Surongon M.A. v Mullegadoo J.H.

2021 IND 4

Cause Number 1138/2013

IN THE INTERMEDIATE COURT OF MAURITIUS

In the matter of:

Mr. Michel Alex Surongon

Plaintiff

v.

Mr. Jacques Henri Mullegadoo

Defendant

Judgment

Plaintiff is allegedly an owner of a portion of land of the extent of 5 perches at Seebarath Lane, Floreal, as duly transcribed in Volume 1682 No. 183.

Defendant is the contiguous neighbour of Plaintiff.

Plaintiff has averred that on 11 May 2013, Mr. Ravin Tupsy, Sworn Land Surveyor, surveyed his said portion of land and as per his report dated 24 June 2013, part of a concrete storeyed building and a concrete block wall belonging to Defendant have encroached on the Plaintiff's property on a length of 4.00 metres and a width of 0.25 metres covering an area of 0.81 square metres and accordingly Defendant has not respected the statutory distance of 0.91 metres from the boundary line.

Plaintiff has also averred that as a result of the acts and doings of Defendant which amount to *"faute"* he is suffering from great prejudice, trouble and inconvenience which he estimates at Rs. 100,000 and which sum Defendant is bound to make good to him.

Plaintiff is, therefore, moving for – (i) the pulling down of part of the concrete building and wall that allegedly encroach on Plaintiff's property, (ii) the respect of the statutory distance between their respective properties and (iii) the payment to him in the sum of Rs.100, 000/- as alleged damages.

Defendant has essentially denied liability in his plea and he has essentially contended that he purchased his property from Plaintiff's sister in or about 1990. At the material time, the property consisted of a portion of land on which stood a wooden house under a corrugated iron sheet roof. In or about 1999, Defendant pulled down the said house and caused to be built a concrete house at exactly the same place. Defendant applied for and obtained all the relevant permits prior to starting the constructions in or about September 1999 and the constructions started in or about 1999, *au vu et au su* of the Plaintiff. The latter neither objected nor complained as regards the constructions.

The case for the Plaintiff rested on the evidence adduced by his Sworn Land Surveyor and that of the Plaintiff himself.

Mr. Ravin Tupsy in his capacity as Sworn Land Surveyor gave evidence in Court. Following a request from Plaintiff, he repaired on site on 11 May 2013 at 10 p.m. to survey a portion of land of the extent of **two hundred and eleven and four hundredths square metres (211.04m2) or 0A05Ps** – being Lot No.2, belonging to **him** as per title deed transcribed in **Volume 1682/183.** He made a memorandum of survey dated 24 June 2013 as per Doc. A in which he found that the said portion of land belonging to Plaintiff to be of a lesser extent of "**two hundred and one and six hundredths square metres (201.06 m2),** bounded as follows: -

*On the first side, by a common and party road 1.96 m wide, on **twelve metres and ninety eight centimetres(12.98 m)***

*On the second side, by the property belonging to Mr. Jacques Henri MULLEGADOO, on **fifteen metres and seventy one centimetres(15.71 m)***

On the third side, by the property belonging to Harry SEEBARUTH, on ***twelve metres and eighty two centimetres(12.82 m)***

On the fourth side, by the property belonging to Joanita Nancy Corinne ROSE, on ***fifteen and seventy six hundredths square metres (15.76 m2)****".*

However, his memorandum of survey is not in relation to the portion of land as bounded as per the title deed produced by Plaintiff viz. Doc. C. in relation to Lot No.2 meaning the 5 perches of land.

Although Mr. R. Tupsy after having surveyed the said land of Plaintiff found it to be **of a lesser extent of (201.06 m2) instead of (211.04m2) or 0A05Ps** and yet his observation is verbatim as per the averment of the plaint as it would have been for the higher extent of **211.04m2 or 0A05Ps** as follows:

*"***Observation is hereby made that:-**

1. *Part of a concrete storeyed building and a concrete block wall belonging to* ***Mr Jacques Henri MULLEGADOO*** *has encroached on the property of* ***Mr Michel Alex Surongon*** *on a length of 4.00 m and a width of 0.25 m covering an area of* ***0.81 m2****, thus not respecting the required statutory distance of 0.91 m from the boundary line."*

He has not explained which part of the concrete storeyed building of the Defendant has encroached onto the property of Plaintiff and by how much and in what manner the concrete wall of Defendant has encroached onto the land of Plaintiff and by how much. Instead he rested content in concluding that the statutory distance has not been respected because of the encroachment and in the same vein in cross-examination, he highlighted that the Plaintiff as well did not respect the statutory distance as regards his building.

Plaintiff produced his title deed viz. Doc. C which is not in relation to a portion of land of the extent of 5 perches duly transcribed in Volume 1682 No. 183 as averred in his plaint but in relation to a division in kind wherein the said extent of 5 perches is in relation to Lot No.2 which is bounded as follows: -

"*-On one side by Lot No.1, upon fifteen metres seventy six centimetres(15.76 m) or fifty five feet five inches(55' 5"). On the second side, by Seebaruth or assigns, upon twelve metres ninety eight centimetres(12.98m) or forty two feet seven inches (42'7"). On the third side, by Lot No.3 to be attributed to Anne Marie Surongon, upon*

fifteen metres seventy six centimetres(15.76m) or fifty five feet five inches (55'5''). On the fourth side by the axis of a common and party road six feet wide, a reserve six feet five inches in between, upon twelve metres ninety eight centimetres or forty two feet seven inches (42'7''). I value this lot at the sum of Rupees Fifteen Thousand-(Rs 15,000.-). OBSERVATION is here made that no account has been taken of the wooden building lying astride of Lots Nos. 1 and 2 and which as stated above sic- all be pulled down within a delay of THREE MONTHS after confirmation of the division in kind….".

At no time, Plaintiff testified to the fact that he had complained to the Defendant as regards the encroachment and had requested him to remedy the situation.

Defendant, for his part, has denied liability and has deposed essentially to the effect that the construction was made *au vu et au su* of the Plaintiff who did not complain of any encroachment and had in or about 1999 pulled down the existing wooden house under a corrugated iron sheet roof and caused to be built a concrete house at exactly the same place. There were no complaints from the Plaintiff in that respect.

I have given due consideration to all the evidence put forward before me and the submissions of both learned Counsel. The outcome of this whole case revolves on the memorandum of survey of Mr. R. Tupsy, Sworn Land Surveyor, who deposed in Court as an expert.

The provisions of the law applicable at the time of survey are to be found at Sections 9, 10 and 11 of the **Land Surveyors Act 1979** which are reproduced below:

*"**9. Owners of adjoining lands at surveys***

(1)(a) Subject to section 12, no land surveyor shall survey a plot of land which adjoins the property of another person for any purpose, unless the owner of the adjoining property is present at the survey or has consented in writing to the survey being made in his absence, or upon proof that the owner has been summoned to attend the survey.

(b) A summons under paragraph (a) shall be served personally by an usher upon the owner of the adjoining property not less than 14 days before the survey.

(..)

10. Owners to produce title deeds

(1) Every land surveyor shall, before making a survey under section 9, call upon every owner of an adjoining property who is present to produce his title deed.

(2) Where the owner of an adjoining property who is present at a survey refuses or is unable to produce his title deed, the land surveyor shall record his refusal or inability, as the case may be, in the memorandum of survey.

(…)

11. Contents of memorandum of survey

(6) Where a land surveyor has contravened section 9 or 10 or this section, the memorandum of survey shall be null and void." ***(emphasis added)***

In the present case, the land surveyor did not specify in his report namely that his memorandum of survey was done pursuant to the Land Surveyors Act 1979 in force at the time of survey.

Nor did he produce the notice together with its return which was served upon Defendant in this case so that it would have been a notice served by the usher of the Supreme Court in relation to which there would have been a return. The said memorandum of survey was signed neither by the Defendant's wife present as Defendant was not present at the time of survey and nor by the adjoining occupiers who were present at time of survey as per Doc. A. let alone that the said surveyor conceded that the extent of the land of Plaintiff was found to be less when surveyed. The land surveyor has not specified in his memorandum of survey that the Defendant's wife and the other adjoining owners have been asked to produce their title deeds prior to survey on day of survey and that after having been asked at the end of the survey if they have any objection or comments, they said they did not have any but in fact he relied on his own searches as regards the various title deeds and plans and on the landmarks and on the position of the existing boundary stones in order to survey the property which he found to be **not of an extent of (211.04m2) or 0A05Ps but of a lesser extent of (201.06 m2).** Furthermore, there is no mention in his survey report that Defendant's wife refused to sign or was unable to do so or that she did not object to survey and that she had no comments thereon to make and also nothing of the sort has been mentioned as regards the other adjoining owners in

breach of Section 11(4) of the Act. Indeed, as per the title deed produced by Plaintiff for the land in *lite*, the extent of it being bounded on all sides by the adjoining properties as per Lot No.2 as per Doc. C are not in conformity with his memorandum of survey.

It is significant to note that the Court would imperatively have to make a finding in relation to the boundaries of the land belonging to the Plaintiff on the one hand and that belonging to the Defendant and the other adjoining owners on the other (vide – **Gungah P.&Ors. v Mrs. Widow Vassoo Mootoosamy & Ors.[1999 SCJ 301].** An excerpt from **Dulloo B v P.Ng King Man & Anor.[2002 SCJ 108]**) clearly illustrates the point:

> *"(…) a survey under section 9 of the Act is to ascertain the boundaries of the land of the owner requesting that exercise and a survey cannot be effected along one side only. It concerns all adjoining neighbours as the boundaries of each one of them must be ascertained. This is why the legislator has provided that the neighbours must be served personally with the notice; they must produce their title deed and they must be asked at the end of the survey if they have any objection or comments.*
>
> *It was further submitted by learned counsel for the respondents that the trial court was entitled to rely on the oral testimony of Mr. Dumazel to conclude that there was an encroachment. We do not agree that the oral evidence of Mr. Dumazel can be substituted to the memorandum of survey as provided by section 11 of the Act. Furthermore, since Mr. Dumazel failed to comply with section 9 of the Act, the whole survey exercise is a nullity."* ***(emphasis added)***

Therefore, no weight can be attached to the said survey as it does not comply with the provisions of sections 10 and 11(4) of the **Land Surveyors Act 1979** in force at that particular point in time so that the evidence is not conclusive as regards the extent of the land of the Plaintiff and as to whether there is any encroachment at all by the Defendant on the land in *lite*.

Furthermore, no written notice or "*mise en demeure"* was served upon Defendant by Plaintiff following the survey exercise as regards the said encroached parts to be removed bearing in mind that he is claiming damages over and above the pulling down order so that Defendant would have been expected to have his land surveyed by a Sworn Land Surveyor in order to ascertain same and which lends support to the version of Defendant that he was not liable for any encroachment and that everything was done *au vu et au su* of Plaintiff.

For all the reasons given above, I am unable to find that the case for the Plaintiff has been proved on a balance of probabilities. I, accordingly, dismiss the plaint with costs.

S.D. Bonomally (Mrs.) (*VicePresident of Industrial Court)*
30.11.2021