

(2013) 12 KAR CK 0308

In the Karnataka High Court

Case No : Regular First Appeal No. 791 of 2009 (INJ)

Sri Mahaveer Chand

APPELLANT

Vs

Sri Roshanlal and Smt. Manuvar Devi

RESPONDENT

Date of Decision : 12-12-2013

Acts Referred:

Citation : (2013) 12 KAR CK 0308

Hon'ble Judges : Ashok B. Hinchigeri, J

Bench : Single Bench

Advocate : G.B. Nandish Gowda, for Sri R.B. Sadashivappa, for the Appellant; Akkamahadevi Hiremath, Advocate for R1 and R2, for the Respondent

Final Decision : Disposed Off

Judgement

Ashok B. Hinchigeri, J.—The defendant is in appeal aggrieved by the dismissal of his counter claim by the Court of the V Additional City Civil Judge, Bangalore by its judgment and decree, dated 18.6.2009 in O.S. No. 4448/2003. The facts of the case in brief are that the respondents filed the suit for the grant of permanent injunction restraining the appellant from causing any damage to the suit schedule properties both bearing No. 9/2. It is the further case of the respondents that they were running a grocery business in the suit schedule premises and the defendant-appellant, the owner of the adjoining property bearing No. 10, was doing his pawn- broker business. On 15.6.2003, the appellant and his son Sachin Bora and their workers trespassed into the suit schedule properties by demolishing the roof of the adjacent wall.

2. The appellant filed the written statement admitting that he is the owner of the property bearing No. 10 and that the respondents are the owners of the properties bearing No. 9/2. The appellant claims to have got the plan sanctioned and started demolishing the dilapidated building standing on his property. It is at that time that the respondents started obstructing the appellant on the ground that it has affected their business. They are stated to have lodged the police complaint thereafter.

3. The appellant also made the counter claim by seeking the relief of mandatory injunction alleging that the respondents have put up the wall intruding into the appellant's written statement schedule property. The appellant prayed for the dismissal of the respondents' suit and for the removal of the encroachment on his property by the respondents. The respondents filed the written statement to the counter claim denying the allegation of encroachment.

4. Based on the rival pleadings, the Trial Court formulated the following issues and additional issues:--

1) Whether the plaintiffs prove their possession over suit "A" & "B" schedule properties as on the date of suit?

2) Whether they further prove the alleged interference by the defendant with their possession over the suit "A" and "B" schedule properties and damage to the same?

3) Whether the plaintiffs are entitled to the relief of permanent injunction and damage as prayed for?

4) What order or decree?

Addl. Issues:

1) Does the defendant prove that the plaintiff extended the roof of his property on the northwestern side by 8" and constructed a wall along side the staircase, encroaching upon his (defendant's) property by 10"?

2) Does the defendant prove that he is entitled for relief of mandatory injunction as has been sought for by him by way of counterclaim?

5. The respondent No. 1 got himself examined as PW1. He also got an independent witness Sri Sampath examined as PW2 marking the documents at Exhibits P1 to P5. The defendant got himself examined as DW1 marking 7 documents in Exhibit-D series.

6. On considering the pleadings, oral and documentary evidence placed on the record, the Trial Court dismissed both the suit of the plaintiff and the counter claim of the defendant, but it gave a direction to the appellant-defendant not to cause damage to the property of the respondent-plaintiffs while demolishing his building. Aggrieved by the dismissal of the counter claim, the defendant is in appeal before this Court.

7. Sri Nandish, the learned counsel appearing for Sri R.B. Sadasivappa for the appellant has made the following two submissions:--

(i) The Trial Court has negated the claim of the appellant on the ground that he has not taken any steps for the appointment of the Court Commissioner. The appellant has indeed made I.A. No. 2 invoking Order 26 Rule 9 of CPC for the appointment of the Court Commissioner, but without passing any order on this I.A., the Court has proceeded to pass the judgment. Not making any order on

the I.A. No. 2, but finding fault with the appellant for not taking the steps for the appointment of Court Commissioner are not justifiable, so submits the learned counsel.

(ii) His second submission is that the respondent No. 1 (PW1) has indicated his no objection to the measurement of the wall and to its demolition, if it is found on its measurement that it is not situated within his property. It is on elucidating this response or ascertaining the readiness of the respondents to the measurement of the wall that the appellant has filed I.A. No. 2.

8. The submissions of the learned counsel have received my thoughtful consideration. I have browsed through the L.C.Rs. The L.C.Rs indeed contain the appellant's I.A. No. 2 for appointment of the Court Commissioner and the respondents' objections to the same. The appellant does not appear to have pressed the said I.A. and the Trial Court appears to have missed track of the same.

9. To examine the grievance of the appellant, I may usefully refer to the Madras High Court's judgment in the case of Vaithinattar and Janardhanan Vs. Sakkubai Ammal, , wherein it is held that when one party complains of the encroachment of the adjoining land and the other party denies it, the best evidence could be obtained only by the appointment of the Court Commissioner.

10. It is also profitable to refer to this Court's decision in the case of B. Jagannath Vs. N.C. Narayanappa and Another, . In the said case it is held that where the dispute relates to the accuracy of the sketch of the suit property, the need for the appointment of the Court Commissioner under Order 26 Rule 9 for measuring and demarcating the suit property would arise only after the parties have adduced evidence in regard to matters in issue in the suit in order to better appreciate the evidence.

11. This Court in its decision in the case of Annappa Mestha Vs. Mutayya Achari, has held that the appointment of the Court Commissioner can be resorted to only in cases where, either from the records, or from the evidence, it is not possible for the Court to determine the dispute.

12. The perusal of the judgment and decree under appeal reveals that the Trial Court is not satisfied with the oral evidence of DW1 and the photographs produced by him. It ought to have appointed the Court Commissioner for holding the local investigation for elucidating the dispute. I therefore deem it necessary and just to set aside that part of the judgment and decree under appeal which has dismissed the counter claim.

13. I dispose of this appeal with the following order: (i) The judgment and decree under appeal is set aside in so far as it has dismissed the counter claim of the appellant-defendant. It is made clear that the judgment and decree under appeal, in so far as it pertains to the suit of the respondents, is left undisturbed.

(ii) I.A. No. 2 for the appointment of the Court Commissioner stands allowed.

The Trial Court is directed to appoint the Court Commissioner. The Court Commissioner's fee shall be fixed by the Trial Court. Liberty is reserved to both the parties to give their terms of reference to the Court Commissioner.

(iii) On receiving the report of the Court Commissioner and on affording the opportunity to both the sides to lead further evidence (which shall be confined only to the Commissioner's report) and on hearing the parties further, the counter-claim shall be disposed of.

No order as to costs.