

(2012) 11 KAR CK 0092

In the Karnataka High Court

Case No : Regular Second Appeal No. 209 of 2004 and Regular second Appeal No. 210 of 2004 (DEC)

Gurappa Mural

APPELLANT

Vs

Irappa Revadikar (Nidagundi) Since Deceased By His Lrs.

RESPONDENT

Date of Decision : 27-11-2012

Acts Referred:

Citation : (2012) 11 KAR CK 0092

Hon'ble Judges : Mohan Shantanagoudar, J

Bench : Single Bench

Advocate : Veeresbh B. Patil in Regular Second Appeal No. 209 of 2004 and Regular second Appeal No. 210 of 2004 DEC, for the Appellant; Amaresh S. Roja, Advocate in Regular Second Appeal No. 209 of 2004 and Regular second Appeal No. 210 of 2004 (DEC), for the Respondent

Final Decision : Allowed

Judgement

Mohan Shantanagoudar

1. These second appeals are filed by the original defendant.

The respondent herein filed a suit for mandatory injunction praying for demolition of the building constructed by the appellant herein encroaching upon his property. Perpetual injunction is also sought for restraining the defendant from constructing the building further.

The case of the plaintiff is that he is the owner of the property bearing CTS No. 2972 and whereas the defendant is the owner of the property bearing CTS No. 2968. Both the properties are abutting each other. However, the defendant started to construct the building encroaching certain portion of CTS No. 2972.

Case of the defendant is that he has not encroached upon the plaintiffs property but he has constructed the building on CTS No. 2968 after obtaining due permission from the Municipal authorities.

The Trial Court on evaluation of material on record held that the defendant has encroached an extent of 5 feet of plaintiffs property and ordered the defendant to pay damages to the plaintiff for saving the building. The Trial Court relied upon the submission made by the plaintiffs counsel during the course of argument that instead of demolishing the building, necessary damages may be awarded to the plaintiff.

As against the judgment of the Trial Court the plaintiff as well as the defendant preferred appeals in R.A. No. 77/2003 and R.A.No. 61/1998. Both the appeals were heard together by the First Appellate Court. The First Appellate Court also concluded that the defendant has encroached upon about 5 feet of the area belonging to the plaintiff and has constructed the building. However, the First Appellate Court modified the judgment of the Trial Court by directing the defendant to demolish the building. As against the judgment of the First Appellate Court, these second appeals are filed by the unsuccessful defendant.

At the time of admission the following question was raised.

Whether the findings of the 1st appellate Court reversing the decree passed by the trial Court granting compensation in lieu of mandatory injunction, is perverse, arbitrary and contrary to law?

2. Both the Courts below on evaluation of material on record have rightly concluded that the defendant has encroached upon the plaintiffs property and has constructed the building. The encroached portion is stated to be about 6 to 7 feet x 10 feet. The major portion of the building is situated in the property of the defendant. However certain portion of the building is occupied by the plaintiffs property also. It is not in dispute that the building was already constructed when the suit came to be filed. The First Appellate Court has set aside the judgment of the Trial Court in so far as it relates to direction relating to the payment of damages. It is by now well settled that wherever the payment of damages would be equitable, the mandatory injunction of demolishing the building may not be granted.

3. In the matter on hand, the plaintiff can be suitably compensated by paying damages. Thus the Trial Court had taken just decision directing the defendant to pay damages. However, the damages awarded by the Trial Court was on the lower side. The judgment of the Trial Court discloses that the Advocate for the plaintiff fairly conceded before the Trial Court that the damages may be awarded against the defendant. On the basis of such submission the Trial Court awarded damages. Even otherwise it was open for the Trial Court to take its decision on the said issue. Even without concession of the Advocate, the Court in such matters levy damages instead of directing to demolish the building. However, the First Appellate Court strangely has concluded that there is no record to show that the Advocate for the plaintiff conceded before the Trial Court. There need not be any record for the Advocate's concession. The Advocates concede before the Courts during the course of arguments. Thus, generally there will be no record in

that regard unless the Advocates file memo.

4. Be that as it may, this Court is of the opinion that the interest of justice will be met if the damages are ordered to be paid by the defendant to the plaintiff. The suit is of the year 1985. The encroachment is made in the year prior to 1985. The encroachment made is some extent of 6 to 7 feet x 10 feet. The area in question is a taluka place. Having regard to the totality of facts and circumstances, in my considered opinion, interest of justice will be met if the defendant is directed to pay Rs. 30,000/- towards damages. Accordingly, the following order is made:

ORDER

(i) The suit in O.S.No. 91/1985 is decreed in part.

(ii) The defendant instead of demolishing the building has to pay damages of Rs. 30,000/- (Rupees Thirty Thousand Only) to the plaintiff, within three months from this day. If the said amount of Rs. 30,000/- is not deposited within three months from this day, the same would carry 12% interest per year.

(iii) Rest of the judgment passed by the First Appellate Court stands confirmed.

Appeals are allowed in part to the aforementioned extent.