

(2013) 11 KAR CK 0181

In the Karnataka High Court

Case No : Regular First Appeal No. 1756 of 2007 (DEC and INJ)

Sri Abdulla Sab Since Deceased Represented by his LRs. And Others APPELLANT

Vs

Smt. Hanifa Bi and Others RESPONDENT

Date of Decision : 28-11-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10(2), 96
Specific Relief Act, 1963 — Section 34

Citation : (2013) 11 KAR CK 0181

Hon'ble Judges : K.L. Manjunath, J;A.V. Chandrashekara, J

Bench : Division Bench

Advocate : M.J. Alva and Nagaraja Hegde, for the Appellant; Shankar H.C., Sri M.G. Jagadeesh and Sri K.P. Yashwanth Rao for C/R 19, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Chandrashekara, J.—This appeal filed u/s 96 of CPC is directed against the judgment and decree passed in O.S. No. 5286/1999 which was pending at the file of City Civil Court, Bangalore. Suit filed by the plaintiffs for the reliefs of declaration of the title and consequential injunction in respect of 3.00 acres of land in Sy. No. 5/4 of Chikkabettahalli Village, Yelahanka Hobli, Bangalore Taluk has been dismissed by a considered judgment passed by the learned XXIV Addl. City Civil Judge, Bangalore, in O.S. No. 5286/1999 on 01.09.2006. It is this judgment and decree which is called in question on various grounds urged in the memorandum of appeal filed before this Court. One Abdulla Sab had filed the above suit and he died during the pendency of the suit and hence his legal representatives came to be brought on record. Respondent No. 1 herein was the defendant No. 1 in the said suit. Respondent Nos. 2 to 11 herein are the children of the defendant No. 1 and her husband, late Ameen Sab. Respondent Nos. 12 to 14 herein are the partners of a firm "M/s. AMS Land Developers" who have developed residential sites in Sy. No. 5/4 and respondent Nos. 16 to 18 herein were the defendant Nos. 16 to 18 are the purchasers of residential sites formed

in Sy. No. 5/4 and respondent No. 19 herein was the defendant No. 19 in the said suit represented by its President.

2. Parties will be referred to as plaintiffs and defendants as per their status in the cause title of the plaint filed in O.S. No. 5286/1999. It is pertinent to know the pleadings of the parties filed in the Trial Court.

3. Sri. Abdulla Sab, the deceased plaintiffs sister is Smt. Haanifa Bi, who is the defendant No. 1 in the suit. Her husband was Late Ameen Sab s/o Hussain Sab of Jarakabande Kaaval of Bangalore Taluk. Deceased plaintiff Abdulla Sab and his brother-in-law Ameen Sab s/o Hussain Sab had purchased in all 12 acres of land in erstwhile Sy. No. 5 of Chikkabettahalli through separate registered sale deeds from the lawful owners, the details of which are as follows:-

a) 3.00 acres of land in Sy. No. 5 had been purchased by Ameen Sab from one Sri. Pothalappa vide registered sale deed dated 17.9.1953.

b) 6.00 acres of land in Sy. No. 5 had been purchased jointly by Ameen Sab and Abdulla Sab in Sy. No. 5 vide registered sale deed dated 9.6.1955.

c) 3.00 acres of land in Sy. No. 5 had been jointly purchased by Ameen Sab and Abdulla Sab vide sale deed dated 12.2.1971.

4. At the time, when the lands in Sy. No. 5 were purchased, they had not been bifurcated by means of phodi work. According to the plaintiffs, 12 acres of land purchased vide three registered sale deeds mentioned above were numbered as Sy. No. 5/3 and 5/4 with 4.30 acres in Sy. No. 5/3 and 7.03 acres in Sy. No. 5/4. As such the total extent of these sub Nos. 3 and 4 of Sy. No. 5 was 11.33 acres. According to the plaintiffs, the relationship of deceased plaintiff with late Ameen Sab was very cordial and that Ameen Sab was enjoying 6 acres of land on one side and Abdulla Sab was enjoying 6 acres on the other side, by means of an oral division.

5. It is further averred that the land in Sy. No. 5/3 and 5/4 were divided in terms of the boundaries as reflected in the respective sale deeds, orally. According to the plaintiffs, 6 acres of land purchased jointly vide sale deed dated 9.6.1955 was divided into two equal portions and the land came to be assigned sub No. 4 in Sy. No. 5 and that the eastern portion of three acres had fallen to the share of plaintiff Abdulla Sab and the western half fell to the share of Ameen Sab. According to the plaintiffs, this arrangement continued undisturbed till the death of Ameen Sab.

6. According to the plaintiffs, 6 acres of land which fell to the share of deceased Ameen Sab was in one block and was in the middle of old Sy. No. 5. Thus, deceased plaintiff became the absolute owner of 3.00 acres in Sy. No. 5/4 and that is the eastern portion and he was in lawful possession is the averment.

7. Since, there was interference with the peaceful possession of 3.00 acres of land in Sy. No. 5/4 held by him in the month of March 1998, deceased plaintiff

had to file a suit in O.S. No. 10360/1998 before the City Civil Court, Bangalore against the wife and children of Late Ammen Sab and Sri. Krishna Kumar for permanent injunction. That suit, according to the plaintiffs, was got withdrawn by filing a memo as the title of the plaintiffs therein to 3.00 acres of eastern portion in Sy. No. 5/4 had been seriously disputed. Their advocate had not made proper pleadings in the said suit due to some confusion is one more averment and that General Power of Attorney executed on 9.10.1985 by Abdulla Sab came to be revoked is the averment. Cause of action for the suit for declaration of title and injunction arose when all the defendants in the suit O.S. No. 10360/1998 emphatically denied his title for filing written statement.

8. Defendant Nos. 1 to 11 chose to specifically deny the averment of a) oral partition between Ameen Sab and Abdulla Sab b) Eastern portion in Sy. No. 5/4 being allotted to Abdulla Sab and c) Abdulla Sab enjoying the same as the absolute owner in possession.

9. According to them, suit was not at all maintainable either in law or on facts, more so when deceased plaintiff had sold his land in Sy. No. 5/4. According to them, the actual extent of land purchased as per the boundaries of sale deed dated 9.6.1955 was not six acres but 7.03 acres and hence phodi work was done on the basis of this actual extent of land by assigning Sy. No. 5/4. The extent of land actually purchased by Ameen Sab vide sale deed dated 17.9.1953 was 4.30 acres and this extent was bifurcated and was assigned Sy. No. 5/3. It was further averred that the actual extent of land purchased vide sale-deed dated 17.9.1953 by Ameen Sab was his self acquisition and that the same had not been purchased by the plaintiff and that there was no contribution of money by Ameen Sab to purchase three acres in 1953. According to them, the joint ownership was in respect of actual extent of land purchased in 1955. Hence, the averment that during the life time of Ameen Sab there was equal division of land in Sy. Nos. 5/3 and 5/4 has been emphatically denied. According to them, the plaintiff had sold 3 acres 21 guntas of land in Sy. No. 5/4 to the defendant Nos. 13 to 15. Hence, plaintiff had unnecessarily dragged the legal representatives of deceased Ameen Sab to the suit.

10. According to them, out of the land purchased vide sale deed dated 12.02.1971, a portion of the land has been acquired for Karnataka Electricity Board. The averment that land purchased jointly on 12.02.1971 is not the land assigned with Sy. No. 5/3. The identity of land mentioned in the plaint, according to the defendants 1 to 11, is incorrect and utterly wrong. All other material allegations have also been emphatically denied. Thus they had prayed for dismissal of the suit. Defendants 1 to 3, 5 to 10 have filed a memo adopting written statement of defendant No. 4.

11. The case of the defendants 13 to 15 as put forth before the Trial Court in their pleadings is that plaintiff and his brother Jani Sab executed an unregistered General Power of attorney in their favour on 27.03.1995 authorizing to form a layout in respect of 3.00 acres in Sy. No. 5/4 of Chikkabettahalli. It is their case

that one more General Power of attorney in respect of the same land was executed in their favour by plaintiff and his brother and got it registered as an irrevocable power of attorney authorizing them to do all acts necessary for effective completion of the layout. Accordingly land was got converted by them on payment of conversion fee of Rs. 93,961/- to the Government and that thereafter proper roads have been laid and electricity and all civic amenities have been provided. Power of attorney Holders have executed as many as 70 sale deeds and thus majority of the site owners have already put up their houses. The sites so carved out in Sy. No. 5/4 are in this suit property and that the purchasers of different sites are necessary parties.

12. According to them, Sy. No. 5/4 is no more an agricultural land but a fully developed residential layout with broad roads, borewells for providing drinking water, parks and bus stop. Even according to them, the boundaries shown in the suit property are wholly wrong and incorrect and they do not depict the existing reality.

13. The averment that there was some confusion in the mind of the lawyer while drafting the plaint in O.S. No. 10360/1998 has been specifically denied. It is further averred that plaintiff, in the present suit, has taken a wholly inconsistent stand when compared with that of the one in O.S. No. 10360/1998. According to them, the suit is misconceived and one filed to make an unlawful gain by suppressing material facts. With these pleadings, they had prayed for dismissal of the suit with exemplary costs. They have further averred that even if General Power of Attorney is revoked, it has no consequence, as the entire layout is completed and the purchasers are in possession of the same.

14. The pleadings filed by defendants 16 and 19 separately are almost identical to the one filed by the defendants 13 to 15 and they have also prayed for dismissal of the suit. On the basis of the above pleadings, following 7 issues came to be framed:-

ISSUES

1. Does plaintiff prove that he is the absolute owner of the suit schedule property?
2. Does plaintiff prove that he is in possession and enjoyment of the suit schedule property?
3. Whether the plaintiff is entitled for permanent injunction against all the defendants?
4. Whether the suit is not maintainable as contended by the defendant?
5. Whether the suit is not properly valued and proper Court fee is not paid?
6. Does plaintiff prove the exact identity of the suit schedule property in order to maintain the suit?

7. Do the defendants prove that the plaintiffs are guilty of suppression of material facts and circumstances of the case?

15. On behalf of the plaintiffs, plaintiff No. 1(a), Ameer Jan has been examined as PW 1 and has got marked 14 exhibits. On behalf of the defendants Sri Fayaz, S/o late Ameen Sab i.e., 4th defendant has been examined as DW 1. Sri I.S. Ponnappa, the Treasurer of 19th defendant Welfare Association has been examined as DW 2. 16th defendant V. Chandrashekara and Sri C. Manjunatha, the partner of M/s. AMS Land Developers have been examined as DWs. 3 and 4 respectively. In all 63 exhibits have been got marked as Exs. D1 to D63. During the pendency of the suit, Advocate Commissioner had been appointed to inspect the suit property and to submit a report. Accordingly, Sri Kamaleshwar Poojary, Advocate-Commissioner submitted his report on 10.11.2003 and the same is in ink page 177 to 209 (entire file with memo of instructions and inspection notes). This was done after inspecting the spot on 08.11.2003.

16. After hearing the arguments of learned Counsel appearing for the parties and after looking to the pleadings and evidence, the learned Judge has chosen to answer 1 to 3 and 6 in the negative and issues 4, 5 and 7 in the affirmative. Consequently, suit is dismissed with costs with a further direction to pay deficit Court fee of Rs. 42,875/- within 15 days from 01.09.2006. It is this judgment which is called in question by raising several grounds in the appeal memo.

17. We have perused the entire records and the appeal memo. We have heard the arguments advanced by the learned Counsel appearing for the parties in this appeal.

18. It is contended that the Trial Court has erred in dismissing the suit. It is contended that the Trial Court has properly analysed the pleadings and the evidence placed on record in right perspective. It is vehemently contended that the Trial Court has virtually lost sight of the acquisition of title of the plaintiff on the basis of the sale deeds and the consequential oral partition that took place between the deceased plaintiff and late Ameen Sab. It is contended that issue regarding title could not have been answered in the negative and that identity of the suit property has been properly made out. It is further contended that the Commissioner appointed by the Court was not a technically qualified person to conduct the survey and that it was only meant to be a material at the time of considering the application filed for temporary injunction. It is strongly argued that the said report could not have been relied upon by the Court on deciding the case on merits.

19. Trial Court has adopted a wrong approach to the real state of affairs and thus grave injustice is caused to the plaintiff. The trial Court has unnecessarily directed for payment of Court fee when the reckoning of the market value is within the purview of Section 7(2) of Karnataka Court Fees and Suits Valuation Act. Ex. P6 which is a vital document prepared by Assistant Director of Land Records has been overlooked and thus the Court has come to a wrong conclusion

about the identity. The Trial Court could not have ignored Exs. P1 to P3 while deciding the aspect of title is one more ground urged. The judgment and decree according to the appellant are opposed to law, facts and probabilities and hence it is prayed to allow the appeal in its entirety and thereby decree the suit as prayed for with costs.

20. The following points arise for our consideration in this appeal:

1. Whether the Trial Court is justified in holding that plaintiffs have failed to make out a clear case of absolute title in their favour?
2. Whether the exact identity of the suit property is established?
3. Whether all the purchasers of sites sold by M/s. AMS Developers are necessary parties to the suit?
4. Whether any interference is called for and if so, to what extent?

REASONS

Re. Point Nos. 1 and 3:

21. Both these points are interrelated and hence they are taken up together for common discussion.

22. Suit is based on title. Case of the plaintiffs is that deceased plaintiff and late Ameen Sab who was husband of the sister of deceased plaintiff purchased land in Sy. No. 5 of Chikkabettahalli through different sale deeds. 3.00 acres of land in Sy. No. 5 came to be purchased by late Ameen Sab from one Pothalappa vide registered sale deed dated 17.09.1953. Anyhow deceased plaintiff was not a co-purchaser of 3.00 acres of land in Sy. No. 5 vide sale deed dated 17.09.1953. Whereas six acres of land came to be purchased by deceased plaintiff Abdulla Sab and his brother-in-law Ameen Sab in Sy. No. 5 through registered sale deed dated 09.06.1955. Then 3 acres of land in Sy. No. 5 was purchased by the deceased plaintiff and Ameen Sab through sale deed dated 12.02.1971. When the lands were purchased through these sale deeds, no bifurcation of Sy. No. 5 had taken place. It took place many years after these sale deeds were executed.

23. What is averred by the plaintiff in the present plaint is that out of 12 acres purchased under these three sale deeds were equally divided between the deceased plaintiff and deceased Ameen Sab, orally. It is further averred that deceased plaintiff had contributed towards the sale consideration of the sale deed dated 17.09.1953 and as such, there was oral division of entire extent of lands equally. But absolutely nothing is placed on record to substantiate the same. Neither there is any documentary evidence placed on record to that effect nor there is any admission to that effect in the evidence of DW 1 Sri Fayaz, S/o late Ameen Sab. According to the pleadings found in paragraph-6 of the plaint is that, total extent of 12 acres of land in Sy. No. 5 purchased vide three sale deeds came to be identified and phoded as Sy. Nos. 5/3 and 5/4. Admittedly the total extent of land earmarked after phodiwork of Sy. No. 5/3 was 4.30 acres and Sy.

No. 5/4 was 7.03 acres. If this pleading were to be accepted, the total extent of land actually purchased from these three sale deeds was not 12 acres but 11.33 acres.

24. In the light of not placing any material to show that there was oral partition between them dividing the extent of lands purchased vide three sale deeds, the title of the deceased plaintiff will be definitely lesser than the same, as he was not a co-purchaser of 3.00 acres of land.

25. On the other hand, the defendant No. 4 has pleaded that though the extent was mentioned in the sale deed dated 09.06.1955, the actual extent of land purchased as per boundaries was 7.03 acres and hence that portion came to be bifurcated and renumbered as Sy. No. 5/4, appears to be more probable. What is specifically pleaded by the plaintiff is that 3.00 acres of land described in the plaint schedule is the eastern portion in Sy. No. 5/4 and this was the land which actually fell to the share of the plaintiff. It is true that Sy. No. 5/4 is to the east of land in Sy. No. 5/3 and lands in Sy. No. 5/1 and 5/2 are to west of Sy. No. 5/3. This is evident from Ex. P6 Utthar extract of Sy. No. 5/1 to 5/4 issued by the Assistant Director of Land Records, Bangalore North Sub-Division.

26. Whether Ex. P6 could be accepted as an authentic document is the moot point that arises for our consideration. If Ex. P6 were to be an extract taken out from the register maintained by the Assistant Director of Land Records, it should have been mentioned as certified copy and not "extract". On looking to Ex. P6 the dimension of all these Sy. Nos. 5/1 to 5/4 is almost identical. When the extent of Sy. No. 5/4 is 7.03 acres and if Sy. No. 5/3 is 4.30 acres, the figure of Sy. No. 5/4 should have been definitely larger than the figure or block shown in respect of Sy. No. 5/3. Hence it is very difficult to attach much credence to Ex. P6.

27. It is further pleaded in the plaint that the entire extent of land in Sy. No. 5/3 and 5/4 was equally divided orally between the plaintiff and deceased Ameen Sab. But it is interesting to note that the deceased plaintiff and his brothers Jani Sab, Ismail Sab and Ushaf Sab executed a Power of Attorney on 11.10.1995 in favour of one Sri R. Narayana Swamy in respect of 3.00 acres in Sy. No. 5/2 with specific boundaries i.e., 3 acres bounded by East-remaining land in Sy. No. 5/2 of Kaism Sab, West-portion of land in Sy. No. 5/3 of Anisha Bi, North-by portion of land in Sy. No. 3 and south by Road. This General Power of Attorney is a registered one and is marked as Ex. D3. Similarly PW 1 has admitted another power of attorney executed by Abdulla Sab and his brother Jani Sab on 27.03.1995 in favour of Sri S. Amara, Sri Manjunath and Sri H.C. Srinivas jointly pertaining to 3.00 acres of land in Sy. No. 5/4 bounded by East and West - remaining land in Sy. No. 5/4, North - by land in Sy. No. 3 and South by road. This is an irrevocable power of attorney. This document is marked as Ex. D4 and is unregistered. As Ex. D4 was unregistered, one more of attorney was executed by Abdulla Sab and Jani Sab jointly in favour of the same three persons namely S. Amara, C. Manjunath and H.C. Srinivas on 09.10.1995 and got it registered

before the Sub-Registrar. This document is got confronted to PW 1 and got marked as Ex. D5. In fact, PW 1 has clearly and unequivocally admitted in his oral evidence as found in page No. 11 of his deposition recorded on 03.01.2006. The said portion is extracted in page Nos. 17 and 18 of the impugned judgment. This is nothing but, a clear admission as defined u/s 17 of Evidence Act.

28. PW 1 has unequivocally deposed on 01.08.2005, as found in page No. 7, that out of 9 acres purchased by his father jointly with Ameen Sab, 6 acres have already been sold by deceased Ameen Sab and his sons in favour of defendant No. 12 Krishna Kumar and that Krishna Kumar has formed layout in the said 6 acres.

29. If really 3.00 acres of land i.e., the eastern portion had really fallen to the deceased plaintiff Abdulla Sab, boundaries in Exs. D4 and D5 i.e., General Power of Attorneys would have been different and definitely eastern boundary would not have been shown as balance portion of land of Sy. No. 5/4 and west as portion of land in Sy. No. 5/4. PW 1 having admitted the execution of Exs. D4 and D5 and the contents therein unmistakably, PW 1 cannot turn round and say that they have still 3.00 acres of land in Sy. No. 5/4. PW 1 and his family members are clearly estopped from contending contrary to the contents of Exs. D4 and D5 which are clearly admitted by them. When deceased plaintiff and their brothers could sell 3.00 acres of land in Sy. No. 5/2 vide another Power of attorney got marked as Ex. D3 in favour of Sri Narayanaswamy, it is ununderstandable as to how some more land in Sy. No. 5 would remain with the deceased plaintiff or his family members. These documents marked as Exs. D3 to D5 and the clear and unequivocal admission of PW 1 in his cross-examination cuts the very case of the plaintiff. The learned Judge has discussed this in the light of the relevant portion of deposition of PW 1 extracted in the judgment.

30. There is acceptable document in respect of the land of 3.00 acres mentioned in Ex. D4 and D5 being got converted for non-agricultural purposes by defendants 13 to 15 and paying the conversion fee to the Government. The orders passed by the Special Deputy Commissioner on 03.07.1995 and 05.07.1995 speak to that effect. Rs. 93,961/- came to be paid as conversion fee to the Government by defendants 13 to 15 and PW 1 has admitted to that effect. Of course conversion was granted to an extent of 2.35 acres in Sy. No. 5/4 and the boundaries mentioned in Ex. D7 tallies with Ex. D5 the registered General Power of Attorney. PW 1 has further admitted that the attorney has developed a full fledged residential layout and that several houses have been put up and all civic amenities have been provided to the layout. On the strength of these documents marked as Ex. D5, more than 70 sale deeds have been executed and the encumbrance certificates marked as Exs. D9 to D36 reflect the same. Relevant deposition of PW 1 recorded on 01.08.2005 is extracted in page No. 21 of the impugned judgment and the sale of six acres of land sold by Ameen Sab is being admitted by him. PW 1 has further admitted that layout was formed in the suit property in 1996. The exact deposition found in page No. 23 is as follows:

It is not true to suggest that in the year 1994 itself the said layout had been formed in the suit property. But the said layout was formed in the suit property in the year 1996.

31. The persons who have purchased sites formed in the suit property have not been made as parties to the suit. The names of the purchasers are found in Exs. D9 to D36, the encumbrance certificates issued by Sub-Registrar. Many of them have even constructed houses and this is established by confronting the photographs as Exs. D37 to D49. These purchasers having acquired title from the Power of Attorney holder of deceased plaintiff are necessary parties and in their absence there cannot be any effective decree. Even if decree is drawn behind their back, it becomes unexecutable.

32. It is averred in the plaint that a suit for permanent injunction was filed by Abdulla Sab in O.S. No. 10360/1998 in respect of the same property against the wife and children of Ameen Sab and one M. Krishna Kumar, was withdrawn, since his title was seriously disputed. It is further averred that there was some confusion in the mind of the Advocate who drafted that plaint and hence the pleadings made in the said plaint were not correct. The copies of the plaint filed in O.S. No. 10360/1998 is marked through PW 1 as Ex. D1. The contents of the said plaint substantially differ with the pleadings in the present plaint and they are evident. The substance of the pleadings in the plaint in O.S. No. 10360/1998 is that there was oral division of land in Sy. No. 5 between plaintiff and Ameen Sab and after the said partition, the survey authorities effected survey and prepared sketch and gave sub-numbers to the respective properties. If this were to be accepted, extent of land in Sy. No. 5/4 would not have been 7.03 acres and 4.30 acres in Sy. No. 5/3. Hence the pleading in the present plaint that there was some confusion in the mind of that advocate who drafted plaint in O.S. No. 10360/1998 is unacceptable as the parties alone will be knowing facts and whatever material facts would be provided by them to their advocate, they would be reflected in the pleadings.

33. Even after re-assessing the oral and documentary evidence and the pleadings of the parties by this court which is the final court of facts, we are of the opinion that the trial Court has properly analysed the evidence and has rightly come to the conclusion that plaintiff has thoroughly failed to make out a clear case of title to have the equitable relief of the declaration of title u/s 34 of Specific Relief Act. Similarly the trial Court has rightly held that plaintiff is not in possession of the suit property either as on the date of suit or immediately prior to that. Hence the relief of injunction is rightly refused. Hence we answer points 1 and 3 in the affirmative.

Point No. 3:

34. For granting the equitable reliefs of injunction and declaration in respect of immovable property, the identity of the same must be properly made out, lest any decree that could be passed without proper identification becomes

unexecutable. The defendants have taken up a specific contention that the schedule furnished in the plaint is absolute and not incorrect. The schedule appended to the plaint describes the suit schedule property as 3 acres agricultural land in Sy. No. 5/4 of Chikkabettahalli Village, Yelahanka Hobli, Bangalore North Taluk, bounded on the east by Government Gomal land, West-land belonging to defendants 1 to 11 in Sy. Nos. 5/4 and 5/3 which has been now sold by them to defendants 13 to 15, North by land of Bade Sab and South by Nagavara Appaiah's land. This aspect regarding the identity of the land has been discussed by the learned Judge in the light of specific issue No. 6 framed to that effect.

35. The boundaries mentioned in the schedule appended to the plaint referred to the boundaries existed in the year 1955. As rightly pointed out by the learned Judge, lot of changes have taken place in between 1955, the year in which the sale deed was obtained by Abdulla Sab and Ameen Sab jointly in respect of six acres of land and 1999, the year in which the suit was filed.

36. PW 1 himself has admitted that there is a road to the south of suit schedule property. But the southern boundary shown in the schedule appended to the plaint is Nagavara Appaiah's land. It is ununderstandable as to how the said Nagavara Appaiah could possess the land even in 1999, when he was the owner of land in 1955. Similarly, to the south of schedule property land, Medar Sab, is mentioned in the plaint and that Medar Sab is not at all alive and still his name finds a place as the northern boundary. There cannot be gomal land to the east of the suit schedule property as the entire land in Sy. No. 5 has been converted and there exists full-fledged layout. As such eastern boundary is apparently incorrect.

37. The Advocate Kamaleshwar Poojary, had been appointed as Commissioner by the trial court to inspect the spot and submit a report. He has submitted a report after inspecting the spot in the presence of the plaintiffs and defendants. He has specifically mentioned that there is a mud road on the eastern side of the suit schedule property. The said Commissioner's report is not objected to by the plaintiffs. In order to identify the beginning of land in Sy. No. 5/4, the Commissioner had noticed a small stone erected on the south western corner of Sy. No. 5/4 and both parties had admitted that as the boundary of Sy. No. 5/4. The stone had been erected in between site Nos. 111 and 112. He has also made a specific mention about the existence of several RCC houses and partially constructed houses and the existence of full-fledged roads and civic amenities like roads, electricity supply and water connections. In fact, the property in question was shown to him by the parties themselves and that property was the suit schedule property. He has mentioned about the site numbers, measurements thereof and has also mentioned as to whether constructions have been put up thereon.

38. What is argued before this Court also is that the Commissioner's report cannot be taken into consideration as the Commissioner was appointed for the

limited purpose of disposing of the interlocutory application filed for temporary injunction. We are unable to accept the same. The Commissioner's report is a detailed report. It was prepared after taking into account the realities that existed. He inspected the spot in the presence of the parties. If the plaintiffs had been really prejudiced, nothing had come in his way to object the same by filing objections. The learned Judge has referred to this Commissioner's report to come to the conclusion that lot of changes have taken place and the entire suit schedule property is a fully developed layout with many constructions thereon. In the light of objections being not filed to this report, the authenticity of the same cannot be disputed. It becomes an evidence for all practical purposes under Order 26 Rule 10(2) of CPC.

39. Hence, we are of the considered opinion that the boundaries mentioned in the schedule appended to the plaint in O.S. No. 5286/1999 do not reflect the reality at all and they are wholly incorrect and wrong. Thus the learned Judge is justified in holding issue No. 6 in the negative observations that plaintiffs has thoroughly proved to make out identity of the suit schedule property. Hence, I answer point No. 2 in the negative.

Re. Point No. 4:

In view of our findings on the above three points, we are of the considered opinion that there is absolutely no scope for interference by this Court. The learned Judge has properly analysed the oral and documentary evidence in right perspective. The decision arrived at by the learned Judge is on the basis of preponderance of probabilities. He has taken into consideration the important admissions of PW 1 which have gone to the very root of the case. In fact, the learned Judge while discussing issue No. 7 has come to the conclusion that the plaintiff has unnecessarily dragged the defendants to the Court and has made them to spend money for defending the litigation and therefore, costs have been imposed on them. Imposition of costs on the plaintiffs is also justified. Thus no interference is called for and the appeal is liable to be dismissed with costs.

ORDER

Appeal filed u/s 96 of CPC in RFA No. 1756/2007 challenging the judgment and decree passed in O.S. No. 5286/1999 which was pending on the file of the Court of City Civil Judge, Bangalore, is dismissed with costs. Consequently the impugned judgment and decree are upheld.