

(2012) 06 KAR CK 0123

In the Karnataka High Court

Case No : Regular Second Appeal No. 1775 of 2005

Bisanna, Since dead by Legal Representatives Muniyappa,
Lingappar, Ramaz-bandrappa and Narayanappa

APPELLANT

Vs

Agadurappa Since dead by his L.Rs. Smt. Muniyamma,
Anjinappa and Krishnappa

RESPONDENT

Date of Decision : 01-06-2012

Acts Referred:

Citation : (2012) 06 KAR CK 0123

Hon'ble Judges : A.N. Venligopala Gowda, J

Bench : Single Bench

Advocate : A.V. Gangadharappa, for the Appellant; Pradeep Naik K., for R1 to R3, for the Respondent

Final Decision : Allowed

Judgement

A.N.Venligopala Gowda

1. Legal representatives of the plaintiff are the appellants and the respondent was the defendant in O.S.382/1992 on the file of the Additional Civil Judge (Jr. Dn.), Bangalore Rural District, at Bangalore. Suit was filed for passing a decree of declaration that plaintiff is the owner of plaintiff B schedule property and for delivery of possession of the same to him after removing the structure or the house put up on the E schedule property, which is a portion of A schedule property and for perpetual injunction restraining the defendant from interfering in any manner with the plaintiff's peaceful possession and enjoyment of the plaintiff A schedule property. The property described in plaintiff A schedule is, one bearing Village Panchayath Assessment No. 510, property No. 112, forming a portion of Sy. No. 112 of Gunjur Village, Gunjur Palya, Varthur Hobli, Bangalore South Taluk, measuring east to west 43 yards or 129 feet, north to south 28 yards or 84 feet, with a house constructed in a portion of it and bounded on the east; by a road, west by; land in Sy. No. 112/22 of one Smt. Marakka, North by; HogEtha's house and vacant space and defendant's house measuring east to

west 1.0 feet and north to south 23 feet with open space towards Eastern side and south by; land in Sy. No. 112 of one Hotteppa. Plaintiff's property is a building with Mangalore Tile roof forming a portion of A schedule property, measuring east to west 10 feet, north to south 12 feet and bounded on the east, West and North; by remaining portion of plaintiff's property i.e., A schedule property and south by; defendant's house property. Respondent - defendant filed written statement denying the allegations made in the plaint. However, he admitted that the plaintiff's property is having assessment No. 510 and property No. 112 by Village Panchayath and according to him, the tax paid receipts and assessment receipts produced are got up documents for the purpose of the case. Though he admitted that his house is situated in northern side of A schedule property, he denied the measurement and the alleged encroachment and stated that the construction has been put up by him only on his property. Based on the pleadings, the learned Trial Judge framed five issues. Plaintiff's son, power of attorney holder of the plaintiff, deposed as PW-1 through whom Exs.P1 to P9 were marked. Defendant got himself examined as DW-1 and got marked Exs.D1 to D5.

2. The identity of the suit property being in dispute, a Commissioner was appointed by the Court to conduct local survey and for submission of the report. Commissioner so appointed was examined as CW-1, through whom Exs.C1 to C4 were marked. Appreciating the rival contentions and the record, the Trial Court answered the issues in favour of the plaintiff and as a result, decreed the suit with costs.

3. Being aggrieved, the defendant filed R.A.No. 57/2000 in the Court of the I Addl. Civil Judge (Sr. Dn.), Bangalore Rural District, Bangalore. The First Appellate Court having considered the case, despite observing that the Trial Court was justified in holding the plaintiff as the owner of A schedule property, noticing that the sketch of the alleged encroached portion has not been furnished and prior to the institution of the suit, survey of the suit property was not got done through a competent surveyor and by observing that, to seek relief of mandatory injunction, such a document is necessary and since the same had not been produced, despite noticing the appointment of a Court Commissioner and the report submitted by him, finding the appeal to be of merit, allowed the same and as a result, set aside the Judgment and Decree passed by the Trial Court decreeing the suit. Feeling aggrieved, the legal representatives of the plaintiff have filed this second appeal.

4. This appeal was admitted on 01.08.2007 to consider the following substantial question of law:

Whether the lower appellate Court is justified in allowing the appeal and dismissing the suit filed by the appellant mainly on the basis of the report of the Commissioner especially when the Commissioner has not executed the warrant in accordance with law?

5. Sri A.V. Gangadharappa, learned Advocate appearing for the appellants, firstly, contended that the First Appellate Court is not justified in law in dismissing the suit despite the fact that the defendant has admitted in the written statement that the plaintiff is the owner of plaintiff A schedule property and that the plaintiff B schedule property is part and parcel of plaintiff A schedule property. Secondly, the First Appellate Court is not justified in law in overlooking the illegality committed by CW-1 in executing the commission warrant, in that, he had failed to adhere to the joint memo of instructions filed by the parties and there being no dispute of the Commissioner having not executed the warrant in terms of the joint memo of instructions. Thirdly, the First Appellate Court is not justified in law in reversing the considered Judgment and Decree passed by the Trial Court and hence, interference in the matter is called for.

6. Sri K. Pradeep Naik, learned Advocate appearing for the respondents, on the other hand, made submissions in support of the findings and conclusion of the First Appellate Court and sought dismissal of the appeal.

7. From the perusal of the record, it is clear that there is a dispute with regard to the identity of plaintiff B schedule property. Court Commissioner was appointed to conduct local inspection. Joint memo of instructions was filed by the parties. The Court Commissioner executed warrant and submitted the report. He was examined before the Court as CW-1. Ex.C3 is the memo of instructions and Ex.C4 is the sketch. CW-1 has admitted that he had not taken the plaintiff, written statement and documents from the Court, before execution of the warrant. He has admitted that he did not measure the entire land in Sy. No. 112 as per the memo of instructions vide Ex.C3. According to CW-1, Ex.C4 was prepared on the basis of the survey records available in his Office which is an incorrect statement, since he has admitted that he could not measure the suit property as per the schedule given in Ex.C1 and that the boundaries in A schedule property shown in Ex.C1 and the property shown in Ex.C4(b) did not tally with each other. CW-1 had also not taken revenue records from his Office at the time of execution of warrant. CW-1 has specifically admitted that he had not executed the warrant as per the memo of instructions filed by both parties.

8. The identity of suit property being in dispute and CW-1 having been appointed as Court Commissioner to conduct local inspection, he having not executed the warrant as per the joint memo of instructions filed by both the parties, both the Courts below have rightly found that the report submitted by CW-1 is not of material assistance to decide the case. However, despite finding the report of CW-1 to be not of assistance and there being no sufficient evidence placed on record by the parties to decide the case, the suit and the appeal have been decided which is wholly erroneous. The evidence on record is insufficient to decide the case. The dispute being with reference to the identification of plaintiff B schedule property, the report of CW-1 being not of any assistance and CW-1 having retired from the service, there is need for appointment of another person as a Court Commissioner to conduct local inspection and submit the report. In

this regard the appointment of a Taluka Surveyor as the Court Commissioner would be of material assistance to the Court to decide the case. Consequently, the matter requires to be remitted to the Trial Court.

In the result, the appeal is allowed and the Judgment and Decree passed in R.A.No. 57/2000 by learned Civil Judge (Sr. Dn.), Bangalore Rural District, Bangalore and the Judgment and Decree passed in O.S. No. 382/1992 by Civil Judge (Jr. Dn.), Bangalore Rural District, Bangalore, is hereby set aside.

The suit stands remitted to the Trial Court, which is directed to appoint the Taluka Surveyor as the Court Commissioner to conduct local inspection with reference to the joint memo of instructions of the parties - Ex.C3 and submit the report. The parties may also be enabled to place further evidence, if any, on record and decide the suit in accordance with law.

Parties are directed to appear before the Trial Court on 16.06.2012 and receive further orders. The Trial Court is directed to expedite the trial and decide the suit before 31.12.2012.

Needless to observe that, no opinion has been expressed on the merit or otherwise of the case of either of the parties.

Contentions of both parties are kept open for consideration.

Parties are directed to bear their respective costs.