

(2017) 03 KAR CK 0064

In the Karnataka High Court

Case No : Regular Second Appeal No. 7062 of 2009

Gurushanth

APPELLANT

Vs

Mehaboob Shahi Kalburga Mills

RESPONDENT

Date of Decision : 13-03-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Section 1
Specific Relief Act, 1963 — Section 38

Citation : (2017) 2 AirKarR 541

Hon'ble Judges : Aravind Kumar, J.

Bench : Single Bench

Advocate : Sri. Hema Kulkarni, Advocate, for the Appellant; Sri C.C. Malipatil, Advocate, for the Respondent No. 1; Sri. R.A. Patil, Advocate (absent), for the Respondent No. 2

Final Decision : Dismissed

Judgement

Aravind Kumar, J.—This is a plaintiff's second appeal calling in question the judgment and decree dated 11-12-2008 passed in RA No.144/2007 dismissing the first appeal by confirming the judgment and decree dated 23-08-2007 passed in OS No.399/2003, dismissing the suit of the plaintiff for perpetual injunction.

2. This appeal came to be admitted on 08-09-2010 for consideration of the following substantial questions of law.

"1. Whether the Courts below were justified in ignoring the admissions of the parties? and

2. Whether the Courts below have taken note of the fact that the plaintiff having been put in possession, there was no material to show he was subsequently dispossessed?"

3. Facts in brief which has resulted in filing of this second appeal are as under:

Plaintiff filed the suit for a bare injunction to restrain the defendants from interfering with his possession over the suit schedule property, contending inter alia that suit property bearing Sy. No.110 of Brahampur, measures 11acres, 12 guntas and it is part and parcel of total area measuring 155 acres and same was auctioned every year; plaintiff has obtained the suit property on lease and has been paying rent and lease commenced in the year 2001 and it has been continued every year; 15 days prior to the filing of the suit, he requested the 1st defendant to sell the suit property to him by taking into account that he belongs to Schedule Caste community and also the fact that father and mother of the plaintiff had rendered services in the 1st defendant Mill, for which defendant agreed to sell a portion of the said land. It was further contended that there are about 400 to 500 petty vegetable vendors who are sitting and vending vegetables in the suit property and on account of threat posed by the defendant on 05-03-2003 and demand made to hand over possession and threat posed that he would be dispossessed by force, permanent injunction was sought for. It was also contended that 400 to 500 families who are depending upon the vegetable vending business carried on in the suit property would be put to hardship and they are catering to public needs. Hence, plaintiff claiming to be in settled possession of suit property and contending that defendant or any other person claiming under them has no right to dispossess plaintiff by force, sought for a decree of perpetual injunction against the defendants.

4. The defendant Nos.1 and 2 have filed the written statement and first defendant contended that the suit property including entire Sy.No.110 of Brahampur, Gulbarga is owned by the defendant, a Government of India undertaking. In view of Sick Textiles Undertaking (Nationalization) Act, 1974 coming into force in 1974, the defendant Mill including all the assets and liability have been taken over by the Government of India including all its assets and liabilities and it is a public premises. It was contended that Civil Court has no jurisdiction to entertain the suit, in view the bar contained under the provisions of Public Premises (Eviction of Unauthorized Occupants) Act. It was contended that in pursuance of sanction of scheme of BIFR tenders are called for and entire land pertaining to the defendant-Mill is being sold. It was also contended that a false claim over the suit property is being laid by the plaintiff on the fabricated order or communication dated 29-10-2002. It was also pleaded that portion of the land in Sy.No.110 adjacent to the first defendant-Mill compound wall situated on the eastern side was being given on contract basis on tri-monthly period to permanent employees of the Mill on tender basis to sell vegetable from 06-00 a.m. to 12-00 a.m. and for the month of April-2001 tender submitted by the plaintiff came to be accepted for three months from 25-04-2001 to 24-07-2001. Just prior to completion of the tender period, on 21-07-2001 fresh tender was called for the next three months i.e. from 07-08-2001 to 06-11-2001 and same was given to one Sri. Annaraya as informed by the plaintiff by communication dated 06-08-2001 requesting for transferring his (plaintiff's) tender deposit amount to the account of said Sri. Annaraya. For the next period i.e. 07-11-2001

to 06-02-2002 tender was called for by notice dated 24-10-2001 and plaintiff submitted his tender for the said period offering to pay Rs. 800/- per day. Likewise one Sri. Abbas Ali also submitted his tender offering to pay Rs. 601/- per day for the same period and likewise other tenderers also submitted their offers. Plaintiff's tender came to be accepted and plaintiff was also intimated by communication dated 05-11-2001 to take charge from Annaraya. However, plaintiff is said to have instigated said Annaraya to file a suit OS No.585/2001 against 1st defendant-Mill and an order of temporary injunction came to be granted on 22-11-2001. In the said suit plaintiff herein filed an affidavit stating thereunder that he has no intention to take the vegetable market on lease and he has no objection to continue Sri. Annaraya. Hence, plaintiff was intimated on 29-11-2001 by 1st defendant that contract awarded to the plaintiff for running vegetable market in suit schedule property was cancelled and plaintiff was called upon to collect the earnest money paid at the time of submitting the tender. In the meanwhile defendant filed an appeal against the order of temporary injunction and in the said appeal MA No.106/2001, by order dated 10-01-2002 temporary injunction granted in OS No.585/2001 was vacated.

5. The plaintiff filed one more suit in OS No.33/2002 against the first defendant for perpetual injunction to restrain the 1st defendant from giving works of tender to Mr. Abbas Ali or to any other person other than plaintiff and same is pending. In the said suit I.A. No.1 was filed for temporary injunction and said application came to be dismissed by order dated 24-01-2002, as per Ex.D2. Said suit came to be dismissed on 30-06-2006 as per Ex.D4.

6. The second defendant who purchased the suit property under registered sale deed dated 24-07-2004 has developed the said property into sites of various dimensions for being sold to the members of the public. 2nd defendant contended that plaintiff was never in possession of suit schedule property and it is asserted that possession of suit schedule property is with it. On these amongst other grounds, first defendant contended that plaintiff was never in possession of the suit property and as such prayed for dismissal of the suit.

7. Trial Court on the basis of the pleadings of the parties framed issues and after evaluating the entire evidence tendered by the parties held that plea of the plaintiff cannot be accepted since plaintiff did not subject himself to the cross-examination and plaintiff had also not cross-examined the defendant's witnesses namely DW1 and DW2. It was also further held by the trial Court, that issues disclosed that burden was on the plaintiff and he had failed to discharge the burden of proving the issues. Hence, plaintiff's suit came to be dismissed.

8. Being aggrieved by the same, an appeal came to be preferred by plaintiff in RA No.144/2007. Lower Appellate Court after considering the arguments of the respective learned advocates appearing for the parties and on re-appreciation of entire evidence, held that issues framed by the trial Court are proper and insufficient and on account of plaintiff having not subjected himself for cross-examination, his evidence cannot be eschewed. It was also held by the First

Appellate Court, that plaintiff was extended sufficient opportunity by trial Court to cross-examine the defendant's witnesses and in fact DW1 was also cross-examined and as such held that there was no error in the trial Court judgment and as such dismissed the appeal by judgment and decree dated 11-12-2008.

9. I have heard the arguments of Sri. Subramanya Jois, learned Senior Counsel, appearing on behalf of Hema L. K. advocate for appellant-plaintiff and Sri. A. M. Nagaraj, advocate appearing on behalf of Sri. R.A.Patil, respondent No.2. Perused the judgment and decree passed by the trial Court as well as judgment of Lower Appellate Court and also the records secured from the courts below.

10. It is the contention of Sri. Subramanya Jois, that several admissions in the written statement of the defendant which has been ignored by with the Courts and pleas found in the written statement of both defendants disclose that plaintiff was in settled possession of the suit property and non-consideration of these admissions has resulted in erroneous judgments being delivered by with the courts. He would also elaborate his submissions by contending that in the written statement first defendant has admitted that plaintiff had been indicated as a lessee of suit schedule property and this would indicate plaintiff is in lawful possession of the suit property and as such there has been non-consideration of said admission in the pleadings by the courts below and if same had been considered in proper perspective it would have resulted in suit being decreed.

11. He would also contend that even otherwise there has been violation of principles of natural justice, inasmuch as plaintiff has not been afforded opportunity to tender himself for cross-examination and courts below had not permitted the plaintiff to cross-examine the defendant's witnesses. Hence, he prays for substantial question of law being answered in favour of the appellant/plaintiff. In support of his submission, he has relied upon the following judgments:

1. AIR 1977 SC 2262 (Smt. Chander Kali Bai and others v. Shri. Jagdish Singh Thakur and another.

2. AIR 1982 Madras 431 (M. R. Ramakrishnan v. The Assistant Director of Ex-Servicemen Welfare (District Soldiers, and Airmen Board), Tiruchirapalli and others.

3. AIR 1994 Kerala 164 (B. Valsala v. Sundaram Nadar Bhaskaran).

12. Per contra, Sri. A. M. Nagaraj would support the judgment and decree passed by the courts below and contends that the findings recorded by the courts below are all questions of fact and no substantial law is involved, much less the one framed on 08-09-2010 and as such he prays for dismissal of the appeal.

Re: Substantial Question of Law No.1.

13. As could be seen from the pleading namely the written statement filed by defendant Nos.1 and 2, it would clearly indicate that first defendant in the

written statement filed on 31-07-2004, apart from categorically contending that suit property is a " public premises-has also contended that a portion of the property bearing Sy.No.110 was being used for the purpose of vegetable market and the description of the property so used is specifically indicated at in paragraph 11-D of its written statement. It is also specifically contended thereunder that said area was being given on contract basis for a period of three (3) months to the permanent employee of the Mill since April-2000 by calling for tenders. Plaintiff was also the successful tenderer for the period of 25-04- 2001 to 24-07-2001 and thereafter he has been not given or allotted the tender and as such it was specifically denied by the defendant that plaintiff was in possession of any portion of Sy.No.110. A stray sentence in paragraph 11(d) to the effect: "said tender of the plaintiff was accepted and the same was leased to the plaintiff for a period of (3) months accepting his tender to deposit Rs. 650/- per day from 25-04-2001 to 24-07-2001 from 06-00 a.m. to 12-00 noon to the defendant along with other terms and conditions of tender", cannot be construed as an admission on the part of the defendant about alleged settled possession over the suit property by the plaintiff and nor such plea can be construed as a admission on the part of the defendant as plaintiff being in possession. In that view of the matter, the findings recorded by the courts below cannot be held as the said courts having ignored the admissions of the parties. with the courts below have properly and for justifiable reasons has not held that there is no explicit admission on the part of the defendant about plaintiff being in settled possession of the suit property. Isolated admission in pleadings would not be sufficient to decree a suit for permanent injunction particularly when entire averments made in the written statement would suggest or indicate that defendant has denied the averments made in the plaint. In that view of the above, 1st substantial question of law is answered in the affirmative i.e. against the appellant-plaintiff and in favour of respondents-defendants.

Re: Substantial Question of Law No.2.

14. At the out set it requires to be noticed that plaintiff asserted that he has been put in possession of the suit property and because of such plea having been raised, trial Court had framed issue Nos.1 and 2, and it reads as under:

1. Whether the plaintiff proves that, he is in lawful possession of the suit property?
2. Whether the plaintiff further proves the illegal interference by the defendants in his possession over the suit property?

15. While adjudicating these issues, trial Court has rightly arrived at a conclusion that the burden was cast on the plaintiff to prove said issues and on account of plaintiff having not tendered himself for cross-examination it was held that plaintiff had failed to discharge burden cast on him. Lower appellate Court while re-appreciating the plea of the plaintiff of alleged violation of principles of natural justice by the trial Court in not affording opportunity has noticed that plaintiff

never entered the witness box after tendering the examination-in-chief and did not subject himself to cross-examination. No effort was made by plaintiff to appear before Trial Court to get himself tendered for cross-examination. No application was filed in that regard. It is also noticed by the first appellate Court that DW1 was partly cross-examined and thereafter no steps were taken to further cross-examine the DW1 or other witness, and as such it came to be held by the first appellate Court that despite full opportunity extended to the plaintiff, he had not made use of the same to cross-examine the witnesses. It is in this background, both courts held that plaintiff had failed to discharge the initial burden cast on him to prove his alleged settled possession of the suit property and he had failed in that regard.

16. That apart, First Appellate Court while examining the plea of plaintiff as to whether plaintiff had been in possession of the suit property has noticed that defendants had filed a suit OS No.82/2004 against the plaintiff for perpetual injunction and after a full fledged trial, suit came to be decreed by judgment and decree dated 21-10-2006 vide Ex.D59, where under a specific finding has been recorded that defendants in the present suit i.e. respondents herein are in possession of the suit property. Courts below have also taken into consideration that plaintiff had filed OS No.33/2002 as per Ex.D1 against 1st defendant to restrain 1st defendant from giving works of tender to Mr. Abbas Ali by admitting thereunder that Mr. Annaraya had been earlier issued with the tender for conducting vegetable vending in suit schedule property and said suit having been dismissed on 30-06-2006 vide Ex.D62 had clearly established that plaintiff was not in possession much less settled possession of the suit property as on the date of the suit in question and said finding had reached finality.

17. In fact the defendants in the present suit had filed OS No.82/2004 for permanent injunction against the defendant therein i.e. plaintiff herein seeking a judgment and decree of permanent injunction against defendant therein i.e. plaintiff herein from interfering with their possession and enjoyment of suit schedule property and had obtained an order of temporary injunction on 16-04-2004 which came to be assailed by plaintiff in MA No.16/2004. The appellate Court dismissed the appeal and affirmed the order of temporary injunction granted in favour of the respondents herein as per Ex.D65.

18. In the present suit i.e. O.S.399/2003, the plaintiff herein has filed an application I.A. No.1 under Order 39, Rules 1 and 2 CPC seeking ad interim order of temporary injunction to restrain the first defendant or any other officers or officials or any other authority on their behalf from interfering in the possession of the plaintiff over the suit schedule property. The said application came to be allowed by order dated 29.11.2003. Being aggrieved by this order, the first defendant herein filed an appeal in M.A. No.64/2003. The Lower Appellate Court by judgment dated 13.04.2003 allowed the appeal and set aside the order dated 29.11.2003. Being aggrieved by the same, plaintiff herein filed W.P. No.24427/2004. An order of status-quo had been granted on 03-08-2004 while

disposing the writ petition by order dated 04-11-2006 and directing the said order of status-quo would be in force till disposal of the suit in question i.e. O.S. No.399/2003. Hence, relying upon this order, the appellant herein has contended that it would establish plaintiff is in settled possession. However, the order of status-quo granted on 03-08-2004 came to be vacated on 01.12.2004. Being aggrieved by this order the appellant herein filed Writ Appeal No.5504/2004 and said appeal came to be dismissed as not maintainable by order dated 30-05-2005 Ex.D66. Thereafter, second defendant herein filed Review Petition No.499/2006 seeking review of the order dated 04-11-2006 passed contending that order of status-quo granted on 03-08- 2004 and confirmed on 04.11.2006 in WP No.24427/2004 be vacated, since by order dated 01-12- 2004 passed in the same writ petition had already been passed. The said review petition came to be allowed and order dated 04.11.2006 passed in WP No.24427/2004 came to be reviewed and modified as under:

"Accordingly, the writ petition is disposed of. The trial Court is directed to dispose of the suit OS No.399/2003 within a period of six months from today, since the order of status-quo has been vacated by this Court 01-12-2004."

(Emphasis supplied by me)

19. Thus, as on 01.12.2004 there was no order in operation either in favour of the present plaintiff or an order of injunction or status-quo operating against the defendants in the present suit. On the other hand, the order of temporary injunction passed in O.S. No.82/2004 on 16.04.2004 had been affirmed in M.A. No.16/2004 on 24.01.2006 as per Ex.D-65. In fact, the suit filed by the defendants in question namely O.S. No.82/2004 against the plaintiff herein came to be decreed on 21.10.2006 as per Ex.D59 and as such it would not lie in the mouth of the present plaintiff to contend that he has been in possession of the suit schedule property or any portion thereof by virtue of any orders of the Court or otherwise.

20. The above facts would clearly indicate that at no point of time the plaintiffs alleged possession had been established or recognised. On the other hand, in various proceedings it has been held that plaintiff is not in possession of the suit property and as such question of courts below having not taken note of the said fact about plaintiff having been put in possession or he having been subsequently dispossessed did not arise.

21. For the reasons afore stated, this Court is of the considered view that substantial question of law No.2 is answered by holding that at no point of time the courts below had held plaintiff having been put in possession of the suit property and continued thereafter and as such question of plaintiff being dispossessed from the suit schedule property did not arise.

22. For the reasons afore stated, I proceed to pass the following:

ORDER

(i) Second appeal is hereby dismissed by answering the substantial questions of law against the appellant and in favour of the respondents.

(ii) Judgment and decree dated 11-12-2008 passed in RA No.144/2007 by the III Addl. Civil Judge (Sr.Dn.), Gulbarga is hereby affirmed.

23. No costs.