

(2016) 01 KAR CK 0179

In the Karnataka High Court

Case No : Regular Second Appeal No. 643/2011(POS)

Kamalajammani and Others

APPELLANT

Vs

N.M. Chamaraje Urs and Others

RESPONDENT

Date of Decision : 12-01-2016

Acts Referred:

Citation : (2016) 01 KAR CK 0179

Hon'ble Judges : P.D. Waingankar, J.

Bench : Single Bench

Advocate : Sarat Chandra Bijai, Advocate, for the Appellant; M.N. Madhusudhan, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

P.D. Waingankar, J.—1. This appeal is directed against the judgment and decree dated 09.11.2010 in Regular Appeal No. 70/2009 on the file of the Additional Senior Civil Judge, Hunsur, sitting at Penyapatna, whereby the learned Judge dismissed the appeal while confirming the judgment and decree dated 09.12.2003 passed in O.S. No. 64/1997 on the file of the Civil Judge (Junior Division), Penyapatna.

2. The parties are referred to their respective ranks before the Trial Court. The appellants are referred to as "plaintiffs" and respondents as "defendants".

3. Plaintiffs filed a suit for possession of the schedule property from the defendants. The case of the plaintiffs is that the suit schedule property was purchased by Rukmangada Raje Urs, the husband of plaintiff No. 1-Smt. Kamalajammani by registered sale deed dated 28.10.1963. He died leaving behind the plaintiffs his wife and children as a legal heirs. Since Rukmangada Raje Urs was not allowing any of the plaintiffs to lookafter the agriculture operations, the defendant Nos. 1 and 2 took advantage of the same and encroached upon the suit schedule property in the month of May, 1996 since they happened to be the owners of the lands adjoining the suit property. When

the plaintiffs questioned the defendants, they wanted the plaintiffs to get their land measured and accordingly, measurement was done on 17.07.1996, wherein it was found that the defendants have encroached the suit schedule property of the plaintiffs. The plaintiffs requested the defendants to vacate and handover the possession of the suit schedule property encroached by them in favour of the plaintiffs. But, the defendants failed to vacate and handover the vacant possession. Hence, the plaintiffs filed a suit for declaration and possession of the schedule property in O.S. No. 64/1997 before the Civil Judge (Junior Division) at Periyapatna.

4. The defendants contested the suit. In their written statement, they denied all the plaint allegations including the allegations that the defendants have encroached upon the suit schedule property in the month of May 1996 or for that matter the plaintiffs got the land measured and found encroachment by the defendants and when they were called upon to vacate and handover the possession but they declined to vacate. They have also contended that the description of the boundaries of the schedule property furnished by the plaintiffs is totally incorrect apart from taking the contention that the plaintiffs are not in possession of the schedule property for a continuous period of twelve years prior to the date of filing of the suit. For all these reasons, the defendants have sought for dismissal of the suit.

5. Based on the pleadings, the Trial Court framed the following issues:--

"1) Whether the plaintiffs prove that they are the absolute owners of the suit schedule property?

2) Whether the plaintiffs further prove that they are entitled to recover the possession of the suit schedule property from the defendants?

3) Whether the Court fee paid by the plaintiffs is not sufficient?

4) Whether the suit is not maintainable?

5) Whether the plaintiffs are entitled to get decree as prayed for in the plaint?

6) To what decree or order?"

6. In order to establish their case, on behalf of the plaintiffs, plaintiff No. 3-B.R. Mallaraje Urs was examined as PW.1, one Govinda was examined as PW.2. Exs.P1 to P4 were marked. The defendant No. 2 was examined as DW.1 apart from examining two other witnesses as DW.2 and DW3 on behalf of the defendants. Exs.D1 to D7 were marked. The Trial Court on appreciation of evidence both oral and documentary answered all the issues in negative which ultimately resulted in dismissal of the suit by the judgment and decree dated 09.12.2003.

7. Regular Appeal No. 70/2009 preferred by the plaintiffs against the dismissal of the suit also came to be dismissed while confirming the judgment and decree passed by the Trial Court on re-appreciation of evidence by the impugned

judgment and decree. Therefore, this appeal by the plaintiffs.

8. Upon hearing the learned counsel appearing for the parties and on perusal of the material, the following substantial question of law is raised for consideration in this appeal:--

"Whether the judgment and decree of the Court below are perverse in misreading Ex. P3 and the evidence of PW.2?"

9. The case of the plaintiffs is that the schedule property bearing Sy. No. 33/1 area 20 guntas of Barse village, Bettadapura Hobli, Penyapatna Taluk was purchased by one late Rukmangada Raje Urs, the husband of plaintiff No. 1 and the father of other plaintiffs. Ex. P1 is the sale deed for having purchased the schedule property by Rukmangada Raje Urs. The further case of the plaintiffs is that the defendants who are adjacent land owners have encroached the schedule property. The case of the defendants is that of total denial of encroachment of the schedule property which has been reiterated by defendant No. 2 in his evidence who was examined as DW.1. Therefore, the burden is on the plaintiffs to establish that the suit schedule property has been encroached by the defendants. Apart from Ex. P1 the copy of the sale deed under which Rukmangada Raje Urs said to have purchased the schedule property, the plaintiffs have produced Ex. P2-Mahazar, Ex. P3-Sketch and Ex. P4-RTC extract. The defendants, on the other hand, have produced sale deed as per Ex. D1 in respect of the purchase of land bearing Sy. No. 32/1 of Barse village and the RTC extracts as per Exs.D2 to D7 in respect of their landed properties. The surveyor who said to have measured the suit schedule property of the plaintiffs prepared a sketch as per Ex. P3 and mahazar as per Ex. P2. The surveyor is examined as PW.2. During the course of cross-examination, PW.2 went on record to depose that he has not ascertained as to who owns adjacent land. He has also deposed that he has not identified the adjacent survey numbers of suit Sy. No. 33/1. Meaning thereby, PW.2 has failed to locate the boundaries of the schedule property. Unless all the adjacent survey numbers are surveyed, measured and boundaries are located, it is not possible for him whether the schedule property of the plaintiffs has been encroached upon by the defendants or not. PW.2 himself has admitted that he cannot say as to who actually encroached the suit land. In view of the admission made by PW.2 in his evidence, the documents prepared by him namely Ex. P2-mahazar and Ex. P3-sketch will be of no assistance and cannot be relied upon to decide whether the defendants have encroached upon the suit schedule property of the plaintiffs or not. Moreover, PW.2 said to have surveyed the schedule property before filing of the suit. The plaintiffs infact ought to have appointed a survey commissioner during the pendency of the suit to survey all the adjacent survey numbers of the schedule property and fixed the boundaries and it is only thereafter he could have located the encroachment if any made by the defendants. In a case of this nature where encroachment is pleaded, the oral evidence is of not much relevance. Even if we look at the sketch-Ex. P3 said to have been prepared by PW.2, it takes us

nowhere. Even to locate the schedule survey number, the sketch is of no use. The schedule survey number 33/1 is shown in one direction and the encroachment is shown in another direction. As such, both the Courts below on proper appreciation and re-appreciation of the evidence placed on record rightly held that the plaintiffs failed to prove the encroachment of the schedule property by the defendants. The contention of the plaintiffs that the judgment and decree of the court below are perverse in misreading Ex. P3 and evidence of PW.2 is impossible to accept. Thus, the appeal is devoid of merits and as such, it is liable to be dismissed.

Accordingly, the appeal is dismissed.