

(1999) 02 KAR CK 0057

In the Karnataka High Court

Case No : Regular First Appeal No. 350 of 1990

Janab Nizar Ahmed Sheriff

APPELLANT

Vs

A. Kannan

RESPONDENT

Date of Decision : 16-02-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 4 (2), Order 2 Rule 2, Order 9 Rule 3, Order 9 Rule 8

Citation : (1999) 3 KarLJ 359

Hon'ble Judges : T.N. Vallinayagam, J

Bench : Single Bench

Advocate : Sri Younious Ali Khan, for the Appellant; Sri A. Gunashekar, for the Respondent

Judgement

1. The defendant is the appellant. The suit for declaration of ownership and for possession apart from the mandatory injunction for demolition and removal of unauthorised construction and also for mesne profits have been decreed by the Trial Court. Challenging such decree the defendant has preferred the present regular first appeal.

2. The brief facts of the plaintiff's case are that the plaintiff claimed to be the absolute owner of the suit site bearing No. 4 in Sy. No. 132 at Kacharakanahalli, Bangalore North Taluk, having purchased the same on 21-11-1980 from one Smt. Muniyamma, W/o. T.M. Reddy. The re-cords of the panchayat like R of R and ILR has been changed in the name of the plaintiff; but however as the panchayat was not collecting taxes, the plaintiff has not paid the taxes. On 1-6-1986 the plaintiff was surprised to find that the defendant had trespassed upon the suit property and constructed a residential house with asbestos sheet roof in a portion of the suit site; the issue of legal notice on 9-6-1986 having no use, and consequently the suit came to be filed.

3. The contention of the defendant in the written statement was that he is the absolute owner of the property having been purchased the same from

Muniyamma on 15-4-1980 under the registered sale deed. The said property has been assessed for tax and the defendant also obtained no objection certificate from village panchayat; only then the defendant has constructed the house and he has given a permission from the Electricity Board for electricity supply; on 14-5-1984. The site claimed by the plaintiff is totally different from the defendant's property and the defendant has put up construction on his own site.

4. On the above pleadings, the following issues have been framed by the Trial Court.-

1. Whether the plaintiff proves that he is the owner of the suit schedule property?
2. Whether the defendant proves that he is the owner of the suit property?
3. Whether the plaintiff is entitled for declaration, and mandatory injunction?
4. Whether suit is bad for non-joinder of parties?

Additional issue

5. Whether plaintiff is entitled for the relief of mesne profits as claimed?

Answering the Issue Nos. 1 and 3 in the affirmative and Issue Nos. 2 and 4 in the negative the suit was decreed as prayed for by the Trial Court on consideration of the evidence of P.W. 1, Exs. P. 1 to P. 7(a) and D.W. 1, Exs. D. 1 to D. 6.

5. The contention raised in the grounds of appeal are that the learned Judge was prejudiced against the Counsel for the defendant and therefore Counsel did not argue the matter; Issue No. 2 has been decided against the defendant which ought to have been held in his favour as he has purchased the property and proved his case by producing the original sale deed, site assessment extract, tax paid receipts, no objection certificate and the latest tax paid receipt etc. The site claimed by the plaintiff is quite different than the one claimed by the defendant; the reason given by the learned Judge on Issue No. 1 is not sustainable; the vendor of the plaintiff has not been made a party in spite of the fact that an issue was framed whether the suit is bad for non-joinder of the party; no reasoning was given on Issue No. 4; the schedule mentioned in the plaint and the schedule mentioned in the sale deed of the defendant are quite different. The north of the appellant's property is Ambika's property. Whereas the north as shown as private property and the south by Ambika's property; While in paragraph 13 of the written statement was made much by the Trial Court but the Court below does not consider paragraph 8 of the written statement wherein the defendant has categorically stated that the property is totally different from the defendant's property.

Heard the Counsel.

6. The only question to be decided in this appeal is whether the property of the plaintiff is different from that of the defendant and whether the decree of the

lower Court is sustainable?

7. The main grievance of the appellant appears to be that final argument was not made by the Counsel for the appellant/defendant and no proper opportunity was given. The Court appears to have made observation that the defendant's Counsel remained absent throughout and in spite of granting several adjournments for arguments, there has been no arguments at all from the defendant's side. Therefore, the Court was compelled to pass an order going through the evidence on record keeping in view of the pleadings of the parties.

8. The CPC prescribe the mode of conduct, the trial in several of its order; to begin with Order 9, Rule 3 contemplates the dismissal of the suit if none of the parties appeared and Order 9, Rule 8 contemplates that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed. Order 10 contemplates the oral examination of the parties by the Court. In fact Order 10, Rule 4(2) says that when the Court postpone on the hearing of the suit for answering the question raised by the Court and if the parties does not appear on that day, the judgment shall be delivered against the absentee parties. While Order 12 speaks about the admissions and Order 14 speaks about the settlement of issues and determination of suit on issues of law or on issues agreed upon and proceed to pronouncement of judgment, Order 14 contemplate disposal of the suit at the first hearing when the parties are not at issues. When the parties at issues and summons were issued as contemplated under Order 16, Order 17 contemplates adjournment for the purpose of hearing of the case and Order 18 deals with the hearing of the suit and examination of the witnesses. Order 18, Rule 1 says that the plaintiff has every right to begin unless the defendant admits the fact in which case the defendant has right to begin. Really speaking no stage is prescribed for the party beginning to reserve his right to produce rebuttal evidence. Order 18, Rule 2 speaks about "the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove". Order 2, Rule 2 says that either parties "shall state his case and produce his evidence if any and may then address general whole case". Order 2, Rule 3 says that "the parties begin with case except general on whole case". So Order 18, Rule 2 only contemplates the arguments which normally a Counsel is entitled to submit. But the stage contemplated in Order 2 is that when the evidence of the parties should be given and the argu- proprietor/part-ner(s)/ Director(s) argument heard, evidence of the other party also should be given and the arguments heard and finally replied by the party beginning on the whole case. These are the three stages in which the argument is contemplated. Now for the purpose of convenience, the Courts have adopted the procedure of completing the evidence of both the parties and then "state his case" by the Counsel. The question to be considered is whether stating the case is essential or whether the Court can deal with the matter if an argument is not addressed by the Counsel?

9. Once the evidence is recorded by the Judge he understands the case and he can take care of the entire problem on hand and argument may not be necessary unless the Judge has got doubt on a particular aspect of the case. In fact in Cr. P.C. it is permitted to file written arguments though not as a rule, such written arguments is permitted even in civil cases. There is no prohibition for the submission of the written arguments and consequently in my opinion, written arguments may be permitted by the Trial Judge in a particular case. Therefore, arguments before the Trial Court cannot be considered as an essential ingredients. Though at the same time, I preferred to hold that the party cannot be deprived of what his Advocate wants to argue and to say finally on the evidence adduced and the legal submission if any. In the present case, there is a complaint that despite so many adjournments given, the Advocate has not submitted his arguments. In my opinion if the written argument is permitted such complaint can be avoided as I find that in a number of cases the very same complaint has been made by the parties to the suit. Therefore, the Trial Courts are directed to permit and obtain the written arguments and apart from the written arguments, oral submission may be permitted if the Court find that submission is necessary for arriving at correct conclusion. In this case I find that the non-submission of the arguments by the defendant has not in any way affected the disposal of the case. But however I find that in case of identity of the property, the best way is to appoint the Commissioner. I find that the Commissioner is not appointed in this case for really finding out the identity of the property as complained of by the parties. In a case of this nature, appointment of a Commissioner is a must and the Court in my opinion must compel the parties to appoint Commissioner and even the Court can unilaterally appoint the Commissioner to have the clear report on the location of the property, so that the complaint of identity can be solved without any problem or difficulty.

10. In this view, without expressing any opinion on the merits I set aside the Judgment-decree of the Court below only for the limited purpose of appointing Commissioner and to find out the real identity of the property and to see that justice is not only done but also really done and remitting the case back to the Trial Court for the above purpose. The parties are directed to appear before the Trial Court on 5-4-1999. In the circumstances no order of cost.