

(2014) 01 KAR CK 0153

In the Karnataka High Court

Case No : Regular Second Appeal No. 804 of 2004 (INJ)

Chidambar and Basappa

APPELLANT

Vs

Manohar and Prabhakar @ Fakirappa Since Dead by L.Rs.

RESPONDENT

Date of Decision : 16-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10(2) 100 96

Citation : (2014) 01 KAR CK 0153

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

Bench : Single Bench

Advocate : Shrikant T. Patil, for 2A-2E and Party in Person, for the Appellant;
S.L. Matti, for R1, R2(A)-Abated, for the Respondent

Final Decision : Allowed

Judgement

A.V. Chandrashekara, J.—Present appeal is directed against the divergent finding of the first appellate Court. The present appeal is filed by the plaintiffs of an original suit bearing O.S. No. 149/1991 which was pending on the file of the Civil Judge (Jr. Dn.), Saundatti. The suit of the plaintiffs had been decreed as prayed for. Being aggrieved by the said judgment and decree passed in O.S. No. 149/1991, the defendants therein had filed an appeal u/s 96 of CPC before the first appellate Court i.e., the Court of Senior Civil Judge, Saundatti in R.A. No. 2/2000. The said appeal came to be allowed in its entirety and thereby the relief of permanent injunction granted in favour of these appellants was set aside. Being aggrieved by the said judgment and decree passed in R.A. No. 2/2000, plaintiffs have approached this Court u/s 100 of CPC challenging the same on various grounds as set out in the appeal memo. The appellants were plaintiff Nos. 1 and 2 and respondents herein were defendant Nos. 1 and 2 before the trial Court. Parties will be referred to as plaintiffs and defendants as per their ranking given in the trial Court.

2. The suit schedule properties, according to the plaintiffs, plot Nos. 3 and 4 measure 40 feet x 80 feet each and TMC Nos. 2514/1+2 and 2514/1+3 of

Savadatti town, Belgaum district. According to them, these plots were granted to them by the Special Land Acquisition Officer, Malaprabha Project, Saundatti as they had lost their properties due to submersion. According to them, both these plots exist side by side and being a compact block are commonly bounded by east and west by road and north, plot No. 2 belonging to Smt. Sudhatai and south tank area. Plaintiffs are stated to be in lawful possession and enjoyment of them right from the year 1985, i.e., the year in which the grant was made in their favour. When the plaintiffs were intending to construct residential houses in their respective plots, the defendant interfered with their possession and as such, they had to file a suit for injunction. According to the plaintiffs, temporary injunction was in force till disposal of the suit and during the pendency of the suit, both of them have put up construction.

3. Defendant No. 1 chose to file a detailed written statement denying all the material averments. He had called upon the plaintiffs to prove the plaint averments strictly. According to defendant No. 1, the land belonging to the Rajaram Math was submerged due to Malaprabha Project and therefore, a property measuring 200 feet x 300 feet was granted to them by the SLAO, Malaprabha Project and that they have been in possession and enjoyment of this space measuring 200 feet x 300 feet and a Math is already existing. According to them, the SLAO visited the spot and then only granted the site as requested. The property measuring 200 feet east-west and 300 feet north-south is stated to be in the actual possession of the Math. The Government is stated to have granted a sum of Rs. 99,000/- in the year 1988 to improve the Math. Defendant No. 1 is stated to be the chairman of the said Math and as such he has no personal interest over the property belonging to the Math. According to him, the said suit of the plaintiffs is speculative and that the boundaries furnished in the plaint are incorrect and wrong and hence no relief of injunction could be granted. He had requested for dismissal of the suit. Defendant No. 2 appeared before the trial Court and did not file any written statement. On the basis of the above pleadings, the following issues came to be framed on 01.02.1993.

i. Whether the plaintiffs prove that they are in possession and enjoyment of the suit properties?

ii. Whether the plaintiffs prove the alleged interference?

iii. What Decree or Order?

4. Plaintiff No. 1 has been examined as P.W. 1 and two witnesses have been examined on their behalf and 28 documents have been got marked. Defendant No. 1 alone has been examined as D.W. 1. After hearing the arguments, the learned Judge of the trial Court has answered issue Nos. 1 and 2 in the affirmative and has consequently decreed the suit as prayed for vide considered judgment dated 13.01.2000. Against this considered judgment and decree, an appeal was filed u/s 96 of CPC before the Court of Senior Civil Judge, Saundatti, which came to be numbered as R.A. No. 2/2000. After hearing the arguments

and perusing the records, the learned Judge of the appellate Court has set aside the judgment and decree passed by the trial Court and has thereby dismissed the suit vide considered judgment dated 16.07.2004. It is this judgment and decree of the first appellate Court, which is called in question on various grounds as set out in the appeal memo filed before this Court u/s 100 of CPC.

5. It is contended that the trial Court has committed grave error in up turning a well-written judgment based on factual finding and that the first appellate Court has not properly reassessed the evidence in order to set aside a considered judgment and that it has adopted a wrong approach to the real state of affairs. It is further contended that the first appellate Court has not reassessed the evidence on the basis of the preponderance of, probabilities and that the judgment and decree of the first appellate Court is opposed to law, facts and probabilities.

6. Per contra, learned counsel for the respondent has vehemently supported the impugned judgment of the first appellate Court and has argued that the suit was rightly dismissed by the first appellate Court, as the very title of the document of the plaintiffs do not disclose the boundaries. It is argued that weakness as if any, of the defendants, cannot be considered as advantageous to the plaintiffs and therefore the first appellate Court is justified in allowing the suit. On the basis of the pleadings and the appeal memo, my learned predecessors has been pleased to frame the following substantial question of law for consideration and the same is evident from the order sheet dated 08.09.2005 of this Court.

Whether the lower appellate Court is justified in reversing the judgment and decree of the trial Court on the ground that the plaintiff proved the lawful title and possession over the suit plots in a suit for permanent injunction?

7. I have heard the arguments from the learned counsel appearing for the parties.

8. The undisputed facts of the present case is that, a space measuring 200 feet x 300 feet south in the tank area of Gurlhosur of Saundatti taluk was granted in favour of the Rajaram Math, of which, defendant No. 1 is the Chairman. Similarly, plaintiff No. 1 was allotted plot No. 3 measuring 40 feet x 80 feet and similarly plaintiff No. 2 was allotted plot No. 4 having the same measurement. According to these plaintiffs, both these two plots are abutting each other and they are having common boundaries with road on eastern and western side, Sudhatai's property bearing Plot No. 2 on the northern side and the tank area on the southern side. The first appellate Court has come to the conclusion that the plaintiffs suit is not maintainable in view of the boundaries being not mentioned in the title deeds issued by the SLAO, Saundatti. Even D.W. 1 does not seriously dispute the grant of property made in favour of the plaintiff Nos. 1 and 2. Similarly, plaintiff No. 1 also does not seriously dispute the grant of area measuring about 200 feet x 300 feet made in favour of Rajaram Math.

9. Ex. P20 is the grant order passed on 12.08.1985 in favour of Sri. Basappa

Yallappa relating to plot No. 4 measuring 40 feet x 80 feet. Similarly, Ex. P21 is the grant order made in favour of plaintiff No. 1 Chidambar Yallappa relating to Plot No. 3 measuring 40 feet x 80 feet. There is no dispute about the non-mentioning of boundaries in these two documents. In the operative portion of the grant order dated 12.08.1985 indicated in Exs. P20 and 21, it is specifically mentioned that the plots bearing Nos. 3 and 4 were granted in favour of the plaintiffs excluding the land granted in favour of the Rajaram Math. Exs. P22 and 23 are the common undertaking given by the plaintiff Nos. 1 and 2 to the SLAO in regard to the grant made in their favour and for having accepted the grant. Ex. P24 is a letter addressed by defendant No. 1 in favour of the Chief Officer, Town Municipality, Saundatti requesting him to effect the change of Katha in favour of Math. Exs. P1 to P4 are the certified copies of the assessment extract of Plot Nos. 3 and 4 issued by the jurisdictional Town Municipality, Saundatti for the years 1985-86 and 1989-90. They are all extracts of the registers maintained by the Municipality in accordance with the Karnataka Town Municipalities Act, 1964. Exs. P5 to 13 are the tax paid receipts. Exs. P14 and 15 are the blue print plan submitted by the plaintiff Nos. 1 and 2 seeking approval in order to put up construction thereon. They have been approved by the Chief Officer, Town Municipality.

10. Before approving the plan submitted by anybody for putting up construction, the municipal authorities invariably visit the spot and formal approval will be given after being satisfied that the proposed construction is well within the boundaries mentioned in the application filed by them. Therefore, these plans approved by the municipal authorities have a great probative value and the same has not been taken into consideration in right perspective, by the first appellate court.

11. Now the learned counsel for respondent No. 1 has vehemently argued that witnesses examined on behalf of plaintiff Nos. 1 and 2 have not been able to give decisive evidence in regard to the boundaries as shown in the plan. I have perused the plaint in which it is mentioned that to the north of the suit properties is the property of Sudhatai and to the south is the tank area.

12. It is very important to note that defendant No. 1 had filed a suit against this Sudhatai who has property on the northern side of the present suit schedule property. The said suit had been filed for the relief of injunction in O.S. No. 162/1990, which was pending on the file of the then the Court of Munsiff, Saundatti. As there was serious dispute about the identity of the property, a competent Commissioner had been appointed to visit the spot and to submit a report. A copy of the sketch and the report submitted by the Commissioner to the Court in O.S. No. 162/1990 is marked as Ex. P28. In the suit filed by defendant No. 1 as plaintiff in O.S. No. 162/1990, the boundaries had been mentioned is as follows:

East: Government road,

West: Tank area

North: Tank area

South: Road leading to Sangarkoppa.

13. Even in the said suit, the dimensions had not been mentioned and that is evident from Page 5 of Ex. P28. What is mentioned in Page 6 of Ex. P28 is that a property measuring 200 feet x 100 feet north-south had been given to the plaintiff i.e., defendant No. 1 herein on 27.07.1972 and grant order was made on 10.11.1982. The rough sketch prepared by the Court Commissioner appended to Ex. P28 would disclose that a site measuring 200 feet x 200 feet had been indicated in letters "DCBE". A site measuring 40 feet x 80 feet is on the north-eastern side of this site measuring 200 feet x 300 feet. Similarly, another site measuring 41 feet x 59 feet was lying to the south-east of the said site measuring 200 feet x 200 feet. Area measuring 40 feet x 80 feet indicated in letters "LMNO" was the property belonging to Sudhatai. In the report marked as Ex. P28, it is specifically mentioned in paragraph 5 and the same is as follows:

This document marked as Ex. P28 cuts the case of defendant No. 1 at the root.

14. On perusing the evidence of defendant No. 1 examined as D.W. 1, it is evident that a compound has been put up around the property of the defendant Math. The entire property of the Math is protected by a strong compound and nobody can interfere with the possession of the property held by defendant No. 1-Math. It is not the case of DW1 that Math has property extending beyond the compound put up. Therefore, assertions of defendant No. 1 that the suit schedule property of the plaintiffs are imaginary, cannot be accepted. It is to be seen that D.W. 1 himself has not been able to specifically depose as to the exact extent of land, before filing of the application. He has admitted that the SLAO did not give any sketch in regard to the land granted in favour of the Math. Admittedly a small shed was put up in an area measuring 40 feet x 60 feet. He does not know the area in which the temple is put up. He has specifically deposed that he did not insist the LAO to give a sketch relating to the property granted in favour of the Math. On the other hand, D.W. 1 himself has admitted that in the year 1988, Smt. Sudhatai has put up a house after obtaining duly approved plan from the Town Municipality, Saundatti. Therefore, the property of the plaintiffs are necessarily to the south of the property held by Smt. Sudhatai. While cross-examining P.W. 2, a suggestion is made that a compound wall has been put up around the Math area, P.W. 2 has admitted the same and is found in page 3 of his cross-examination.

15. It is also forthcoming in the evidence that during the pendency of the suit, temporary injunction was subsisting and on the strength of the same, plaintiffs have already put up house in their respective plots bearing Nos. 3 and 4, that is virtually admitted. The construction of the house by the plaintiffs on their respective plots on the basis of the temporary injunction obtained by them cannot be found fault with and it cannot be considered as illegal construction by

any stretch of imagination.

16. The trial Court has considered the entire evidence in the right perspective and has tested the evidence of the parties on the touchstone of intrinsic probabilities. The factual finding given by the trial Court on issue No. 1, is a well reasoned finding based on actual assessment of oral and documentary evidence. The first appellate Court has mainly focused on the non-mentioning of the boundaries in the title deeds of the plaintiffs. It is of not much consequence in the light of the admitted position about the identity of the property of the Math being questioned by Smt. Sudhatai in the suit filed by the Math in the year 1990 and Ex. P28, the report submitted by the Commissioner to the Court and the same speaks volumes against defendant No. 1. The submission of the learned counsel for the appellants that the suit filed by the Math in the year 1990 against Smt. Sudhatai came to be dismissed after contest is not seriously disputed by the learned counsel appearing for the respondents herein. Suffice to state that on the basis of the preponderance of probabilities the plaintiffs have been able to make out a good case in their favour relating to permanent injunction. The burden cast upon the plaintiffs has been effectively discharged and on the other hand, the onus which has shifted on the defendant has not been properly explained and this is evident from the contents of Ex. P28, the Commissioner's report being accepted by the Court way back in the year 1990 and the admissions culled out from the mouth of D.W. 1 in regard to the compound wall put up around the entire area granted in favour of defendant No. 1 by the SLAO.

17. The trial Court has taken into consideration that the grantor of the land in favour of plaintiffs and defendant No. 1 are one and the same and even the grant order was made by the SLAO, Saundatti on 10.11.1982 in favour of defendant No. 1-Math speaks of a lesser area than the extent mentioned in the grant order of the Math. It can safely be said that defendant No. 1 does not have any space other than the area around which compound is put up. The report of the Commissioner is an evidence under Order 26 Rule 10(2) of CPC. The remaining area 200 feet x 200 feet east-west and north-south is stated to be the remaining tank area. In the light of a complete compound wall being put up around the property of the defendants, they cannot lay any claim beyond that area, which is specifically indicated in letters "ABFG", the hand sketch appended in Ex. P28.

18. What exactly is the role of the first appellate Court in up turning a factual findings given by the trial Court has been eloquently explained by the Hon'ble Supreme Court in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., . While up turning the factual findings of the trial Court, the first appellate Court should come to its own conclusion and assign its own reasons as to how the trial Court has gone wrong.

19. In paragraph 20 of the impugned judgment, the first appellate Court has focused mainly non-mentioning of boundaries in the title deeds of the plaintiffs. Therefore, it has come to the conclusion that it is very difficult to locate the suit plots, more especially, when P.W. 2 has also admitted about the property of

Rajaram Math. Well written judgment of the trial Court has been upset by coming to the conclusion that the trial Court has passed a judgment based on surmises and conjectures. This Court is unable to accept the said reasoning. The learned Judge of the first appellate Court has failed to look into Ex. P28 a vital document coupled with some admissions culled out from the mouth of D.W. 1 during the course of cross-examination. In the light of the failure of defendant No. 1 to make out exact identity of the property granted in favour of the Math, which is forthcoming from Ex. P28, it can be safely held that the plaintiffs herein have been able to probablize their case and that the trial Court has reached a proper conclusion by testing the evidence of touch stone of intrinsic probabilities. Thus the reasons assigned by the first appellate Court are not sound and convincing to upset a well reasoned judgment of the trial Court and hence the substantial question of law framed by my learned predecessors will have to be answered in the negative holding that the first appellate Court is not justified in reversing the judgment and decree of the trial Court holding that the plaintiffs have failed to prove the possession. In a suit for injunction based on possession and title will not be very much relevant. When the plaintiffs themselves have produced all the documents which are in their command relating to the title of the property, incidentally, the title could also be looked into and the trial Court has looked into the same. In that view of the matter also the appeal is liable to be allowed in its entirety and thereby the judgment of the first appellate Court will have to be set aside. Consequently, the judgment passed by the trial Court in O.S. No. 149/1991 will have to be restored.

ORDER

The appeal filed u/s 100 of CPC is allowed with costs. The judgment and decree passed in R.A. No. 2/2000 which was pending on the file of the Civil Judge (Sr. Dn.), Saundatti is set aside. Consequently, the judgment and decree passed by the Civil Judge (Jr. Dn.), Saundatti in O.S. No. 149/1991 is restored.