

THE HON'BLE SRI JUSTICE V.GOPALA KRISHNA RAO

APPEAL SUIT No.1140 OF 2003

JUDGMENT: -

1. This Appeal, under Section 96 of the Code of Civil Procedure [for short '**the C.P.C.**'], is filed by the Appellants/Defendants challenging the Decree and Judgment, dated 25.03.2003, in O.S. No.257 of 1993 passed by the learned II Additional Senior Civil Judge, Kakinada [for short '**the trial Court**']. The Respondent herein is the Plaintiff in the said Suit.

2. The Respondent/Plaintiff filed the Suit praying for declaration of plaintiff's title in the ABCD portion of the plant plan which is the part of the plaint schedule property and consequentially for recovery of vacant possession of the same after evicting the defendants therefrom and for permanent injunction restraining the defendants from interfering with the said ABCD portion of the plaint plan in any manner whatsoever after recovery of possession by the plaintiff and so also for relief of permanent injunction against the defendants after recovery of possession of property.

3. Both the parties in the Appeal will be referred to as they are arrayed before the trial Court.

4. The brief averments of the plaint, in O.S. No.257 of 1993, are as under:

The plaintiff is represented by her General Power of Attorney Holder, who is staying at Gandhi Nagar, Kakinada, whereas the plaintiff is staying at Vizag. Plaintiff purchased the plaint schedule property under a sale deed dt.22.01.1981 and she is in possession of the same. On 03.07.1993 when the General Power of Attorney (G.P.A.) Holder of plaintiff had been to his godowns which are situated nearby to the schedule property, he found to his surprise that the constructions are being made in part of the plaint schedule property by the 2nd defendant. Immediately, plaintiff's G.P.A. Holder got measured the property and found that 2006 square yards from out of the plaint schedule property on Northern side was high handedly and stealthily occupied by the defendants and they are making constructions therein without knowledge and consent of plaintiff. A rough plan is filed showing the 2006 square yards of occupied site as ABCD. As construction is going on with lightening

speed, no time is left to the plaintiff to give any notice. Hence the suit is filed for declaration of title of plaintiff in 2006 square yards of site shown as ABCD in plaint plan and for recovery of possession of the same and also for permanent Injunction against the defendants not to interfere with the remaining site in the plaint schedule property.

5. The second defendant filed written statement, which was adopted by the first defendant. The brief averments of the written statement are as under: -

i) The first defendant is the son of second defendant. First defendant is not a member of the joint family and the property where godowns are constructed exclusively belongs to first defendant. The first defendant purchased an extent of Ac.2.30 cents in T.S.Nos.1970/1 and 1970/2 under registered sale deeds dt.13.05.1993 and 14.05.1993 bearing document Nos.2585/93 and 2595/93. The ABCD marked portion shown in the plaint plan is a part of the property covered by the above two sale deeds. G.P.A. holder of the plaintiff very frequently visits the suit locality because his godowns and other properties are situated on the further South of the plaint schedule property.

- ii) The Northern boundary of ABCD portion should have been described as the site of first defendant. Anisetty Nookaratnam owned the property to the North of first defendant's property and now that site is in possession of Nagarjuna Fertilizers and Chemicals Limited. The Northern boundary in the plaint schedule should have been shown as the remaining land of Pilli Prakasa Rao.
- iii) Plaintiff and her G.P.A. holder are very well known to the second defendant from several years. The G.P.A. holder is an ex-counsellor and he persuaded the second defendant to purchase the property covered by two sale deeds dt.13.05.1993 and 14.05.1993. the G.P.A. holder visits the godown and other properties every day.
- iv) The construction of godown was started by second defendant in the first week of May, 1993 after obtaining permission from the Municipality and demarcations made even prior to that to the knowledge of G.P.A. holder of the plaintiff and the material for construction was dumped much earlier. Second defendant requested G.P.A. holder of plaintiff to permit him to draw electricity from godown which stands in the name of his wife and others till second defendant gets the electricity connection. The G.P.A. holder

of plaintiff permitted to do so and electricity was provided by him only. Therefore, it is futile to contend that plaintiff is living far away from land and she did not know about the constructions made by defendants. Second defendant is constructing huge godowns which fetches rental of nearly three lakhs rupees every month. If construction is stopped, defendant would incur a loss of Rs.10,000/- per day. The godowns are leased to M/s.Transit Warehouse and Finance Limited which arranged finance for construction of the godown to Halar Shipping Transport Private Limited that the property was to be delivered to them before 15.10.1993 failing which defendant was subjected to great loss by way of damage. The G.P.A. holder of plaintiff is fully aware of the situation.

v) The ABCD marked portion of plaint plan is not at all encroachment. If the property is measured starting from the beach road, it would have been clear that ABCD marked portion does not cover any part of the plaintiff's sale deeds and on the other hand, ABCD marked portion site would fall within the site of first defendant. Plaintiff is aware that ABCD portion belongs to first defendant and in any view of the matter as she permitted the construction to be

proceeded with, the plaintiff must be deemed to have waived her right for injunction if there is any. As such, she is not entitled for injunction sought for. Even assuming that first defendant made constructions believing that portion is covered by his sale deed and plaintiff's conduct in allowing the constructions to go on, estopped her from asking for possession and at best the plaintiff is entitled for the value of the site if ultimately any encroachment is found on the basis of the valuation of the sale deed. Hence, the suit may be dismissed.

6. By the time of filing the suit, first defendant was a minor. Subsequently, he was declared as major and he filed additional written statement contending as follows:

Some of the property purchased by the plaintiff and her family members was acquired by the Government for the purpose of laying beach road and they were awarded compensation for the same. This materiel fact was not disclosed by plaintiff. The Commissioner appointed by the court did not measure the properties properly and he started the measurements from a stone situated in beach road without verifying the correctness of the stone. To localise the

disputed property, it is necessary to measure and localise the properties of N.F.C.L., land of Dwarampudi people, the puntha and the land acquired for beach road with the help of F.M.B. and the plan of beach road. First defendant is in possession of the land purchased by him from Pilli Prakasa Rao and he never encroached the plaintiff's site.

7. After filing the additional written statement by the first defendant, a rejoinder was filed by the plaintiff. The contents of the same are as follows:

i) After the execution of sale deeds in favour of the plaintiff and others for Ac.4.00 cents of land, Pilli Prakasa Rao had only Ac.2.00 cents of land, but the extent is mentioned as Ac.2.30 cents in the sale deed without measuring the land. No property purchased by second defendant in the name of first defendant was acquired by the Government at any time. No land belongs to plaintiff and others who purchased from Pilli Prakasa Rao was acquired.

ii) The commissioner properly verified the existing stone and executed the warrant and first defendant was not present at the time of execution of warrant. Only to prolong the proceedings, first

defendant filed additional written statement after examination of second defendant is completed.

8. Based on the above pleadings, the trial Court framed the following issues:

- (i) *Whether the plaintiff is the owner of the part of the plaint schedule property shown as ABCD portion in the plaint plan?*
- (ii) *Whether the 1st defendant is the exclusive owner of part of the plaint schedule property shown as ABCD portion in the plaint plan?*
- (iii) *Whether the plaintiff is entitled for declaration of his title and to recover vacant possession of the part of the plaint schedule property shown as ABCD portion in the plaint plan?*
- (iv) *Whether the plaintiff is entitled for consequential permanent injunction?*
- (v) *To What relief?*

9. During the course of trial in the trial Court, on behalf of the Plaintiff, PW1 to PW4 were examined and Ex.A1 to Ex.A6 were marked. On behalf of the Defendants DW1 to DW3 were examined and Ex.B1 and Ex.B2 were marked. Ex.X-1 was marked through a

witness. EXs.C1 to C5 were marked through PW4-Advocate-commissioner.

10. After completion of the trial and hearing the arguments of both sides, the trial Court Decreed the Suit vide its judgment, dated 25.03.2003, against which the present appeal is preferred by the appellants/Defendants in the Suit questioning the Decree and Judgment passed by the trial Court.

11. Heard Sri T.Ravi Kanth, learned counsel, representing on behalf of Sri Venkat Challa, learned counsel for the appellants and Sri G.Rama Gopal, learned counsel for the respondent.

12. The learned counsel for the appellants would submit that the trial Court relied upon the Advocate Commissioner's report while coming to the conclusion that the defendants have encroached the site of the plaintiff without considering the objections on a commissioner report in a proper manner. He would further contend that the trial Court failed to consider the admissions of the Advocate Commissioner in his evidence. He would further contend that there are no survey stones in the land and the measurements taken as per the boundaries mentioned in both the documents. He would

further contend that the trial Court committed error in decreeing the suit and the appeal may be allowed.

13. *Per contra*, the learned counsel for the respondent/plaintiff would contend that the plaintiff sale deed is relates to the year 1981, whereas the defendants sale deed is relates to the year 1993 i.e., after 12 years from the date of purchase by the plaintiff the defendants purchased the property from the same vendor and plaintiff's property is situated in Ac.1.00 cents and the said property is situated at Kakinada Municipality limits and the defendants also purchased Ac.1.00 cents in the same patta number and the vendor in both the documents are one and the same and the learned trial Judge after appreciating the evidence on record, rightly decreed the suit and the appeal may be dismissed.

14. Having regard to the pleadings in the Suit and the finding recorded by the trial Court and in the light of rival contentions and submissions made on either side before this court, the following points would arise for determination:

- I. Whether the Trial Court justified in holding that the plaintiff proved the title in H, E, E1, E4 portion***

and so also E1, E2, E3, E4 shown in the plan prepared by Advocate-Commissioner?

II. Whether the decree and judgment passed by the trial court needs any interference? If so, to what extent?

15. **Point No.1:** The plaintiff in the suit originally claimed relief of declaration of title in ABCD portion of the plaint plan which is a part of the plaint schedule property and consequently recovery of vacant possession of the same after evicting the defendants there from and the plaintiff also claimed another relief of permanent injunction restraining the defendants and their men after recovery of possession by the plaintiff from the plaint schedule property. The suit is instituted by the plaintiff for claiming the relief of declaration of the title of ABCD schedule mentioned in the plaint plan. Therefore, the duty cast on the plaintiff to prove that she is having right and title in the plaint schedule property by producing the oral and documentary evidence on record. She is not supposed to depend upon the weaknesses in the case of the defendants. The title of the vendor of the plaintiff is not at all disputed by the defendants.

16. The undisputed facts are that the sale deed of the plaintiff is dated 22.01.1981 under Ex.A2, the sale deeds of the defendants are dated 13.05.1993 and 14.05.1993 respectively under Ex.B1 and Ex.B2 and the defendant Nos.1 and 2 are son and father. The vendor of the plaintiff and defendants are one and the same and the properties of the plaintiff and defendants are contiguous plots running from South to North. Both the parties purchased the vacant sites from the common vendor, there is no compound wall by separating in between both sites.

17. As stated supra, the plaintiff purchased Ac.1.00 cents of land on 22.01.1981 under Ex.A2 registered sale deed from Pilli Prakasa Rao. The Power of Attorney holder of the plaintiff is examined as PW1. In fact, PW1 filed a suit in a capacity of Power of Attorney holder. As per the evidence of PW1 original plaintiff executed a General Power of Attorney in favour of the PW1 under Ex.A1 on 26.05.1993. As per the case of the plaintiff, PW1 noticed on 03.07.1993 that the defendants are making construction by trespassing into the plaintiff's land and the same is shown as ABCD in the plaint plan. Originally the defendants purchased the vacant

land under Ex.B1 and Ex.B2 dated 13.05.1993 and 14.05.1993 respectively and by the date of the sale deeds of the defendants, the first defendant is the minor. The material on record clearly goes to show that after purchase of the property, within two months, the defendants started construction, immediately after the construction was started by the defendants, the plaintiff filed the suit by resisting the acts of the defendants. Ex.A3 is the sale deed of the vendor of the plaintiff dated 27.05.1979. The common vendor of the plaintiff and the defendants purchased open land of Ac.6.50 cents under Ex.A3, the same is not at all disputed by the defendants. The plaintiff also relied on Ex.A4 to Ex.A6 sale deeds dated 22.01.1981, therefore, Ex.A2 sale deed of the plaintiff and sale deeds of the purchasers of the vicinity of the same locality under Ex.A4 to Ex.A6 shows that the purchasers under Ex.A4 to Ex.A6 and so also plaintiff purchased the entire extent of Ac.4.00 cents of land from Pilli Prakasa Rao on 22.01.1981 itself. As stated supra, the plaintiff and her relatives purchased an extent of Ac.4.00 cents from Pilli Prakasa Rao on the same day on 22.01.1981. In fact, the vendor of the plaintiff purchased total extent of Ac.6.50 cents under Ex.A3, from out of the said extent the plaintiff and her relatives purchased

an extent of Ac.4.00 cents of land in the year 1981. The vendor of the plaintiff is having remaining Ac.2.50 cents of land by that date. As stated supra after 12 years from the date of purchase by the plaintiff, the defendants who are no other than son and father purchased Ex.B1 and Ex.B2 property from the said Pilli Prakasa Rao i.e., Ac.1.00 cents and Ac.1.30 cents, total extent of Ac.2.30 cents. In fact, the second defendant purchased the said property and obtained Ex.B1 in the name of minor since by that date, the first defendant was minor.

18. To discharge her burden, the plaintiff relied on the evidence of PW1 to PW4. PW1 is the General Power of Attorney holder of the plaintiff, who instituted the suit. It is in the evidence of PW1 that the plaintiff purchased an extent of Ac.1.00 cents of land, which is a schedule property, from Pilli Prakasa Rao as per the registered sale deed dated 22.01.1981 under Ex.A2 registered sale deed. Since the date of purchase she is in a possession and enjoyment of the same, the schedule property is situated at Kakinada Municipal Corporation limits and the plaintiff is staying at Vijayawada and that PW1 is looking after her property which is situated at Kakinada on behalf of

the plaintiff. Though the learned counsel for defendants thoroughly cross examined PW1, nothing was elicited from PW1 to discredit his testimony.

19. PW2 is a Village Karanam of Kakinada, who attested Ex.A2, Ex.A4 to Ex.A6. As per his evidence, after measuring the property covered under Ex.A2, Ex.A4 to Ex.A6, all the four documents were prepared in the year 1981 and he attested all the four documents and the vendor under Ex.A2, Ex.A4 to Ex.A6 informed them with regard to the boundaries of the property covered by those all the documents. His evidence clearly goes to show that after measuring the property only the plaintiff purchased Ex.A2 property and there was a clear recital in the document of the plaintiff itself that after measuring the property, the vendor of the plaintiff delivered the property to the plaintiff and got registered the same under Ex.A2.

20. It is in the evidence of PW3 that he is practicing as an advocate at Kakinada since 1987 and he was appointed as an Advocate Commissioner to note down the physical features of the suit schedule property and he inspected the suit locality on 14.07.1993 by giving notices to both the parties and Ex.C1 is the

preliminary report filed by him. Due to some personal inconvenience, as he is not in a position to execute warrant further, he returned the said warrant to the Court.

21. PW4 is another Advocate-Commissioner, who is a senior advocate practicing at Kakinada since 44 years. As per his evidence, he was appointed as an Advocate-Commissioner to execute the warrant with reference to the documents filed by both the parties and the Advocate-Commissioner warrant was re-entrusted to him and he executed the warrant in the presence of both the counsels and so also in the presence of both the parties with the assistance of Mandal Surveyor. By the time of execution of warrant, the retired Mandal Surveyor was also present on behalf of defendants. In cross examination, he stated that he perused the document showing the title of the vendor and so also title deeds of neighbouring land owners, when he went to measure the land with the assistance of Municipal Surveyor, one retired surveyor represented the defendants also present. The evidence of PW3 and PW4 clearly supports the case of the plaintiff. Ex.C3 is the report filed by the Advocate-Commissioner and Ex.C4 is the plan prepared

by him. Ex.C3 and Ex.C4 are marked through PW4. The evidence of PW4 coupled with Ex.C3 and Ex.C4 clearly supports the case of the plaintiff that the defendants encroached the property of the plaintiff. Another important point is that there was a clear recital in Ex.A2 sale deed of plaintiff, after measuring the property, the possession was delivered to the plaintiff. As stated supra, the sale deed of the plaintiff is relates to the year 1981, whereas, the sale deed of the defendants is relates to the year 1993. In the sale deeds of defendants there is no mention that the property was measured and delivered to the defendants by the date of registration of Ex.B1 and Ex.B2. Both the documents of defendants Ex.B1 and Ex.B2 clearly reveals that those documents were obtained by the defendants from the vendor without measuring the property.

22. The second defendant in the suit proceedings is examined as DW1. As stated supra, after attaining majority, the first defendant did not enter into the witness box. The second defendant filed his chief affidavit as DW1. He reiterated the contents of the written statement in his evidence affidavit as DW1. As per the own admissions of DW1, he purchased the property under Ex.B1 and

Ex.B2 from Pilli Prakasa Rao. It is in the evidence of DW1 that there is no mention in Ex.B1 and Ex.B2 that the site was measured and the Eastern boundary in Ex.A2 and Ex.B1 and Ex.B2 are one and the same. Another important admission is that he started construction even before the registration of the sale deeds in favour of first defendant and when the Advocate-Commissioner PW4 retired government surveyor visited the site, his clerk Satyanarayana was present and his advocate was also present and DW2 was present on his behalf. The own admissions of DW1 clearly reveals that in the presence of DW2 and the counsel for defendants and DW3-retired government surveyor only the warrant was executed by the Advocate-Commissioner/PW4.

23. It is in the evidence of DW2 that he is the clerk of the defendants and he is looking after the affairs of the suit schedule property. Though he stated in his chief examination affidavit that the Advocate-Commissioner failed to measure all the three sites of the plaintiff, in cross examination, he clearly admits that a retired Surveyor on their behalf attended the inspection made by the Advocate-Commissioner and he was personally present when the

disputed site was measured by the Advocate-Commissioner and there was a survey stone on the South of the beach road and the stone was located by the Advocate-Commissioner, Municipal Surveyor and the Surveyor on their behalf and the measurements were started from that stone and the Advocate-Commissioner inspected the site so many times. As per his evidence, in their presence only, PW4 executed the warrant of commission. DW3 is the retired Surveyor, who was present on behalf of the defendants throughout the execution of warrant by PW4. As per the admissions of DW3, DW3 is a retired Government Surveyor and he was physically present when the Commissioner executed the warrant and the Advocate-Commissioner measured the land as per the documents and noted the measurements and the Advocate-Commissioner has shown the site occupied by the defendants in a yellow colour. Another admission made by him in his evidence in cross examination is that the Town Surveyor also assisted the Advocate-Commissioner in executing the warrant of commission by PW4 for localization of the schedule property. Therefore, the method undertaken by Advocate Commissioner is transparent to identify the

localization of plaint schedule property and also encroachment made by defendants.

24. The learned counsel for appellants/defendants would submit that the objections raised by the defendants on Advocate-Commissioner report is not considered by the trial Court. The law is well settled that if the trial Court is not considered the objections taken by the defendants in right manner, the remedy is available to the appellants to take necessary steps as per law, but they were kept quiet for about 20 years, now they cannot agitate the said aspect before this Court. The decree was passed by the trial Court on 25.03.2003. The evidence of PW4 coupled with Ex.C2, Ex.C3 clearly goes to show that the Advocate-Commissioner visited the plaint schedule property and localized the property with the help of Municipal Surveyor. The report of the Advocate-Commissioner reveals that the properties of plaintiff and defendants are contiguous running from South to North and the sale deeds of the plaintiff and her relatives are four in number and registered on the same day on 22.01.1981 and he localized the plaint schedule property and surrounding properties with the help of the documents produced by

the parties and the properties of both the parties i.e., plaintiff and the defendants are contiguous running from South to North and both the properties are situated towards North of the beach road from Kakinada to seashore and the road runs from West to East.

25. There was a clear recital in the report of Advocate-Commissioner that “the properties of plaintiff and defendants were identified by him with the help of the boundaries and there is no difficulty to identify the properties of the defendants and the plaintiff as the boundaries on the land in both the documents are tallied with the documents of all the parties and the Municipal Surveyor was also accompanied him and the Municipal Surveyor was in a possession of town survey plans covering the suit properties”. The report of the Advocate-Commissioner further reveals that on the date of execution of warrant a retired Government Surveyor was also present on behalf of the defendants and the clerk of the defendants and counsel for the defendants were also present through-out the execution of warrant. The Advocate-Commissioner prepared the rough plan and rough sketch under Ex.C4 and Ex.C5 and the same are filed by the Advocate-Commissioner. The

evidence on record goes to show that the DW3, who is a retired Surveyor on behalf of defendants could not point out anything specifically on the report of Advocate-Commissioner to show that the Commissioner failed to properly localize the disputed property. As per the plan filed by the PW4, the defendants 1 and 2 are in possession of Ac.2.37 cents more than what the defendants purchased. As per the report filed by the Advocate-Commissioner, Ac.0.40 cents of land belongs to the plaintiff was encroached by the defendants. As stated supra, the document of the plaintiff is relates to the year 1981, after lapse of 12 years, the defendants purchased the property i.e., open land Ac.1.00 cents and Ac.1.30 cents respectively and started construction within a period of two months. The material on record reveals that the defendants occupied the gravel portion for an extent of Ac.0.18 cents which is shown as H, E, E1, E4 in the plan prepared by Advocate-Commissioner and further the defendants encroached the portion of E1, E2, E3, E4 as shown in the Advocate-Commissioner plan in an extent of Ac.0.22 cents which is shown in yellow colour by the Advocate-Commissioner. *Per contra*, the defendant No.1 failed to prove that some of the property purchased by the plaintiff was acquired by the government. As

stated supra, he did not examine himself as a witness to prove his defense in additional written statement. The trial Court by giving cogent reasons held in its judgment that the method undertaken by the Advocate-Commissioner was transparent and no serious discrepancies are made out in his report to reject the same and the trial Court by assailing cogent reasons decreed the suit.

26. The learned counsel for the appellants/defendants would submit that at the time of localization of the property by the Advocate Commissioner, the Advocate-Commissioner has not found survey stones on land and he identified the property with reference to the boundaries on the land, therefore, the plaintiff cannot get the declaration of title. As per the admissions of own witnesses of the defendants i.e., DW3, the retired surveyor, who was present, when the Advocate-Commissioner measured the sites and stone was available to the South-West corner of the beach road and the entire property is relates to the block No.45, whereas, the plaint schedule property area is situated at block No.45 at present and Advocate-Commissioner measured the land as per the documents of both the parties and so also neighboring land owners and the Advocate-

Commissioner also shown the open land encroached by the defendants in his plan. The Advocate-Commissioner localized the suit schedule property by following prescribed procedure with the assistance of Municipal Town Surveyor. At the time of execution of warrant, DW2 and DW3 retired government surveyor were also present on behalf of defendants and the objections taken by the defendants on the Advocate-Commissioner report is not considered by the trial Court. As stated supra, no steps are taken by the defendants to pursue their remedy and the decree was passed by the trial Court on 25.03.2003, after a lapse of 20 years, now the appellants cannot agitate that there are defects in the report of Advocate-Commissioner.

27. The legal position in this regard is not resnova. In a case of *Subhaga and others vs. Shobha and others in Appeal (civil) No.2836 of 2006*, arising out of S.L.P.(C) No.13705 of 2003, the Apex Court held that:

Here the attempt had been to identify the suit property with reference to the boundaries and the Commissioner has identified that property with reference to such boundaries. Even if there was any discrepancy, normally, the boundaries should prevail. There

was no occasion to spin a theory that it was necessary in this suit to survey all the adjacent lands to find out whether an encroachment was made in the land belonging to the plaintiff.

28. The facts in that case are as follows:

The trial court decreed the suit holding that the plaintiff was the owner of the suit land which had been identified on the spot and was hence entitled to the reliefs claimed. An appeal filed by the defendants was dismissed holding that the disputed constructions lay in the suit property described in the plaint, that the plaintiff had title to it and that the trial court was hence right in decreeing the suit. Thus, the appeal filed by the defendants was dismissed. The defendants filed a Second Appeal before the High Court of Allahabad. The High Court upheld the finding rendered by the courts below that the plaintiff was the exclusive owner of plot No. 1301/1 Ba. The High Court found that there was no illegality in the approach made by the courts below in arriving at that finding and the finding was based on the evidence on record. But in spite of this finding, the High Court reversed the judgment and decree of the first appellate court and dismissed the suit on a finding that there was no proper identification of the suit property by the plaintiff either in the plaint or at the spot and since the boundaries cannot be ascertained without surveying the adjoining plots, no decree could be granted to the plaintiff as was done by the courts below. The Second Appeal was thus allowed and the suit was dismissed. This is challenged in this appeal by the legal representatives of the plaintiff.

The Apex Court, on hearing the said S.L.P., held as follows:

We find that a commission was issued for demarcating the suit plot No.1301/1 Ba and the Commissioner showed the disputed area in the map prepared by him. The lower appellate court while considering the question of identification had referred to the description of the boundaries in the plaint, the admissions of one of the defendants as DW1 and the report and plan submitted by the Commissioner. That Court also noticed that the plaintiff had given specific boundaries of the suit land and it was clear from the sketch prepared by the Commissioner that the disputed constructions lay in the suit land and that it belonged to the plaintiff. This was the basis of the affirmance of the decree in favour of the plaintiff by the lower appellate court. In Second Appeal, the learned Judge of the High Court, after referring to the description of the boundaries in the plaint, simply discarded the sketch prepared by the Commissioner in the presence of the parties after ascertaining the plots lying as boundaries of the suit property.

We think that the High Court was not justified in interfering with the finding of the lower appellate court and in discarding the identification made by the Commissioner.

Ultimately, the Apex Court held as follows:

“The attempt had been made to identify the suit property with reference to the boundaries and the Commissioner has identified that property with reference to such boundaries. Even if there was any discrepancy, normally, the boundaries should prevail. There was no occasion to spin a theory that it was necessary in the suit to

survey all the adjacent lands to find out whether an encroachment was made in the land belonging to the plaintiff and the judgment passed by the High Court in a Second Appeal is liable to be set aside, consequently suit of the plaintiff was decreed and confirmed the judgment of the first appellate Court. The ratio laid down in the above judgment squarely applicable to the present facts of the case. The facts in the aforesaid case are similar to the instant case. In view of the dictum laid down by the Apex Court and on considering the entire material on record, I do not find any illegality in the judgment passed by the trial Court.

29. The evidence on record clearly proves that the defendants encroached the property of the plaintiff. As stated supra, the defendants purchased the property without measuring the same from Pilli Prakasa Rao after 12 years from the date of purchase by the plaintiff from the same vendor and the properties of the plaintiff and defendants are contiguous plots at the time of their purchase. The evidence on record further reveals that the defendants encroached the Ac.0.40 cents of land of the plaintiff. The defendants encroached the gravel portion for an extent of Ac.0.18 cents which

is shown as H, E, E1, E4 in yellow colour by the Advocate-Commissioner in his plan and the defendants also encroached the construction portion of the godown which is in the possession of the defendants for an extent of Ac.0.22 cents which is shown as E1, E2, E3, E4 in yellow colour in the plaint plan by the Advocate-Commissioner. Therefore, the trial Court by giving cogent reasons rightly decreed the suit. The plaintiff proved her title in the plaint schedule property, consequently she is entitled for recovery of possession of the plaint schedule property and so also she is entitled for permanent injunction restraining the defendants and their men from ever interfering with their possession after restoring her possession of the plaint schedule property. Therefore, the Trial Court is justified in holding that the plaintiff proved the title in H, E, E1, E4 portion and so also E1, E2, E3, E4 shown in the plan prepared by Advocate-Commissioner, since plaintiff is entitled for relief of declaration of title in H, E, E1, E4 and E1, E2, E3, E4 portion shown in the plan prepared by Advocate-Commissioner, she is entitled for recovery of possession of the above said property and so also relief of permanent injunction as claimed after recovery of possession of above said property. There is no reason for this

Court to arrive at different conclusion than the one arrived by Trial Court. I believe that the findings arrived at by the Trial Court are cogent and no justifiable reasons have been shown by the appellants for arriving at different conclusions.

30. The learned counsel for respondent/plaintiff would submit that this Court ordered in A.S.C.M.P.562 of 2006 and C.M.P.No.12331 of 2003 dated 19.06.2006 by directing the trial Court to conduct an enquiry into the mesne profits and to ascertain the same by giving opportunity to both the parties, the copy of the order is placed on record. The learned counsel for plaintiff placed a reliance of Division Bench Judgment of this Court in *Kalepu Subbarajamma vs. Tiguti Venkata Pediraju and 10 others*. In that decision, it was held as under:

In the case of future profits, no question of payment of court fee arises as the period for which the litigation prolongs cannot be predicted. We therefore held that so far as future mesne profits are concerned even without there being a prayer in the plaint, the Court can award the same or direct an enquiry into the same at the time of passing the decree for possession. Similarly, the Appellate Court can grant future mesne profits even if there is no appeal by the plaintiff against that part of the decree which is silent about future mesne profits. In an appeal pending before it against a decree for

ejection, the Appellate Court has got undoubted jurisdiction to grant mesne profits or to direct an enquiry into the same as it is a part of the general relief of possession. It is a well-settled principle of law that the power of the Appellate Court is coextensive with the power of the original Court and when an appeal is pending, the suit is deemed to be pending”.

Accordingly, the trial Court has to conduct enquiry with regard to the mesne profits and therefore the trial Court is directed to ascertain the mesne profits in a separate application to be filed by the plaintiff by giving an opportunity to both the parties.

31. **Point No.2:** In view of my findings on point No.1, the decree and judgment passed by the trial Court is perfectly sustainable under law and the trial Court is directed to ascertain the mesne profits in a separate application to be filed by the plaintiff by giving an opportunity to both the parties.

32. In the result, the Appeal Suit is ***dismissed*** confirming the Judgment and Decree, dated 25.03.2003, in O.S. No.257 of 1993 on the file of the II Additional Senior Civil Judge, Kakinada. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in the Appeal shall stand closed.

V.GOPALA KRISHNA RAO, J

Date: 29.11.2023

sj

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THE HON'BLE SRI JUSTICE V.GOPALA KRISHNA RAO

APPEAL SUIT No. 1140 OF 2003

Date: 29.11.2023

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