
(2015) 06 KAR CK 0012

In the Karnataka High Court

Case No : Writ Petition Nos. 54620/2013 (GM-CPC), 20124/2014 (GM-CPC) and 14135/2015 (GM-CPC)

A. Shanmugam Naidu and Others

APPELLANT

Vs

Mayan Kutty and Others

RESPONDENT

Date of Decision : 30-06-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9
Constitution of India, 1950 — Article 227

Citation : (2015) 06 KAR CK 0012

Hon'ble Judges : A.V. Chandrashekara, J.

Bench : Single Bench

Advocate : S.N. Aswathanarayan, Advocate, for the Appellant; T.S. Amar Kumar, Advocate, for the Respondent

Judgement

A.V. Chandrashekara, J.—Main writ petition bearing No. 54620/2013 has arisen out of an order passed by the learned 43rd Addl. City Civil and Sessions Judge, Bangalore, in O.S. No. 7429/2003 on I.A. No. 21 filed under Order 26 Rule 9 of CPC. The said application came to be filed by the defendants therein requesting the Court to appoint the Assistant Director of Survey and Land Records, Bangalore South Sub-Division, as the Court Commissioner to conduct survey and demarcate 20 acres of land allotted by the BDA in favour of Bhavani Housing Co-operative Society under bulk allotment scheme and to survey and identify the lands in Sy. Nos. 133, 132 or 143 of Kathriguppe village and to elucidate the matters in dispute. The said application has been dismissed after contest on 20.9.2013.

2. Writ Petition No. 20124/2014 has arisen out of an order passed on IA No. 22 filed under Order 26 Rule 9 of CPC by the plaintiffs on an original suit bearing O.S. No. 7429/2003 pending on the file of the Court of 43rd Addl. City Civil and Sessions Judge, Bangalore. Their plea is to appoint a Court Commissioner to make local inspection and identify the location of site No. 4, 5th B-Block as reflected in the layout plan approved by BDA and to report the same to the

Court. The said application has been allowed after contest. Hence, the defendants being aggrieved by the said order have filed this petition under Article 227 of the Constitution of India.

3. Writ Petition No. 14135/2015 has arisen out of the order passed on IA No. 23 in the same suit bearing No. 7429/2003 on 9.3.2015. The said IA No. 23 had been filed by the plaintiffs therein requesting the Court to permit the defendants to cross-examine the Commissioner i.e. BDA Assistant Executive Engineer. The said application has been dismissed after contest on 9.3.2015. Hence, plaintiffs have approached this Court by filing a separate petition under Article 227 of the Constitution of India.

4. Since all these orders have been passed in one suit bearing No. 7429/2003, they are taken up together for common discussion.

5. Facts leading to the filing of O.S. No. 7429/2003 by deceased plaintiff Mayan Kutty are as follows:

"Deceased plaintiff Mayan Kutty is stated to have purchased the site bearing No. 4 in Block No. 5-B, formed in Sy. No. 17 and its sub numbers and survey Nos. 132 and 133 of Kathriguppe Village. He is stated to have purchased the suit schedule property from Bhavani Housing Co-operative Society Limited on 22.7.2002 for a valuable consideration of Rs. 1,29,600/-. According to the plaintiff, the area measuring 20 acres of land had been allotted by the BDA under the bulk allotment scheme to Bhavani Housing Cooperative Society, which subsequently formed a residential layout. According to the plaintiff, Sy. No. 17 was sub-divided into various sub-numbers and new numbers were also given. The Bhavani Housing Co-operative Society is stated to have acquired 20 acres of land under two sale deeds executed by BDA and subsequently layout plan was approved. Since the defendants therein tried to deny the very title set up by the plaintiffs, the deceased plaintiff was forced to file a suit for declaration of title and to deliver the vacant possession of the schedule property by demolishing the illegal construction put up thereon, at their cost. The site bearing No. 4 of Block No. 5-B formed in Sy. No. 17 and its sub numbers 132 and 133 measuring East to West 45 feet, North to South 30 feet. During the pendency of the said suit, the plaintiff died and his legal representatives have been brought on record."

6. The defendants have filed a detailed writ statement denying all the material averments and have called upon the plaintiffs to prove their case strictly. According to the defendants the office bearers of Bhavani Housing Cooperative Society have played fraud on the plaintiff by showing more number of sites in the layout in excess of 20 acres of land taken on bulk allotment scheme. According to the defendants site No. 4 which is the suit schedule property does not come within the 20 acres of land allotted by BDA in favour of Society and that the schedule property is not in existence. According to the defendants, they have purchased this site in the year 1985 through a registered sale deed from one Chikkaiah the GPA holder of the original owner Anjinappa. The said Chikkaiah is

the 3rd defendant in the present suit. According to the defendants 1 and 2, they have put up construction soon after purchasing the site from Anjinappa and in the year 1993, BDA officials came to the spot and attempted to demolish the structure. Hence, they had approached this Court seeking regularization of their construction in writ petition No. 36321-326/1993 and they were all disposed of directing the BDA to consider their applications. The order was passed by this Court in the above writ petitions on 13.7.1994.

7. In the meantime, Karnataka Regularization of Unauthorised Construction in the Urban Area Act, 1991 came into force. Accordingly, they were directed by this Court to make necessary application before BDA seeking regularization in terms of the above Act. This Court directed the BDA not to demolish the structures till a decision is taken in this regard, after the applications were filed by the persons in possession of the property. The defendants requested the trial Court to appoint the Assistant Director of Land Records and Survey, Bangalore South Sub-Division to visit the site and to survey the land and to submit a detailed report and to elucidate the matter in question and that was objected to by the counsel for the plaintiff. Ultimately, the said application came to be dismissed after contest. During the pendency of the suit, another application has been filed by the plaintiff seeking appointment of Assistant Executive Engineer, BDA, to visit the spot and to submit a report and that application has been allowed. The Assistant Executive Engineer has visited the spot and submitted a report regarding the identification of site No. 4 which is the suit schedule property. That report has been objected to by the defendants by filing a detailed objections and permission is accorded to the defendants to cross-examine the Commissioner on the basis of the objections filed by them. It is an admitted fact that the plaintiffs have not filed any objection to the said report submitted by the Engineer.

8. The plaintiffs themselves have specifically pleaded that erstwhile survey No. 13 of Kathriguppe village was subdivided into various sub numbers. Their case is that, site No. 4 which is the suit schedule property has been carved out of sub numbers 132 and 133 of Kathriguppe village situated in block No. 5-B. Schedule appended to the plaint is as under:

"SCHEDULE

All that piece and parcel of site bearing No. 4, Block No. 5-B, formed in Sy. No. 17 and its sub numbers and Sy. Nos. 132 and 133 of Kathriguppa Village, Banashankari III Stage, Bangalore, measuring East to West: 45 feet and North to South : 30 feet and bounded on the:

East by : Road

West by : Site No. 17

North by : Site No. 5

South by : Site No. 3

The same schedule found in the plaint finds a place in the sale deed relied upon by the deceased plaintiff."

9. The Commissioner appointed by the Court is none other than the Assistant Executive Engineer, BDA, which initially allotted 20 acres of land to Bhavani Housing Cooperative Society. Subsequently, a layout was formed by Bhavani Housing Co-operative Society and the same was proved by BDA. The defendants have stated that the Housing Society in question misrepresented the allottees showing sites in excess of the actual extent allotted under bulk allotment scheme. The defendants who had made an application long back had approached this Court in the year 1993 itself seeking an order from BDA to regularize the construction put up by them. The defendants had asserted that the schedule shown by the plaintiff in O.S. No. 7429/2003 is not part and parcel of the extent of land allotted under the bulk allotment scheme and they are in of the site purchased by them from Anjinappa through the 3rd defendant who was his power of attorney holder.

10. As could be seen from the written statement filed by them in the trial Court, their suit schedule property falls within sub number 143. In the light of the serious dispute about the very identification of the property based on the rival pleadings, no useful purpose would be served by appointing Assistant Executive Engineer, BDA who has already submitted the report.

11. Since several survey numbers have been carved out of erstwhile survey number 17 and a portion of the land measuring 20 acres was allotted to Housing Society under a bulk allotment scheme, it would be in the interest of justice to appoint a competent person to survey various new survey numbers carved out of erstwhile Survey No. 17 and to elucidate the matter in dispute.

12. The proper and competent person to survey agricultural land with reference to various boundaries based on the survey records would be the surveyor of the Department. It is in this regard a decision rendered by the Hon'ble Apex Court in the case of Bhagwat Math v. Madhav Memorial Pathagar and others (2006(9) SCC 221 is relevant. What is held in para-4 of the said decision is that appointment of any neutral and independent person not connected in any manner with either of the parties and possessing knowledge of survey as Commissioner for spot inspection would meet the ends of justice.

13. Admittedly, the Commissioner already appointed by the trial Court is none other than the Assistant Executive Engineer of BDA which has already allotted 20 acres of land in bulk allotment. As rightly pointed out by Shri S.N. Aswathanarayan, learned Counsel appearing for the defendant, the engineer would be interested in giving evidence in support of BDA based on the records already prepared by the B.D.A. in connection with the bulk allotment and in subsequent approval of layout plan of Bhavani Housing Co-operative Society.

14. Admittedly, the Technical Engineer of B.D.A. would not be that competent to survey the land and identify those lands with respect to boundaries mentioned in

the survey records and connected revenue records. In the decision of N. Swamygowda Vs. Ramegowda, , this Court has held that if there is serious dispute with regard to area and boundaries of the land in question, non-appointing of Court Commissioner results in serious miscarriage of justice. When there are conflicting versions regarding location of the suit schedule property, no amount of oral and documentary evidence would enable the trial court to adjudicate the matter in question effectively. The report that would be submitted by a competent surveyor could be analysed in the light of oral and other documentary evidence that has already been placed on record by the parties.

15. In the present case, the competent person to elucidate the matter in dispute after making a local inspection would be the surveyor and not the engineer. Anyhow, the engineer has already been appointed and he has already submitted a report. It is not prudent to set aside the said report of the Engineer by this Court at this stage. In the interest of justice, it would be better to appoint a competent person i.e. Senior and experienced Surveyor of Survey Department to survey the land and identify the disputed property. Therefore, the approach adopted by the trial Court in rejecting the application filed by the defendants under Order 26 Rule 9 of CPC is incorrect and improper. Therefore, this Court will have to step in to rectify the said serious mistake committed by the trial Court. Hence, W.P. No. 54620/2013 arising out of order passed on I.A.21 will have to be allowed and the petition filed by the plaintiff in W.P. No. 14135/2015 and the petition filed by the defendants in W.P. No. 20124/2014 will have to be dismissed.

Petition filed in W.P. No. 54620/2013 is allowed and the trial Court is directed to appoint the Assistant Director of Land Records and Survey, Bangalore South Sub-Division to visit the spot and to elucidate the matter in dispute. The parties are at liberty to furnish correct and comprehensive memo of instructions to enable the Commissioner to visit the spot and to submit a detailed report. Nothing comes in the way of the Court to consolidate both the memo of instructions and submit one common instructions to the Commissioner to execute the warrant effectively and to submit a correct and detailed report elucidating the matter in dispute.

Permission is accorded to the Counsel for the defendants in the trial Court to cross-examine the Assistant Engineer, BDA who has already submitted a report. If the plaintiffs want to cross-examine him by putting questions, it need not be reiterated that they can do after filing objections wholly or partially to the said report. Anyhow, the plaintiffs are permitted to file their partial or full objections to the said report and in such an event, they may be allowed to cross-examine the Engineer. Since the matter is quite old, learned Judge is directed to expedite the matter. The parties shall file their respective memo of instructions without fail on 8th July 2015, the next date of hearing in the trial Court.

Tentatively, a sum of Rs. 5,000/-(Five Thousand) is fixed as the Commissioner's fee and it is to be born by both plaintiffs and defendants equally and it will be deposited on or before 8th July 2015. The learned Judge would be at liberty to fix

the Commissioner's fee after receipt of the report.