

(2010) 09 KAR CK 0012

In the Karnataka High Court

Case No : Regular First Appeal No. 1393 of 2004

Chikkabbaiah alias Chinnappa (Since dead by L.Rs. Smt. Jayamma, C. Venkatesh and C. Shashikala), Dabalappa alias Muniyappa, Chikkamuniyappa and Ramakrishnappa

APPELLANT

Vs

Shri Namdev, Shri Lingappa Sri Kothi Jogappa and Shri Muniyappa

RESPONDENT

Date of Decision : 15-09-2010

Acts Referred:

Citation : (2010) 09 KAR CK 0012

Hon'ble Judges : Ravi Malimath, J

Bench : Single Bench

Advocate : B.N. Ananthanarayana, for the Appellant; R1 and R2 - Notice dispensed, for the Respondent

Final Decision : Allowed

Judgement

Ravi Malimath, J.—Aggrieved by the judgment and decree dated 15.10.2004 passed by XVII Additional City Civil Judge, Bangalore City in O.S. No. 8507/2000 dismissing the suit, the Plaintiffs have filed the present appeal.

2. The parties would be referred to as per their rank in the trial Court.

The case of the Plaintiffs is that, the land bearing Survey No. 2/1, measuring 1 acre 10 guntas situated at Dhookanahalli Village, Bangalore North Taluk, as described in the schedule to the plaint, originally belonged to Smt. Ponnamma, the grand mother of the Plaintiffs and Defendant No. 3. She bequeathed the suit schedule property in favour of the Plaintiffs and Defendant NG.3 under a registered will date 09.02.1955. She died more than 30 years prior to filing of the suit. Since then the Plaintiffs and the Defendants became joint owners of the suit schedule property and they are in possession and enjoyment of the same. That a portion of the land measuring 1 acre 2 juntas was acquired by the CITB, (presently the Bangalore Development Authority) vide notification dated

20.01.1960. However, without any justification, the Defendants 1 and 2 who were strangers to the suit schedule property attempted to put up an illegal construction on the said property by dispossessing the plaintiffs. Hence the present suit was filed seeking for a decree of mandatory injunction to direct the Defendants to demolish the unauthorised construction attempted to be put up.

On service of notice, the Defendants remained absent and were placed as *exparte*.

The trial Court on considering the plaint averments dismissed the suit of the Plaintiffs solely on the ground that the Plaintiffs had not led any evidence. Hence the present appeal.

3. Heard the learned Counsel appearing for the Appellant. Notice to Respondents 1 and 2 have been dispensed with. Respondent No. 3 has been served and unrepresented.

4. The learned Counsel appearing for the Appellants contends that the impugned judgment and decree is bad in law and liable to be set aside. He contends that no adequate opportunity was given to them to lead the evidence in support of their case. Failure to do so has led to miscarriage of justice. He relies on the judgment reported in *Smt. Aisha Bi and another Vs. M. Shamsher Khan*, to contend that the Court should have applied its mind and thereafter passed appropriate orders.

5. While considering the case of the plaintiffs, the trial Court Came to the conclusion that it is necessary for the Plaintiffs to establish their exclusive possession so as to seek the relief of permanent injunction against the Defendants by leading evidence. Failure to do so has led to dismissal of the suit.

6. The learned Counsel appearing for the Appellants submits that they may be given an adequate opportunity to lead their evidence in order to establish their case. He further contends that due to the lapse on the part of the Plaintiffs in not leading evidence, the impugned Order has been passed. He further submits that in view of the precious time lost by this Court, reasonable costs may be imposed. In view of the financial situation of the plaintiffs, he is willing to pay costs of Rs. 25,000/-.

7. The APPELLANT's counsel places a reliance on the judgment reported in *Smt. Aisha Bi and another Vs. M. Shamsher Khan*, It has been held therein, by relying on the judgment of Hon''ble Supreme Court of India reported in *Balraj Taneja and Another Vs. Sunil Madan and Another*, that when the plaint itself indicates that there are disputed questions of fact, involved in the case regarding which, two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the Plaintiff to prove the facts. However, in the instant case the Court below having coming to the conclusion that the evidence is required in order to establish the case of the Plaintiffs and the same having not been done, the trial Court committed an error in dismissing

the suit of the Plaintiffs solely on the ground of absence of evidence. In view of the law laid down by the Hon"ble Supreme Court of India, the trial Court should have directed the Plaintiffs to lead evidence in support of their case. In view of the finding of the trial Court that such evidence is necessary and the failure to do so, the matter requires to be remitted back to the trial Court for fresh adjudication. Hence, I am of the considered view that the judgment and decree requires to be set aside and the Plaintiffs be given an adequate opportunity to lead their evidence.

8. For the aforesaid reasons, I pass the following order:

- i) The appeal is allowed.
- ii) The judgment and decree dated 15.10.2004 passed by XVII Additional City Civil Judge, Bangalore City in O.S. No. 8507/2000 is set aside.
- iii) The matter stands remitted to the trial Court for fresh disposal in accordance with law.
- iv) The trial Court shall issue fresh notices to the Defendants.
- v) In view of the suit being filed in the year 2002, the trial Court shall hear and dispose off the suit within a period of six months from the date of receipt of copy of this order.
- vi) The Appellants are directed to pay a costs of Rs. 25,000/- with the registry of this Court within a period of four weeks from today.