

(2011) 12 KAR CK 0048

In the Karnataka High Court

Case No : Regular Second Appeal No. 3201 of 2006

Sri K.P. Ramesh

APPELLANT

Vs

Sri K.N. Chandre Gowda, Since dead by L.Rs., (H.R. Hemavathi, K.C. Sharath and K.C. Bharath) Respondents No. 1(b) and 1(e) are the children of late K.N. Chandregowda. All are

RESPONDENT

Date of Decision : 07-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31

Citation : (2011) 12 KAR CK 0048

Hon'ble Judges : B. Manohar, J

Bench : Single Bench

Advocate : Sanathkumar Shetty, for the Appellant; S. Nagaraja, for R1(a - c), for the Respondent

Final Decision : Allowed

Judgement

B. Manohar

1. In this appeal, the appellant challenging the legality and correctness of the judgment and decree dated 29.9.2006 made in R.A.No.328/2006 passed by the Fast Track Court-II, Chikmagalur, setting aside the judgment and decree dated 28.10.2002 made in O.S.No. 115/1998 passed by the Court of Principal Civil Judge (Jr.Dn.) and JMFC, Mudigere has filed this appeal.

2. For the sake of convenience, parties would be referred to as per their status before the trial court. The appellant in the plaintiff before the trial court.

3. The facts of the case are as under:

The plaintiff filed a suit seeking for permanent injunction restraining the defendant from interfering with the suit schedule property and also forming a road in the suit property belonged to the plaintiff. In the plaint, it is averred that the plaintiff is the absolute owner of land bearing Sy.No.80/1 measuring 5 acres

11 guntas, Sy.No.82 measuring 16 acres 39 guntas and Sy.No.83 measuring 3 acres 10 guntas of Kogile village. The said properties were allotted to the shares of the plaintiff as per the registered family partition held on 1.3.10.1980. Since then, the plaintiff has been in possession and enjoyment of the said properties without interference of anybody. The revenue records are standing in the name of the plaintiff. It is further averred that there is no public road or even the symptoms of any road in the plaintiff schedule properties. Except the plaintiff, nobody has got any manner of right, title and interest over the plaintiff schedule properties. When such being the case, the defendant, who had no right, title and interest over the plaintiff schedule properties, tried to interfere with the peaceful possession with an intention to form a road in the plaintiff schedule properties with his henchmen on 9.8.1998 and frivolous attempts were made by the defendant and his henchmen to trespass into the plaintiff schedule properties and tried to form the road forcibly by removing the fence. The plaintiff resisted the illegal acts of the defendant, in view of the threat given by the defendant regarding formation of road illegally, the plaintiff has filed the suit with the above prayer.

4. Pursuant to the notice issued by the court below, defendant entered appearance and filed his written statement denying the averments made in the plaint. He denied that the plaintiff is the owner in possession, occupation, cultivation and enjoyment of the plaintiff schedule properties. He also denied the partition, which took place in the family of the plaintiff. He further denied the contention of the plaintiff that there is no road or symptoms of road in the plaintiff schedule properties. It is further alleged that the plaintiff has suppressed the real and correct facts with a mala fide intention to block the road, which is in existence since the time immemorial. The defendant further contended that there is a road, which deviates from Guthi-Sabbenahally road at Kotrakere, which runs up to Kogile A K Colony. The Zilla Panchayath has improved the road by spending huge money. The Zilla Panchayath Engineering Division, Chikmagalur has built culvert to the said road for the benefit of the public of Kotrakere, Kogile and Tripura village. The villagers are using the said road in order to reach their estate and school, which is situated at Kotrakere. The plaintiff with the help of his followers i.e. K P Laxmanagowda and others have damaged the culvert and planted the coffee plants on the said road, in spite of the complaint made to the Zilla Panchayath, Deputy Commissioner, Assistant Commissioner, the Tahsildar, Mudigere and Banakal Police. Hence, he sought for dismissal of the suit.

5. The court below on the basis of the pleadings of the parties, framed the following issues for consideration:

1. Whether the plaintiff proves that he is the lawful owner in possession of the plaintiff schedule properties?
2. Whether the plaintiff proves the alleged interference by the defendant?
3. Whether the defendant proves that himself and other villagers have got the

right of way over the suit schedule properties as averred in para 8 of his written statement?

4. Whether the plaintiff is entitled for the relief of permanent injunction as sought for?

5. To what order or decree?

6. The plaintiff in order to prove his ease examined himself as P.W.1 and got marked the documents as Ex.P1 to Ex.P14. On the other hand, the defendant got himself examined as DW1 and got marked the documents as Ex.D1 to Ex D9. Further the Taluk Surveyor was examined as CW1 and got marked the documents as Ex.C1 and Ex.C2.

7. The Trial Court after considering the oral and documentary evidence let in by the parties held issue No.1 and 2 in affirmative and issue No.3 in the negative, consequently by its judgment and decree dated 28.10.2002 decreed the suit restraining the defendant, his men, agent, servant or any other person claiming under him from interfering upon the plaint: schedule property and removing the fence and forming any road and disturb peaceful possession of the plaintiff in any manner.

8. Being aggrieved by the judgment and decree dated 28.10.2002 made in O.S.No.115/1998, defendant filed R.A.No.328/2006 on the file of the Fast Track Court. - II, Chikmagalur, interalia contending that the judgment and decree passed by the trial Court is contrary to law and appreciation of the evidence by the trial Court is erroneous in law. The Trial Court failed to take into consideration the evidence of CW1, who is the Taluk Surveyor and has submitted his report in OS No, 166/1999 with reference to the existence of the road. Further the trial Court failed to consider that there is no other approach road to go to the estate and school and the reasoning assigned by the trial Court is contrary to law. The 1st Appellate Court after considering the arguments addressed by the parties, raised the following point for consideration:

Whether the impugned judgment is unsustainable one?

9. The 1st Appellate Court after taking into consideration of the evidence of the Taluk Surveyor and Ex.D7, the certified copy of the order sheet in O.S.No. 164/1999 for which the plaintiff is not a party allowed the appeal and set aside the judgment and decree made in O.S.No. 115/1998 and dismissed the suit filed by the plaintiff. Being aggrieved by the judgment and decree dated 29.10.2002 made in RA No.328/2006, the plaintiff has preferred this appeal.

10. Sri Sanathkumar Shetty, learned Advocate appearing for the appellant contended that the judgment and decree passed by the 1st Appellate Court is contrary to law and the evidence on record. Learned Advocate further contended that the duty cast upon the 1st Appellate Court is to reappraoiate the evidence adduced by the parties in the instant case and the 1st Appellate Court without taking into consideration the evidence and re-examining the matter has

erroneously set aside the judgment and decree passed by the trial Court. Further, it is contended that the 1st Appellate Court has grossly erred in relying Ex.D7, certified copy of the order sheet in OS No. 164/1999. The said document ought not to have been considered by the 1st Appellate Court. The reason assigned by the 1st Appellate Court is erroneous and is not a speaking order and sought for setting aside the same.

11. On the other hand, the Advocate appearing for the respondents argued in support of the judgment and decree passed by the 1st Appellate Court and contended that on considering the documentary evidence produced by the parties and also taking into consideration the report of the Taluk Surveyor, the 1st Appellate Court set aside the judgment and decree passed by the trial Court and dismissed the suit. Learned counsel further argued that there is no infirmity or irregularity in the judgment and decree passed by the 1st Appellate Court and sought for dismissal of the appeal.

12. I have carefully considered the arguments addressed by the parties and perused the oral and documentary evidence let in by both the parties.

13. At the time of admission of this appeal, this Court framed the following substantial questions of law that arise of consideration:

(i) Whether the judgment/decreed of the first appellate Court is vitiated on account of the reliance placed on Ex.D7 to which the plaintiff/ appellant is not a party?

(ii) Whether the impugned judgment of the first appellate Court is in accordance with R.31 of O.41 CPC?

14. On careful consideration of the arguments addressed by the learned counsel for the parties and on perusal of records, it is clear that the suit schedule properties are the joint family properties of the appellant as per the registered partition held on 13.10.1980. The suit schedule properties are allotted to the appellant. Since then without any interference by anybody, the appellant has been in possession and enjoyment of the said properties by raising coffee plant. PW1 in his evidence deposed that three survey numbers are in compact block and fenced on all sides and there is no public road inside the coffee estate. The appellant/plaintiff produced the revenue records, mutation register, patta book, sketch marked as Exs.P1 to P10. In the sketch, there is no mentioning of the public road. That the suit schedule properties are not the granted lands and they are hidevali lands of the appellant/plaintiff. If there is any existence of road in the coffee estate, it could have been clearly mentioned in the sketch and village map, In the evidence, he has reiterated his plaint averments and contended that there is no public road. Nothing contrary has been elicited in the cross-examination.

15. DW1 in his evidence has deposed that his property is adjacent to the property of the plaintiff. He reiterated the stand taken in the written statement.

However, in the cross-examination, he admitted that Sy.Nos.81/1, 82 and 83 are the adjacent lands and they are in one block. The defendant has got the property towards east of the property of the plaintiff and he has no right or interest in respect of the property of the plaintiff. In order to examine the existence of the road, an application was made by the plaintiff for appointment of Court Commissioner. The defendant has objected for the same. Further, as per the village map, there is no existence of road in the suit schedule properties. The Taluk Surveyor has been examined as CW1. In his evidence, he deposed that only for the purpose of reference, he made available to the Court the report submitted in OS No. 164/1999 i.e. with regard to the dispute in respect of property bearing Sy.No.4/1 of Kotragere village. In his cross-examination, he did not say whether there is a public road in the suit schedule properties or not. The owner of the property formed the pathway for the purpose of carrying manure and coffee. He did not say whether the plaintiff has formed the pathway in his property. In Sy.Nos.82 and 83, there is no existence of the pathway, but he did not say whether the plaintiff has formed the pathway for his use or for the public.

16. In view of the evidence available on record, I find that the reasoning of the 1st Appellate Court in setting aside the judgment and decree passed by the trial Court is contrary to law. The 1st Appellate Court has not reappreciated the oral and documentary evidence produced by the parties. The judgment and decree passed by the 1st Appellate Court is not based on the evidence on record. Hence, it is required to be interfered by this Court.

17. The 1st Appellate Court mainly relied upon the evidence of CW1 i.e. the Taluk Surveyor, who prepared the sketch in OS No. 164/1999 in respect of Sy.No.4/1 of Kotrakere village. The 1st Appellate Court has committed a serious error in relying on the sketch prepared in the suit in O.S.No.164/99. In Sy.No.4/1, there is an existence of private road. When the defendant tried to interfere with the said road, B N Suresh and others filed OS No.164/1999. In the said suit, a compromise petition was filed. In terms of the compromise, the said suit came to be decreed. In the said suit, the Taluk Surveyor prepared the sketch regarding the existence of the road in Sy.No.4/1. The Taluk Surveyor submitted his report. The said report cannot be taken into consideration in the present suit and came to the conclusion that there is a pathway in the suit schedule properties. Apart from that, the 1st Appellate Court has not reappreciated the oral and documentary evidence. The order passed by the 1st Appellate Court is a cryptic one without considering the documents. Therefore, I find that the judgment of the 1st Appellate Court cannot be sustained. The substantial questions of law framed in this appeal are held against the defendant. The 1st Appellate Court ought not to have relied upon Ex.D7. Further the judgment and decree passed by the 1st Appellate Court is not in consonance with the Order 41 Rule 31 of Code of Civil Procedure. Hence, the same is liable to be set aside.

18. Accordingly, I pass the following:

ORDER

The appeal is allowed.

The judgment and decree dated 29.9.2006 made in RA No.328/2006 by the Fast Track Court-II, Chikmagalur is hereby set aside and the judgment and decree dated 28.10.2002 in OS No. 115/1998 passed by the learned principal Civil Judge (Jr.Dn.) & JMFC, Mudigere, is restored. Parties to bear their own costs.