

(2014) 01 KAR CK 0014
In the Karnataka High Court
Case No : MSA No. 88 of 2008

Anant and Venkatesh

APPELLANT

Vs

Rajendra and Town Municipal Council

RESPONDENT

Date of Decision : 22-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17 96
Easements Act, 1882 — Section 15

Citation : (2014) 01 KAR CK 0014

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

Bench : Single Bench

Advocate : V.P. Kulkarni, for the Appellant; Shivasai M. Patil, for R1, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Chandrashekara, J.—This is a second appeal challenging the order of remand passed by the learned first appellate Judge in R.A. No. 71/1994 which was pending on the file of the Court of Senior Civil Judge at Haveri dated 30.10.2007. Appellants herein were the defendants Nos. 1 and 2 in an original suit bearing O.S. No. 81/1982, which was pending on the file of the Court of the Munsiff and JMFC, Haveri. Respondent No. 1 herein is the plaintiff in the said suit. Respondent No. 2 is the defendant No. 4 in the said suit. Parties will be referred to as plaintiffs and defendants as per their ranking in the trial Court. The plaintiff Sri. Rajendra had filed a suit seeking prohibitory and mandatory injunction in O.S. No. 81/1982 against defendant Nos. 1 to 4, inclusive of Town Municipal Council, Haveri. The said suit came to be dismissed holding that the suit of the plaintiff was not maintainable without seeking the relief of declaration of easement by way of prescription. The said judgment is dated 31.10.1994. Against the said judgment and decree passed in O.S. No. 81/1982, an appeal came to be filed u/s 96 of CPC in R.A. No. 71/1994 before the Court of Senior Civil Judge and CJM, Haveri. The said appeal so filed by the plaintiff has been allowed on 30.10.2007 remanding the matter to the trial Court with a direction

to give an opportunity to address arguments on all the issues and with a further direction to give findings on all the issues which had been struck off by the trial Court. It is this order of remand dated 30.10.2007, which came to be called in question by filing regular second appeal in RSA 403/2008. Subsequently, it was converted into miscellaneous first appeal by order dated 29.05.2008. On 24.10.2008 miscellaneous first appeal was converted into miscellaneous second appeal. Hence, the case is posted for hearing regarding admission.

2. I have heard the arguments from the learned counsel for the appellant and perused the impugned judgment and records. The suit came to be filed in the year 1982 seeking the relief of prohibitory and mandatory injunction. Plaintiff had claimed that property bearing CTS No. 1171/A and 1171/B of Haveri town had been purchased by his uncle and in turn they had purchased the same from his uncle through a registered sale deed and therefore, he is in possession of the suit properties as owner. The property bearing CTS No. 1170 is stated to be a passage and has been used as a passage since long time by all the occupiers of the property belonging to the plaintiff as well as the owners of the property situated in the neighborhood property bearing CTS No. 1170. According to the plaintiff, this has been used as a passage to go to Kondawadgalli situated in the northern side of CTS No. 1170. This space bearing CTS No. 1170 is stated to be a property belonging to defendant No. 4-Town Municipality and is being used as a space for flowing the natural rain water and the water from bathrooms, latrine of the houses of the plaintiff and other adjoining owners, so that the said natural water and the waste water to join main gutter situated in Kondawadgalli. According to the plaintiff, defendant Nos. 1 to 3 tried to obstruct the passage in connivance with defendant No. 4, and therefore, he had to file a suit for the reliefs of prohibitory and mandatory injunction. According to him, there is a permanent gutter measuring 50 feet north-south and 1 feet east-west in the said CTS No. 1170 and this gutter is in existence since times immemorial and the rain water and waste water from the properties of the plaintiff and other neighborhood is being flown through this passage only.

3. Defendant Nos. 1 to 3 who are members of the joint family tried to construct a wall across the gutter, so as to block the flow of natural rain water and waste water and had collected material for construction of the said wall. If they were allowed to put up a construction, plaintiff and other adjoining houses would be put to lot of inconvenience and hardship. Since defendant No. 4 being a local authority failed in its duty in the matter of getting the wall removed, plaintiff had to file a suit for injunction.

4. Defendant Nos. 1 to 3 appeared before the Court and contested the matter. Defendant No. 4 had also filed written statement. All the defendants have specifically stated that property bearing CTS No. 1170 is the property belonging to defendant Nos. 1 to 3 and there is no passage for property bearing CTS No. 1170. The averment that defendant No. 4 had directed defendant Nos. 1 to 3 vide order dated 13.8.1981 to remove the said wall has been specifically denied.

According to defendant No. 4, it is not a necessary party. It is further averred by defendant Nos. 1 to 3 that CTS No. 1170 meant for the flow of waste water from the residential houses of defendant Nos. 1 to 3 which are situated in CTS No. 1168 and that the said gutter is not meant for the flow of waste water from the plaintiffs property. It is further averred that, plaintiff has not acquired easementary right whatsoever in regard to the flow of water in his property through property bearing CTS No. 1170 and that the plaintiff has right to get the waste water of his house flown from his property through the property bearing CTS No. 1115 and that the said property bearing CTS No. 1115 is situated at a lower level from the plaintiffs property. Hence, they had prayed for dismissal of the suit. On the basis of the above pleadings, 10 issues came to be framed by the trial Court.

- i) Whether plaintiff proves that in suit 1(B) property waste water from the houses abutting that property including the property of the plaintiff and natural water is being flowed from time immemorial?
- ii) Whether the plaintiff proves that the existence of a gutter in suit 1(B) property and in the said gutter waste water from the houses abutting that property including suit 1(A) property and rain water is being flowing and joins the gutter situated in Kondawadgalli from time immemorial?
- iii) Whether suit 1(B) property is situated in a lower level than suit 1(A) property?
- iv) Whether defendants 1 to 3 have put up a wall at point "GH" recently and obstructed flow of water in the above said gutter?
- v) Whether defendants 1 to 3 prove that there is right of way only in the suit 1(B) property to go to Kondawadgalli as contended at para-27 of their written statement?
- vi) Whether defendants 1 to 3 prove that the suit is bad for principles of estoppel and waiver as contended in para-30 of their written statement?
- vii) Whether the suit is bad for mis-joinder of parties?
- viii) Whether any of the parties to the suit entitled for compensatory costs?
- ix) Whether plaintiff is entitled for reliefs of permanent injunction and mandatory injunction sought for?
- x) What decree or order?

5. Plaintiff-Rajendra is examined as P.W. 1 and one Veerabhadra examined as P.W. 2. In all, 12 exhibits have been got marked on behalf of the plaintiff. Defendant No. 2 has been examined as D.W. 1 and certain documents have been got marked on behalf of the defendants. After hearing the arguments from the learned counsel appearing for the parties, the learned Civil Judge (Jr. Dn.) chose to dismiss the suit mainly on the ground that the plaintiff had not sought the relief of declaration to the effect that he has acquired easementary right by way

of prescription. While doing so, the learned Civil Judge has struck off issues 1 to 7 holding that they are unnecessarily framed. He has answered issues 8 and 9 in the negative. As could be seen from the finding given on issue No. 9, it is evident that more focus is about the suit being filed for the mere relief of prohibitory and mandatory injunction without seeking the relief of declaration. It is also evident that the learned Judge has relied upon the decision of this Court reported in D. Ramanatha Gupta Vs. S. Razaack, . What is held in the said decision is that, a suit for injunction based on a prescriptive right is not maintainable without seeking the main relief of declaration from the Court.

6. It is this judgment and decree came to be questioned by the plaintiff by filing an appeal u/s 96 of CPC before the jurisdictional Court i.e., the Court of Senior Civil Judge, Haveri in R.A. No. 71/1994. After hearing the arguments from the learned counsel appearing for the parties, the first appellate Court has come to the conclusion that the trial Court could not have struck off the issues 1 to 7 without giving an opportunity to the counsel appearing for the parties and that the trial Court should have given finding on all the issues. What is further observed by the first appellate Court, placing reliance on the decision reported in Noorulla Amin Musuba and Others Vs. Chandru Shenyar Naik, is that, even in a suit for injunction, there is no inhibition for the Court to incidentally consider the question of title. Such an exercise would be dependent on the facts and circumstances of each case. A specific order is passed by the learned first appellate Judge on 30.10.2007 in R.A. No. 71/1994 remanding the matter to the trial Court with a direction to give sufficient opportunity to the counsel appearing for the parties to address arguments on all the issues and thereafter to give finding based on the issues so struck off.

7. Admittedly, the moved point that arise for consideration of this Court is,

whether the first appellate Court is justified in remanding the matter to the trial Court to consider all the issues after hearing the arguments from the learned counsel appearing for the parties?

8. Records would disclose that, no opportunity is given to the learned counsel appearing for the parties before striking of issues 1 to 7. When issues are framed and at a particular stage if the Court feels that certain issues are not required or unnecessary, an opportunity has to be given to the counsel appearing for the parties stating that the Court is of the opinion about certain issues being wrongly framed or about certain issues being framed unnecessarily. Without doing so, the learned Judge has chosen to struck off all the issues during the course of the judgment and thus a vital opportunity has been denied to both the counsel. If all the issues had been considered and finding had been given and if the matter had been remanded on the ground of some more issues need to be framed, or some issues need to be struck off, or some amendment is required to the pleadings, or appointment of Commissioner is required, then this Court would have found fault with such an order holding that the first appellate Court which has all the trappings of a trial Court dealing with an original suit could not have abdicated its

responsibility of considering an application for amendment or for appointment of Commissioner, or for additional evidence etc.

9. In the present case, the first appellate Court is denied of an opportunity to go into the matter, since the trial Court has not at all given its finding on issues 1 to 7. The first appellate Court can go into all the aspects u/s 96 of CPC only when the findings are given on all the issues without there being a specific finding on all the issues, the first appellate Court cannot go into the merits of the case put forth by the parties in the trial Court. In this view of the matter, the order of remand so made by the first appellate Court cannot be considered as ill founded. Admittedly, the remand so made is virtually an open remand.

10. The decision rendered in Ramanatha Gupta's case is perused. While dealing with Section 15 of Easements Act, the Hon'ble High Court of Karnataka has specifically held that, a mere suit for injunction based on the prescriptive easementary right is not maintainable without seeking the main relief of declaration. Courts are there not to deal with technicalities, but to do substantial justice between the parties. When both plaintiffs and defendants have adduced oral and documentary evidence in support of their respective pleas, dismissing the suit on the technical ground of not seeking the relief of declaration amounts too much of technicality. Nothing would have come in the way of the trial Court to suggest the plaintiff to seek a prayer of declaration in terms of the decision rendered in Ramanatha Gupta's case.

11. If really the trial Court was of the opinion that the suit filed for the prohibitory and mandatory relief of injunction without seeking the relief of declaration was not maintainable, it could have framed a preliminary issue to that effect before the parties were asked to adduce oral and documentary evidence. Having not done so, the trial Court was not justified in allowing the parties to adduce additional evidence and thereafter to dismiss the suit mainly on the ground of plaintiff had not sought the relief of declaration. In the light of the discussion made above, this Court is of the opinion that the order of remand so made by the first appellate Court cannot be found fault with, since no opportunity is given to both the parties to advance arguments on all the issues and thereafter the Court to give a finding on these issues. Nothing comes in the way of plaintiff to make necessary application under Order 6 Rule 17 of CPC seeking the main relief of declaration. In such an event, the trial Court to consider the said application appropriately. Since the matter is of the year 1982, it needs to be taken up on priority. This Court does not find any reason to interfere with the judgment and decree passed by the first appellate Court in remanding the matter.

ORDER

The appeal is dismissed as unfit for admission. Notwithstanding the dismissal of the appeal the plaintiff is at liberty to make necessary application seeking declaratory relief of having acquired easementary right by way of prescription.

Parties shall appear before the trial Court on 19.02.2014 without fail and shall cooperate with the learned Judge in disposing of the matter at the earliest. The learned Judge shall make all endeavor to dispose of the matter within six months from the date of receipt of a copy of this judgment. Parties are directed to cooperate with the learned Judge.