

(2016) 01 KAR CK 0255

In the Karnataka High Court

Case No : Writ Petition Nos. 4319-20/2015 (GM-CPC)

Agnel B. Pereira and Others

APPELLANT

Vs

K.A.V. Bhanu Prakash and Others

RESPONDENT

Date of Decision : 19-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 39 Rule 1, Order 39 Rule 2, Order 6 Rule 17
Karnataka Court Fees and Suits Valuation Act, 1958 — Section 26(a), Section 26(c)
Specific Relief Act, 1963 — Section 34

Citation : (2016) 162 AIC 342 : (2016) 2 KantLJ 479

Hon'ble Judges : Budihal R.B., J.

Bench : Single Bench

Advocate : Narendra Gandhi, Advocate, for the Appellant; K. Suryanarayana Rao, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Budihal R.B., J.—1. These petitions are filed by the petitioners-plaintiffs to set aside the observations made in the order on the application filed by the petitioners under Order 26 Rule 9 of CPC dated 24.6.2014 passed as per Annexure "H" and also to set aside the orders on the application filed by the petitioners under order 6 Rule 17 of CPC dated 2.1.2015 passed as per Annexure "L" by the 39th Addl. City Civil judge, Bangalore passed in O.S. No. 3112/2013.

2. Application under order 26 Rule 9 of CPC was filed by the plaintiffs requesting the Court to appoint the Court Commissioner to survey and inspect the suit schedule property and to give report by allowing the said application. Another application under Order 6 Rule 17 of CPC was filed by the plaintiffs requesting the Court to grant permission to amend the pleadings by inserting paragraph Nos. 12 and 13. The GPA holder of the plaintiffs filed his sworn affidavit contending that plaintiffs have purchased site No. 1 measuring East to West 44" on the northern side and 50" on the southern side and measuring North to South 40", totally measuring 1880 sq. ft., vide sale deed dated 30.3.1995 marked as

Ex. P3. After the purchase, plaintiffs were put into actual possession of the said site No. 1 and khata was transferred into the name of the plaintiffs. Thereafter, plaintiffs sold the western portion measuring East to West 32" and North to South 40" totally measuring 1280 sq. ft. in the said site No. 1 vide sale deed dated 18.7.2011 marked as per Ex. P7. So, there is a remaining area of 600 sq. ft. remained with the plaintiffs which is the schedule property. On perusal of the layout plan which consists of defendant's property it can easily be seen that the property of the defendants is not rectangle in size. The said property measures lesser on the southern side. It can also be seen from the said layout plan that the neighbouring properties were of the dimension of less than 30"x40". Though the property of the defendants measures less than 30"x40" as can be seen from the layout plan, the sale deed of the defendants shows 40"x44". The plaintiffs have also filed application under 39 rule 1 and 2 of CPC and same was dismissed on technical point vide order dated 16.7.2013 against which, they preferred M.F.A. No. 6732/2013. The said appeal came to be disposed by this Court by order dated 27.8.2013, wherein this Court suggested for appointment of Commissioner. Hence, if this application is not allowed, plaintiffs will incur great hardship and irreparable loss and requested to allow the application. The said application was objected to by the defendants stating that there is no encroachment on the plaintiffs' property and Commissioner cannot be expected to gather evidence for the plaintiffs. P.W. 1 has already been examined and that he is to be cross-examined.

3. In another application filed by the plaintiffs under order 6 Rule 17 of CPC it is stated that after dismissal of the I.A. filed under order 39 Rule 1 and 2 of CPC by the trial Court as well as by this Court, taking advantage of the same, defendants have started construction over the suit schedule property. So, the plaintiffs have sought mandatory injunction and also possession of the suit schedule property with declaratory relief by way of amendment to the pleadings by proposed paragraph Nos. 12 and 13 and also to amend the prayer column by inserting prayers (ab), (ac) and (ad) after prayer column (a) and to declare that the plaintiffs are the absolute owners of the suit schedule property and to grant a decree of possession directing defendants, their agents or any person representing them to deliver vacant possession of the suit schedule property to the plaintiffs and to grant a decree of mandatory injunction by demolishing the constructions made in the suit schedule property. This application was also opposed by the defendants stating that it is filed only to drag on the proceedings. The evidence is already commenced. The proposed paragraphs 12 and 13 will change the nature of the suit. Hence, the application is not maintainable.

4. After considering the merits of both the applications, the trial Court has allowed the application filed under order 26 Rule 9 of CPC, but has observed that Commissioner would be appointed after full fledged trial, if necessary. However, the application filed for amendment has been rejected by the trial Court, against which these two writ petitions are filed by the petitioners-plaintiffs.

5. Heard the arguments of the learned counsel appearing for petitioners-plaintiffs in respect of both the petitions and also the learned counsel appearing for the respondents-defendants.

6. Learned counsel for the petitioners-plaintiffs submitted that when the injunction application filed under 39 Rule 1 and 2 before the trial Court in the suit by the plaintiffs was dismissed, the plaintiffs preferred M.F.A. and while disposing of the M.F.A. this Court has observed that there is an allegation of overlapping of the properties of plaintiffs and defendants. Hence it is necessary to appoint Court Commissioner to see whether there is overlapping of the property or not and then the trial Court has to proceed accordingly. The learned counsel has submitted that in view of the observation by this Court in M.F.A. 6732/2013 (CPC) dated 27.8.2013, the plaintiffs-writ petitioners filed the application under order 26 Rule 9 of CPC for appointment of Court Commissioner. It is submitted that though the trial Court has allowed the application, but made a wrong observation that Commissioner will be appointed after completion of full fledged trial, if necessary, which observation is illegal and not sustainable in law.

7. So far as amendment application is concerned, counsel submitted that when the injunction application was dismissed, which was confirmed by this Court, taking undue advantage of the same, defendants have proceeded to make construction over the suit schedule property and as it is the subsequent event during the pendency of the suit, plaintiffs have sought for amendment of pleadings, so also the prayer column, for the relief of mandatory injunction, recovery of possession of the encroached area and also for the relief of declaration of title of the petitioners-plaintiffs to the suit schedule property. The learned counsel has submitted that the trial Court has wrongly rejected the application, hence submitted to allow the same by setting aside the order of the trial Court. In support of his contention, learned counsel for the writ petitioners-plaintiffs has relied upon the following decisions:

1. AIR 2002 SCW 3925
2. AIR 2009 MADHYA PRADESH 129 (DB)
3. , ILR 2015 KAR 3997

8. Per-contra, the learned counsel for the respondents-defendants has submitted that so far as the application filed seeking appointment of Court Commissioner is concerned, it is already allowed by the trial Court, but only with an observation that commissioner would be appointed after full fledged trial, if necessary. Therefore, plaintiffs cannot have any grievance against the said order. So far as the amendment application is concerned, it is submitted that this was rightly rejected by the trial Court as it was filed after the commencement of evidence in the case and when the case was posted for cross-examination of P.W. 1. Hence, he has submitted that as per the amendment to CPC, the application filed seeking amendment under Order 6 Rule 17 after commencement of the evidence is not maintainable. He has also submitted that regarding the reliefs seeking

amendment of the pleadings so also the prayer column for declaration of title of the plaintiffs, mandatory injunction and recovery of possession are concerned, these amendments will change the very nature of suit itself and such amendments cannot be allowed. Hence, he has submitted that the trial Court has rightly rejected the amendment application. No merit in the writ petitions and hence, sought to dismiss the petitions.

9. I have perused the grounds urged in the writ petitions, orders passed by the trial Court on the application filed seeking appointment of Court Commissioner and application filed seeking amendment of the plaint, so also, other materials produced in the case by the writ petitioners-plaintiffs and the decisions relied upon by the learned counsel for the writ petitioners-plaintiffs, which are referred above and the principles enunciated in the said decisions.

10. Coming to the order passed by the trial Court on the application filed seeking appointment of Court Commissioner under Order 26 Rule 9 of CPC, as rightly submitted by the learned counsel for the writ petitioners-plaintiffs, in the Miscellaneous First Appeal also this Court has opined that there is necessity to appoint the Court Commissioner to ascertain whether there is overlapping of the properties. The said application is allowed by the trial Court, but it has postponed the appointment of the Commissioner after full fledged trial, if necessary. So, it clearly shows that said application is not rejected by the trial Court. Therefore, no fault can be found with the said observation made by the trial Court while passing order on the application under Order 26 Rule 9 of CPC.

11. So far as rejecting the amendment application is concerned, it is no doubt true the suit was originally filed for permanent injunction against the defendants. But, in the proposed amendment it is the contention of the plaintiffs that when the injunction application was dismissed by the trial Court, which was confirmed by this Court in M.F.A., taking undue advantage of the same, defendants have proceeded with construction over the property. Since this is a development in the case subsequent to the filing of the suit and during its pendency, by way of proposed amendment, plaintiffs have sought for declaration of title that they are the owners of the suit schedule property, for a decree of possession from the defendants and also for a decree of mandatory injunction for demolishing the constructions made in the suit schedule property.

12. Looking to the original plaint also, the plaintiffs have pleaded claiming ownership of a piece of site measuring 600 sq. ft. i.e., suit schedule property. But the defendants in their written statement as well as objection to the I.A. have denied the title of the plaintiffs. When there is a pleading in the original plaint claiming title to the suit schedule property by the plaintiffs and its denial by the defendants in the written statement, then Court has to decide the title by collecting necessary Court fee. Court has to see the entire pleadings presented by the parties and not only the relief column in the said pleadings. It is no doubt true that bare injunction suit would be valued under Section 26(c) of the Karnataka Court fees and Suits Valuation Act. But even looking to the said

provision Section 26(a), it also makes it clear that if title with regard to immovable property is involved, then necessary Court fee is to be collected to decide the title. In this connection, I refer to the decision of the Hon'ble Supreme Court reported in , AIR 1989 SUPREME COURT 1809 in the case of Corporation of the City of Bangalore Vs. M. Papaiah and another wherein their Lordship's have laid down the proposition as under:-

"(A) Specific Relief Act (1963), S. 34 ? Suit for decree of perpetual injunction restraining defendant from interfering with possession-Relief of declaration of title not specifically mentioned in relief portion of plaint ? Suit could not be dismissed on that ground.

A suit was filed for a decree of perpetual injunction restraining the defendant Corporation from interfering with possession of plaintiff over land in dispute. The case of Corporation was that disputed area was acquired for using it as burial ground under Govt. Order and compensation was paid to plaintiff out of Municipal funds and land was in possession of defendant since then. The plaintiff's case was that the alleged G.O. was cancelled and land was settled under another G.O. with persons who subsequently sold it to plaintiff. The plaintiff also got his name entered in revenue records. The suit was decreed by trial Court but the decision was reversed in first appeal. The plaintiff's second appeal was allowed by High Court and the decree of trial court was restored.

Held, that foundation of claim of plaintiff was title which was pleaded in earlier part of plaint and for deciding the nature of a suit the entire plaint has to be read and not merely the relief portion. The plaint in the present case does not leave any manner of doubt that the suit has been filed for establishing the title of the plaintiffs and on that basis getting an injunction against the Corporation. The Court fee payable on the plaint has also to be assessed accordingly."

13. Looking to this aspect of the matter, it is necessary for the Court to decide the title also. Regarding the mandatory injunction and the recovery of possession of encroached area as alleged in the amendment application is concerned, it is stated that it has taken place during the pendency of the suit when the application seeking injunction was dismissed by the Court. According to the plaintiffs it is a subsequent event after filing the suit and there is a pleading to this effect in the proposed amendment. It is true that the said application was filed when the matter was set down for cross-examination of P.W. 1. But only on that ground the said application cannot be rejected as it would be necessary to allow the amendment application to avoid multiplicity of proceedings and as the proposed amendment is in respect of the events alleged to have taken place subsequent to filing of the suit. In this regard, I have also perused the decisions and the principles enunciated in the said decisions relied upon by the learned counsel for the writ petitioners-plaintiffs. Hence, even if the amendment application is allowed and plaintiffs are permitted to amend the pleadings and the relief column, it will not cause any injury or hardship to the respondents-defendants as respondents will be having an opportunity to cross-examine the

plaintiffs during the course of trial with regard to the amended pleadings and the reliefs claimed. But if the amendment application is rejected, it will cause injury and hardship to the writ petitioners-plaintiffs and also leads to multiplicity of proceedings. In these facts and circumstances of the case, the lower Court ought to have allowed the amendment application and hence, the rejection of the application is not sustainable in law.

14. Accordingly, the amendment application filed under Order 6 Rule 17 of CPC is allowed and writ petitioners-plaintiffs are directed to carry out amendment to the pleadings before the trial Court. The order of the trial Court dated 2.1.2015 passed on the amendment application is accordingly set aside. So far as, the order dated 24.6.2014 passed by the trial Court on the application filed under Order 26 Rule 9 of CPC, I do not find any good grounds to interfere with the said order. Accordingly, the writ petitions filed challenging the observations of the trial Court on the said application is dismissed.