

(1996) 04 KAR CK 0023

In the Karnataka High Court

Case No : Regular Second Appeal No. 93 of 1992

Noorulla Amin Musuba and Others

APPELLANT

Vs

Chandru Sheniyar Naik

RESPONDENT

Date of Decision : 19-04-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1 (5), Order 14 Rule 3, Order 32 Rule 2

Transfer of Property Act, 1882 — Section 108 (f)

Citation : (1996) ILR (Kar) 2693 : (1996) 6 KarLJ 275

Hon'ble Judges : B.N. Mallikarjuna, J

Bench : Single Bench

Advocate : Chaitanya Hegde, for the Appellant; C.V. Guruvareddy, for the Respondent

Final Decision : Allowed

Judgement

B.N. Mallikarjuna, J.—This second appeal is by the plaintiffs challenging the judgment and decree of the Civil Judge, Uttara Kannada" dated July 24, 1991 in R.A. No. 13/86 arising out of the judgment and decree of Munsiff, Bhatkal dated December 21, 1985 in O.S. No. 10/83. Defendant in the suit is the respondent in the appeal.

2. Plaintiff's suit is for permanent injunction restraining the defendant or anyone on his behalf from making any addition or alteration to the existing construction bearing municipal No. 1/90/60-1 situated by the side of main road in Bhatkal Taluk (U.K.) in revenue Sy.No. 354-B of Susagadi village in Bhatkal Taluk. Trial court decreed the suit, but in appeal by the defendant before the Civil Judge, judgment and decree of the trial court are set aside and the suit of the plaintiff dismissed. Hence the second appeal.

3. Heard both the learned counsel for the parties.

4. Substantial question of law formulated by this court at the time of admission

of the appeal on January 31, 1992 reads thus:

"Whether the findings of the lower appellate Court are vitiated by misreading of the pleadings and also by its reasoning that the issue regarding ownership is irrelevant in a suit for injunction?"

5. It is undisputed that plaintiffs are the owners of the land on which the construction is put up. It is also undisputed that under the deed Ex.P-4 dated November 20, 1980, defendant came in possession of the property in question as a tenant under the plaintiffs on a monthly rent of Rs. 90/- and the rent karar was for a period of 11 months. Therefore, on the date of suit defendant was a tenant under the plaintiffs. Plaintiffs brought the suit for injunction contending that defendant with intent to make additions or alterations to shed or the building existing on the land has stored laterite stones and has collected cement in the shop and if the defendant is allowed to make addition or alteration by putting up stone walls or otherwise, plaintiffs would be put to irreparable loss and injury.

Defendant resisted the suit contending inter alia that there is no cause of action for the suit, plaintiffs are minors and their natural guardian is one Bibi Khatija and the suit brought without making her a party is not maintainable. Suit filed by the General Power of Attorney is not maintainable. The contention of the defendant is that the shop or the building that is put up in the land is by himself and not by the plaintiffs, what was leased him was only the land and thereupon he put up the construction by spending a sum of Rs. 5,000-6,000/- and what the plaintiffs were entitled to is only for ground rent of Rs. 90/-. Plaintiffs' father demanded a higher rent and since he refused to pay Rs. 4/- per day towards the rent, they have filed the suit only with intent to harass him. He is a motor-mechanic by profession and he has put up the shed by putting up poles and covering it by rafters with a wooden shutter and the security therefore is not sufficient to protect the implements, it is therefore he requested the father of the plaintiffs to permit him to put up shutters to the garage and the same was agreed. He also agreed and permitted him to put up stone walls in place of wooden poles. Even before he could collect the building materials plaintiffs' father started demanding rent at Rs. 4/- per day instead of Rs. 3/- and since he did not agree, suit is filed.

6. Trial Court at the first instance framed certain issue, but on December 12, 1985 re-casted the issues and following issues framed for consideration:

"1. Whether the plaintiffs prove that they are the owners of the suit garage and its site?

2. Whether the plaintiffs prove the cause of action for the suit?

3. Whether the plaintiffs are entitled for the order of injunction?

4. What order or decree?"

7. Two witnesses were examined by the plaintiffs and documents Exs.P-1 to 4

were produced. Defendant examined himself and 3 other witnesses and produced documents Exs.D-1 to 18. Learned trial Judge after hearing the arguments and on considering the evidence both oral and documentary held issues 1 to 3 in favour of the plaintiff and accordingly decreed the suit.

8. In appeal the learned Civil Judge disturbs the findings on the ground that failure to mention the date of execution of the General Power of Attorney has prejudiced the case of the defendant and that is a defect. Secondly, he holds that the Trial Court has committed an error in framing Issue No. 1 requiring the plaintiff to establish ownership in a suit for mere injunction. There is no cause of action for the suit, non-examination of the father of the plaintiffs is fatal to the case of the plaintiffs and when the defendant has denied that he has made any attempt to construct a new structure, the cause of action does not survive. Having concluded thus he has disturbed the findings of the Trial Court and has set aside the judgment.

9. Learned counsel for the appellants contended that there is misconstruing of evidence and also misreading of plaint averments and that has led the Civil Judge to come to erroneous conclusion calling for interference by this Court. On the other hand, learned counsel for the respondent contended that this being a second appeal, this Court cannot disturb the findings of the appellate court however erroneous the findings may be.

There is merit in the arguments of the learned counsel for the appellants and deserves acceptance. If the findings of the courts below are divergent and where the findings of the appellate court on disputed question of fact is by misconstruing of evidence, this court sitting in second appeal can certainly interfere with the findings of the appellate court. More so, if it is shown successfully by the appellants that there is an error in law and defect in procedure which would be a substantial question of law this court can interfere with the findings of the appellate court.

10. Defendant except making a mention that plaintiffs are minors and therefore the suit brought without their next friend is bad, has not filed any application under Order-32 Rule-2 C.P.C. with a prayer to take off the plaint. In the absence of any such application by the defendant if the court proceeds to pass the judgment and decree in favour of the plaintiffs that may amount to an irregularity and the judgment and decree in favour of the plaintiffs would not be a nullity. Even otherwise, in the case on hand, it is not shown that the plaintiffs are minors. Ex.P-1 is the Power of Attorney executed by the plaintiffs and 3 others in favour of PW-1 Sri Govinda and there the age of these two plaintiffs is given as 24 and 22 years. Ex.P-4 is the rent karar by the defendant in favour of plaintiffs and there is nothing in the document to indicate that plaintiffs were minors at the time of deed in the year 1980. Therefore, viewed from any angle, there is no substance in the contention that the judgment and decree in favour of the plaintiffs by the Trial Court is a nullity since the institution of suit was without natural guardian as next friend.

11. Appellate court finds fault with the Trial Court in framing Issue No. 1. Learned counsel for the respondent argued that the Trial Court committed an error in law in framing that issue in a suit for mere injunction and that was required to be corrected. I find no merit in the contention in view of the facts and circumstances of the case.

There is no rule or law prohibiting the court in considering the question of ownership in a suit for injunction. Even in a suit for injunction, in certain cases the court would be required to consider atleast incidentally the question of ownership and that would depend upon the facts and circumstances of each case.

Order 14 Rule 1(5) of C.P.C. requires the Court to frame and record issues on which right decision of the suit appears to depend keeping in mind both the fact and law, the parties are at variance. Order 14 Rule 3 C.P.C. provides for framing issues of certain materials and in settling the issues, the court must necessarily take note of the relief sought in the suit. Further Rule 5 empowers the court to strike out any issue at any time before passing the decree if it is of the view that a particular issue or issues are wrongly framed. Therefore, it would be incorrect to say or hold that the Court committed an error if in a given case, the Court were to amend or strike any issue before proceeding to judgment. It requires to be examined in the facts and circumstances of each case.

It is admitted that the plaintiffs are the owners of the land on which the garage is put up. Relief sought for by the plaintiffs is to restrain the defendant and his men from making any alterations or additions to the existing structure. Ownership of the garage/structure, is in dispute. Therefore, perhaps the Trial Court frames Issue No. 1 as to the ownership of the garage throwing the burden of proving it on the plaintiffs. May be, it is not properly worded, but in view of the defence, the controversy required to be determined and the relief sought, the Trial Court cannot be found fault with in framing issue No. 1.

Plain reading of the pleadings make it clear that the lease is not in dispute. Ex.P-4 is the rent karar and it is marked through PW-2 Balakrishna Datta, the scribe of that document. Dispute is as to who put up the garage/structure or whether what was leased included garage also. Plaintiffs would be entitled to the relief of injunction if only they establish that what was leased to defendant under Ex.P-4 is not merely the open site but also the garage and the agreement did not provide for alteration or additions by the defendant without the consent or approval of the lessors.

In the circumstances, I am of the considered view that the Trial Court committed no error in law in striking out and framing issue No. 1 before proceeding to judgment as observed by the appellate court in para-14 of its judgment.

12. It is then observed that non-examination of the father of plaintiffs is a serious omission in the case of the plaintiffs and an adverse inference has to be drawn for his non-examination. This is not correct. Adverse inference for non-examination of a witness can be drawn if there is no evidence in that behalf.

When there is evidence on record more particularly by way of admissions, non-examination of a particular witness whatever may be his position in the suit will not permit the court to draw adverse inference. The appellate court is therefore wrong in observing that non-examination of the plaintiffs' father is a defect and that defect would enure to the benefit of the defendant.

Appellate Court proceeds to say the P.Ws-1 & 2 have no personal knowledge, the evidence of P.W-1 is in the nature of hearsay evidence and therefore, the examination of plaintiffs' father was necessary. He appears to have ignored the evidence of defendant DW-1 and DW-3 Durgappa in this behalf. DW-1 admits that he did not take any permission from the municipality while putting up the shop in question. Secondly he states that he had not collected the building materials but his younger brother had collected the material. However, he denies the suggestion that building materials were collected to put up new construction. But DW-3 Durgappa admits that the garage in possession of the defendant did not have proper security and therefore he had made an attempt to put up a proper construction. Relevant portion of his deposition reads thus:

When that is the evidence, non-examination of plaintiffs' father is not fatal as observed by the appellate court in para-14 of the judgment.

13. In view of the controversy between the parties viz., as to whether there was construction at the time of lease and whether that was put up either by the plaintiffs or defendant, the appellate court ought to have taken into consideration the stipulation in agreement Ex.P-4. If there was no mention of a shed or any structure in the agreement, then of course the court could have considered the oral evidence independently. The appellate court holds that the possession of the defendant in respect of the suit property is, as a lessee. A plain reading of Ex.P-4 rent karar makes it clear that what was leased is the constructed portion facing west abutting the main road for the purpose of running garage. The relevant portion in Ex.P-4 reads thus:

(under-lining supplied)

The appellate Judge perhaps without taking into consideration this relevant covenant in the rent karar holds that the Trial Court committed an error in framing first issue which is not correct.

14. The suit is in between the land-lord and tenant. The rent karar Ex.P-4 was for a period of 11 months and therefore the defendant's position is that of a tenant holding over. Even then if the defendant felt insecurity or wanted certain repairs to the building as a measure of security, he had every right to approach the landlord, obtain his permission and put up construction. It is averred in the written statement that in fact defendant approached the plaintiffs' father, obtained permission and made an attempt to collect the materials, but plaintiffs' father with a view to secure higher rent got filed this frivolous suit. There is nothing to indicate in the evidence that defendant at any time approached the plaintiffs or their father and obtained permission. There is no evidence to support

the plea that he sought permission, defendant does not even make a mention of it in evidence. Section 108(f) of the Transfer of Property Act provides a remedy in a situation where the land-lord neglects or refuses to effect necessary repairs. Sub-section (h) empowers him to remove such fixtures even after the determination of the lease subject to the condition that he leaves the property in the state in which he received it. These things and the question of law on the point have been ignored by the appellate court in considering the evidence both oral and documentary. It is an error in law and defect in procedure which requires to be corrected in appeal.

14. In view of the fore-going reasons, I find merit in the contention that the appellate court has committed an error in construing the evidence and that has led the court to interfere with the findings recorded by the Trial Court which is based on sound reasons. Therefore, the appeal must succeed.

15. In the result, this appeal is allowed. Judgment and decree of the Civil Judge, Karwar in R.A.No. 13/86 dated July 24, 1991 are hereby set aside, judgment and decree of the Munsiff, Bhatkal in O.S.No. 10/83 dated December 21, 1985 are hereby restored. However, in the circumstances of the case, I direct each party to bear their own costs throughout.