
(2015) 04 KAR CK 0237

In the Karnataka High Court

Case No : Regular First Appeal No. 1288 of 2009

Akbar Sharieff

APPELLANT

Vs

Naaz Parveen and Others

RESPONDENT

Date of Decision : 20-04-2015

Acts Referred:

Citation : (2015) 04 KAR CK 0237

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : N. Shankaranarayana Bhat, for the Appellant; V.B. Shivakumar, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Anand Byrareddy, J.

1. Heard the learned counsel for the appellant and heard the learned counsel for the respondent.

2. The appellant was defendant No. 1 before the trial court. It was the plaintiffs case that the mother of the plaintiff one Smt Zubeda Khatoon wife of T.M. Wazie Ahmed was allotted an item of property described in the suit schedule from amongst 7 properties as between her and her sisters. The entire suit properties said to have been allotted to the mother of the plaintiff consisted of 8 business premises in the first floor and common areas in undivided shares. This was effected by a Deed of Settlement dated 29.12.1992, which was a registered document. It was the plaintiffs case that under the said document, there was a specific recital that the shops have common walls and the verandah which each gets is a common area and the stair case leading to the first floor in the annexed plan to the settlement was common to all the occupants of the building and further that the beneficiary would be entitled to the "C" schedule property and the other daughters of plaintiff s aunt would be enjoying the property along with all others and therefore, the undivided share, right and interest of the common

areas was granted. The plaintiff further contended that what was described in suit schedule "A" were common areas.

3. It is further stated that the plaintiff had divided the share which she had inherited from her mother in favour of her several daughters and for this purpose a civil suit in O.S. No. 3539/1997 was filed. A compromise was effected and the suit was decreed in terms of the compromise. The plaintiff was allotted a share in the property in terms of the compromise described as Schedule IV under the compromise decree, which is more fully described in the plaint at schedule "B". The plaintiff was said to have been inducted and she was in possession of the said extent, with common rights and privileges as provided under the Deed of Settlement and which was also reiterated in the compromise decree as afore said.

4. The controversy which is the subject matter of the suit was that defendant No. 2 who was also one of the sharers of the suit property had sold the property falling to her share in the ground floor of the suit property to defendant No. 1. Defendant No. 1, on such purchase of the property, sought to carry out certain alterations in the ground floor portion of the suit property, thereby, endangering the safety and stability of the shop premises bearing No. 21 in the first floor and it was the case of the plaintiff that by virtue of defendant No. 1 being in possession of shop No. 20 in the ground floor and the purported alterations carried out, would seriously affect the safety of shop No. 21 on the first floor and therefore, had rushed to the civil court and filed a suit for permanent injunction restraining defendant No. 1 from carrying out any such alterations including common wall or supporting the wall of the shop at the first floor, from carrying out such alterations in the common wall or the ceiling between the first floor and the second floor ceiling which formed a common wall for ground floor and the first floor and thereby causing injury and damage to the plaintiffs property. The suit was not contested by defendant No. 1. Therefore, the court below had framed the following points for consideration:

"1. Whether the plaintiff proves that she is entitled right title share interest together with common right with regard to the common walls, common stair case common open space in respect of A schedule property, by virtue of Deed of settlement Dt. 29.12.1952?

2. Whether the plaintiff proves the interference of the defendants?

3. Whether the plaintiff is entitled for the relief of perpetual injunction?

4. What Decree or Order?"

And had decreed the suit in favour of the plaintiff it is that which is under challenge in the present appeal.

5. Though the learned counsel for the respondent would submit that during the pendency of this appeal, the parties have amicably settled their case and there is no dispute whatsoever and they coexist peacefully. The learned counsel for the appellant would dispute this position and would submit that his client had not

furnished any instructions as to the present state of affairs and therefore, he would draw attention of this Court to certain glaring aspects and further draw attention of this Court to the compromise decree, which is relied upon by the plaintiff and pointed out that the share that fell to the share of plaintiff is defined as shop No. 21 only and does not include shop No. 20 on the ground floor, which admittedly was sold by defendant No. 2 in favour of defendant No. 1. This mischief on the part of the plaintiff to lay claim over the shop No. 20 in the ground floor, has been completely overlooked by the court below in passing the judgment and decree as prayed for, by the plaintiff, which results in enabling the plaintiff to lay claim over shop No. 20 in the ground floor. Further, it is seriously disputed that the common areas which are described by the plaintiff are indeed common areas and defendant No. 1 being restrained from allegedly interfering with any of these common areas would cause serious threaten to the enjoyment of those common areas by defendant No. 1. It is in this context that the learned counsel would point out that there is no intention on the part of defendant No. 1 to cause any such damage or injury to the property, as defendant No. 1 would then be jeopardizing the very safety of his own property. The learned counsel would further point out that by virtue of the judgment and decree, it would be open for the plaintiff, at every step, to seek coercive remedy in the event of defendant No. 1 interfering with the judgment and decree and thereby preventing defendant No. 1 from using and enjoying his own property. Merely, because there is a judgment and decree in terms as prayed for by the plaintiff and the suit having been decreed ex parte, results in grave miscarriage of justice insofar as defendant No. 1 is concerned and hence seeks that the appeal be allowed.

6. In the face of serious discrepancy in the description of the property, as well as the mischief of the plaintiff seeking to lay claim over the defendant's property, the learned counsel for the respondent - plaintiff would point out that there is no claim made by the plaintiff insofar as shop No. 20 on the ground floor and it is admittedly the property which fell to the share of defendant No. 2, at the partition and it has been sold by defendant No. 2 in favour of defendant No. 1. The alleged mis-description in the suit schedule is not intended to lay claim over the property of the defendant. On the other hand, the apprehension of the plaintiff is that any alteration carried out, insofar supporting walls or the ceiling of the ground floor portion, would directly affect the plaintiff who is occupying the first floor, right overhead of shop No. 20 and therefore, what was shown as common ceiling of property of defendant No. 1, would form the base of the property of the plaintiff and it is therefore, clarified that the plaintiff does not claim over shop No. 20 at all, which belongs to defendant No. 1.

7. While, the learned counsel for the appellant would by way of reply point out that the contention of the plaintiff that the shop No. 21 occupies the portion over the shop No. 20, may not be a correct position. Shop No. 21 does not rest on shop No. 20, but it is off the area and therefore, is a misleading statement.

8. Notwithstanding these minor controversies which the appellant seeks to raise, which would be permissible in the present appeal, the apprehension as regards the claim of the plaintiff over shop No. 20 having been clarified by the learned counsel for the appellant, there is no warrant for concern by defendant No. 1, as the judgment and decree having been granted in terms of the prayer by the plaintiff, does not in any manner affect or confer any right or title over shop No. 20, insofar as the plaintiff is concerned, as admittedly shop No. 20 has fallen to the share of defendant No. 1.

9. The second contention that the judgment and decree would enable the plaintiff to claim that there is a violation of judgment and decree, at every step of the way, if defendant No. 1, who now proceeds to carry out any alteration or construction in his own property is concerned. This cannot be a closed chapter. If indeed, defendant No. 1 should carry out any construction, which appears in violation of the judgment and decree, the law would certainly enable the plaintiff to seek execution of the judgment and decree, in which event, it would have been open for defendant No. 1 to establish before the Executing Court that there is no such violation by producing appropriate material. Therefore, the plaintiff cannot be shut out from seeking benefit of the judgment and decree, by any such conditions being placed with the judgment and decree in appeal by defendant No. 1, who has never contested the suit. The question would necessarily have to be left open, in the face of further circumstance that the plaintiff claims in the present appeal, that there is no animosity between the parties and they are co-existing peacefully, should let the matters be raised at that stage. Accordingly, the appeal stands disposed of.