

(2015) 01 KAR CK 0522

In the Karnataka High Court

Case No : Regular Second Appeal No. 287/2011 (INJ)

J.B. Gangadharappa and Others

APPELLANT

Vs

K.K. Azez and Others

RESPONDENT

Date of Decision : 13-01-2015

Acts Referred:

Citation : (2015) 01 KAR CK 0522

Hon'ble Judges : Ravi V. Malimath, J

Bench : Single Bench

Advocate : K. Abhinav Anand, for the Appellant; Rajendra S., Advocate for S.V. Prakash, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Ravi V. Malimath, J.

1. Aggrieved by the judgment and decree of the First Appellate Court, setting aside the judgment and decree passed by the trial Court, dismissing the suit and thereby the First Appellate Court decreeing the suit of the plaintiffs and directing the defendants to remove the construction/shed put up in the suit schedule property within thirty days from that day and to restrain the defendants from interfering with the usage of the road and putting up any construction thereon, the legal representatives of defendant No. 6 and defendant No. 7 have filed this appeal. The parties will be referred to as per their rank in the trial Court.

2. All the plaintiffs have got their houses abetting the suit schedule property, and back yard as per the description in the plaint rough sketch and they are residing therein since time immemorial. To the north of their houses and back yard their lies the suit schedule public road, marked as RXYZ in the plaint sketch. According to the plaintiffs, defendants 6 and 7 are running a touring cinema hall to the further north of the suit road. The cinema hall property has no compound wall on all its sides, but they are in the process of constructing the same. At the instance of the defendants 6 and 7, the defendants 1 to 5 have put up temporary sheds in

the suit road marked as "B to F" in the plaint sketch. They are running pan stalls and a hotel in the said sheds, thereby causing difficulty to the plaintiffs to take their cattle to the back yard from the suit road and they are also causing difficulty to the public. Hence, the instant suit was filed seeking mandatory injunction to direct the defendants to demolish the structures thereon and for a permanent injunction to restrain them from interfering with the peaceful usage of the road.

3. On service of summons, defendants entered appearance and filed written statement. Defendant No. 6 has filed the written statement and denied the plaintiffs claim. He admits the property of the plaintiffs. That there is inexistence of the cinema theatre, but the other allegations in the plaint were denied. He denied that there was a road in existence since a long time. Though the defendants 6 and 7 are trying to construct a compound wall on the alleged road and that the 6th defendant has already constructed a small building about two months prior to filing of the suit and that the building box shops, hotels etc. which are shown in the plaint sketch, which are situated on the middle of the alleged road and that they are causing inconvenience to the cattle etc. was denied.

4. On the basis of the pleadings, the trial Court framed the following issues:

- i) Whether plaintiffs proves that the suit schedule property as is shown in sketch as RXYZ which is an public road?
- ii) Whether plaintiffs further proves that 6th and 7th defendants constructed the foundation on public road unauthorisedly and it would cause inconvenience to move cattles, public vehicles etc.?
- iii) Does further plaintiffs proves that they are entitled for relief as prayed for?
- iv) What decree or order?

5. In support of the case, three witnesses were examined on behalf of the plaintiffs and seven exhibits were marked on their behalf. Two witnesses were examined on behalf of the defendants and 10 exhibits were marked on their behalf.

6. The issues were held in the negative and the suit was dismissed.

7. Aggrieved by the same, plaintiffs preferred an appeal before the Civil Judge (Sr. Dn.) and JMFC, Sorab, which was allowed. The judgment and decree of the Trial Court was set aside. The suit of the plaintiffs was decreed by granting a mandatory injunction directing the defendants to remove the construction/shed put up on the suit property within 30 days from that day and for the permanent injunction restraining the defendants from using the road or from putting up any further construction. Aggrieved by the same, the legal representatives of defendants 6 and 7 have filed this appeal.

By the order dated 27.11.2013, the appeal was admitted to consider the

following substantial question of law:

"When the trial Court dismissed the suit of the respondents herein holding that there is no public road on which the sheds have been put up and gave finding that the plaintiffs are not entitled to the mandatory injunction by assigning consistent and cogent reasons, whether the first appellate Court was justified in reversing the Judgment and Decree of the trial Court without assigning consistent and cogent reasons to over-come the finding of the trial Court?"

8. The appellants contend that the impugned order is erroneous and liable to be set aside. The First Appellate Court committed an error in considering the material evidence on record. That the Trial Court having considered the evidence in detail has rightly dismissed the suit. The Appellate Court has failed to consider the reasoning of the Trial Court and has committed an error in reversing the findings.

9. On the other hand, the learned Counsel for the respondents contends that there is no merit in this appeal nor is there any substantial question of law that arises for consideration. Hence, he prays for dismissal of the appeal.

10. The First appellate Court while considering the judgment and decree of the Trial Court specifically dealt with the areas on which the Trial Court committed an error in dismissing the suit. On framing issues for consideration, it firstly noticed the fact that the evidence of 6th defendant was not considered by the Trial Court. That even though the trial Judge has noticed the same in its judgment, the evidence of defendant No. 6 becomes extremely crucial for the determination of the case, inasmuch as he has admitted to the plea alleged against him. In the cross-examination of defendant No. 6, he has categorically admitted about the existence of the suit road and also of he obtaining approval, namely the sanction to built a cinema theatre. He has even admitted that, Ex. P6 was drawn by him and he has narrated that there exists a road.

11. The Trial Court having referred to the cross examination of defendant N. 6, has failed to consider it appropriately. It is on this reasoning that the First Appellate Court was justified in considering the cross-examination of defendant No. 6, wherein he has admitted to the existence of the road as mentioned in the plaint sketch.

Hence, the judgment and decree of the trial Court was reversed. On considering the same the First Appellate Court has rightly decreed the suit. The First Appellate Court having considered the evidence of defendant No. 6 has rightly held that the plaintiffs are entitled for a mandatory as well as permanent injunction.

12. When in the light of the averments made in the plaint, the same was admitted by the defendant No. 6 in his cross-examination, nothing else remains for consideration. The contention of the appellants with regard to the discrepancy in the properties in the sale deed and as to the existence in the property either

to the north of his property or to the south of his property, is of no consequence. He having admitted to the road being in existence, plaintiffs are entitled to the decree as sought for. The Commissioner was appointed to submit a report and also annexed the sketch in support of the same. The evidence of the Commissioner was also recorded. The same does not support the case of the defendants. Even in the Commissioner's report, he has narrated the fact that there exists a road, but there is no evidence or material to show that it is a public road. Whether it is a public road or not, is of no consequence. So far as the defendants are concerned, the fact is the admission of the defendant which is supported by the report of the Commissioner that there exists a road. It is needless to state that the road cannot exist inside the private property of an individual and that too a property measuring 325 ft. x 60 ft. It is beyond logic to accept that there could be any road in such a small property. The evidence on record would show that the width of the road. The report of the Commissioner and the sketch having been marked as C4 and C5, would show that the width of the road is 32.9 ft. and marked as YZMN in his sketch. Therefore, in the property measuring 325 ft x 60 ft. there cannot be a road measuring 32.9 ft. I have considered the exhibits produced by the plaintiffs, the defendants as well as the Commissioner's report. The plaint sketch tallies with the sketch of the Court Commissioner. The same would clearly disclose that shops have been constructed by defendants 1 to 5 on the road in question. Even in the sale deeds produced by them, there is no narration of the road as being owned by them. It is a road beyond their property. Therefore, I have no hesitation to hold that the Trial Court committed an error in holding that the plaintiffs have not made out their case. It even committed an error in not properly considering the evidence. The defendant No. 6 himself has admitted to the existence of the road. The Appellate Court in terms of exercise of power under Section 96, has rightly held that, on appreciation of evidence the Trial Court has committed an error.

13. For the aforesaid reasons, the substantial question of law is answered by holding that the First Appellate Court was justified in reversing the judgment and decree of the Trial Court by assigning consistent, cogent, reasons based on material and evidence. The First Appellate Court has rightly re-appreciated the evidence and by affording valid and cogent reasons, has reversed the finding of the Trial Court. The substantial questions of law are accordingly answered. Consequently, the appeal is dismissed.