

(2006) 08 KAR CK 0041

In the Karnataka High Court

Case No : Regular Second Appeal No. 72 of 2005

Mahaboob Khan

APPELLANT

Vs

Mohamed Khasim dead by Lrs. (Sufiyabi and Others)

RESPONDENT

Date of Decision : 11-08-2006

Acts Referred:

Citation : (2006) 08 KAR CK 0041

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

Bench : Single Bench

Advocate : K.S.N. Karanth, for the Appellant;

Final Decision : Dismissed

Judgement

N.K. Patil, J.—This Second Appeal arises out of the judgment and decree dated 10th September 2004 in R.A. No. 50/1996 on the file of the Principal Civil Judge, (Senior Division) and C.J.M., Kolar by confirming the judgment and decree dated 29th February 1996 in O.S. No. 3/1991 on the file of the Principal Munsiff, Kolar, decreeing the suit of the plaintiff - respondent.

2. The respondent herein - plaintiff since dead is represented by his legal representatives. Respondent -plaintiff had filed the suit for declaration and possession in respect of "B" schedule property measuring 9 ft. x 10 ft. bounded by east - house of defendant ; west and north remaining property of plaintiff and south by road marked as a, e, f and g in the rough sketch bearing Municipal khata No. 1133 and assessment No. 1297 at Kolar town contending that, the respondent - plaintiff had acquired "A" schedule property under a partition effected between himself and his brothers under the registered partition deed dated 26th March 1988 and he was in peaceful possession and enjoyment of "A" schedule property including "B" schedule property. When the deceased plaintiff was not in station, taking advantage of the absence of the deceased plaintiff - respondent herein, the defendant -appellant herein unlawfully occupied "B" schedule property marked in the sketch measuring East-West: 9 ft. and North-

South: 10 ft. Therefore, the plaintiff was constrained to file a suit in O.S. No. 3/91 on the file of the Principal Munsiff, Kolar. It is the case of the defendant - appellant in their written statement that, the plaintiff was in illegal occupation of "B" schedule property without any valid or legal right. In view of difference of opinion, the matter was referred to the Local Muslim Jamayath of Fort area. But, the defendant appellant denied the allegation that, the dispute of the plaintiff was referred to Local Muslim Jamayath stating that, there is no cause of action to file the suit. The "B" schedule properly belongs to one Dastagir Khan, the grandfather of the defendant and the said Dastagir Khan was in possession and enjoyment of the same. On 30th July 1960, the said Dastagir Khan and his wife Rabiya effected the partition deed of "B" schedule property along with the adjacent house on the eastern side in favour of the father of defendant by name Moogi Sadulla Khan and he was in peaceful possession and enjoyment of the suit property and after the death of the father of the defendant - appellant herein, the defendant and his brothers are in possession of "B" schedule property and therefore, the defendant contended that, the plaintiff was never in possession of "B" schedule property and hence, the suit filed by the plaintiff is barred by time and the same may be dismissed. The Trial Court on the basis of the pleadings of both the parties and after hearing the learned Counsel appearing for the parties, has framed four issues for consideration and answered issue Nos. 1 to 3 in the affirmative and issue No. 4 in negative. The Trial Court, by its judgment and decree dated 29th February 1996 after appreciation of the oral and documentary evidence available on file and in view of the admission made by the defendant-appellant herein in his cross - examination, the evidence of DW3, the Commissioner's report and the settlement deed at Ex. D4, has categorically held that, the defendant's father acquired only 11 ft. x 34 ft. property and that, the "B" schedule property is not the part or parcel of the property acquired by the father of the defendant under the settlement deed at Ex.D4. Assailing the correctness of the said judgment and decree passed by the Trial Court, the defendant - appellant herein has filed a Regular Appeal in R.A. No. 50/1996 on the file of the Principal Civil Judge (Senior Division) CJM Kolar. The Lower Appellate Court after reconsideration and re-appreciation of the relevant material available on file and after considering the judgment and decree passed by the Trial Court, has raised three points for further consideration and answered all the three points in the affirmative. The Lower Appellate Court, by its order dated 10th September 2004, after re-appreciation of the oral and documentary evidence and after assigning cogent reasons at paragraphs 15 and 16 of its judgment, has dismissed the appeal filed by the defendant herein holding that, there is no justification or good grounds to interfere in the judgment and decree passed by the Trial Court. Being aggrieved by the impugned judgment and decree passed by both the Courts below, the appellant herein has presented the instant second appeal.

3. The principal submission canvassed by the learned Counsel for appellant is that, both the Courts below have committed a grave error in proceeding to pass

the impugned judgment and decree on the basis of the evidence adduced by the parties and accepting the Commissioner's report and contrary to the relevant material produced by the defendant - appellant at Ex.D4 the settlement deed dated 30th July 1960. It is also the case of appellant that, both the Courts erred in taking into consideration the evidence of DW3 and holding that the evidence of DW2 is in no way helpful and that, the objections to the Commissioner's report filed by defendant has not been taken into consideration. Further, he submitted that, both the Courts below ought to have proceeded to pass an order in consonance with the documentary evidence at Ex. D4 - the settlement deed entered into by the parties in the year 1960. Therefore, he submitted that, all these aspects prove beyond reasonable doubt that, the appellant - defendant was in peaceful possession and enjoyment of "B" schedule property measuring 9x10 ft. Further, it is the contention of learned Counsel for appellant that, the Court Commissioner was not at all a competent person to measure, identify and demarcate the property. Further, it is the case of appellant that, there is no evidence from the experts as to whether "B" schedule property falls within the khata No. 1133 belonging to the plaintiff - respondent herein. Therefore, he submitted that, the Courts below erred in decreeing the suit for possession by overlooking and misleading the evidence. The Courts below have also misread the documents and arrived at a wrong conclusion. Therefore the judgment and decree passed by both the Courts below are liable to be set aside.

4. I have heard the learned Counsel for appellant for considerable length of time. After careful evaluation of the judgment and decree passed by both the Courts below and after considering the submission made by learned Counsel for appellant as stated supra, the only question that arise for consideration in the instant second appeal is as to:

Whether the appellant has made out a case for interference in the judgment and decree passed by both the Courts below ?

After careful perusal of the judgment and decree passed by both the Courts below, it emerges on the face of the judgment and decree passed by both the Courts below that, both the Courts have not committed any error of law much less material irregularity in passing the impugned judgment and decree. The Trial Court, after appreciation of the oral evidence of PW1 and documentary evidence adduced by plaintiff, has categorically stated that the disputed property, i.e. "B" schedule property comes to the share of the plaintiff as per the partition schedule at Ex. P4 and that, he is not in possession and enjoyment of the said land and that, when he was not in station, respondent - defendant taking advantage of his absence, has illegally occupied the "B" schedule property. At this stage, the matter was referred to the Jamayat and the said Jamayat, consisting of the elders belonging to the community of the parties, after interaction with all the members who participated in meeting, has directed the appellant - defendant to vacate the encroached portion and hand over the same to the plaintiff - respondent herein. To find out the ground reality and factual

aspect of the matter, the Trial Court has appointed the Court Commissioner to make spot inspection and submit the report. The Court Commissioner, after making the spot inspection in the presence of both the parties, submitted the report stating that, the property of the appellant defendant is more than the property that was acquired under Ex.D4 - settlement deed. Therefore, the Trial Court observed that, it is clear under the settlement deed that, the defendant's father acquired only 11 ft.x34 ft. property and if the said settlement deed is considered along with the plaint sketch and Commissioner's report, it is clearly established that "B" schedule property is not the part and parcel of the property acquired by the father of the defendant -appellant herein under the settlement deed Ex.D4. Further, it is significant to note that, the appellant defendant herein has examined DW3 to substantiate his claim that the property belongs to him. DW3, in his evidence, has categorically admitted that, he is a party and signatory to the partition under Ex.P4 - partition schedule and that, the property fell to the share of the plaintiff - respondent herein bounded by East: house of defendant; west by road, north by portion of Azeez sab and south by road. Therefore, the Trial Court felt that, there is no reason to disallow Ex.P4 partition deed schedule relied upon by plaintiff to substantiate his case. Further, the Trial Court observed that, considering Ex.P1 to P4 which are the documents relied upon by the plaintiff, it is clear that, the plaintiff is the owner and in possession of the entire "A" schedule property including "B" schedule property measuring 9 ft. x10 ft. as per the settlement deed executed by Dastagir Khan and his wife Rabiya in favour of the father Sri. Moogi Sadaulla Khansab and that, the father of the defendant acquired the property under Ex.D4 only to the extent of 11 ft. x 34 ft. and nothing more than that. The Trial Court has analysed the evidence of DW2, who has categorically stated that, he is not aware of the specific measurement of "B" schedule property which is in dispute and held that, the said evidence is of no help to the defendant - appellant herein. The Trial Court after appreciation of the oral and documentary evidence has further categorically held that, in spite of giving sufficient opportunity to the appellant -defendant, he has failed to substantiate his case by producing authenticated document. Therefore, the Trial Court has decreed the suit of the plaintiff declaring him as the owner of "B" Schedule property as fully described in the schedule of the plaint and is also entitled for possession of the "B" schedule property from the defendant and directed the defendant to deliver the vacant possession of "B" schedule property in favour of plaintiff. The said judgment and decree passed by the Trial Court has been confirmed by the Lower Appellate Court after re-appreciation of the oral and documentary evidence by assigning cogent reasons with reference to the evidence of PW1 and Exhibits P1 and P4 and other relevant material available on file at paragraphs 15 and 16 of its JUDGMENT has held that, the Appellate Court does not find any justification to interfere in the judgment and decree passed by the Trial Court. The Lower Appellate Court after proper re-appreciation of the oral and documentary evidence held that, there is consistency in the documents relied upon by the plaintiff and it establishes that there is house of defendant on the eastern side of the property of plaintiff and that, the Trial Court was proper in

accepting the case of plaintiff.

5. After careful perusal of paragraphs 15 and 16 of the judgment and decree passed by the Lower Appellate Court, it can be seen that, both the Courts below, after critical evaluation of the oral and documentary evidence available on file and in view of admission made by the appellant - defendant, DW2 and DW3, with reference to the Commissioner's report and the decision of the Jamayat, have rightly passed the impugned judgment and decree holding that, the plaintiff - respondent herein has proved that, he is the absolute owner of the suit property in question. The reasoning given and the finding recorded after proper appreciation and re-appreciation of the oral and documentary evidence by both the Courts is just and proper. Therefore, interference by this Court is not justifiable. Hence, in view of concurrent finding of fact recorded by both the Courts below, I do not find any justification or good grounds to entertain the instant second appeal.

6. Having regard to the facts and circumstances of the case, as stated above, the instant second appeal filed by the appellant is dismissed as devoid of merits.