

(2015) 11 KAR CK 0276

In the Karnataka High Court

Case No : Regular Second Appeal No. 2372/2007

Shivaraya and Others

APPELLANT

Vs

Ramachandra and Others

RESPONDENT

Date of Decision : 25-11-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 96

Citation : (2015) 11 KAR CK 0276

Hon'ble Judges : A.N. Venugopal Gowda, J.

Bench : Single Bench

Advocate : Manvendra Reddy, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

A.N. Venugopal Gowda, J.—This second appeal, under Section 100 CPC, is by the L.Rs. of the deceased plaintiff. O.S. No. 37/2001 was instituted in the Court of the Prl. Civil Judge (Jr.Dn.), Gulbarga to pass a decree of declaration that the permission granted by the City Corporation, Gulbarga on 04.09.2003 and the map enclosed with the said permission are illegal, unauthorised and against the provisions of law and to pass a decree of perpetual injunction and restrain the defendants from opening any door, window, ventilators on the Northern and Southern side of house No. 10-20/2, in Plot No. 12 of Pardi (survey) No. 13 of Brahmapur, Gulbarga and also to pass a decree of mandatory injunction against the defendants to close the three windows and two drains opened to the Eastern wall of their house No. 10-18 i.e., towards the Western side of the suit property. Relief was claimed on the ground that the plaintiff is the owner and possessor of house No. 10-20/2 in plot No. 12 of Pardi (survey) No. 13 situated at Brahmapur, Gulbarga. The claim of the plaintiff was contested by the defendants by filing written statement. Issues were raised on 13.08.2003 and the additional issues were raised on 12.12.2005.

2. The issues and additional issues raised are the following:

ISSUES.

"1. Do the plaintiff proves that, the L.Rs. of the defendant have no right to open any door, window and ventilator on the northern and western side of the house No. 10-18 in plot No. 12 pardi No. 13 of Brahmapur?

2. Whether the plaintiff proves that, defendant and his L.Rs. attempted to open the doors, windows and ventilators causing legal infringement of the plaintiff's right?

3. Whether plaintiff is entitled the relief of permanent injunction?

4. What order or decree?

ADDITIONAL ISSUES.

1. Whether plaintiff proves that construction permission granted by Defendant No. 2 dated 4-9-2003 is illegal, un-authorized, and against the provisions of law?

2. Whether plaintiff is entitled for mandatory injunction as sought for?"

3. In proof of the plaintiffs' case, PWs.1 to 3 deposed, through whom Exs. P1 to P32 were marked. For the defendants, the 1st defendant deposed as DW.1 and a witness was examined as DW.2 and Exs. D1 to D14 were marked. The trial Judge having regard to the rival contentions and on appreciation of the evidence, answered all the issues and the additional issues in negative and dismissed the suit by a judgment and decree dated 11.07.2006.

4. Assailing the findings recorded in the judgment and the consequential decree of dismissal passed in the suit, R.A. No. 158/2006 was filed in the Court of Prl. Civil Judge (Sr.Dn.) at Gulbarga on 26.08.2006. The learned appellate Judge having perused the record of the case and taking into account the rival contentions, raised the following points for consideration:

"1. Whether the L.Rs. of the Plaintiff prove that the finding of the court below regarding the right of the LR. of the defendant to open the door, window, and ventilator on the northern and western side of house No. 10-18 in plot No. 12, pardi No. 13 of Brahmapur is not correct?

2. Whether the L.Rs. of Plaintiff further prove that the finding of the Court below regarding non-infringement of the plaintiff's right on account of their opening of the windows, doors and ventilators on the northern and western side of the house No. 10-18 in plot No. 12, pardi No. 13 of Brahmapur is not correct?

3. Whether the L.Rs. of Plaintiff further prove that the finding of the Court below that they are not entitled for the mandatory injunction closing the doors, windows and ventilators in the above said wall is not correct?

4. Whether the L.Rs. of Plaintiff further proves that the Judgement and decree of the Court below is arbitrary, capricious and perverse?

5. What order?"

5. On a fresh assessment of the evidence and upon appreciation of the rival contentions, it was held that the plaintiff has not made any effort to say how his privacy is going to be affected and on what angle and at what high, the defendants are entitled to open the doors and windows. Finding that the opening of windows would not affect the right of privacy of the plaintiff and the infringement of right of privacy having not been established and the alleged nuisance also having been proved, concurred with the findings recorded by the learned trial Judge, dismissed the appeal on 15.06.2007. Assailing the said judgments and decrees, this second appeal was filed.

6. Sri Manvendra Reddy, learned advocate appearing for the appellants contended that the trial Judge having failed to frame proper and relevant issues, there is injustice caused to the plaintiff/L.Rs and as the Courts below have taken extraneous facts into consideration, there is failure of justice, in that, the suit and appeal have been illegally dismissed. Learned counsel submitted that the impugned judgments have given raise to substantial questions of law raised in the appeal memorandum and hence, the second appeal filed under Section 100 CPC is maintainable.

7. Sri Krupa Sagar Patil, learned advocate appearing for respondent Nos. 1A to 1E, on the other hand contended that there being concurrent finding on pure questions of fact, by the Courts below and as the impugned judgments have not given raise to any substantial question of law, the findings recorded by the Courts below having not been shown to be perverse, second appeal under Section 100 CPC is not maintainable. Learned counsel made submission in support of the findings recorded in the impugned judgments/decrees and sought rejection of the second appeal.

8. The issues and additional issues raised by the trial Judge encompass the material pleadings of both parties. Keeping in view of the scope of the suit and the pleadings of the parties, relevant issues have been raised for trial. Knowing well the issues raised, evidence was adduced. Upon appreciation of the rival contentions and the record of the suit - oral and documentary evidence, the L.Rs. of the plaintiff having failed to establish that the defendants have no right to open any door, window and ventilators on the Northern and Western side of house No. 10-20/2 in plot No. 12 of Pardi (survey) No. 13 of Brahmapur, Gulbarga and that the plaintiffs have failed to prove the causing of any illegal infringement of their rights by the defendants, who have made the construction in terms of the permission granted by the City Corporation on 04.09.2003, the issues were answered in the negative and the suit was dismissed.

9. In the appeal filed under Section 96 CPC, in view of the grounds raised in the appeal memorandum and the contentions urged, by keeping in mind the scope of the suit, the points have been raised for consideration and upon fresh assessment of the evidence, the Court below has answered the points raised in

the negative.

10. It is not the case of Sri Manvendra Reddy, learned advocate for the appellants, that there is omission to read any material evidence or that there is misreading of the evidence brought on record of the suit by the Courts below. The findings recorded by the Courts below in the impugned judgments were not shown to be perverse. Hence, there is hardly any scope to interfere in exercise of limited power under Section 100 CPC with the concurrent findings recorded by the Courts below. Pure finding of fact, unless shown to be perverse cannot be interfered in exercise of jurisdiction under Section 100 CPC. Having regard to the findings, which have been recorded by the Courts below, in the impugned judgments, no substantial question of law arises for consideration.

In the result, the second appeal, lacking substantial question of law being not maintainable, is rejected.