

(2015) 03 KAR CK 0096

In the Karnataka High Court

Case No : Regular Second Appeal No. 2194/2011 (DEC/INJ)

Seethamma and Others

APPELLANT

Vs

The Tahasildar and Others

RESPONDENT

Date of Decision : 23-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80, 80(2)
Karnataka Land Revenue Act, 1964 — Section 79(2)

Citation : (2015) 03 KAR CK 0096

Hon'ble Judges : A.S. Bopanna, J.

Bench : Single Bench

Advocate : A. Keshava Bhat, for the Appellant; M. Elizabeth, HCGP, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

A.S. Bopanna, J.—The appellant is before this Court assailing the judgment dated 20.07.2011 passed in RA No. 14/2000. By the said judgment, the Lower Appellate Court has set aside the judgment and decree dated 30.11.1999 passed in O.S. No. 25/1991 by the trial Court whereby the declaration as sought for by the plaintiff was granted.

2. The Lower Appellate Court while arriving at its conclusion though has taken note of the fact that the plaintiff was claiming Kumki privilege in respect of the "B" schedule properties adjoining the "A" schedule lands which belonged to the plaintiff, has arrived at the conclusion that in view of the documents marked as Exhs. D1 and D2, the right of enjoyment of the Kumki privilege in favour of the plaintiff did not exist and without challenging such orders before the appropriate authorities, a declaration before the Civil Court could not have been sought. The Lower Appellate Court has also arrived at the conclusion that the suit without issue of prior notice was not maintainable under Section 80 of CPC. In the light of such conclusion reached by the Lower Appellate Court, this Court while admitting the appeal on 30.11.2011 has formulated the following substantial

questions of law:

"i) Whether the Lower Appellate Courts is justified in law in holding that as per the orders passed under Exs. D1 and D2 by the Deputy Commissioner, the Kumki privileges in respect of the "B" Schedule property got extinguished though the said order does not relate to the suit schedule properties?

ii) Whether the Lower Appellate Court is justified in reversing the judgment of the trial Court on the ground that the suit is not maintainable without challenging the orders of the Deputy Commissioner as per Exs. D1 and D2?

iii) In the light of the leave granted by the trial Court under Section 80(2) of C.P.C., whether the Lower Appellate Court is justified in holding that the suit was not maintainable for want of notice under Section 80 of C.P. C?"

3. Essentially, a perusal of the substantial questions of law would lead to the conclusion that what is required to be decided by this Court is as to whether the Lower Appellate Court was justified in dismissing the suit by relying upon the Exhs. D1 and D2 and also setting aside the order of the trial Court with regard to permitting the plaintiff to file the suit in terms of Section 80(2) of the CPC.

4. Heard the learned counsel for the appellant, the learned Government Advocate and perused the appeal papers including the records received from the Court below.

5. The prayer as made in the plaint is to seek declaration that the plaint "B" schedule properties form direct kumki to the plaint A" schedule properties and the plaintiff is entitled to enjoy the kumki privilege over "B" schedule properties. The consequential relief of injunction restraining the defendants has also been sought. The fact that the properties described in the A" schedule to the plaint belong to the plaintiff is not in dispute. A perusal of the written statement filed on behalf of the defendants would also indicate that there is no dispute to the fact that the properties described in the "B" schedule properties are the kumki lands. The lands described in the "B" schedule properties are the properties in Sy. No. 150/1c measuring 5 acres 30 cents, Sy. No. 150/1B measuring 9 cents, Sy. No. 150/1B measuring 1 cent and Sy. No. 151/4A measuring 26 cents. The purpose of referring to the survey numbers as described in the suit "B" schedule herein is for noticing the nature of consideration that was made in the documents at Exhs. D1 and D2 since that is the question of law which is relevant in this appeal. A perusal of the document at Ex. D1 would disclose that the Tahsildar has forwarded a recommendation to allot sites measuring 5 cents each in Sy. No. 151/4A of Uppinangadi village which is the item No. 4 property in the "B" schedule to the plaint. By the document at Ex. D2, it is indicated that it is a proceedings of Deputy Commissioner as per the request of the Tahsildar for allotment of the sites. The question is as to whether the said document would come in the way. Therefore, if the written statement filed on behalf of the defendants, the evidence tendered by the parties before the Court below and the document at Ex. C1 are kept in view, the question that would arise is as to

whether even if the site in Sy. No. 151/4A is considered as granted, the same relates to 26 cents described in item No. 4 to the suit "B" schedule property; even then whether the extinguishment of kumki right has been made in accordance with law and in that light, whether the plaintiff should have challenged the said orders before the competent authority as held by the lower Appellate Court. The further question that would also arise is even if the documents at Exhs. D1 and D2 are held to be the documents which have come into existence in accordance with law, whether the said documents alone could have been held against the plaintiff by the Lower Appellate Court to decline the declaration as sought in respect of the properties described in items No. 1 to 3 of the suit "B" schedule.

6. At the outset, it is to be noticed that the Lower Appellate Court while accepting the documents at Exhs. D1 and D2 has referred to Section 79(2) of the Karnataka Land Revenue Act. In fact the Lower Appellate Court has considered the contents of the said provision as against what it actually means. The right as granted under Section 79(2) of the said Act could only be curtailed in the manner known to law and this aspect of the matter has been considered by the Hon'ble Division Bench of this Court in the case of Devakumarshetty and Others Vs. State of Karnataka and Others, . Further the right in respect of such kumki privilege and the manner in which it is to be recognized has been considered by the Hon'ble Supreme Court in the case of State of Mysore and Others Vs. K. Chandrasekhara Adiga and Another, . Therefore, if the position of law and the interpretation as rendered by this Court as well as the Hon'ble Supreme Court is kept in view, certainly the documents at Exhs. D1 and D2 cannot be considered as documents wherein the procedure as contemplated has been followed to curtail the kumki privilege even in respect of the property bearing Sy. No. 151/4A measuring 26 cents.

7. Having arrived at the above conclusion, before considering the ultimate relief to which the plaintiff would be entitled, it is also necessary to take note of the further question of law which had been framed relating to the leave granted by the trial Court to institute the suit by dispensing with the issue of notice to the defendants. On this aspect, the position of law is clear that it is for the trial Court to exercise its discretion at the outset and come to the conclusion as to whether such leave is to be granted and thereafter proceed with the suit. In the instant case, the trial Court had granted such leave and had proceeded with the suit. The defendants had not made out any grievance with regard to the same and had gone through the entire proceedings of the suit and therefore there was no reason for the Lower Appellate Court to come to a different conclusion that such leave granted is not justified. Therefore, in any event, the suit was maintainable.

8. In the light of the above, keeping in view the conclusion reached by this Court that there can be no dispute with regard to the fact that the suit schedule "B" items No. 1 to 3 properties are kumki properties and since the said items of properties do not constitute the subject matter in the documents at Exhs. D1 and

D2, the trial Court in fact was justified in decreeing the suit declaring the kumki privilege in favour of the plaintiff and the Lower Appellate Court could not have set aside the same merely by relying on Exhs. D1 and D2. Hence, to the said extent, the declaration as declared by the trial Court in O.S. No. 25/1991 is restored.

9. Insofar as item No. 4 in "B" schedule properties though I have arrived at the conclusion that the kumki privilege has not been extinguished as required under law even under Ex. D1 and D2, the matter requires a different consideration. The report of the Commissioner at Exhs. C1 and C3 as also the sketch at Ex. C2 would make it clear that the property bearing Sy. No. 151/4A consists of a larger extent of land than 26 cents to which the plaintiff is laying claim. Even if the documents at Exhs. D1 and D2 are kept in view, it would not be possible to come to the conclusion as to whether the grant to different persons as proposed thereunder relates to 26 cents for which the plaintiff is laying claim or is it beyond the said extent. If a physical verification is made and if it is found that the allotments have been made beyond the extent of 26 cents, the plaintiff in any event would be entitled to declaration for the item No. 4 property also. On the other hand, if the grant proposed under Exhs. D1 and D2 are found to be in the said 26 cents of item No. 4 in "B" schedule property, even though I have arrived at the conclusion that the said orders are not passed in accordance with law, keeping in view the fact that such consideration has been made as far back as in the year 1972, the right of the persons who are in actual physical possession cannot be disturbed at this stage and that too behind their back.

10. Therefore, only to the extent of the said item No. 4 in "B" schedule property, the matter stands remitted to the Lower Appellate Court to restore RA No. 14/2000 on file to the limited aspect of appointing an appropriate Commissioner to make a spot verification of the land bearing Sy. No. 151/4A with reference to the report of the Commissioner and the sketch which are already on record as Exhs. C1 to C3 and submit a factual report to the Lower Appellate Court as to whether any person is in occupation of 26 cents of item No. 4 in B schedule property claiming to be in possession by virtue of a grant made by the Government. If any other person is in occupation of the said extent pursuant to the grant made by the Government, the declaration that is presently limited to items No. 1 to 3 in "B" schedule properties as presently made by this Court shall stand confirmed. If the report submitted by the Commissioner indicates that no person other than the plaintiff is in occupation of the 26 cents of land in Sy. No. 151/4A, the Lower Appellate Court shall on accepting the report of the Commissioner declare that the plaintiff would enjoy the privilege of kumki right even in respect of the said land by confirming the judgment of the trial Court even to that extent of the land. For the present, the judgment and decree of the trial Court stands restored insofar as Items No. 1 to 3 of "B" Schedule properties.

11. To enable the said consideration, the parties shall appear before the Lower Appellate Court on 15.04.2015 as the first date of appearance without summons

being issued by the Lower Appellate Court. The Lower Appellate Court shall thereafter regulate its proceedings and conclude the same in an expeditious manner.

In terms of the above, the appeal stands allowed in part. Parties to bear their own costs.