

(2016) 03 KAR CK 0054

In the Karnataka High Court

Case No : Writ Petition Nos. 10444-445 of 2016 (GM-CPC).

B.N. Chandrasekhar, S/o Late Narayanaswamy, Aged about 65 years, R/at: No. 22, 7th Cross, LBS Nagar, 2nd Stage, Indiranagar, Bangalore-560038. Presently residing at No. 10, Lakshmaiah Reddy Road, Halsur, Bangalore-560008

APPELLANT

Vs

Sri. M. Krishnapp

RESPONDENT

Date of Decision : 03-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9

Citation : (2016) 2 AirKarR 723 : (2016) 4 ICC 598 : (2016) 4 KCCR 3736

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

Bench : Single Bench

Advocate : M.D. Anuradha URS for C.V. Sudhindra, Advocates, for the Appellant; V. Javahar Balu, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Budihal R.B., J. - Heard the arguments of the learned counsel. Though the matter is listed for preliminary hearing, with consultation of both the sides, this matter is taken up for final disposal.

2. Heard the learned counsel for the writ petitioner - defendant and also the arguments of the learned counsel appearing for the defendant-plaintiff. This writ petition is filed by the defendant being aggrieved by the order passed by the Trial Court rejecting the application filed by the defendant under Order 26, Rule 1 of CPC, seeking to appoint the Court Commissioner.

3. Learned counsel during the course of arguments made a submission on earlier occasion also that the defendant filed a similar application seeking appointment of Court Commissioner and which was objected by the other side and the Court passed the order that the said application is premature. Challenging the said order, the defendant preferred MFA. 4827/2015 and this court directed the Trial Court to dispose of the suit within 12 months from the date of receipt of copy of

this Order.

4. Learned counsel further made a submission that after completion and closure of the evidence, the defendant again filed an application under Order 26, Rule 9 of CPC, requesting the Court for appointment of a Court Commissioner, to measure the properties and ascertain the extent of encroachment as alleged by the plaintiff in the case. Learned counsel submitted that the Trial Court without considering the merits of the application, only on the ground of delay and that there is direction by this Court to dispose of the matter within 12 months time, the Trial Court will have to dispose of the suit as fixed by this Court.

5. Learned counsel made the submission that still there are six months time for the trial court to dispose of the suit as fixed by this court. Therefore, it is her submission that the application was not considered on merits, but only on technicalities, the trial court has rejected the said application. It is also her contention that if the Commissioner is appointed and visit the property to measure the same and submit a report, it will be helpful to ascertain whether there is any encroachment as alleged by the respondent/plaintiff in the case. Hence, she submitted that with regard to the appointment of the Court Commissioner on the 2nd application, she relied on the order of this court dated 14.3.2013 passed in W.P. No. 6488/2013. Hence, she submitted that when the application is not at all considered on merits, the order passed by the trial court rejecting the application is illegal and the matter requires consideration at the hands of this court.

6. Per contra, the learned counsel appearing for the respondent/plaintiff during the course of his argument made the submission that the suit is filed by the plaintiff seeking permanent injunction against the defendant. Hence, it is for the plaintiff to establish his lawful possession as on the date of the suit, so also the interference as alleged in the plaint. I earned counsel also made the submission that the earlier application filed by the defendant was rejected, therefore, the trial court has rightly held that the subsequent application under the similar provision for the same relief is hit by section 11 of CPC under the principles of res judicata. It is also the submission of the learned counsel that there is a direction from this court in the MFA No. 4827/2015 to the trial court to dispose of the suit itself at the earliest point of time. Hence, Counsel submitted that when the evidence of both sides is completed and the matter was posted for arguments and the plaintiff's argument was also heard. Thereafter the matter was posted for hearing the argument of the defendant, this application is filed. Hence, counsel submitted at this stage, the application cannot be allowed and the trial court has passed the order validly and there is no illegality.

7. In support of his contention the learned counsel for the respondent/plaintiff also relied upon the decision of this court, reported in AIR 2004 Kar 92.

8. A perusal of the grounds urged in the writ petition and the impugned order passed by the trial court, so also perusal of the pleadings of the parties, plaint,

written statement and also the application filed for appointment of Court Commissioner. The plaintiff filed the suit seeking permanent injunction as against the writ petitioner/defendant. After filing the suit, the defendant entered appearance in the suit and filed his written statement. Thereafter the defendant has made similar application under Order 26, Rule 9 of CPC requesting the court to appoint a Court Commissioner. But the said application on contest by other side, came to be rejected. Subsequently, in the suit, the court was proceeded to record the evidence of both parties and after concluding the evidence, the matter was posted for hearing arguments. As submitted by the learned counsel appearing for the respondent/plaintiff, arguments of the plaintiff's side was over and when the matter was posted for hearing the arguments of the defendant, the defendant has come up with the present application. These facts are not disputed.

9. Per contra, the learned counsel for the writ petitioner submitted that an application was filed by the defendant immediately after conclusion of the trial. But in the meanwhile, the counsel appearing for the plaintiff before the trial court commenced argument. However, the earlier application filed for the similar relief was rejected by the trial court and subsequently, this application was filed seeking appointment of a Court Commissioner.

10. Looking to the relief claimed in the plaint it was a bare suit for permanent injunction filed by the plaintiff. The plaintiff has to establish his case by adducing the evidence in the matter and he has to show his lawful possession over the suit schedule property as on the date of filing the suit. The plaintiff has also to establish the alleged interference by the defendant in the said suit. So burden is cast on the plaintiff in the said suit. But so far as the request of the defendant for appointment of the Court Commissioner is concerned, as it is rightly submitted by the learned counsel appearing for the respondent/plaintiff that the matter is already concluded and posted for hearing arguments. Therefore, the trial court is justified in rejecting the application. But looking to the order which is relied upon by the learned counsel appearing for the writ petitioner, the suit is filed for declaration of title and for mandatory injunction. Therefore, the court has to take decision in the matter before passing a decree for mandatory injunction and to ascertain about the encroachment. But, as per the relief claimed in the plaint, it is a simple suit for permanent injunction. As I have already observed above, the burden is cast on the plaintiff to establish his case. I have also perused the decision relied upon by the learned counsel for the respondent/plaintiff which is referred to above and the principles enunciated in the said decision. It is observed by this court in the said decision, when once the evidence is concluded and when the matter reached at the stage of arguments, it may not be proper for the court to appoint a Court Commissioner, it otherwise leads to de-nova trial in the said suit. The court has to proceed with the case from the beginning itself.

11. Considering all these aspects of the matter, so also the direction by this court in the miscellaneous appeal, to dispose of the suit itself, within the scheduled time and as the earlier application filed by the defendant was also rejected, I am

of the opinion that the trial court is justified in rejecting the application filed by the defendant. There is no illegality found in the order passed by the trial court. No justifiable grounds to interfere with the order passed by the trial court in this writ jurisdiction. Accordingly, the petition is rejected.