

(2011) 12 KAR CK 0140

In the Karnataka High Court

Case No : Regular Second Appeal No. 1011 of 2011 (Res)

Sri. M.N. Muthanna and Others

APPELLANT

Vs

Sri. P. Usman

RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

Citation : (2011) 12 KAR CK 0140

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

Bench : Single Bench

Advocate : Vishnu Hegde, for the Appellant; T.I. Abdulla for M/s. Hegde Assts.,
for the Respondent

Final Decision : Dismissed

Judgement

K.N. Keshavanarayana

1. This appeal by the unsuccessful plaintiffs in O S.No.98/07 on the file of Additional Civil Judge & JMFC, Madikeri, is directed against the concurrent judgment of the courts below dismissing the suit filed by the plaintiffs for the relief of possession of C-schedule property. The property described in "C" schedule to the plaint is an area of 1/4 cents measuring 12 ft by 8 ft out of 7 cents of Sy.No.51/3 of Bethu Village, Madikeri Taluk.

2. The ease of the plaintiff in brief was that they are the owners of the A-schedule property measuring 0.71 acre in Sy.No.51/3 of Bethu village, Madikeri Taluk and out of the said land an extent of 2 cents was sold in favour of the defendant and subsequently the defendant by encroaching on to the portion of A-schedule property has put up a bunk shop in an area of 12 feet x 8 feet and thus the defendant is in illegal possession of the C-schedule property which forms part of A-schedule property as such he has no right to remain in possession of the same and since the plaintiffs are the absolute owners of A-schedule property they are entitled to get possession of C-schedule property from the defendant.

3. The defendant denied the case of the plaintiff. He contended that he is the

absolute owner of the B-schedule property measuring 2 cents: that the area purchased by him has been phoded and assigned with survey No. 51/16; that the bunk shop put up by him is within the area purchased by him viz., within the area described in B-schedule to the plaint; that he put up the said bunk shop after obtaining permission from the local authority; that he has not encroached on to the plaintiffs' property in any manner as contended; that the suit is barred by the principles of res judicata since the very issue was the subject matter in earlier suit filed in O.S.No. 21/2000 wherein specific finding has been recorded that the bunk shop put up by him falls within the area purchased by him, therefore, the plaintiff is not entitled for the relief of possession.

4. The trial Court on the basis of the pleadings of the parties framed several issues. The trial Court also appointed a Commissioner for local inspection and to submit the report who accordingly on local inspection of the disputed property, submitted his report to the effect that the bunk shop falls within the area bearing Sy.No.51/16 and that it is not in the land bearing survey No.51/3. The trial Court on assessment of oral and documentary evidence, by placing reliance on the Commissioner's report and also based on the finding of the court in the earlier proceedings in O.S.No.21/2000, held that the bunk shop described as C-schedule property in the plaint falls within the area comprised in B-schedule property which is admittedly the property owned by the defendant. The trial Court further held that the bunk shop described in C-schedule property does not form part of A-schedule property owned by the plaintiffs, therefore, the plaintiffs are not the owners of the area on which the bunk shop has been put up as such the plaintiffs are not entitled for the relief of possession as sought. In the light of the findings recorded on various issues, the trial Court dismissed the suit of the plaintiffs. Aggrieved by the said judgment the plaintiffs filed appeal in R.A. NO. 33/10 before the Senior Civil Judge, Madikeri. The Lower Appellate Court on reassessment of the oral and documentary evidence concurred with the finding recorded by the trial Court and consequently dismissed the appeal. It is against these concurrent judgment of the courts below, the plaintiffs are in this appeal before this Court.

5. I have heard the learned counsel appearing for the appellants. Perused the judgments tendered in appeal.

6. It is the submission of the learned counsel for the appellants that the judgment of the courts below are perverse, illegal being contrary to the evidence on record, therefore, they are liable to be set aside. It is his further submission that the courts below have committed serious error in placing reliance on the Commissioner's report, which in turn was based on a survey sketch said to have been prepared earlier in respect of which certain proceedings are pending before survey settlement Officers as such no reliance could have been placed on same. He further contended that the oral and documentary evidence produced by the plaintiff clearly establishes that the defendant has put up bunk shop not in the area purchased by him but outside the said area and the area on which the bunk

shop has been put up is part of A-schedule property of which the plaintiffs were admittedly the owners, therefore they are entitled to get possession of the C-schedule property. Thus according to the learned counsel, the appeal involves substantial question of law which requires to be considered by this Court.

7. Having heard the learned counsel for the appellant and on perusal of the judgments under appeal, I find no substance in any of these contentions. I find no question of law much less substantial question of law involved in this appeal.

8. As noticed supra, the courts below on the basis of the oral and documentary evidence and on appreciation of such evidence have recorded findings of fact that the bunk shop put up by the defendant does not fall within the A-schedule property, but on the other hand, the said bunk shop is situated in the B-schedule property which admittedly is owned by the defendant. It is fairly well settled law that the plaintiff who approaches the Court will have to establish the case. He has to either stand or fall on the strength of his case and he cannot depend on the deficiency of the case of the defendant. In the case on hand, the undisputed facts are that, the plaintiffs sold the B-schedule property to the defendant. Thus the defendant is the owner of the B-schedule property. The contention of the plaintiffs is that the defendant has put up a bunk shop in the area falling in the A-schedule property instead of putting up the bunk shop in the B-schedule property, thereby, the defendant has encroached on the plaintiffs property. It is not in dispute that the plaintiffs are the owners of the A-schedule property. In the light of the specific case of the plaintiffs what is required to be established by the plaintiffs is that the bunk shop put up by the defendant is located in the A-schedule property and not in the B-schedule property." The said fact cannot be established by mere oral evidence or by any amount of documentary evidence. It is for that purpose, the trial court appointed a Commissioner for local inspection. It is only by local inspection and by ascertaining the actual situation at the place, the court could record a finding as to whether the bunk shop is on the A-schedule property or on the B-schedule property. The Commissioner who held the local inspection has found that the bunk shop is in the B-schedule property and not in A-schedule property. No doubt, the plaintiffs have filed their objection to the Commissioner's report. However, the Commissioner's report under law forms part of the record and the court is entitled to rely on it. It is for the objecting party to take their objection to its logical conclusion and establish that the report of the Commissioner is not acceptable one. In fact, the trial Court has extracted in extenso the various admissions made by PW. 1 in the cross-examination. As could be seen from the judgment of the trial Court, PW. 1 in cross-examination has admitted that the area sold to the defendant has been assigned a different number as survey No.51/16. He also admitted that Ex.D. 11 is the sketch showing the area of two cents sold to the defendant and he also admitted that he has not produced any document to show that the defendant encroached on to the A-schedule property and has put up a bunk shop thereon. On the other hand, he further admits that the photographs Exs.P.5 and P.6 produced by him do not show that the

defendant has encroached on the A-schedule property. He has further admitted that he has no difficulty in producing the sketch prepared by his father in respect of the land sold to various persons. He admits that even the said sketch does not indicate that the defendant has encroached on to the A-schedule property. It is on the basis of this admission, the trial Court has held that the plaintiffs have utterly failed to prove that the bunk shop has been put up in the A-schedule property. The courts below have also noticed that on an earlier occasion, the defendant had filed suit in O.S.No.21/2000 against the plaintiffs herein for the relief of permanent injunction in respect of survey No.51/16 measuring 2 cents. In the said suit, there was averment that he was putting up a bunk shop in the property owned by him and the plaintiffs herein are trying to interfere with him in the said activity. The said suit was contested and ultimately the suit came to be decreed and the appeal filed by the plaintiffs herein who were defendants therein came to be dismissed and the further appeal to this court also came to be dismissed. The trial Court has noticed that the Lower Appellate Court in R.A.No.34/2002 filed by the plaintiffs herein has recorded a finding that the bunk shop is within the area purchased by the defendant herein who was plaintiff therein. This finding recorded by the Lower Appellate Court was affirmed by this court while dismissing the second appeal. Thus the said finding is binding on the present plaintiffs. Therefore, it is not open for the plaintiffs herein to contend that the bunk shop is constructed on the A-schedule property by encroaching on to the plaintiffs' property. The Lower Appellate Court on reassessment of the evidence has concurred with the said finding. The findings recorded by the courts below in my opinion cannot be termed as perverse or illegal. Both the courts on proper consideration of the evidence have recorded findings of fact which cannot be interfered by this Court sitting in second appeal.

9. Having regard to the facts and circumstances. I find no question of law much less substantial question of law for my consideration in this appeal. In this view of the matter, the appeal lacks merit. Therefore, the appeal is dismissed.