

(2009) 04 KAR CK 0108

In the Karnataka High Court

Case No : Regular Second Appeal No. 596 of 2003

Kallathi Veerashadreshwara Swamy rep. by its Conveners (K. Rudrappa and Others) APPELLANT

Vs

H.B. Honnappa (since deceased by Lrs. Shivamma and Others) RESPONDENT

Date of Decision : 01-04-2009

Acts Referred:

Citation : (2009) 04 KAR CK 0108

Hon'ble Judges : K.N. Keshavanarayana, J

Bench : Single Bench

Advocate : Jayakumar S. Patil, for the Appellant; Jagadish Mundargi, for the Respondent

Final Decision : Dismissed

Judgement

K.N. Keshavanarayana, J.—This second appeal is directed against the concurrent judgments of the courts below decreeing the suit of the respondent-plaintiff for relief of declaration, mandatory and permanent injunction.

2. The appellants were defendants in the Trial Court. The respondents herein are the L.Rs. of original plaintiff.

3. The original plaintiff H.B. Honnappa filed the suit in O.S. No. 162/97 on the file of Civil Judge (Jr. Dn) Tarikere seeking relief of declaration that he has perfected the right of prescriptive and privilege over "B" schedule property having been in continuous possession and enjoyment for more than 30 years, to reach Thimmapura- Aladahalli main road from his house and for mandatory Injunction directing the defendants to restore the said road in its original form and for permanent injunction restraining the defendants from preventing the plaintiffs making use of the said road to reach Aladahalli- Thimmapura road from his house.

4. The case of the plaintiff in brief is that he is the owner in possession, of "A"

schedule property and to reach his house in "A" schedule property there is a path way running from Thimmpura - Aladahalli road described in "B" schedule which forms part of property of the first defendant - temple and that he has been using this path way for more than 30 years. However, the conveners of the first defendant temple being highly powerful started meddling with the said path way and during August 1995 the defendants erected a barbed wire fencing all around the path way so as to prevent the plaintiff from entering his property. Therefore, it became necessary for him to file the suit for declaration of his right over the path way and also for mandatory injunction for removal of the obstruction and for permanent injunction.

5. The defendants, who appeared in the Trial Court contested the suit interalia contending that there is no path way as described in the "B" schedule, to reach the house of the plaintiff and that the plaintiff has not been using any such road, as such he is not entitled for any relief sought in that suit. They have also denied that they have obstructed the road by putting barbed wire fencing.

6. In the light of the pleadings of the parties, the Trial Court framed the following issues:

- 1) Whether plaintiff proves that he is the owner of "A" schedule property?
- 2) Whether plaintiff proves existence of "B" schedule property?
- 3) Whether plaintiff proves that he has acquired easementary right by prescriptive over suit "B" schedule property?
- 4) Whether plaintiff proves that defendants have closed "B" schedule road in August 1995?
- 5) Whether plaintiff proves interference by defendants of his right to use "B" schedule property?
- 6) Whether suit is barred by res-judicata
- 7) What order or decree?

7. During the trial, P.Ws. 1 to 3 and D.w.1 were examined. Ex.P1 to 21 and Ex.DI to 6 were marked. The Trial Court after hearing both sides and on assessment of oral and documentary evidence answered issue Nos. 1 to 5 in the affirmative and issue No. 6 in the negative holding that the plaintiff has proved that he is the owner of "A" schedule property and also the existence of road in the B schedule property. The Trial Court also held that the plaintiff has proved that he has acquired easementary right by prescription over the path way running in the B schedule property and that he has further proved that the defendants have closed the said path way during August 1995, In that view of the matter, the Trial Court decreed the suit of the plaintiff as prayed in the plaint.

8. Being aggrieved by the said judgment and decree the defendants filed appeal before the Civil Judge (Sr.Dn) Tarikere in R.A. No. 21 of 2001. The Lower

Appellate Court on hearing both sides during the course of the judgment framed the following points for consideration.

- 1) whether the plaintiff proved the existence of "B" schedule property?
- 2) Whether the plaintiff proved that he has acquired easementary right by prescription over "5" schedule property?
- 3) Whether the plaintiff proved the interference by the defendants for his right to use "B" schedule property?
- 4) Whether the Judgment and decree passed by the court below are erroneous, opposed to law, facts and probabilities of the case?

9. On re-appreciation of the oral and documentary evidence, the Lower Appellate Court answered point Nos. 1 to 3 in the affirmative holding that the plaintiff has proved the existence of "B" schedule property as path way and that the plaintiff has acquired easementary right over the said path way and that the defendants have interfered with the plaintiff's usage of said path way. The Lower Appellate Court also held that judgment and decree passed by the Trial Court does not call for interference. In that view of the matter, the Lower Appellate Court dismissed the appeal and affirmed the judgment and decree passed by the Trial Court.

10. Against this concurrent judgments of the courts below, the defendants have presented the second appeal. While admitting the Second appeal on 23.5.2003 the following substantial question of law was framed.

Whether the concurrent finding given by the Appellate court that the plaintiff has proved the prescriptive right of way over the suit schedule property is perverse, contrary to law and evidence on record?

11. Upon service of notice in this appeal the respondents have appeared through their learned Counsel. I have heard both sides. Perused the records and also the judgments of the courts below. As noticed earlier the simple case of the plaintiff is that he is the owner of the "A" schedule property and "B" schedule is the path way running from Thirmapura- Aladahalli main road to his house and this road has been in existence for more than 30 years prior to the suit and he has been using the same, as such he has acquired a prescriptive right and therefore, the defendants have no right to prevent him from using the said road. It is also his case that the defendants have highhandedly put barbed wire fencing around this path way thereby they have prevented him from using the said road. The defendants merely denied the existence of path way. The fact that the plaintiff is owner of "A" schedule property is not seriously disputed. The only question is, whether there is a path way as described by the plaintiff in schedule "B" to the plaintiff running from Thirmapura- Aladahalli road up to his house in "A" schedule property as shown in the suit sketch.

12. In support of his contention, the plaintiff apart from examining himself, examined two more witnesses as P.W.2 and P.W.3, who have consistently spoken

about the existence of the road as described in the B schedule to the plaint and its user by the plaintiff for over 25 to 30 years prior to the suit. During the pendency of the suit, a Court Commissioner was appointed for local inspection and after conducting inspection he submitted a report. In the said report, though in clear terras it is not shown that there exists a pucca road, the area shows as path way by the plaintiff has been shown as "Korakalu". However, the courts below have noticed that the evidence on record indicates that during August 1995 the defendants have dug up the path way and have erected barbed wire fencing with stone pillare. Therefore, as on the date of visit by the Court Commissioner, he could not notice the road. Having regard to the oral evidence of P.Ws 1 to 3, the courts below have recorded a finding of fact regarding the existence of path way as described in the "B" schedule to the plaint. The evidence of P.Ws. 1 to 3, according to the courts below is cogent and convincing, as such their testimony deserves to be accepted. Accordingly, the courts below have accepted the oral testimony of P.Ws. 1 to 3 and have rejected the testimony of D.w.1. The existence of path way as described in "B" schedule to the plaint has been accepted by the courts below on the basis of the evidence of P.Ws. 1 to 3. Therefore, it is a question of fact and on proper appreciation of the oral evidence, the courts below have recorded a positive finding of fact in that regard. The said finding does not involve any question of law and it is not the contention of the appellant that the courts below have ignored any material evidence nor it is their contention that though there is no acceptable evidence, the courts below have recorded a finding. Therefore, the findings of the courts below regarding the existence of path way as described in B schedule to the plaint and its usage by the plaintiff for the prescriptive period cannot be termed as perverse and contrary to the evidence. The said finding is in accordance with oral evidence of P.Ws. 1 to 3. In a case of this nature the existence of path way can be proved only by oral evidence. Therefore, I do not find any question of law having been involved in this appeal. The judgments of the courts below are sound and in accordance with the evidence on record. The courts below have properly appreciated the oral evidence and have recorded a proper finding. Therefore, the judgments of the courts below do not call for interference by this Court in the second appeal. In this view of the matter, there is no merit in this appeal. Hence, the substantial question of law framed is answered in the negative.

Accordingly, the appeal is dismissed directing the parties to bear their own costs.