

(2012) 09 KAR CK 0018

In the Karnataka High Court

Case No : Regular First Appeal No. 541 of 2010

Sri Muniramaiah Dead, by his LRs (Sidda Reddy and Muni Reddy, Sri Obalappa and Sri Krishnappa)

APPELLANT

Vs

Sri D. Ramaswamy

RESPONDENT

Date of Decision : 20-09-2012

Acts Referred:

Evidence Act, 1872 — Section 101

Citation : (2012) 09 KAR CK 0018

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

Bench : Single Bench

Advocate : P.N. Nanja Reddy, for the Appellant; C. Shankar Reddy and S Chennaraya Reddy, for C/R in R.F.A. No. 541/2010, Sri C. Shankar Reddy, Sri S Chennaraya Reddy, for C/R1, M/s. V.N. Murthy Associates for R2 Sri H.V. Devaraju, for R4 in R.F.A. No. 526/2010, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Bopanna

1. The appellants herein are defendants No. 2 and 3 in O.S. No. 2192/ 1988. The said suit was filed by the plaintiff seeking for a judgment and decree of permanent injunction against the defendants' interference with his peaceful possession and enjoyment of the suit schedule property. The Court below after considering the rival contentions has decreed the suit by its judgment dated 26.02.2010. The first defendant had died during the pendency of the suit which abated against him. The defendants No. 2 and 3 are therefore before this Court assailing the impugned judgment and decree. The parties would be referred to in the same rank as assigned to them before the Court below for the purpose of convenience and clarity.

2. The case of the plaintiff in brief is that he is the owner in possession of the property bearing No. 181, Challaghatta village, Varthur Hobli, Bangalore South Taluk measuring North to South 100 ft and East to West 38 ft (hereinafter

referred as "100 ft x 38 ft"). The said property was at that point within the H.A. Sanitary Board. The plaintiff claims that the property belonged to his forefathers i.e., Anekal Byrappa, from whom the grand father of the plaintiff viz., Ramaiah succeeded and after him, the plaintiffs father Anekal Devappa succeeded and subsequently the plaintiff succeeded to the same. The plaintiffs name is indicated in the revenue receipts and is also paying the taxes. The boundaries to the said property is also stated in the plaint. The case of the plaintiff is that towards the northern side of schedule property, there is the house property of Guttahalli Muniswamappa and the property which originally belonged to Nagappa and the property of Lakshamma. The further case of the plaintiff is that there is a lane in existence between Nagappa's and Guttahalli Muniswamappa's property which leads to the plaintiffs property but is partly closed by the construction put up by defendant No. 2. Hence the plaintiff is put to hardship to reach the suit schedule property from his house and the plaint schedule property is being used as backyard.

3. Though earlier itself, the plaintiff had protested for such blocking of the passage, some space was left. Since the property of Nagappa is purchased by defendant No. 1, the defendants have made arrangements to put up construction in the remaining vacant space. On being questioned by the plaintiff, the defendants have asserted that they have purchased the backyard measuring East to West 45 ft and North to South 90 ft (hereinafter referred as "45 ft x 90 ft") and as such, they have right to put up construction including the said 2 yards. The plaintiff therefore lodged a complaint with the police.

4. The plaintiff on referring to the sale deed dated 08.08.1962 under which defendant No. 1 purchased his property from Nagappa and the sale deed dated 05.09.1956 contends that wrongly a larger extent is indicated. On the other hand, with reference to the revenue documents contended that the extent standing in the name of defendant No. 1 is only an extent of 30 ft x 50 ft. The essence of the further contention is that though the defendants are entitled to only an extent of 30 ft x 50 ft, they are laying claim to a larger extent of 45 ft x 90 ft and as a result are interfering with the extent of 100 ft x 38 ft owned by the plaintiff. Hence, it is contended that the attempt to put up the compound wall is within the property belonging to the plaintiff. Hence the plaintiff has filed the suit seeking for injunction.

5. The defendants on being served with suit summons, appeared and filed their written statement. The defendants contended that the plaintiff has nothing to do with suit schedule property and that the defendants are in possession and enjoyment of the suit schedule property for more than twenty seven years. The defendants are stocking hay, cowdung and tethering cattle in the said area, by putting cattle shed for the last several years.

6. The defendants are paying taxes and are enjoying the properties and the Khata stands in the name of the first defendant. The claim made by the plaintiff to the property bearing No. 181 measuring 100 ft x 38 ft and that the plaintiff

had succeeded to the same from his forefather is denied as false. The defendants have contended that the plaintiff does not have any document to show that the property belonged to Anekal Byrappa and thereafter succeed by inheritance. It is their case that in collusion with the H.A. Sanitary Board (for short the "HASB"), the documents have been concocted.

7. The defendants have further denied that the property in question is a vacant site since they have put up cattle shed which earlier consisted thatched roof. The existence of a lane running from north to south as contended is also denied. Since the suit property is being used as backyard by the second defendant, he did not close the lane as there is no lane. The defendants claim to be in possession of the suit property from the date of purchase under the sale deed dated 08.08.1962. It is contended that the property in their possession is bounded on the east by Lakshmamma's property; west by pathway leading to Anekal Byrappa's house; north by Guttahalli Muniswamappa's house and south by Anekal Byrappa's property. It is denied that the defendants are putting up unauthorised construction. The defendants assert their right to put up the compound wall and the plaintiff has not made out any case for injunction, is their contention.

8. The Court below on taking note of the rival contentions has framed as many as five issues for its consideration, which read as hereunder,

- (1) Whether the plaintiff is in lawful possession of suit property?
- (2) Whether defendant attempted to put up unauthorised and illegal construction over the suit property?
- (3) Whether there is no cause of action for the suit?
- (4) Whether plaintiff is entitled for relief of permanent injunction?
- (5) To what reliefs?

9. In order to discharge the burden cast on the parties, the plaintiff examined himself as P.W. 1 and examined a witness as P.W. 2 and relied upon the documents at Exhs. P1 to P13. The second defendant examined himself as D.W. 1 and a witness was examined as D.W. 2 and relied upon the documents at Exhs. D1 to D11. The Court below has held the material issues in favour of the plaintiff and has decreed the suit. The defendants are therefore before this Court.

10. Heard Sri P.N. Nanja Reddy, learned counsel for the defendants and Sri C. Shankar Reddy, learned counsel for the plaintiff and perused the appeal papers including the records received from the Court below.

11. On hearing the learned counsel, the following points arise for my consideration,

- i) Whether the judgment and decree is liable to be set aside on the sole ground that it is passed against the first respondent who was dead?

ii) Whether the documents relied on by the plaintiff is sufficient to hold that the extent of property in his possession is 100 feet x 38 feet?

iii) If the extent of the property as claimed not being established, whether the plaintiff is entitled to the injunction in the manner as prayed for?

iv) Whether the judgment and decree of the Court below call for interference?

12. Insofar as the first point is concerned, the contention of the learned counsel for the defendants is that admittedly, the first defendant -Muniswamaiah died on 25.12.2002 during the pendency of the suit and the learned counsel for the plaintiff himself had filed a memo which is recorded in the order sheet on 15.02.2003. The legal representatives were not brought on record and the suit was allowed to be abated. Yet, the Court below has entertained the suit and passed the judgment on 26.02.2010. It is therefore liable to be set aside is the contention. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of Jaladi Suguna (deceased) through LRs. Vs. Satya Sai Central Trust and Others, . In the cited case, the sole plaintiff-respondent had died and though there was two different claims to be the legal representatives, that was not decided and the Court proceeded to decide the main matter against the deceased respondent which was held as not permissible. However, in the instant case, there were three defendants and the suit was for injunction against all the three as they claimed that they had right to the property. Though the first defendant died, the surviving two defendants continued to claim right to the property and as such, the right to the property was effectively represented and also the relief of injunction being in personum, the suit in any event was maintainable against the surviving two defendants as allegation of interference was against them also and the suit would not abate in its entirety. The Court below has therefore not committed any error in continuing the suit against the surviving defendants and passing the judgment. Hence, Point No. (i) is held against the defendants.

13. The plaintiff though has referred to the nature of use of the backyard and has also indicated in the averment that a portion of the passage is blocked by the defendants and when there was attempt to block the remaining portion, the suit is filed, the prayer made in the plaint is not to restrain the defendants from blocking the passage, but the prayer is to restrain the defendants from interfering with the peaceful possession and enjoyment of the suit schedule property by the plaintiff and from committing any encroachment or putting up any compound wall or other construction in any manner over the suit schedule property. In that context, the suit schedule property which is described in the plaint is an extent of 100 ft x 38 ft. If this aspect is kept in view, the contention of the plaintiff appears to be that the defendants who are the adjacent owners are encroaching upon an extent of the property belonging to the plaintiff. The contention that the defendants are not actually the owners of the property measuring the extent of 45 ft x 90 ft but, of a lesser extent of 30 ft x 50 ft is urged in that regard. While taking note of the above contention, it cannot be lost sight that the instant suit is for bare injunction and not for a declaration that the

plaintiff is the owner of the said extent of the property measuring 100 ft X 38 ft. Hence, the materials available on record and the oral evidence would have to be perused to find out at the outset as to whether the plaintiff has established his pre-existing right and also lawful possession over the said extent and as to whether the defendants are shown to be putting up construction in the said extent claimed to be in the possession of the plaintiff. This in fact was the requirement to prove Issues No. 1 and 2 which were framed by the Court below.

14. The plaintiff has examined himself as P.W. 1 and reiterated what has been averred in the plaint. The plaintiff does not possess any document relating to title to the suit schedule property but is seeking to establish possession based on the revenue entries and the alleged admissions stated to have been made by the defendants. The document at Ex. P1 is a tax paid receipt dated 11.11.1987 which indicates the name of the plaintiff and also the khatha No. 181 and taxes for the periods 1982-83 to 1987-88. Exhs. P2 and P5 are the same notice of house tax of HASB wherein the name of the plaintiff is shown and the extent is indicated as 100 ft X 38 ft. The Exhs. P2 and P4 are the same documents and is dated 05.10.1987 which is also stated to be the notice of the house Tax of HASB showing the name of Nagappa i.e., the vendor of the first defendant and the extent is referred to as 30 ft X 50 ft. Ex. P11 is the tax paid receipt in the name of Nagappa. The Tax Assessment List is at Ex. P10 wherein the extent is shown as 100 ft X 38 ft and the owner's name as that of the plaintiff. The document at Ex. P12 is the sale deed dated 01.10.1947 whereunder Smt. Lakshamma i.e., the mother of the defendant had purchased one extent of property to which the southern boundary is shown as that of the property belonging to the father of the plaintiff. Ex. P13 is the Tax Paid receipt dated 25.08.1970 in the name of the father of the plaintiff. The document at Ex. P6 is the plaint in O.S. No. 2566/1999 i.e., a suit inter se between the defendants No. 2 and 3 herein. Ex. P3 is the sale deed dated 05.09.1956 whereunder the vendor of the defendant Sri Nagappa purchased the property.

15. From the above said documents and from the averment contained in para 5 of the written statement wherein the defendants themselves had referred to the boundaries of their property making reference to the pathway leading to Anekal Byrappa's property and the southern boundary as Anekal Byrappa's property; also from the admission in the cross-examination of D.W. 1 to the extent of the location of the different properties in the vicinity which was suggested to him; the admission regarding the pathway and also admitting that even now Anekal Byrappa is in possession of the land which is situated towards the northern side of Muniramaiah's property, the right is sought to be established. It would no doubt establish that the plaintiff owns certain property to the southern side of the defendants' property from the probabilities that would emerge as a whole. The learned counsel for the plaintiff has relied on the decision in the case of Smt. S.V. Kunhima -vs- B.N. Viswanath (ILR 1996 Karn 1853) to contend with regard to the binding effect of the admission made in the cross-examination, even if it is a stray sentence.

16. The learned counsel for the defendants on the other hand has relied on the decision in the case of M/s. Mahesh Centre and Another -vs- People Charity Fund by its Trustees (ILR 2007 Kar 4344) to contend that stray admission or the statements of the witness in the course of evidence shall not be the criteria or the basis for the decision but it is the duty of the Court to consider the evidence in a case as a whole and its finding should depend upon the cumulative effect of the entire oral and documentary evidence. It is while keeping in view the position of law enunciated on that aspect, the materials available on record and the admissions have been noticed insofar as the indication of the location of the property of the plaintiff and the defendants being in the vicinity. However, the question which arise here is as to whether such admissions alone are sufficient to hold that the plaintiff is in actual physical possession of the extent of 100 ft. X 38 ft and what is the effect of the documents in its entirety.

17. The learned counsel for the defendant by relying on the decision in the case of Rangammal Vs. Kuppuswami and Another, has contended with regard to the burden of proof as contemplated u/s 101 of the Evidence Act and that placing the burden on the wrong party would vitiate the judgment. There can be no quarrel with the said proposition of law and it cannot also be in doubt that in the instant facts, the plaintiff was required to discharge the initial burden with regard to his lawful possession over the extent of 100 ft X 38 ft relating to which the injunction has been sought. While considering that aspect of the matter, what is to be noticed at the outset is that the plaintiff while putting forth his case in the plaint had claimed right of ownership over the said extent and in that regard had referred to certain revenue entries which are marked and has been referred to hereinabove. The defendant in the written statement has denied that the plaintiff is the owner of the suit schedule property and has claimed right over the same. The revenue documents referred to have been alleged to be concocted.

18. In that view, keeping in perspective the oral evidence of P.W. 1, P.W. 2 and D.W. 1, the documents are analysed, though Ex. P5 is claimed to be a notice of house tax, except for marking the extract, the origin has not been established. Further, the basis for indication of the measurement of the property as 100 ft X 38 ft shown in the said document and also in the assessment list at Ex. P10 is not brought before the Court inasmuch as when the plaintiff has no other title document to support that he had been put in possession under such document, the burden was heavy on the plaintiff to establish the correct measurement of the property by producing any other evidence for the basis on which such entries have been made. The plaintiff no doubt to justify the non-availability of title documents has averred with regard to the succession to the property from the forefathers.

19. It is no doubt true that in such cases though the revenue entries in itself would not be the title documents, the revenue entries over a long period of time standing even in the name of the predecessors in title would provide presumptive value until there is rebuttal. However, in the instant case, let alone to prove title

but even to show possession over the extent of 100 ft x 38 ft, there is no such document. The only document is at Ex. P13 which provides no assistance whatsoever in that regard. In that context, though reference is made to Exhs. P2 & P5 of the year 1981, it is seen that by Ex. P1, despite showing that the Tax is paid from 1983-84 upto 1987-88, the said payment is indicated to have been made on 11.11.1987 which is slightly prior to the filing of the suit on 11.05.1988. Hence, apart from there being no revenue entries in the name of the predecessors, the ones produced and attempted to be proved are only immediately prior to filing of the suit and not long before. The same being only extracts would not have much evidentiary value in the absence of supporting documents.

20. The attempt of the plaintiff has also been to show that the defendants in fact are in possession of only an extent of 30 ft X 50 ft though the sale deed dated 08.08.1962 (Ex. D1) whereby the first defendant has purchased the property from Nagappa would depict 45 ft X 90 ft. It is an attempt in the converse to contend that the plaintiff therefore possesses a larger extent, if 15 ft x 40 ft is excluded therefrom. It is in that regard, reliance has been placed on Ex. P4 which is also a notice of House Tax Assessment in the name of Nagappa i.e., the vendor of the first defendant. In the said notice, the extent is mentioned as 30 ft X 50 ft and it is in that context, contended that the defendants in fact are in possession of that extent only. If in fact such notice was issued to Nagappa, it is difficult to understand as to how it is in the possession of the plaintiff more particularly when it is dated 05.10.1987. Notwithstanding the fact that P.W. 2 who is related to Nagappa has been examined on his behalf, it does not clarify the factual position with regard to the extent and possession thereof. She is the granddaughter-in-law of Nagappa and she was 32 years on 03.04.2002 when her evidence was recorded. She says that she was married 14 years earlier to that date, which would be around 1988. When sale was of the year 1962, she could not have known the extent of the property that was being used by the family and sold thereafter.

21. Be that as it may, the said document (Ex. P-4) in any event stands rebutted by the document relied upon by the defendants at Ex. D2 which is also issued by the HASB and though dated 24.11.1987, the assessment list is for the year 1982-83 and the measurement indicated therein is 45 ft X 90 ft and the defendants have also relied on the tax paid receipts at Exhs. D3 to D7. Though the said documents need not be relied upon to establish title of the defendants to the said extent of the property, it could be certainly noticed as a rebuttal of the claim of the plaintiff to be in possession of the extent of 100 ft X 38 ft based on such revenue documents issued by the very same local authority. Hence, the said document would not be of assistance to the plaintiff.

22. The learned counsel for the plaintiff next relied on the document at Ex. P3 i.e., the sale deed under which the vendor of the first defendant Sri Nagappa purchased the property. It is pointed out that the extent of the property is not

indicated therein but, the boundaries are shown. Reference is made to the western boundary being the passage of Anekal Byrappa's House. In that context, it is contended that when the correct extent is not mentioned, the extent indicated in Ex. D1 dated 08.08.1962 in favour of the first defendant would not be justified. It is contended that when there is conflict with regard to the extent of the property and the boundaries thereof, the boundaries would prevail. In that regard, the decisions in the case of Narasimha Shastry -vs- Mangesha Devaru (ILR 1988 Kar 554) and the one reported in ILR 1990 Karn S.N. No. 4 are also relied upon.

23. First and foremost, it is to be noticed that Ex. P3 is of the year 1956 and Ex. D1 is of the year 1962. The dispute with regard to the boundaries and the extent of properties being owned is being raised in the year 1988 and that too such dispute is not between the parties to those documents. As already noticed, the plaintiff has not sought right only with regard to the alleged passage by describing it as the scheduled property. The right claimed is in respect of the whole extent of the property which is claimed to be in the possession of the plaintiff. As against the claim made by the plaintiff, the defendants are claiming right under a registered document of the year 1962. Hence, the possession of the property and the dimension thereof cannot be deduced by such assumptions by looking into the boundaries of the documents under which the defendants and their predecessors claim right so as to establish the dimension of the plaintiff's property when the plaintiff himself has no document depicting his boundaries to say that the property within such boundaries is his extent. The prevalence of boundaries though is the established position of law, it could have been taken note of if the plaintiff had certain documents indicating the boundaries to his property and to claim right to the extent which is within such boundaries.

24. If in the instant case such exercise was required, it was incumbent on the plaintiff to have sought for the relief of declaration claiming the extent of the property and consequently to show possession of the plaintiff over such extent by physical verification of the boundaries and the extent situate within by seeking for appointment of the Surveyor or Commissioner as the case may be. In the absence of the same, the possession over the exact extent of 100 ft X 38 ft would not stand established though as already noticed the contentions put forth can only be accepted to the extent that the plaintiff is in possession of a property which is situated to the south of the defendants' property but, the extent cannot be ascertained to confirm possession and as such a vague injunction cannot be granted.

25. It is also necessary to notice the reference which was made to the rough sketch which was marked as Ex. P13 in another suit in O.S. No. 2866/1988 which is the subject matter in the companion appeal. In fact the said sketch if accepted would also indicate only that aspect relating to the location of the property and not the actual measurement of the property. Though in the said sketch a passage has been depicted by the plaintiff to the western side of the defendants'

property, in the context of the plaintiffs claim over the larger extent depicted in the suit schedule and for the reasons observed above, the same would not become relevant. Insofar as the lane is concerned, D.W. 1 in his evidence in chief itself has stated that the lane is still in existence without any obstruction and the plaintiff with ulterior motive wants to trespass over the property belonging to the defendant in the guise of making use of the lane. If the lane was the only issue, the plaintiff should have put forth such case in an appropriate manner.

26. The learned counsel for the plaintiff while referring to the admissions of the defendant has relied on the plaint in O.S. No. 2566/1999 (Ex. P6) which is an inter se suit for partition between the defendants No. 2 and 3. Reference is made to para 4 in the said plaint and the description of the southern boundary in "B" schedule to that plaint. The learned counsel for the defendants contended that the plaintiff in fact had instigated the third defendant herein to file the said suit since there were certain misunderstandings between them and he had taken advantage of the same. It is also contended that the suit was subsequently withdrawn and therefore, the averments made therein would not be of consequence. In that regard, it is true that D.W. 1 did not state anything about the suit by way of explanation. What is also to be noticed is that the said document was not confronted to that witness. While taking note of the plaint therein (Ex. P-6), the fact that the defendants are not well-versed with regard to the boundaries with reference to the directions such as East, West etc., is also evident from the cross examination of D.W. 1 wherein he has stated so and the directions were thereafter explained to him by referring to the name of the places. In that context, even if it is taken into consideration that the third defendant had filed such a partition suit and certain averments were made on his instructions, this Court will have to assess the overall situation to find out as to whether such averments and indications are natural, more particularly in a situation when the suit between the plaintiff and defendants herein was pending for more than a decade on the very same issue relating to dimension of the property. It is noticed that the second defendant herein is claiming interest in the subject property and he was the defendant in that suit and he had no control over such pleading. Further, in a partition suit when a share was claimed based on a document, it is difficult to accept that a further explanation would have been made by the plaintiff therein to indicate the reduced extent of the property than what was purchased. Further, both in "A" as well as "B" schedule to the said plaint at Ex. P6 several other boundaries are also indicated. However, it is strange that only while referring to the southern boundary of Item No. 2 property in B-Schedule, the extent as 100 ft X 38 ft is mentioned when in fact the parties were litigating with regard to the same in a different suit which appears to be tailor made. Hence in the absence of other materials in favour of the plaintiff, the said document by itself cannot form the basis with regard to the actual measurement of the property which is in possession of the plaintiff. Hence, Points No. (ii) & (iii) would have to be held against the plaintiff. Consequent to the same Point No. (iv) would be in the affirmative.

27. It is made clear that the detailed reference to the documents to assess the right to the dimension of the property is made incidentally to find out the possession over the actual extent as claimed by the plaintiff and not with regard to the ownership over the property which may be got determined by the parties in accordance with law in a properly constituted suit.

In RFA No. 526/2010 arising out of O.S. No. 2866/1988

28. In the instant suit in O.S. No. 2866/1988, the very same plaintiff who was the plaintiff in O.S. No. 2192/1988 has instituted the suit seeking for the relief of mandatory injunction to direct the defendants who were originally impleaded as defendants No. 1 to 4 i.e., the Karnataka Electricity Board and its Officers to remove the electric wires passing over the middle portion of the suit schedule property for providing electricity connection to Lakshamma's property on the northern side of the suit schedule property. The defendants in O.S. No. 2192/1988, Sri Muniramaiah and his brothers and also their mother Smt. Lakshamma impleaded themselves as defendants No. 5 to 8. The Court below after considering the rival contentions by its judgment dated 26.02.2010 decreed the suit and directed the defendants to remove the electric wires passing over the middle portion of the suit schedule property. The defendants No. 6 to 8 have assailed the said judgment.

29. Similar contentions which have been urged in the companion appeal were put forth. At this juncture, it is not in dispute that the direction issued by the Court below has already been given effect and the electric wires have been removed and the electricity connection to Smt. Lakshamma's property has been given from the pole on the northern side to the property. This fact has been brought to the notice of this Court by the learned counsel representing the defendants No. 1 to 4.

30. In view of the above development, I am of the opinion that the instant appeal does not call for detailed consideration. In any event, while considering the companion appeal, I have already noticed that though the plaintiff has not proved the actual possession over the claimed extent of 100 ft X 38 ft, the plaintiff by preponderance of probabilities has established that he is in possession of a property which is on the southern side of the defendants' property which would also mean that it is to the south of Lakshamma's property. In such circumstance, in any event, it is shown that the electric wire was drawn over the property of the plaintiff. Hence, it was for the defendants No. 1 to 4 to have established that drawing the electric line over the property of the plaintiff was the only option available to them so as to justify such action. However, when the defendants No. 1 to 4 themselves have found an alternative and have removed the electric wires, there is no need for this Court to reappraise the materials on record nor is it necessary to interfere with the judgment of the Court below. In the result, the following:

ORDER

- (i) RFA No. 541/2010 arising from O.S. No. 2192/1988 is allowed.
- (ii) RFA No 526/2010 arising from O.S. No. 2866/1988 is dismissed.
- (iii) The judgment and decree dated 26.02.2010 passed in O.S. No. 2192/1988 is set aside and the suit is dismissed.
- (iv) The parties to bear their own costs.
- (v) Draw up the decree accordingly.