
(2015) 04 KAR CK 0164

In the Karnataka High Court

Case No : Regular Second Appeal No. 1601 of 2010

N.D. Babbajetty and Others

APPELLANT

Vs

Sathyanarayana Jetty and Others

RESPONDENT

Date of Decision : 06-04-2015

Acts Referred:

Citation : (2015) 04 KAR CK 0164

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : B. Srinivas, for the Appellant; Varadaraj R. Havaladar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Aravind Kumar, J.—Heard Sri B Srinivas, learned Advocate appearing for appellant and Sri Varadaraj Havaladar, learned Advocate appearing for respondents-1 (a) to (g). Respondents-2 to 4 are served and unrepresented. Appeal against respondent-5 has been dismissed vide order dated 19.03.2014.

2. Parties are referred to as per their rank in the trial Court. Facts in brief which has led to filing of this appeal are as under:

"Plaintiff filed a suit for declaration and perpetual injunction contending that residential house bearing old Khata No. 158 and new Khata No. 503/270/2 morefully described in the plaint schedule along with cattle shed and backyard measuring 22" x 124" situated at Kumsi-Jettarakeri Village, Shimoga Taluk was owned by father of plaintiffs and father of defendants-1 to 3 had purchased the same from plaintiff's father under sale deed dated 15.05.1966 and plaintiff's father was treated as tenant of suit schedule property and on termination of the lease, landlord filed an ejectment suit in S.C. No. 646/68 but could not succeed in evicting the plaintiff and said plaintiff having expired seven years prior to filing of the suit, his L.Rs. namely, defendants-1 to 4 who having lost right, title and interest over the suit schedule property illegally attempted to trespass into the

suit property and as such, claiming title by adverse possession, suit for declaration came to be filed and for consequential relief of perpetual injunction was sought. Defendants having appeared contested the suit by filing detailed written statement through defendant No. 1 who admitted that his father was the owner of suit schedule property and it was contended that his father had filed a suit in S.C. No. 646/68 and obtained decree for eviction and took delivery of possession of suit property in the execution proceedings. Other averments made in the plaint came to be denied. On the basis of pleadings of the parties trial Court framed eight issues for its adjudication and after appreciating the evidence tendered by the parties and after considering Exs. D-1 to D-7 which was very heavily relied upon by defendants to contend that plaintiffs' father had been evicted from the suit schedule property was held as not having been proved suit came to be decreed. It was held by the trial Court as under:

"I have gone through Ex. D.1 to D.7. Ex. D-1 is "" and Ex. D.2 to D.7 are pertaining to the properties, which were taken by the defendants for their possession. If one is pleased to go through Ex. D.1 to D.7, in detail there is no mention regarding the possession of the suit schedule property by the defendant at any point of time. So the defendant has not in crystal clear terms stated in his examination-in-chief regarding this aspect and there is no other documentary evidence in support of the claim of the defendant. On the other hand, the plaintiff in order to prove his case, has sufficiently produced documents to show that he has been in possession of the suit schedule property for more than 21 years and it is very much pertinent to note that the defendant has utterly failed to disprove issue No. 2."

3. Being aggrieved by said judgment and decree dated 30.06.1997 passed by the trial Court in O.S. No. 264/1989 appeal came to be filed by defendants in R.A. No. 36/2005. Lower appellate Court after considering the rival contentions and after securing the records and on re-appreciation of entire evidence, by its judgment and decree dated 26.03.2010 reversed the finding recorded by trial Court and dismissed the suit by allowing the appeal. In the course of its judgment, lower appellate Court has held that undisputedly, plaintiffs father had sold the suit schedule property in favour of defendant's father under sale deed dated 15.06.1966 which came to be marked as Ex. P-1 and on account of non payment of rents, defendants' father had filed a suit for ejectment in S.C. No. 646/1968 for eviction and also for recovery of rent of Rs. 96/- which came to be decreed by judgment and decree dated 14.04.1970 and in order to enjoy the fruits of said decree, an execution petition had been filed in E.P. No. 492/1970 which resulted in possession being taken by the decree holder and as such, recording a finding on possession being taken over by decree holder execution proceedings had been closed. Hence, it was held that material available on record would indicate that possession had been taken by defendant's father and as such, claim for adverse possession was held to be alien to such proceedings and accordingly allowed the appeal by reversing the judgment and decree passed by the trial Court. Being aggrieved, plaintiffs have filed this appeal.

4. It is the contention of Sri Srinivas, learned Advocate appearing for appellants that trial Court was fully justified in decreeing the suit of the plaintiff for declaration whereunder it has been declared that suit schedule property is part and parcel of residential house and of plaintiff and he has perfected his title to suit schedule property by adverse possession and thereby it had granted judgment and decree of perpetual injunction in favour of the plaintiff and against defendants by restraining them from interfering with plaintiffs' peaceful possession and enjoyment of suit property and as such, lower appellate Court without properly analyzing the evidence tendered by parties could not have reversed the said finding on the hypothesis and finding recorded by lower appellate Court is diametrically opposite to the finding of fact arrived at by the trial Court and as such, substantial questions of law formulated in the appeal memorandum would arise for consideration for being adjudicated and answered in favour of the appellants.

5. Per contra, Sri Varadaraj Havaladar, learned Advocate appearing for respondents-1(a) to (g) would support the judgment and decree passed by the lower appellate Court and contends that there is no substantial questions of law that would arise for consideration in this appeal and finding arrived at by the lower appellate Court is based purely on appreciation of facts and documentary evidence tendered and as such, he prays for dismissal of the appeal without being admitted.

6. On the short ground that plea of adverse possession is not available to plaintiffs in a suit for declaration, present appeal is liable to be dismissed. Adverting to the facts on hand, it would clearly indicate that plaintiffs father had sold suit schedule property to defendants' father under a sale deed dated 15.06.1966 as per Ex. P-1. In fact, plaintiff themselves admit this factual position in paragraph 3 of the plaint. It is also admitted by the plaintiff that he was a tenant under father of defendants-1 to 3 and husband of defendant No. 4 till 15.05.1967. However, plaintiff had made an attempt to contend that father of defendants-1 to 3 and 4th defendant's husband had filed a suit in S.C. No. 646/68 and was not successful in evicting the plaintiff and as such plaintiff had continued in possession of suit schedule property. However, lower appellate Court has recorded a finding that documentary evidence Ex. D.1 available on record would show otherwise. This finding recorded by lower appellate Court is just and correct inasmuch as, order sheet of the execution proceedings which came to be produced and marked as Ex. D-1 before the trial Court would indicate that on 27.02.1971 Executing Court has recorded as under:

"Possession delivered to the decree holder. Delivery receipt, Mahazar filed.

Sd/- Judge"

Trial Court though being conscious of this documentary evidence available on record has held as under:

"I have gone through Ex. D.1 to D.7. Ex. D-1 is "" and Ex. D.2 to D.7 are

pertaining to the properties, which were taken by the defendants for their possession. If one is pleased to go through Ex. D.1 to D.7, in detail there is no mention regarding the possession of the suit schedule property by the defendant at any point of time."

Above said finding recorded by the trial Court being contrary to contents of Ex. D-1 namely, order dated 27.02.1971 passed by Executing Court in Execution petition No. 492/1970 which would clearly indicate that on account of possession being taken by decree holder and delivery receipt and mahazar being filed it came to be recorded accordingly by the Executing Court. As such, lower appellate Court has rightly come to a conclusion that finding recorded by the trial Court is contrary to the documentary evidence available on record while re-appreciating the facts.

7. Now turning my attention back to the first point discussed herein above namely, with regard to non-maintainability of suit itself, judgment of Hon"ble Apex Court in the case of Gurudwara Sahib Vs. Gram Panchayat Village Sirthala and Another, (2014) 2 AD 364 : (2013) 4 RCR(Civil) 703 : (2013) 11 SCALE 564 : (2014) 1 SCC 669 can be looked up whereunder it has been held that suit for declaration of ownership of land on the basis of adverse possession cannot be sought for by the plaintiff. That apart, on facts, lower appellate Court has rightly found that documentary evidence namely, Ex. D-1 clearly indicated that possession of the suit schedule property came to be delivered to decree holders i.e., defendants herein and as such plea of adverse possession was not available to plaintiff for being raised. Trial Court committed serious error in arriving at a conclusion contrary to the contents of Ex. D-1. Thus, finding recorded by the lower appellate Court cannot be construed as one contrary to evidence on record, but on the other hand, it requires to be affirmed.

8. Yet another aspect which requires to be noticed in the instant case is, on the one hand plaintiffs contended that they have perfected their title by adverse possession and on the other, they are contending that defendants do not have title to the suit property. These two pleas do not go hand in hand. As such, lower appellate court for these myriad reasons has reversed the finding recorded by the trial Court and allowed the appeal filed by defendants. Said finding recorded by lower appellate Court does not suffer from any infirmity either in law or on facts to give scope to formulate substantial question of law as canvassed by the learned Advocate appearing for appellants in this appeal for being adjudicated and answered.

9. For the reasons aforesated, I proceed to pass the following:

ORDER

"(1) Second appeal is hereby dismissed.

(2) Judgment and decree passed by Principal District Judge, Shimoga dated 26.03.2010 in R.A. No. 36/2005 is hereby affirmed.

(3) No order as to costs."

In view of dismissal of this second appeal, Misc. Cvl. No. 11956/2010 for stay does not survive for consideration and accordingly it is rejected.