

(2013) 12 KAR CK 0276

In the Karnataka High Court

Case No : Regular Second Appeal No. 1097 of 2011 (Inj)

Patel Basavaraju

APPELLANT

Vs

Sudesha

RESPONDENT

Date of Decision : 02-12-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (2013) 12 KAR CK 0276

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

Bench : Single Bench

Advocate : S.C. Vijayakumar, for the Appellant;

Final Decision : Dismissed

Judgement

K.N. Phaneendra, J.—Heard the learned counsel for the appellant regarding admission of the Regular Second Appeal. Perused the judgments of the Trial Court and as well the Appellate Court. The appellant herein is the plaintiff before the Trial Court, filed a suit for permanent injunction restraining the defendant from causing hindrance to the free movement of the plaintiff to reach PWD road from the suit schedule property situated on its eastern side. The plaintiff claim that he is the owner of the suit schedule property acquired under the grant in the year 1974 for upset price of Rs. 40/-, the katha stands in his name and he has been in lawful possession and enjoyment of the said property.

2. It is the contention of the plaintiff that he has put up main door of his house towards east and there is a PWD road situated abutting the eastern boundary of his property. The defendant has been interfering with the plaintiffs ingress and egress to the said PWD road from his house. Therefore, he filed a suit against the defendant. After appearance, the defendant contested the suit stating that the plaintiff has given a wrong boundary to his property, wrongly explaining that there is a PWD road situated immediately after the plaint schedule property.

3. It is the contention of the defendant that there is a vacant site on the eastern

side of the plaintiff's house measuring east to west 30" and north to south 48" bearing site No. 81 granted in favour of the defendant. It is also stated that after the defendant's property, PWD road is situated towards the east of the defendant's property. By mentioning wrong boundary on the eastern side of the suit schedule property, the plaintiff wants to have the right of way over the defendant's property without seeking proper remedies before the court. Hence, the plaintiff has not come up with clean hands before this court. Hence, the defendant prayed for dismissal of the suit.

4. The Trial Court on the basis of the rival pleadings framed the following issues:

- (1) Whether there is cause of action?
- (2) Whether the plaintiff is entitled for the relief of injunction as prayed for?
- (3) What Order or Decree?

5. After discussing in detail, the Trial Court on appreciation of the oral and documentary evidence placed by the parties has come to the conclusion that a site is situated on the eastern side of the plaintiff's property and thereafter, PWD road is situated. The plaintiff though contended during the course of the evidence that the site granted in favour of the defendant on the eastern side of his property has been cancelled by the Panchayath, but the Trial Court observed that he has not produced any material to show that the grant made in favour of the defendant was cancelled by the Panchayath. Therefore, mere oral evidence of the defendant to that extent has not been believed by the Trial Court. The Trial Court also appreciated the document Ex. D-1, which is the document in which the site bearing No. 81 measuring 30" x 48" was granted in favour of the defendant. The Trial Court also held that the defendant is in possession of the said property and the PWD road alleged by the plaintiff is situated after the property of the defendant on the eastern side. Therefore, the Trial Court has observed that, in order to have the right of way over the property of the defendant, if there is no other way available to reach PWD road, plaintiff ought to have claimed the right of easement over the said property But mere suit for permanent injunction is not maintainable. Hence, the suit of the plaintiff came to be dismissed by the Trial Court.

6. Being aggrieved by the judgment of the trial Court, the plaintiff filed Regular Appeal No. 101/2006 before the Court of Senior Civil Judge at Gubbi, re-iterating the same factual aspects and grounds as urged before the Trial Court. The Appellate Court has framed the following points for consideration:

- (1) Whether the appellant has established before the Trial Court that he has been in lawful title and possession over the suit schedule property as on the date of suit?
- (2) Whether the Trial Court has erred in appreciating the oral and documentary evidence and to apply the legal principles to the facts of the case resulted in mis-carriage of the justice?

(3) Whether the appellant/plaintiff has made out the grounds that the document sought to be produced along with IA No. 2 could not be produced before the Trial Court in spite of due diligence and the same is secured recently and therefore the said document is necessary and material for the purpose of consideration of his case?

(4) What order?

The Appellate Court in fact, after formulating the aforementioned points, discussed in detail, and also of the opinion that PWD road is situated after the property of the defendant on the eastern side abutting to the property of the plaintiff. At paragraph 15, it is categorically observed by the Appellate Court that defendant's property as per Ex. D1 to Ex. D3 is situated towards the East of PWD road, but there is a vacant site situated to the east of the property of the plaintiff, granted to the extent of 30"x48" in favour of the defendant which earlier belong to Village Panchayath. The Appellate Court has also observed that, by means of mentioning incorrect and wrong boundaries, the plaintiff wants to have a right of way over the property of the defendant. Looking to the above said facts and circumstances of the case, the Trial Court and the Appellate Court on facts have come to the conclusion that the plaintiff has given wrong boundaries and also that the property of the plaintiff situated to the west of the defendant's property, therefore, he cannot have any; remedy to pass through the property of the defendant to reach PWD road on the eastern side. Hence, the appeal also came to be dismissed.

7. The appellant has also filed an Application under Order XLI Rule 27 of CPC before the Appellate Court seeking production of some document. The Appellate Court has observed that though there was sufficient time for the plaintiff to produce them before the Trial Court, he failed to do so and there was no reason to allow the said Application when the suit is only for bare injunction. Therefore, the Appellate Court also dismissed the said IA filed under Order XLI Rule 27 of CPC.

8. It is also observed by the Appellate Court, that the defendant has already constructed a house with permission" granted by the Panchayath authority as per Ex. D11. It is also observed that the plaintiff has also constructed his house as per Ex. P2, earlier to the defendant as per the measurement shown in Ex. P2, in terms of the measurement as "Gaja" (yard) which covers larger extent than the measurement in terms of "meter". It is also observed that merely because the plaintiff fixed two doors towards east of his house, that itself is not a criteria to fix the eastern boundary of the said property. The plaintiff has not sought for relief of declaration of easement right over the defendants property and it is clearly and rightly observed by the Trial Court while dealing the issues with reference to oral and documentary evidence by both parties. The Trial Court has properly appreciated the evidence on record. The courts have also observed that on the northern side and southern side of the plaintiff's property road is situated. Therefore, merely the plaintiff opens his main door to the eastern side,

he cannot claim any ingress or egress to his property over the defendant's property without seeking proper prayer and such remedy cannot be granted in a permanent injunction suit. Hence, the Appellate Court also dismissed the appeal by means of giving proper reasons based on factual matrix of the case.

9. Looking to the above said facts and circumstances of the case, when both the courts have disposed off the matter purely basing their judgment on the factual matrix of the case, such observations or the judgments cannot be interfered in the Regular Second Appeal, unless there is a substantial question of law is involved. In this regard, the Apex Court in the case of Madhavan Nair v. Bhaskar Pillai reported in (2005) 10 SCC 553, has observed thus:

Even if the courts below commits any error in recording the findings based on facts, that itself cannot be a ground for the High Court to upset the same.

Therefore, I do not find any substantial question of law involved in this particular case and as such, the Regular Second Appeal does not survive for consideration.

Accordingly, Regular Second Appeal is dismissed at the stage of admission itself.