

(1995) 06 KAR CK 0022

In the Karnataka High Court

Case No : Regular Second Appeal No. 208 of 1985

Narayan Nilakantasa Bhute

APPELLANT

Vs

Laxman Chinnusa Meharawade and Another

RESPONDENT

Date of Decision : 29-06-1995

Acts Referred:

Easements Act, 1882 — Section 4

Citation : (1995) 6 KarLJ 639

Hon'ble Judges : Harinath Tilhari, J

Judgement

1. This is plaintiff's second appeal arising from the judgment and decree dated 27-10-1984 delivered by Sri K.H. Rajashekhar, Civil Judge and Principal, J.M.F.C., Ranebennur in Regular Appeal No. 23 of 1983 (Lakshman Chinnusa Meharawade v Narayan Neelakantasa Bhute and Another) whereby the learned lower Appellate Court had allowed the 1st defendant's first appeal from the judgment and decree dated 17-9-1983 passed by the First Additional Munsiff, Ranebennur in Original Suit No. 68 of 1980, whereby the Trial Court had decreed the plaintiff's suit. The lower Appellate Court after having set aside the Trial Court's decree has dismissed the plaintiff's suit for the reliefs claimed in the plaint.

2. The facts of the case, in brief, are that the present appellant-plaintiff filed a suit claiming the decree for partition and separate possession of his alleged 2/3rd share in the suit property viz., the open space or open land bearing C.T.S. No. 969 situate in Ranebennur Town. The plaintiff-appellant's case has been that the plaintiff had purchased house property which is situate on C.T.S. No. 972 and that he had also purchased 1/3rd share in the suit land viz., C.T.S. No. 969 which according to the plaintiff is situate adjacent to the house property of the plaintiff which he had purchased from one Chamansab Nannesab Ladakhanvar by registered sale deeds. So far the house properties are concerned, according to the plaintiff, he has purchased that house by under registered sale deed dated 13-6-1975 and the land in dispute mentioned above had been purchased by him under registered sale deed dated 18-2-1978. The plaintiff-appellant claimed to be in actual possession and enjoyment of the alleged 2/3rd share in the suit

property viz., land bearing C.T.S. No. 969. The plaintiff in the plaint admitted that 1/3rd of that open site in C.T.S. No. 969 had been in use, occupation and enjoyment of defendants 1 and 2, who are the present respondents. According to the plaintiff, the open land or the open space on the suit land bearing C.T.S. No. 969 was being jointly enjoyed by plaintiff-appellant and the defendants under a mutual agreement. The plaintiff's case is that the plaintiff-appellant experienced certain difficulty in enjoying the suit open space jointly with the defendants. So he filed a suit for partition. The defendant 1 contested the plaintiff's claim and denied the claim made by the plaintiff. He denied that the plaintiff had got 2/3rd share and defendants 1 and 2 have got 1/6th share each i.e., 1/3rd share jointly in the suit property. The 1st defendant alleged that it is false to say that plaintiff purchased 2/3rd share in the open space from one Chamansab Ladakhanvar. The 1st defendant further asserted that the plaintiff had got no cause of action to file the suit for partition and separate possession of any such alleged share in the suit property as it did not belong to the family of the plaintiff-appellant. According to the defendants case, the suit property was being used as a passage jointly by the vendor of the plaintiff and the defendants and also by other persons of the locality and the plaintiff has admitted that it was under the common enjoyment of all the persons residing on the four sides of land in dispute viz., C.T.S. No. 969. The plea of non-joinder was also taken. It may be mentioned that suit proceeded ex parte against defendant 2 and that 2nd defendant died during the pendency of the first appeal and his heirs were not brought on record. The Trial Court on the basis of the pleadings of the parties framed the following issues:-

1. Whether the plaintiff proves that he has 2/3rd share in the suit property ?
2. Whether he further proves that he is entitled to partition and separate possession of his share ?
3. What order or decree ?
3. The parties viz., plaintiff and defendant 1 examined themselves as P.W. 1 and D.W. 1 and examined no other witness and plaintiff filed three documents as Exhibits P-1, P-2 and P-3.
4. The Trial Court decreed the plaintiff's suit for partition of the open space in dispute bearing C.T.S. No. 969 and held that the plaintiff is entitled for partition and separate possession.
5. Being aggrieved by the Trial Court's decree the defendant 1 filed the appeal. The lower Appellate Court allowed the defendant's appeal and held that the description of the plaintiff's 2/3rd share in the suit property is vague and the plaintiff is not entitled to a decree for partition and separate possession of suit land which is meant as a common passage for all the parties concerned. The lower Appellate Court held that in case defendants created any obstruction in exercise of its user as a passage, the plaintiff could have filed the suit for permanent injunction. Accordingly, the lower Appellate Court has allowed the 1st

defendant's appeal and set aside the Trial Court's decree and dismissed the plaintiff's suit in toto.

6. Having felt aggrieved by the judgment and decree of the lower Appellate Court, the plaintiff has come up in second appeal before this Court under Section 100 of C.P.C. I have heard Sri M. Ram Bhat, learned Counsel for the appellant and Sri Mahesh Wadiyar holding brief for Sri Mohanshanthana Gowdar, Counsel for the respondent 1 at length. The learned Counsel for the appellant had taken me with the judgment and record of the case.

7. The learned Counsel for the appellant submitted before me that the plaintiff had claimed partition of 2/3rd share in the property viz., plot C.T.S. No. 969 on the ground that he had purchased the said share from Chaman sab under sale deed dated 18-2-1978 for a sale consideration of Rs. 200/- and has been in actual possession and enjoyment of 2/3rd share while the remaining 1/3rd share was with the defendant; but as there was difficulty therein in the use and enjoyment of the land, so the decree was passed. The learned Counsel submitted that the lower Appellate Court appears to have placed the emphasis on the defendant's case that the land in dispute was the passage or pathway. Learned Counsel submitted that it appears that the lower Appellate Court took the view that the pathway or passage was utilised jointly by the plaintiff and defendants and so it cannot be partitioned. So the lower Appellate Court made out a new issue which was not before the Trial Court. He submitted that the appellant-plaintiff had proved his title to the extent of 2/3rd share by producing the sale deeds Exhibits P-1 and P-2. Exhibit P-1 relates to the 2/3rd share of the land in dispute, and as such the lower Appellate Court has committed error of law in dismissing the plaintiff's suit and in setting aside the Trial Court's decree, which decree did not suffer from any error of law. The learned Counsel's contention appears to be that a new case has been made out by the first Appellate Court.

8. This contention of the plaintiff-appellant's Counsel Sri Ram Bhat has been hotly contested by Sri Mahesh appearing on behalf of the respondent 1. Sri Mahesh submitted that for the claim of partition of 2/3rd share the plaintiff had to prove his right and title over the suit property sought to be partitioned. He submitted that there is one admitted position that the plot C.T.S. No. 969 is in common user and enjoyment as per the evidence of P.W. 1 in the cross-examination as well. Sri Mahesh further submitted that the land in dispute as per the survey map appears to be surrounded by the houses situate on various C.T.S. numbers including the house of the plaintiff-appellant at C.T.S. No. 972 and the houses of defendants 1 and 2 as well as others and it is being used by them. The persons who make use of this land-C.T.S. No. 969 do not belong to same caste, community or family nor do they come from common ancestor. He further submitted that they belong to different castes and communities. So there is no question of common ownership or joint ownership of the land. He further submitted that plaintiff has also not been able to prove how his vendor got title to this land and what was its nature. Except the user thereof as others used to,

so far as plot C.T.S. No. 969 is concerned, he submitted that ordinarily it is being used as pathway by the residents of the locality and in such a case when plaintiff's predecessor in title was also not established to the land, the plaintiff's predecessors could not pass any title by way of transfer of this land. No doubt right of easement which the predecessor of the plaintiff had been using would pass on to the plaintiff-appellant when the house in C.T.S. No. 972 was transferred. But that is not the right of ownership. Therefore, he submitted that the lower Appellate Court has rightly allowed the defendant's first appeal and dismissed the plaintiff's claim for partition. In the alternative he submitted that if plaintiff claim any other right of partition on the basis of right of ownership, that was not established by him by admissible evidence and that as such there is no question of decree for partition being passed. So the decree passed by the lower Appellate Court did not suffer by any error of law or jurisdiction.

9. I have applied my mind to the contentions of the learned Counsel for the parties. In my opinion, in a suit for partition and separate possession, the first ingredient to be established is that the property jointly and commonly belonged to the parties to the suit as owners. So far as plot C.T.S. No. 969 is concerned, it had not been proved nor has it been alleged that plot C.T.S. No. 969 belonged to the vendor of the plaintiff and he transferred it to the plaintiff. If the vendor had no share therein, then with whom he had that share in ownership right of plot C.T.S. No. 969? Nothing has been stated in the plaint in that regard nor any evidence has been led on record establishing or proving the title of the plaintiff's vendor over the land in dispute, either over the entire plot or over 2/3rd portion. No person can transfer any title better than what he has in a property and in case one transfers a property in which he has got no title and the purchaser even then accepts and acts on the deed executed by such a person, then none is to suffer but the purchaser if he has not acted with care and caution required from an ordinarily prudent person. I put a question to the learned Counsel for the appellant that sale deed being of the year 1978 and suit having been filed in the year 1980, how plaintiff could now claim title by adverse possession. Whether the title of the plaintiff's vendor over the property is in dispute? The learned Counsel for the appellant failed to explain except saying that it was being enjoyed. When the plaintiff's vendor's title is not proved, then the sale deed Exhibit P-1 could not transfer any title or share over the land or plot C.T.S. No. 969 to the plaintiff as owner and as such there cannot be any claim for partition, particularly when defendants are not the owners of that plot. Though defendants and plaintiff both admittedly claim that the land is being jointly enjoyed and as per defendant's case as a pathway or by way of easement, easementary rights are acquired only in respect of the land of some other person which is called "servient heritage". That means to say there is no question of there being any decree for partition being granted by the lower Appellate Court. In my opinion the Trial Court has committed an error in decreeing the suit for partition without investigating the question as to what right the plaintiff had got over the plot C.T.S. No. 969 under the sale deed. The lower Appellate Court applied its mind to

this aspect and in my opinion it has rightly reached to the conclusion that no decree for partition could be passed in a case like this. There is no doubt the parties admittedly have been enjoying the easementary rights jointly for passage etc., the plaintiff is entitled to enjoy the same jointly with the defendants and other persons and in case any obstruction is created in the user of the path as easementary right of passage etc., the plaintiff may have recourse to law to prevent the same. With this observation, which had already made by the lower Appellate Court, in my opinion the appeal deserves to be dismissed as it has got no merits.

10. This regular second appeal is hereby dismissed and the lower Appellate Court's decree is confirmed. No order as to costs.