

Devikarani Vs. Venkatesha Sastry

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SooperKanoon Citation : sooperkanoon.com/379087

Court : Karnataka

Decided On : Apr-21-1994

Reported in : ILR1994KAR1444; 1994(5)KarLJ99

Judge : Murgod, J.

Acts : Transfer of Property Act, 1982 - Sections 48 and 54; Code of Civil Procedure (CPC) - Order 39 - Rule 2A - Order 41- Rule 27 - Order 43 - Rule 1; [Arbitration Act, 1940](#) - Sections 35

Appeal No. : R.F.As No. 143 and 169 of 1983

Appellant : Devikarani

Respondent : Venkatesha Sastry

Advocate for Def. : S.P Holla and ;D.V. Satyanarayan, Adv.

Advocate for Pet/Ap. : Mirle L. Krishnamurthy, Adv.

Disposition : Appeal dismissed

Judgement :

Murgod, J.

1. These Appeals arise out of the judgment and decree passed in Original Suit No. 6604 of 1980 on the file of VIII Additional City Civil Judge, Bangalore City. They

are clubbed and heard together and are disposed of by this common Judgment.

2. Regular First Appeal No. 143 of 1983 is filed by the defendant in Original Suit No. 6604 of 1980 against the judgment and decree allowing the suit.

3. Regular First Appeal No. 169 of 1983 is filed by the plaintiff against the judgment and decree in Original Suit No. 6604 of 1980 confining to those points wherein her prayers for grant of certain reliefs are disallowed. The parties are hereafter referred to by their original ranks in the trial Court.

4. Plaintiff Smt. Devikarani filed Original Suit No. 2584 of 1979 originally in the Court of First Munsiff at Bangalore. After the establishment of the City Civil Court, the suit came to be numbered as Original Suit No. 6604 of 1980. Plaintiff prayed for reliefs of permanent and mandatory injunctions with costs on the following averments:-

Plaintiff is the absolute owner in possession of the house property with compound wall bearing New No. 55 (old No. 3) in Thota Devara Galli, Cottonpet, Bangalore, bounded on the east by road, west by defendant's property, north by late Adaviappa's house and south by road. Plaintiff purchased it from Sri B.S. Mariyappa and others under a registered Sale Deed dated 8-5-1972 and got the khatha changed in her name and has been paying the taxes to the Corporation of the City of Bangalore. Plaintiff has been in peaceful possession and enjoyment of the schedule property including the compound wall on the western side. To the west of the plaintiff's property beyond the compound wall is the property bearing old No. 4, owned by the defendant. The defendant has no right, title or interest or possession with regard to the western compound wall of the suit schedule property and he cannot encroach upon the same. Taking advantage of the close proximity of his property and the helplessness of the plaintiff, the defendant tried to encroach upon the western compound wall of the plaintiff's schedule property and interfere with the plaintiff's possession and enjoyment of the same. The defendant stealthily carried out construction work during night times and carved out big square holes in the western compound wall and inserted girders and rafters thereon causing damage by encroaching on the same. He has done the work without obtaining sanctioned plan or licence from the Corporation of City of

Bangalore or without leaving a minimum of 3 feet space from the plaintiff's property as required by the Corporation Bye-laws. The protests of the plaintiff and her husband are not heeded by the defendant. The plaintiff therefore prayed for (a) a permanent injunction restraining the defendant and his agents from interfering with her peaceful possession and enjoyment of the western compound wall of the suit schedule property by encroaching or putting up any construction; (b) a mandatory injunction directing the defendant to pull down and remove the girders and rafters and structures put up by him in the western compound wall with costs.

5. The defendant resisted the suit by filing contesting written statement. According to him, the plaintiff is not in possession of the property beyond the boundaries described in the Sale Deed dated 8-5-1972 under which she purchased the property. The compound wall has never been the part of the plaint schedule property. Property bearing old No. 4 lying to the immediate west of the plaintiff's property has been acquired by the defendant in the year 1971 under Sale Deed dated 6-10-1971 from Sri Mariyappa and others. Defendant is the earlier purchaser and the plaintiff is the later purchaser and plaintiff has got to her possession the property of Mariyappa which remained in his possession beyond the properties purchased by the defendant from the said Mariyappa. Plaintiff got to her possession property measuring 35 feet east to west after the eastern boundary lying on the defendant's property old No. 4. The defendant is in enjoyment of the property old No. 4 as per the dimensions in the sale deed of 1971. He had left a strip of six feet at the eastern end of the property for allowing a passage to suit his convenience and use of the property. He had planned and put up wall running north to south within his property six feet inside the boundary line of his property to satisfy the Corporation Authorities and to suit his convenience and he did so soon after purchasing the property in the year 1971. Having learnt about defendant's intended construction, the plaintiff stealthily put up small haphazard construction abutting his property. The defendant objected to the encroachment by the plaintiff over his property to an extent of 6 feet and stopped her from further encroachment and demanded demolition of the illegal construction put up by the plaintiff. The plaintiff promised to demolish the same, but with lame excuses she has failed to demolish it. Plaintiff's promises prevented the defendant from moving the Court for any action but the plaintiff has rushed to Court with false and mischievous claim.

Therefore the defendant is forced to pray for reliefs of declaration that he is the owner of six feet wide portion to the length of 36 feet beyond 34' measured from the road on the eastern side of the plaintiff's property bearing old No. 3 is the portion of his property bearing old No. 4 and for mandatory injunction directing the plaintiff to demolish the construction put up by her illegally on his property to an extent of 25 feet x 6 feet and for putting him in possession of the same and to award mesne profits in respect of plaintiff's illegal use and occupation of that strip of land. The defendant further contended that the wall is not a compound wall and the same was built by him within his property and the plaintiff had no manner of right, title or interest to the portion of six feet after the western boundary of her property beyond 34 feet and she was never in possession of the same. The defendant denied the allegations of taking undue advantage of proximity of his property and alleged helplessness of the plaintiff. He further denied the averment of putting up constructions stealthily on the plaintiff's property. He asserted that he was carrying on construction work as required for his purpose and openly after taking necessary permission from the Corporation authorities. According to defendant, the suit of the plaintiff is liable to be dismissed.

The plaintiff filed reply statement asserting her plaint averments. She submitted that the plaint schedule property bearing old No. 3 has throughout been distinct and separate from the property bearing old Nos. 4 and 5, having its compound wall when it was sold in her favour. She denied the allegation that she got to her possession only the property of Mariyappa left with him after sale of the properties in favour of the defendant. The claim of possession put forth by the defendant in respect of strip of 6 feet wide to the east of his property is contended to be false. The suit property together with the construction thereon including the compound wall on the western side has been there since long even before the purchase of the property by the defendant and an engineering workshop was also run there prior to the purchase by the plaintiff. Therefore there is no question of plaintiff encroaching on the same. The allegations of counter claim and relief of declaration, possession and mandatory injunction sought for by the defendant are contended to be false, untenable and imaginary and the defendant is not entitled to any of them. The defendant having not paid the requisite court-fee is not entitled to make any counter claim. The trial Court framed the following issues:-

'1. Whether the plaintiff proves that she was in lawful possession of the property and the defendant was trying to interfere in the peaceful possession and enjoyment of the suit property by encroaching or putting up any construction thereon?

2. If so, is she entitled for grant of mandatory injunction directing the defendant to pull down and remove the girders and rafters and structures put up by him in the western compound wall of the suit property?

3. If so, is she entitled for an order of permanent injunction, as prayed for?'

6. In the course of the trial, plaintiff examined herself and six more witnesses and got exhibited 25 documents as Exs.P.1 to P.25 of which Ex.P.24 is the report of the Commissioner appointed by the Court during the course of trial. The defendant gave evidence as D.W.1 in addition to evidence of three other witnesses and got exhibited three documents of which Exs.D.1 and D.2 are the two sale deeds in his favour. After assessing the evidence, the learned trial Judge found in the affirmative and in favour of the plaintiff on issues 1 to 3 and decreed the suit granting the reliefs of permanent and mandatory injunctions prayed for by the plaintiff. However the two applications-I.As.3 and 4 filed under Order 39 Rule 2-A, C.P.C. for taking action against the defendant for breach of interim injunction granted in her favour during the pendency of the suit and I.A. 17 filed under Section 35-A CPC for compensatory costs came to be rejected by the learned trial Judge holding that the grounds made therein had not been substantiated. Therefore the defendant, aggrieved by the judgment and decree made by the trial Court granting permanent and mandatory injunctions against him preferred appeal - R.F.A. 143 of 1983 and the plaintiff preferred appeal - R.F.A. 169/83 against the rejection of the three I .As.

During the pendency of the two Appeals which have been clubbed, in plaintiff's Appeal R.F.A. 169/83 she filed various applications; I.A.IV was filed under Order 6 Rule 17 CPC for amendment of the plaint, I.A.V was filed for impleading the Commissioner of the Corporation as additional respondent. These two applications came to be dismissed on 15-7-1985. Thereafter LA.7 came to be filed for amendment of the plaint. When the Appeals were taken up for hearing on merits,

towards the close of the arguments, the plaintiff who is the appellant in R.F.A. 169 of 1983, filed two more applications - I.A.8 is for permitting her to produce additional evidence under Order 41 Rule 27 CPC and I.A.9 is for setting aside the orders passed on I.As.4 and 5 on 15-7-1985. These applications have been opposed and seriously contested by filing counters.

7. The learned Counsel on both sides have been heard in respect of both the Appeals as also the interim applications pending consideration in R.F.A. 169 of 1983. The Points that arise for Consideration are:-

(1) Whether the finding of the learned trial Judge that plaintiff has proved her lawful possession of the suit wall and that the defendant was trying to interfere with her peaceful possession and enjoyment of the same by encroaching and by putting up construction thereon is not correct as contended?

(2) Whether the finding of the learned trial Judge that plaintiff was entitled to permanent and mandatory injunctions needs to be reversed as contended?

(3) Whether plaintiff's appeal R.F.A. 169/83 is not maintainable as contended on behalf of the defendant? If not, to what extent and to what relief plaintiff is entitled in that behalf?

(4) Is plaintiff entitled to any relief in respect of the following applications in R.F.A. 169/83 as prayed for:-

(a) application - I.A.7 for amendment of the plaint?

(b) application - I.A.8 for permission to produce additional evidence under Order 41 Rule 27 CPC?

(c) Application - I.A.9 for setting aside the orders passed on 15- 7-1985 dismissing I As. 4 and 5?

8. Points 1 and 2:- In these two Appeals the property in dispute is the wall between the plaintiff's property and the property of the defendant. Admittedly one Sri B.S. Mariyappa owned properties in Thota Devara Galli, Cottonpet, Bangalore. They are properties bearing Nos. 3, 4, 5 and 6. Of the properties bearing Nos. 4, 5 were

sold in favour of the defendant Sri Venkatesha Sastry, under two Sale Deeds Exs.D.1 and D.2 dated 6-10-1971 and he was put in possession of the same. The property bearing No. 3 lying to the east of properties sold to defendant was purchased by the plaintiff Smt. Devikarani on 8-5-1972 under Sale Deed Ex.P.1. Property No. 6 has been sold to Smt. Alamelamma and it lies to the west of properties 4 and 5. As per the description of dimensions mentioned in defendant's Sale Deed Ex.D.1 in respect of property No. 4 it measures 40' east-west and 36' north-south: like-wise property No. 5 purchased by the defendant under Ex.D.2 measures 33' east-west and 36' north-south.

8.1. The property of the plaintiff as described in her Sale Deed Ex.P.1 measures 40' east-west and 41' north-south. In the schedule to the Sale Deed it is described as house property with compound and side house bearing No. 3 (new No. 55) situate at Thotadevara Galli, Cottonpet, Bangalore-24, bounded on the east by road, west by portions of the house and Door No. 4 belonging to Sri B.S. Mariyappa, north by Adivappa's house and south by road measuring east to west 40 feet and north to south 41 feet fitted with electric connections and with all the appurtenances thereto. There is a wall to the west of the plaintiff's property.

8.2 It is admitted by the defendant in his evidence towards the end of paragraph-8 on page 124 of the paper-book as under: -

'It is fact that the plaintiff has filed this suit claiming western wall as of hers and because I tried put up a construction on it.'

It is therefore clear that when defendant had tried to put up a construction on the western wall the suit out of which the present Appeals have arisen came to be filed and the contentions put-forth disclose that plaintiff claimed the wall as belonging to her and she asserted that she was in possession thereof and on the other hand, the defendant contended that he had constructed that wall soon after purchasing the properties from Sri. B.S. Mariyappa and that he was in possession of the same and it fell within the property purchased by him and plaintiff was not entitled to the reliefs prayed for by her. This is the crux of the dispute between the parties.

9. The schedule of the plaint describes plaintiff's property as the house-property with compound-wall in Thotadevara Galli, Cottonpet, Bangalore, bounded on the east by road, west by defendant's property, north by late Adaviappa's house and south by road. The measurements of the plaintiff's property adverted to above are what are found in her Sale Deed Ex.P.1. The contention of the defendant is that plaintiff has deliberately not mentioned the measurements of her property in the plaint schedule.

10. It is also contended that the western boundary description of the plaintiff's property is incorrect because the properties bearing Nos. 4 and 5 of B.S. Mariyappa had been purchased on 6-10-1971 earlier to the sale of property No. 3 in favour of plaintiff and that the western boundary in plaintiff's property should have been described as property of the defendant but the same has been wrongly described as the property of B.S. Mariyappa.

11. A Court Commissioner was appointed for making local inspection and his Report has been by consent of both sides marked as Ex.P.24 in the trial Court. That Report is accompanied with sketches marked as sketch No. 1 and sketch No. 2. It may be noted that in the evidence of P.W.5, there is reference to the marking of a photo as ExP.24 and thus there appears to be some confusion with regard to marking of the documents. In the Commissioner's Report dated 18-4-1981 it transpires that the two properties purchased under Ex.D.1 and Ex.D.2 in possession of the defendant together measured 67' 3" east-west instead of 73 feet as property No. 4 under Ex.D.1 measured 40 feet east-west and property No. 5 under Ex.D.2 measured 33 feet east-west. The Commissioner also measured and found out the length of the western wall from north to south as 37 feet with width of 1 feet 5 inches. The east-west length of the property No. 3 in possession of the plaintiff from its eastern edge towards west was found to measure 41 feet 9 inches. Therefore as against east-west length of 40 feet mentioned under Ex.P.1 plaintiff was in possession of property of 41 feet 9 inches with a further claim to the western wall with a width of 1 feet 5 inches thus claiming property to an extent of 43 feet 2 inches east-west. With these dimensions in view, the learned Counsel for the defendant submitted that the sale deeds Exs.D.1 and D.2 in favour of the defendant were prior in time and after sale of property measuring 73 feet east-

west there was left with B.S. Mariyappa property measuring about 35 feet east-west and plaintiff could not have got title to larger extent of property under Ex.P.1 and at best she was entitled to the property measuring 40 feet east-west and the disputed wall between the properties of the plaintiff and defendant being within the limits of 73 feet of property purchased by the defendant belonged to him and under Section 48 of the Transfer of Property Act, priority of rights were created in favour of the defendant, in respect of this disputed property under Exs.D.1 and D.2 and this fact has been lost sight of by the trial Court. He also contended that to the west of plaintiff's property there was no property of B.S. Mariyappa on the date of Ex.P.1 namely 8-5-1972 and therefore the western boundary description in the sale deed of plaintiff was inaccurate and therefore the identity of the property described in the Sale Deed Ex.P.1 could not be fixed with reference to the boundary description. He submitted that if the boundary description is correct and accurate then the boundaries prevail. He urged that the properties in Cities like Bangalore are very valuable properties and they are sold in terms of yards, feet and inches and that boundaries are given just to facilitate location of the property and where the property sold under a sale deed is mentioned with reference to exact measurements, those measurements should prevail and accordingly he wanted in this case the measurements contained in the sale deeds of the parties to dispute should prevail. He thus submitted that the plaintiff had no valid claim to the property exceeding 40 feet in east-west dimension as per Ex.P.1. He further contended that the word 'compound' means an enclosure round a house or factory and it only denotes space enclosed by compound and it is a neutral expression and that enclosing walls need not necessarily belong to the owner of the property enclosed and therefore he urged that plaintiff's claim to wall on the west on the ground that it is compound wall cannot be accepted and according to him the plaintiff had not averred and proved that she was in possession of the western compound wall. According to him she had only pleaded her title and the Court-below had only proceeded to look into the title and that no evidence has been given either by the plaintiff or her witnesses that she was in possession of the wall. The learned Counsel further submitted that plaintiff having failed to prove her possession of the wall was not entitled to the reliefs prayed for.

12. Though the submissions are attractive none of them deserves acceptance for the following reasons:-

12.1 Chambers 20th Century Dictionary, New Edition explains the word 'compound' as under:-

'compound':- an enclosure round a house or factory or for housing labourers.

Shorter Oxford English Dictionary, Third Edition explains the word 'compound' as under:-

'compound':- The enclosure within which a residence or factory (of Europeans) stands, in the East; also any similar enclosure round native houses.

From the dictionary meaning seen above, it is obvious that a compound is an enclosed space with whatever buildings there are on it. Since it is enclosed, there is little point in speaking of a compound wall. In the instant case, the sale deed describes the property in the schedule as house property with compound and side house bearing No. 3, situate at Thotadevaragalli with boundaries etc. Therefore it is clear that the property sold is with compound which means 'compound wall'. Compound by itself is used to refer to the wall. Therefore absence of the word 'wall' after the house property with compound in the schedule cannot be made much of. It is urged that in Cities some times all the four walls of the compound may not be owned by the owner of the house which is enclosed with a compound. But when the property sold under a sale deed is described as house property with compound and if one takes the dictionary meaning of the word 'compound', no further explanation is needed to clarify that the house property and the enclosing compound wall are together sold under that sale deed. It is not open to interpret such description to mean that the walls of the compound do not belong to the vendor. The compound or the compound wall enclosing the house property is conveyed under Ex.P.1 to the plaintiff by B.S. Mariyappa and his daughters and therefore there is no merit in the contention that the plaintiff should have specifically pleaded that the western wall belongs to her. In fact the plaint averment towards the close of paragraph-2 in unmistakable terms brings out the plaintiff's ownership and possession of the western wall and the same reads as

under:-

'It is submitted that ever since the purchase, the plaintiff has been in peaceful possession and enjoyment of the schedule property including the compound wall on the western side.'

The above plea is specific and clear not merely with regard to possession but also with regard to title.

13. With regard to incorrect description of the western boundary, the learned Counsel for the defendant submitted that the plaintiff's sale deed gives exact measurements and the western wall falls within the measurements of the defendant's site and therefore plaintiff's sale deed must yield to the sale deed of the defendant. He further submitted that the boundaries are not correctly mentioned and therefore the incorrect western boundary description is to be ignored and according to him if correct boundaries are described, the exact and reliable description must be taken and the description by measurements being exact, incorrect boundary description should be discarded in favour of exact measurement of the property found in the sale-deeds. In this behalf, the learned Counsel for defendant, referred to KUMAR RAMESHAR MALLA v. RAM TARAK HAZRA 1. 14 Calcutta Weekly Notes 268 which lays down that when the boundaries of a land can be ascertained with perfect certainty that an intention to convey all lands comprised within those boundaries can be inferred; and if the boundaries are uncertain the intention should be taken to be to convey the specified quantity of land within those boundaries and in that case with reference to the facts it was held that the intention was to pass the specified quantity of land only and description of the property by boundaries was discarded. Second Decision referred to in this behalf is NARASIMHA SHASTRY v. MANGESHA DEVARU 2. : ILR 1988 KAR554 in which this Court has ruled that where the sale deed mentioned the boundaries specifically and clearly to identify the property, the actual extent of the land not being clear, the recitals as to boundaries should prevail.

14. In this connection it was pointed out that plaintiff had referred to two documents at Ex.P.5 and Ex.P.8. Ex.P.5 is the plan got sanctioned on 5-12-1973

in respect of the plaintiff's property for effecting certain repairs by changing Asbestos sheet roof into R.C.C. roof and addition of some construction. In this map, the compound wall is shown around the property of the plaintiff and the dimensions therein are mentioned as 41 feet north-south and 40 feet east-west. Similarly Ex.P.8 is produced by the plaintiff and it is a plan obtained by the plaintiff's vendor B.S. Mariyappa's father G.R. Siddappa on 23-12-1943. In this plan the dimensions of the property as mentioned are 41 1/2 feet east-west and 36 feet north-south. No doubt, the compound wall is not shown in this map. Ex.P.8 contains measurements which are not discrepant with the measurements found in the Sale Deed Ex.P.1. Absence of compound-wall in the plan Ex.P.8 is made much of. After all, it is to be seen that compound is not part of the plan. The object of a plan sanctioned is to obey the Rules made by the Corporation in that behalf. Omission to denote compound wall in Ex.P.8 cannot be urged as a ground for rejecting the plaintiff's case when the same has been shown in Ex.P.5 the plan made in the year 1973 much before the present dispute started. The learned Counsel for the defendant submitted that these are important documents of title and though they have been referred to by the learned trial Judge in his judgment, the implications of contents of the said documents have not been considered and therefore there is failure on the part of the trial Court to consider the relevant material on record and the findings recorded by him are not binding on the appellate Court. The learned Counsel submitted that a construction of documents (unless they are documents of title) produced by the parties to prove a question of fact does not involve an issue of law, unless it can be shown that the material evidence contained in them was misunderstood by the Courts of fact, and the legal inference from the proved facts may still raise a question of law as observed in para 9 of NEDUNURI KAMESWARAMMA v. SAMPATI SUBBA RAO 3. AIR 1963 SC 88 and contended that Ex.P.8 had been misunderstood by the Court of facts by omission to notice absence of compound wall in Ex.P.8 and urged that an issue of law was involved and it was open to the defendant to urge the same in an appeal. He relied on the Decision in SMT. SONAWATI v. SRIRAM AND ANR 4. : [1968]1SCR617 . in which it is observed that the first appellate Court did not refer to important pieces of evidence and the conclusion cannot be regarded as binding upon the High Court in Second Appeal. It was also pointed out that purely legal

contentions could be raised in appeal as held in SETH LOON KARAN SETHIYA VS IVAN E. JOHN 5. : [1969]1SCR122 and in the case on hand documents of title had been misinterpreted namely Exs.P.5 and P.8 had not been properly construed and that error amounted to a question of law and such question of law can be raised in appeal as held in YESHWANT DEORAO v. WALCHAND RAMCHAND 6. : [1950]1SCR852 and the defendant was within his right to urge the same before this Court. With regard to a discrepancy between a dimension and the boundaries on page 198 of Sir John Woodroffe and Syed Amir Ali's Law of Evidence, 15th Edition, Third Volume, it is observed as under:-

'The primary canon of interpretation of a deed of grant where there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity unquestionably is that the description of the boundaries, if it is precise and accurate, dominates the description of the quantity. On the other hand, there is a supplementary canon, equally well established, though instances of its application are much less frequent than those of the other, that if the description of the boundaries is vague and uncertain, it yields to the description of the quantity. These two canons are in fact illustrations of, and may be summed up in, a more general principle that where there are two conflicting descriptions of the subject-matter of the grant, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter. This again is not a rule of law and hence inflexible in its character but a mere rule of construction, which serves as a safe and almost infallible guide in determining the intention of the parties, which is the touchstone of true interpretation. Indeed, it is all controlling and predominates over all elements of description of the subject-matter But, it is only when the boundaries can be ascertained with perfect certainty that it is permissible to infer that the intention was to convey to the grantee all the land comprised within the boundaries; and where they are uncertain then the description by extent prevails.'

15. One of the submissions of Sri Holla, the learned Counsel for the appellant in R.F.A. 143 of 1983 is that the learned trial Judge has placed burden wrongly on the defendant to prove that the wall was constructed by him. This is based on an

observation in para 17 of the judgment wherein the learned trial Judge observed that there was no convincing evidence led by the defendant to believe that the wall was constructed by him and it formed part of his property. It was the specific contention of the defendant that after purchasing the property under Exs.D.1 and D.2, he built the wall on the eastern side of his house leaving open space of 5' to 6' width beyond that wall to the east. It was the specific defence of the defendant and he had to prove the same and therefore no fault can be found with the learned trial Judge in the observations referred to above. The learned Counsel for the defendant has argued that no evidence has been adduced by the plaintiff to show that she was in possession of the wall. The learned Counsel submitted that the evidence adduced was to show that wall belonged to her and that she was proving her title to the wall and according to the learned Counsel, witnesses examined on behalf of the plaintiff have not stated that she was in possession of the wall.

16. In the case on hand, the learned Counsel for the plaintiff tried to explain the description of the western boundary by referring to a mortgage deed found at pages 180 to 183 of the trial Court records. It was also pointed out that the defendant after purchase of the properties under Exs. D.1 and D.2 mortgaged the same with Mariyappa his vendor as he was not in a position to pay the full consideration amount and therefore western boundary was described as the property of B.S. Mariyappa. This explanation is patently incorrect. A look at the document at pages 180 to 183 shows that the defendant mortgaged his properties purchased under Exs.D.1 and D.2 with one Sri K. Mariyappa, son of Kempanna and not with B.S. Mariyappa his vendor. Therefore the attempts made to offer a plausible explanation are misleading and the explanation is rejected. Therefore proceeding on the basis that there is an incorrect description of the western boundary in the safe deed Ex.P.1 in respect of the plaintiff's property, it is to be seen that the plaintiff has purchased the property enclosed with a compound which means a compound wall and she has become the owner of not merely the compound wall but also the property enclosed by it. The plaintiff has not come to the Court claiming property in excess of what is contained in the compound purchased by her under Ex.P.1. It is in this context the defence of the defendant becomes relevant and needs consideration.

17. The defendant has urged in his written statement that soon after purchasing the properties under Exs.D.1 and D.2, he demolished the ramshackle sheds that brought him no income and he constructed the walls enclosing an area of 67 feet 3 inches leaving about 5 feet to 6 feet open space to its east for convenience and for taking his cattle through that space and that he had enclosed that open space to the east of his wall with wire-fencing by fixing survey poles and that the plaintiff on the pretext of some function, occupied that property for temporary use with an understanding to vacate the same after the function was over but stealthily removed the poles, wire-fencing and put-up a haphazard room and construction making use of his wall in May, 1979 when he and his wife were temporarily away from Bangalore City in connection with attending some marriage outside Bangalore. In support of this version, the defendant has not examined his wife to show that the plaintiff had made use of that open space with the consent of his wife. Even after the return of the defendant to Bangalore from the marriage after noticing the alleged haphazard construction by the plaintiff making use of his western wall, he kept-quiet and filed no complaint. He took no action to get the plaintiff evicted from there. His conduct speaks volumes and that has been rightly relied on by the trial Court to reject the defence version of leaving open space to the east of wall put up by him. It is the defence version that he put up the disputed wall and had left open space beyond that to the east and the trial Court has rightly observed that such an explanation and conduct is opposed to reason and is unacceptable and has rightly rejected the same. Having regard to these facts and having regard to the plaintiff's document under which the plaintiff's vendor sold the house property with compound, it is not necessary to go into the controversy with regard to the discrepancy between boundaries and measurements or the existence of B.S. Mariyappa's property or the property of the defendant to the west of the compound. The plaintiff has become the owner not merely of the compound which means the compound wall but also of the property enclosed within it. Therefore the plaintiff was the owner of property enclosed in the compound conveyed under Ex.P.1 and the oral evidence of defendant and his witnesses does not advance the defendant's case when D.W.4 himself has admitted existence of the suit wall to the west of the property of the plaintiff at the time of purchase. Further the plaintiff and her witnesses P.W.2 Basavarajappa a frequent

visitor and P.W.4 Honnamma an immediate neighbour amply prove the existence of this western wall at the time of purchase of the property by the plaintiff and her purchasing that property with that wall. Therefore there is no merit in the defendant's version that he constructed this wall immediately after purchasing the property in the year 1971. The priority of rights claimed under Section 48 of the T.P. Act under prior sale deeds is also not acceptable because there is nothing to show that plaintiff's property included about 6 feet of east-west length already sold by B.S. Mariyappa and his children in favour of the defendant. It is to be remembered that the properties owned by B.S. Mariyappa were not merely the property sold to plaintiff and defendant but also another item of property bearing No. 6 to the extreme west sold to Smt. Alamelamma and there is no evidence to show that the Commissioner measured the properties sold to all these persons and with reference to any fixed mark or bench-mark as it is called. Therefore priority of rights claimed under Section 48 of the Transfer of Property Act by the defendant cannot be accepted.

18. It is also in the evidence that the defendant has instituted a suit for claiming possession of property wrongfully in the possession of plaintiff to an extent of 5 or 6 feet to the west of plaintiff's property. Defendant has made a claim in his written statement for possession of that six feet of space to the west of plaintiff's property from her. Though he has prayed for declaration of his title to that property and possession thereof from plaintiff, he has not paid court-fee and has not got issues framed in that behalf and his contention in that behalf is allowed to remain as only a contention. Therefore having regard to the conduct of the defendant in the case, there is no merit in the contention of the defendant that there is discrepancy in the boundaries and extent of the area and that the dimensions of the property which are correct should prevail over the boundary description.

19. It may be pointed out here that evidence has been adduced by the plaintiff by producing the copies of the proceedings before the Rent Control Court in respect of eviction orders against tenants Sri Khasi and Sundar. The evidence in that behalf shows that with the help of the wall in dispute they were having shed and rooms and in those premises they were carrying on their activities and that clearly shows evidence of user of the wall by the plaintiff.

20. The learned Counsel for the defendant contended that the learned trial Judge has jumped to the conclusion without giving reasons for the same. In this connection, the learned Counsel relied on the concluding sentence in paragraph-17 of the judgment in which the learned Judge observed that he was of the opinion that the wall in dispute formed part of the property that was sold to plaintiff under Ex.P.1. Before coming to this conclusion the learned trial Judge has considered the defence of the defendant with regard to his having constructed the wall on the eastern side of his house and his failure to substantiate the same and also after referring to his documents at Exs.D.1 and D.2.

21. The learned Counsel also referred to certain observations in para 18 of the judgment wherein the trial Judge observed that in case the description of the property is described by its fixed boundaries then the boundaries must prevail over the description of the property by its area and in the case before him, though there was a small discrepancy about the area, one could not say that the wall in dispute formed part of what was sold to the defendant under Exs.D.1 and D.2. Quoting a proposition of law without supporting it with authority cannot be made much of and the learned trial Judge after giving reasons has concluded that the defendant was not able to show that the disputed wall was part of the property purchased by him under Exs.D.1 and D.2.

22. There is no denying the proposition that a plaintiff not in lawful possession of the property is not entitled to a decree of permanent injunction - BASAVANNAGOUDA FAKIRA GOUD PATIL by LRs. v. STATE GOVERNMENT 7. 1976(2) KLJ 149. It is also ruled by this Court in NARAYAN MUKUND SHET v. NARAYAN NAGESH SHETTY 8. : ILR 1988 KAR3035 that injunction cannot be granted in favour of the plaintiff who is not in actual possession of the property on the date of suit.

23. Placing reliance on these Decisions, the learned Counsel for the defendant contended that the plaintiff is not in possession of the western wall and she is therefore not entitled to the reliefs of injunction prayed for. In this behalf, the learned Counsel pointed out that there was admission on the part of the plaintiff that big square holes were made in the wall and girders and rafters had been

inserted and this according to the learned Counsel amounted to possession of the wall by the defendant and therefore plaintiff was not entitled to the reliefs sought on the ground that she was not in possession. If this contention of the defendant is accepted, it would lead to anomalous result. In the absence of the owner of the wall if the neighbour were to make a hole and attempt to insert a rafter or girder in it, that would only amount to an attempt to take support and by no stretch of imagination tantamount to loss of possession of the owner over the wall. The evidence shows that when the defendant made efforts to insert girders by making the holes, the plaintiff and her husband objected to the same, lodged complaint and when the defendant persisted in his efforts filed the suit, obtained injunction and these facts as brought out by oral and documentary evidence consisting of photos show that the plaintiff is in possession and the learned trial Judge has rightly held accordingly in that behalf. Since the findings of the trial Court are being affirmed with regard to the possession of the western wall by the plaintiff and interference thereof by the defendant by inserting girders and rafter after making holes, the detailed reasons given by the trial Court by evaluating the oral evidence in that behalf are not once again referred to in this Judgment.

24. For the above reasons, Points 1 and 2 are held in favour of the plaintiff by confirming the findings of the learned trial Judge in that behalf.

25. Points 3 and 4 :- The appeal of the plaintiff - R.F.A. 169 of 1983 is confined to certain reliefs disallowed to her namely rejection of her applications I.As. 3, 4 and 17.I.A.3 was filed on 8-4-1980 under Order 39 Rule 2A CPC for taking punitive action for disobedience of the interim order passed by the learned Munsiff on 20-3-1980. Similarly I.A.4 was filed on 4-7-1980 under Order 39 Rule 2A CPC for punishing the defendant for disobedience of the interim order not to proceed with the further construction. I.A.17 was filed under Section 35A CPC for awarding compensatory costs. All these three applications came to be rejected along with the dismissal of the suit by a judgment dated 24-1-1983. Orders rejecting applications filed under Order 39 Rule 2A CPC are appealable under Order 43 Rule 1 Sub-rule (r) CPC and such an appeal cannot be treated as a Regular First Appeal but only as a Miscellaneous First Appeal and the contention raised by the learned Counsel for the defendant in this behalf needs to be accepted. To this

extent, the appeal filed by the plaintiff is not sustainable. Therefore the contention that the order rejecting applications under Order 39 Rule 2A CPC is appealable under Order 43 Rule 1 CPC needs to be accepted and a Miscellaneous First Appeal lies in that behalf and not a Regular First Appeal as done by the plaintiff. Therefore the Regular First Appeal to that extent is not maintainable.

26. Section 104 CPC deals with orders from which appeal lies and Sub-section (1) Clause (ff) provides that an appeal shall lie against an order under Section 35A and it reads as under: -

'Section 104. Orders from which appeal lies:-

(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by law for the time being in force, from no other orders:-

[Clauses (a) to (f) deleted by Arbitration Act X of 1940]

(ff) an order under Section 35-A- Provided that no appeal shall lie against any order specified in Clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.'

it is clear from the above provision that no appeal shall lie against any orders specified in Clause (ff) except on the ground that no order or an order for the payment of a less amount ought to have been made. In the instant case, the learned trial Judge has rejected the application filed under Section 35A CPC on the ground that the defendant found the area of the property purchased under Exs.D.1 and D.2 was about 73 feet in length east to west but actually he was in possession of 67 feet 3 inches east-west and therefore he took up the defence that he was entitled to property of 6 feet more east-west from out of plaintiff's property and his defence therefore could not be said to be fictitious or false and in that view he refused to allow compensatory costs. When the prayer for compensatory costs is rejected out-right there is no appeal provided under Section 104 CPC against such an order. There is limited scope of appeal against an order under Section 35A CPC on the grounds (1) that no order ought to have been

made or (2) an order for payment of a lesser amount should have been made. Plaintiff's appeal is not grounded on either of the grounds and therefore to that extent the appeal filed by the plaintiff is incompetent and is not maintainable. One more ground raised in the appeal memo by the plaintiff is that a decree should have been made directing the defendant to put up the construction after leaving an open space of 3 feet as required by Building Bye-laws of the Bangalore City Municipal Corporation. It may be noted in this behalf that there is no such prayer made in the plaint. If there is no prayer made in the plaint and if the same is not granted, the plaintiff cannot make a grievance in that behalf. In order to entitle a plaintiff to a particular relief, the plaintiff must plead the grounds in support of that relief and he should make a specific prayer claiming particular relief. In the case on hand, the plaintiff has not prayed for a relief of mandamus to the defendant to leave a space of 3 feet from her house. In the absence of such prayer, the plaintiff is not entitled to any relief and omission to grant such relief cannot be a ground to file an appeal in that behalf.

27. From the above, it is clear that plaintiff's grievance in respect of rejection of applications I.As. 3 and 4 filed for punishing the defendant for disobedience of the injunction order under Order 39 Rule 2A CPC can be agitated by filing a Miscellaneous First Appeal under Order 43 Rule 1(r) CPC. Plaintiff's appeal therefore to that extent is treated as a Miscellaneous First Appeal under Order 43 Rule 1(r) CPC. The scope of plaintiff's appeal under Order 43 Rule 1(r) CPC is very much limited and the Court is required to see whether the order under appeal suffers from any illegality or unreasonableness. The discussion in that behalf by the learned trial Judge found in paragraphs 23 onwards of the judgment shows that plaintiff had failed to prove by satisfactory evidence that there was disobedience by the defendant to the injunction order passed by the learned Munsiff on 20-3-1980. The learned Counsel for the plaintiff in this behalf referred to paragraph-7 of the deposition of the plaintiff. The said paragraph reads as under: -

'Two photographs were also taken prior to filing of the suit. An order of injunction was granted against the defendants on 21-3-1980 temporarily restraining him from putting up any structure on the western wall. In spite of that the defendant went on

constructing the same, in contravention of the orders. I got photographs taken numbering 3 on different dates viz. 6-3-1981, 29-3-1980 and 4-3-1981.'

From the above it is seen that the plaintiff has stated that the defendant inspite of the order of the trial Court on 21-3-1980 went on constructing the same and in contravention of the orders. What is the portion built in contravention of the order dated 20-3-1980 is not explained. The photographer P.W.5 E.P. Renuka, P.W.7 - the Sub-Inspector have not stated anything with regard to alleged construction in violation of the order dated 20-3-1980. Merely referring to photographs is not enough. Evidence of P.W.5 shows that he was taken to the plaintiff's house and he took photographs. Disobedience to order dated 20-3-1980, the details of construction that existed prior to 20-3-1980 and further construction in breach of the order dated 20-3-1980 are not spoken to by any of the witnesses and after weighing the evidence of the plaintiff in this behalf, the learned trial Judge has found that there was no satisfactory evidence placed by the plaintiff and therefore plaintiff was found not entitled to any relief on I.As, 3 and 4. Therefore the orders rejecting I.A.s. 3 and 4 cannot be found fault with and there is no scope for interfering with the orders passed by the learned trial Judge in that behalf.

28. The plaintiff has filed applications for amendment of plaint, for impleading Corporation Commissioner as defendant-2 and another application for setting aside the order passed by this Court on 15-7-1985 dismissing I.As. 4 and 5. Such applications could be filed only in an appeal filed against a decree by the aggrieved party. The present appeal by the plaintiff being one under Order 43 Rule 1 (r) CPC is not against the decree made by the trial Court and there is no scope for entertaining such applications in a Miscellaneous First Appeal filed under Order 43 Rule 1 (r) CPC. Moreover, it is to be seen that application for amendment of the plaint for making a prayer for leaving space of 3 feet and the application for impleading the Corporation Commissioner as a defendant are made after a long lapse. The suit has been filed as far back as 7-11-1979 and it is disposed of by the judgment dated 24-1 -1983 and the applications are made in this Court long after the filing of the appeal. There is no cross-objection filed by the plaintiff in the appeal filed by the defendant against the decree of injunction made against him. Having regard to the long delay in making application and taking into consideration

the plaintiff's appeal being a Miscellaneous First Appeal under Order 43 Rule 1 (r) CPC, there is no scope for entertaining the applications for amendment of the plaint or for addition of parties. For adducing additional evidence under Order 41 Rule 27 CPC as prayed for, no satisfactory grounds are made out in the application. Therefore, all these applications filed by the plaintiff in her Miscellaneous First Appeal under Order 43 Rule 1 (r) CPC deserve to be rejected and the Miscellaneous First Appeal also deserves to be dismissed.

29. The learned Counsel for the plaintiff, cited number of Decisions with regard to enforceability of building Bye-laws for leaving open space of 3 feet between the plaintiff's house and defendant's house but those Decisions are not referred to as the application for amendment in that behalf is to be held as not maintainable and the plaintiff is not entitled to any relief in that behalf.

30. As already held, Points 1 and 2 under consideration having been decided in favour of the plaintiff, there is no merit in the Appeal filed by the defendant and his Appeal deserves to be dismissed. Hence, the following order:-

ORDER

Plaintiff's appeal R.F.A.No. 169 of 1983 is treated as Miscellaneous First Appeal in so far as challenge to order rejecting I.As. 3 and 4 under Order 39 Rule 2-A CPC is passed by the learned trial Judge. That appeal is found lacking in merit and is accordingly dismissed.

Plaintiff's Regular First Appeal No. 169 of 1983 against the order rejecting compensatory costs claimed under I.A. 17 is held as incompetent and therefore is not maintainable.

Office is directed to give a separate Miscellaneous First Appeal Number to the plaintiff's appeal forth-with, since Regular First Appeal is treated as Miscellaneous First Appeal.

Defendant's Regular First Appeal No. 143 of 1983 is also dismissed with costs.

