plaintiff did not extend till rain water channel and the specific allegation with regard to this eastern boundary pleaded in paragraph 2 of the plaint was not made in the written statement as pointed out by the appellant's Counsel and which according to him is very relevant for considering the respective portions in possession of the parties.

3. While the trial Court found on evidence that the land to the west of this rain water channel or kani was sold to the plaintiff and that all along he has been in possession of the same, the first Appellate Court on reappraisal of evidence found that the land did not extend till the rain water channel and the boundary terminated somewhere to the west of rain water channel and it also considered the survey map produced by the defendants. This judgment and decree of the first Appellate Court is challenged contending that the first Appellate Court completely ignored the main contention of the appellant that what exactly sold was the land within the boundaries stated in the sale deed and the First Appellate Court referring to the patty-proceedings mainly in support of its judgment was not right in negating this basic proposition that where the extent of the land was not definite or is approximate, it is the boundaries that prevail. While the trial Court accepted and acted on this proposition, the First Appellate Court did not at all keep in view this proposition and acted on some other material which does not prove the possession of defendants to the portion west of the channel. This is the main contention of the appellant and at the time of admission the following question of law has been set down for determination.

Whether the finding of the Court below that the plaintiff has failed to

prove his title and possession in respect of the suit schedule property is vitiated on account of non-consideration of material evidence and circumstances in the case?

4. Sari Ganapathy Bhat appearing for the appellant has invited my attention to the recitals in the sale deed, the admissions made by the saute defendant and his witness D.W.2 in their evidence, the report of the commissioner and the proposition that the boundaries should prevail where there is incardinate with regard to the extent of the land sold.

5. Sari Ashok Haranahalli learned Counsel appearing for the respondents however supported the judgment of the First Appellate Court relying on the patty proceedings which according to him are admitted by the plaintiff subsequent to measurement by the surveyor and fixing the survey line and the fact that the rain water channel is not the same always, but changes its course due to erosion.

6. As early as in the year 1948, the Privy Council in the case of B.K.A.P. CO-OPERATIVE SOCIETY v. GOVERNMENT OF PALESTINE AND OTHERS, 1948 PC 207 observed as follows :-

"In construing a grant of land a description by fixed boundaries is to be preferred to a conflicting description by area. The statement as to area is to be rejected as falsi demons-ratio."

Same view was taken referring to this decision by the High Court of Madras in the case of SIVISESHAMUTHU v. BALAKRISHNA, and it was reproduced by the trial Court in its judgment as-

"Where the property sold is part of a definite survey number and in the sale deed the exact boundaries of the part sold are given and the area mentioned is only approximate, the description by boundaries should prevail in ascertaining the actual property sold under the document."

Nagpur High Court in the case of T. RAJLU NEEDY v. M.E.R. MALAR, AIR 1930 Nagpur 197 also took the same view that -

"In the case of a discrepancy the dimensions and boundaries and the area specified within the boundaries will pass whether it be less or more than the quantity specified."

Keeping in view this well established proposition and principle in the matter of construction of a document or instrument, the Court has to find out what exactly was the property sold under the sale deed relied upon by the plaintiff.

7. The fact that there was a specific plea in the plaint itself as projecting the case of the plaintiff with regard to the rights he possessed in this property cannot be totally ignored and so also the plea put forth by the defendants in their written statement. As I have already pointed out the case in paragraph 2 is a specific case made by the plaintiff that the area at the time of sale was not definite or certain it was only an approximate sale of 70 cents and therefore the parties agreed that the rain water channel or kani and the areca garden of the defendants should be the said eastern boundary. As against this, the defendants did not put forth as to what exactly is their case with regard to boundaries. It was a brief written statement and they referred only to the earlier Original Suit No. 221 of 1946 which the trial Court did not notice that the finding in it was attracted by the principles of resjudicata nor is it the case now, that the finding operates as resjudicata, as this specific issue was not in that suit. Apart from that, the defendants only urged that the trees standing to the west of the channel which were cut by them were in their land and therefore they have not trespassed. Therefore it is very significant that the defendants kept as vague as possible their defence as to the exact eastern

boundary of the land. This is one aspect of the matter as far as pleadings are concerned on which alone subsequent evidence is led.

8. Sari Bhat took me through certain admissions made by defendant -1 himself in his evidence. In paragraph 5 he admitted as follows :

"At the time of sale deed in 1938, the boundaries of S.No. 183/3C were correctly shown. In the sale deed we have referred to the extent of land sold in S.No. 183/3 as 70 cents approximately. At the time of sale deed we were not definite of the exact extent of the survey number sold to the plaintiff. Therefore separate boundaries are shown to that portion of the land in S.No. 183/3. The land sold through the sale deed is within the boundaries shown in the sale deed."

Then he stated that the plaintiff had encroached about 3 or 4 cents of land to the west side of the kani and on the eastern side of his areca garden.

9. But, during evidence another point was made viz., that his father was an experienced shanbhogue in survey and he himself put up the boundary stones according to the sketch, at the time of the sale deed. The plaintiff removed the stone so put up by his father. Thus, it was during evidence that defendant-1 came forth with a specific plea that his father had put up the boundary stones at the time of sale deed. This is entirely a new case never pleaded and only during evidence this was made out, which has to be rejected.

10. D.W.2 examined on behalf of defendants admits that he was not present on the date of the sale deed. The father of defendants 2 and 3 at an eye estimation sold the properties to the plaintiff and on such eye estimation identification stone was fixed on the properties. On that occasion no measurement was taken. The identification stone was fixed to the east of the kani.

11. Sari Bhat in support of his case has pointedly invited my attention to this fact which meets his case half way or inadvertently supports his case that the eastern boundary at any rate was the kani or rain water channel and therefore there is no getting away from this fact.

12. The Commissioner has shown the rain water channel as well as the lines existing as per the survey as 107 and 114. Sari Ashok Haranahalli, learned Counsel for the respondents pointed out to these lines and the survey map is also produced by him. He urged that subsequently when patty proceedings were held the boundaries were refixed and therefore these two lines should be taken as eastern boundary of the lands sold to the plaintiff. In this behalf how these maps came to be prepared has been referred to by the trial Court in its judgment at paragraph 11. It reads as follow:

"It seems to me that when the plaintiff asserted his rights over the tree growth in the portion of the land situated within the boundaries of the land sold to him, the defendants have taken steps to get the land measured at the hands of Taluk Surveyor. From the evidence on record, it is borne out that the 2nd defendant made an application to the Taluk Surveyor and got measured the land S.No. 183/3B1 during 1973. Similarly, the 3rd defendant got surveyed the land 185/1A by an appropriate application on 3-1-1974. The statements given by D2 and D3 before Surveyor are also produced before Court. This suit was filed on 13-7-1973. Immediately after the institution of the suit a commission was issued and Commissioner visited the property on 13-7-1973 itself. The Commissioner had filed his report on 24-6-1974. It appears during the pendency of the suit before Court the defendants seem to have taken steps to get the lands in their possession measured and the field survey lines were got identified after measurement by the Taluk Surveyor. Nothing prevented the defendants to have made representation before Court for a direction to the Commissioner to avail the services of a Government Surveyor during the local inspection of the properties. Instead, they clandestinely have chosen to get the lands measured and refixed

the boundaries of S.No. 183/3B1 and 185/1A.

He further observed that these steps were taken by the defendants without the Court being kept apprised of the steps taken by them. For these reasons the defendants approached the surveyor during the pendency of the suit. The markings if any made in these maps, prepared by the surveyor cannot be accepted conclusively. There is also a sketch Ex.D.4 prepared on 5-4-1973. In all these maps the line 114 has been shown but nowhere the channel has been shown. This is another aspect of the matter.

13. Now, whether these lines shown by the surveyor should offer conclusive evidence is the point. In my view, they cannot be accepted as conclusive for the simple reason that the sale deed clearly make mention as to what exactly is the boundary and what were the basis taken by the Commissioner to refix the survey line. The map has been prepared for the purpose of assessment as the respondent's Counsel calls it in order to decide the title to a property: But the established principles cannot be thrown to the winds. In that view of the matter, the trial Court having referred to the evidence on record found, that in view of the stand adopted by the defendants, the case of the plaintiff which is admitted in the recitals made in the sale deed itself that the land to the eastern side of the channel was sold to the plaintiff, has to be accepted.

14. Another ground of attack by way of adverse inference is the failure of the plaintiff himself giving evidence. I do not find any merit in this contention. Though a party should enter the box and give evidence in support of his case, ultimately the burden of proof lies on the party who should fail if no evidence is led. In this behalf, it is necessary to say that the case of the plaintiff is not that the boundary stones were fixed at the time of sale deed. It is only in evidence, that defendant-1, as already pointed out, spoke about it. The written statement was as bald as anything without giving anything specific with regard to the eastern boundary. The recitals in the admitted sale deed are very clear and specific stating exactly what are boundaries. Therefore, simply because the plaintiff's son has entered the box and gave evidence, it does not make any difference nor does the balance tilts in favour of the defendants. It is also urged that the plaintiff has not produced the patty proceedings as it was observed by the first appellate Court in its judgment. In my view, the patty proceedings if any must have taken place long after the sale deed. The plaintiff was relying exclusively on the recitals in the sale deed. If the patty proceedings had in any way changed the situation and fixed the boundaries at a place away from the channel, it was up to the defendants to produce the same and satisfy the Court as to why and how they were wrong and where the boundary was fixed. It is futile to find exception with the plaintiff for not producing it, because, the plaintiff was not relying on this material at all. Therefore, the first appellate Court was wrong in drawing an inference that because patty proceedings were not produced by him, his case should fail.

15. Having considered the evidence on record and established principles, it is patently clear that the first appellate Court was wrong in upsetting the judgment and decree of the trial Court. The trial Court had appreciated all the material before it in its proper perspective giving due weight to oral as well as documentary evidence.

16. There is also a reference to the water channel becoming wider. In this behalf, though the plaintiff has admitted that due to erosion of the soil the channel is widened, there is absolutely nothing to show whether the course itself got changed and it is not anybody's case. Though there is revetment found on the western side of the channel, it is only for the purpose of protecting it. Another ground of attack is that the plaintiff who has converted his paddy land into an arecanut garden, did not grow the same till the western edge of the channel. Therefore, it is not in the land of the plaintiff. What applies to the plaintiff, equally applies to the defendants inasmuch as they did not raise areca to the west of the channel, as till the eastern edge of the channel they

have raised the areca garden. Therefore, this is a neutral factor which does not help either of the parties in that view of the matter, the first appellate Court was wrong in setting aside the judgment and decree of the trial Court and allowing the appeal.

17.1, therefore, set aside the judgment and decree of the first Appellate Court and restore that of the trial Court. Parties to bear their respective costs.