(2011) 07 KAR CK 0044

In the Karnataka High Court

Case No : Regular First Appeal No. 785 of 2006

Sri S.I. Muneer Ahmed APPELLANT

Vs

The State of Karnataka RESPONDENT

Date of Decision : 04-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Karnataka Forest Code, 1976 — Section 61 (1) (ii)

Citation : (2011) 6 KarLJ 50

Hon'ble Judges : N.K. Patil, J;Arali Nagaraj, J

Bench : Division Bench

Advocate : Venkatesh R Bhagath, for the Appellant; Manjula Kamodolli, HCGP, for the Respondent

Judgement

Arali Nagaraj, J.—In this appeal, the Plaintiff in O.S. No. 55/2000 on the file of the learned Civil Judge (Sr. Dn.,) Madikeri (hereinafter referred to as ''Trial Court'', for short) has challenged legality and correctness of the judgment and Decree dated 02.02.2006 passed by the Trial Court dismissing the said suit.

2. State in brief, the case of the Plaintiff as averred in his plaint is as under:

i) Plaintiff has been a trader in timber at Madikeri Town in Kodagu District. Second Defendant, viz., the Deputy Conservator of Forests, Madikeri Division, Madikeri, Kodagu District published a Notification in "Udayavani" Kannada daily dated 04.10.1998 in respect of the sale of certain quantities of timber by way of public auction scheduled to be held on 14.10.1998 from 10.00 a.m. onwards at Government Depot, Sampaje Taluk, Madikeri, Kodagu District. In response to the said Notification, the Plaintiff participated in the said auction along with other timber merchants in respect of proposed sale of 68.000 Cubic Meters of jack timber and 22 pieces of rose wood stumps.

ii) The Plaintiff purchased in the said auction sale 153 logs of jack timber stored in 36 lots said to be measuring about 56.229 Cubic Meters and 3 logs of rose wood stumps for a total price of Rs. 7,31,500/- excluding the tax (Rs. 9,10,169/- including the tax). As per the terms of the auction, the Plaintiff, being the successful bidder, was to deposit 25% of the said price and to pay the balance within three months from the date of auction or within such time as would be extended by second Defendant.

iii) The second Defendant issued Confirmation Order dated 14.10.1998 in favour of the Plaintiff giving a list of timber logs and rose wood stumps mentioning therein measurement of each log and confirming the bid of the Plaintiff and also requiring him to pay Rs. 5,40,169/- being balance sale price, by way of demand draft drawn in favour of the second Defendant on or before 13.01.1999, i.e., within three months from the date of the said sale and to lift the said timber. In the said confirmation order, the Range Forest Officer concerned was directed to accept the demand draft of the Plaintiff and release the said timber lots. As per the terms of auction sale, the Plaintiff paid on the date of auction Rs. 3,70,000/- being 25% of the sale price.

iv) The timber lots in question were not properly measured inasmuch as, measurements at the middle portion of some of the logs were taken without removing the ''bark'', which was not correct. If the measurement of the girth of each log had been taken at the middle portion of each timber log after removing the bark, the total measurement of the logs could be 31 Cubic Meters only but not 56.229 Cubic Meters as mentioned in the confirmation order. Since neither the Plaintiff nor any number of the public was allowed to go near the logs of timber that were subjected to public auction, the Plaintiff could not notice the discrepancy in the measurements of the said logs. Therefore, the Plaintiff participated in the auction and made his bid in good faith, believing that the measurements of the said logs would be taken in accordance with the said procedure, by removing the bark.

v) Subsequent thereto, the Plaintiff found to his shock that the logs of jack timber totally measured only 31 Cubic Meters but not 56.229 Cubic Meters as stated in the confirmation order dated 14.10.1998. Immediately thereafter, the Plaintiff brought the said fact to the notice of the second Defendant who appeared to have concurred with the Plaintiff and stated that necessary report would be made about the shortage in the quantity of the said timber.

vi) The Plaintiff made repeated representations to the second Defendant and other superior officials of the Karnataka Forest Department and requested them either to make good of the shortfall or to refund the amount that was paid by him. The second Defendant, though agreed that necessary action would follow, he did not take any action in the matter. Therefore, the Plaintiff is entitled to refund of the said amount of Rs. 3,70,000/- being 25% of the bid amount, with interest thereon @ 18% p.a. till the date of actual payment.

vii) The Plaintiff addressed a letter dated 17.05.1999 to the second Defendant informing him all the said facts. In response thereto, second Defendant sent his letter dated 10.07.1999 requiring the Plaintiff to pay balance amount on or before 13.09.1999 and lift the timber. The second Defendant sent another letter dated 26.07.1999 purporting to be reply to the letter of the Plaintiff dated 17.05.1999 informing the Plaintiff that his representation had been rejected.

viii) Thereafter, the Plaintiff caused a legal notice dated 17.01.2000 issued to both the Defendants as required u/s 80 of CPC The Defendants sent an untenable reply dated 14/15.02.2000 refusing to comply with the demands made in the said notice issued u/s 80 Code of Civil Procedure. Therefore, the Plaintiff filed the instant suit seeking a decree for recovery of Rs. 3,70,000/- being 25% of the bid amount, Rs. 1,000/- being notice charges and Rs. 99,900/- interest on the said amount from 14.10.1998 till the date of suit, totally amounting to Rs. 4,70,900/.

3. Both the Defendant Nos. 1 and 2 contested the said of the Plaintiff by filing their written statements ending as under:

(i) The Plaintiff purchased 153 logs of jack timber measuring 56.229 Cubic Meters and 3 rose wood stumps for a total consideration of Rs. 7,31,500/- excluding all taxes (Rs. 9,10,169/- inclusive of all taxes). As per the terms of the auction bale, the Plaintiff made payment of Rs. 3,70,000/- on 14.10.1998, i.e., on the date of auction itself, being 25% of he total bid amount. The Plaintiff was required to pay balance amount on or before 13.01.1999.

(ii) The jack timber that was purchased by the Plaintiff in the said public auction was the subject matter of forest offence and the same had been confiscated to the Government. The white wood in the center in the form of small strip was removed by the offender himself who had committed forest offence. The material was shifted to Government Timber Depot, Sampaje Taluk, Madikeri, District: Kodagu.

(iii) The purchaser (Plaintiff) was expected to verify the logs of timber intended to be purchased by him, before the auction sale. As per the sale condition, the purchaser was to satisfy himself regarding the measurements, quantity and quality of each timber log. It was made clear that the complaint regarding quality, or the measurements, or the timbers hollowness, etc., of the timber in question would not be entertained subsequent to the auction. It was also made clear that the departmental measurements and classifications shall be accepted as final.

(iv) The second Defendant has never concurred with the Plaintiff and never agreed to make good of the shortfall or to refund the amount that was paid by the Plaintiff.

(v) Notices were issued to the Plaintiff on 10.07.1999 and 26.07.1999 calling upon him to pay the balance amount. There is no provision under any Rule to entertain any successful bidder seeking refund of money or complaining of shortfall in the measurement. The legal notice issued by the Plaintiff is replied effectively. Therefore, the suit of the Plaintiff deserves to be dismissed as being fictitious and frivolous.

4. On the basis of the above pleadings, the Trial Court framed the following seven issues and recorded its findings thereon as shown against each of them:

Issue No.

ISSUES

Findings

1

Does the Plaintiff prove that the actual timber should be measured on the inner layer excluding bark?

In Negative

2

Whether the Plaintiff proves that the Defendants have measured the timber logs from circumference on both sides and put it for auction?

In Negative

3

Does the Plaintiff prove that the log purchased by them measures only 31 Cubic meter and not 56.229 in diameter?

In Negative

4

Whether the Plaintiff proves that he purchased it in good faith and that the Defendants had agreed to make good the loss?

In Negative

5

Whether the Defendant proves that the Plaintiff agreed to buy 56.229 Cubic meter of timber with measurement including bark?

Partly in the affirmative and party in the negative In Negative

6

Whether the Plaintiff proves that the Defendants are liable to refund the sum of Rs. 4,70,000/- plus interest?

In Negative

7

To what order and decree?

As per final order

5. In support of their respective contentions, the Plaintiff got examined himself as P.W. 1 and a witness, namely, K.G. Harish as P.W. 2 and got marked the documents at Exs. Pl to Pll. The Defendants got one Range Gowda, an Officer of the Forest Department examined as D.W. 1 and produced documents at Exs. D1 to D15.

6. On appreciation of oral and documentary evidence placed on record by the respective parties, the Trial Court, by its impugned judgment and decree, dismissed the suit of the Plaintiff-appellant holding that the Plaintiff failed to prove that timber should be measured excluding the bark, and that the quantity of logs purchased by him measured only 31 Cubic Meters and not 56.229 Cubic Meters. The Trial Court has also held that the Defendants proved that the Plaintiff agreed to buy timber logs totally measuring 56.229 Cubic Meters with measurements including the bark and therefore, the Plaintiff is not entitled to refund of the said amount with interest thereon as prayed for in this suit.

7. We have heard the arguments of Sri Venkatesh. R. Bhagath, Learned Counsel for Appellant-Plaintiff and Smt Manjula Kamodolli, learned HCGP representing the Respondents. Perused the impugned judgment and Decree and the entire material found in the original record obtained from the Trial Court.

8. Learned Counsel for the Appellant-Plaintiff strongly contended that the findings recorded by the Trial Court on Issue Nos. 1 and 3 that the Plaintiff failed to prove that the timber logs in question should have been measured by removing the bark on each timber and that he further failed to prove that the logs purchased by him in the public auction measured only 31 Cubic Meters but not 56.229 Meters, are quite erroneous and contrary to the material placed by him on record and also contrary to the provisions of Section 61(6)(ii) of the Karnataka Forest Code, 1976 and therefore, the impugned judgment and decree dismissing the suit of the Plaintiff based on the said findings deserves to be set aside and the Plaintiffs suit deserves to be decreed. He also contended that, further finding of the Trial Court on Issue No. 5 that the Plaintiff agreed to buy 56.229 Cubic Meters of timber with measurements without removing the bark is also quite erroneous in as much as, measuring of the timber log without removing the bark is contrary to the said provisions of the Karnataka Forest Code, 1976.

9. Per contra, the learned HCGP, referring to Ex. D1, the copy of the Auction Sale Notification dated 15.09.1998 which is in English language and Ex. D2, copy of the same notification in Kannada Language, Ex. D3, the details of measurements of the timber logs in question, Ex. D4, the document containing the sale conditions, strongly contended that as per the conditions mentioned in the said documents, the Plaintiff-purchaser was expected to inspect the timber before the auction, for satisfying himself as to the measurements and quantity of each log,

quality of timber, etc., and no complaint could be entertained in respect thereof, after the auction, and therefore, having participated in the said auction sale subject to the said conditions, the Plaintiff could not be permitted to contend that the measurements of the timber logs in question were not correct. While contending so, he submitted that the Trial Court, after properly considering the contents of these documents and also other evidence placed on record by both the parties, has rightly dismissed the suit of the Plaintiff and hence, the present appeal deserves to be dismissed as being devoid of merits.

10. Having heard the arguments of Learned Counsel for the Appellant-Plaintiff and the learned HCGP for the Respondents, the points that arise for our consideration in the present appeal are:

i) Whether the Trial Court is justified in recording its finding that the Plaintiff failed to prove that the timber logs in question should have been measured after removing the bark and therefore, the Defendants are liable to deliver to him 56.229 Cubic Meters of timber logs as stated in the confirmation order (Ex.P2) dated 14.10.1998 by measuring them after removing the bark?

ii) Whether the Trial Court is further justified in recording its finding that the Plaintiff agreed to buy 56.229 Cubic Meters of timber logs in question by taking measurements without removing the bark on each of them?

11. Undisputed facts of the case are as under:

(i) The Plaintiff, being timber merchant, participated in the auction sale conducted by the second Defendant on 14.10.1998 at Government Timber Depot, Sampaje Taluk, Madikeri in Kodagu District, pursuant to the Notification dated 15.09.1998, which is marked as Exs. Dl and D2 for the respective parties.

(ii) The said auction was held on the said date at about 10.00 a.m. and onwards and the Plaintiff participated in the said auction sale and made his highest bid in respect of jack timber measuring approximately 68.000 Cubic Meters and three stumps of rose wood as mentioned in the Notification Exs. D1/D2.

(iii) Pursuant to the said auction sale, the second Defendant issued to the Plaintiff confirmation order (Ex. P2) on the very same day of auction, i.e., 14.10.1998 stating therein that the jack timber logs that were purchased by the Plaintiff in the public auction measured 56.229 Cubic Meters and requiring him to pay 25% of the total sale price of the said timber logs and three stumps of rose wood and to pay the balance thereof on or before 13.01.1999 and then lift the said timber logs.

(iv) The Plaintiff did not make payment of balance 75% of the sale price but made representations to the second Defendant, seeking extension of time for making payment of the said amount.

(v) The second Defendant, by its order dated 16.07.1999 (Ex.P3) extended the time for payment of balance 75% of the sale price by the Plaintiff till 13.09.1999.

(vi) In compliance with the order at Ex.P3 dated 16.07.1999, the Plaintiff did not make payment of 75% of the sale price within the extended period of 13.09.1999 on the ground that the jack timbers that were sold to the Plaintiff in public auction did not measure 56.229 Cubic Meters as stated in Ex. P2 Confirmation Order since the measurement of the said logs were taken without removing the bark on each of the logs and therefore he was not prepared to pay the balance amount and take delivery of timber logs.

12. As could be seen from the above undisputed facts, the dispute between the Plaintiff and Defendants is only in respect of the procedure to be followed in measuring the timber logs which were purchased by him in public auction held by the 2nd Defendant. The auction sale notification, Ex. P1 which was published in "Udayavani" Kannada daily in respect of sale of the said timber logs by way of public auction to be held on 14.10.1998 does not mention any condition that the intending purchaser of the said timber in auction shall inspect the said timber logs before his participation in the auction and satisfy himself as to the measurements and the quality of the timber logs. It is also not mentioned in the said notification that any complaint as to measurement/quality of timber would not be entertained after the same were purchased in the auction. What is mentioned in the said Notification is ''further details could be obtained by the intending purchaser from the office of the second Defendant''. Further, in this notification, the total quantity of the timber logs in question is shown as 68.000 Cubic Meters, ''approximately''. Thus the said quality was not ''exact'' but only ''approximate''.

13. Ex. P1/D1 notification and also evidence of PW1 and that of D.W. 1 clearly go to show that the said auction sale was scheduled to be held from 10.00 a.m. and onwards on 14.10.1998 and that it was held accordingly from 10.00 a.m. and onwards on the said date and that the total measurements of the said logs (68.000 Cubic Meters) was only ''approximate'' but not ''exact''. From this it is crystal clear that the said logs were not measured prior to their sale in the said auction. Ex. P2, the Confirmation Order also came to be issued to the Plaintiff on the very date of auction mentioning therein the measurements of each of the jack timber logs sold to the Plaintiff in the said auction.

14. This document (Ex. P2), the contents of which are not in dispute, does not reveal how exactly the said logs were measured. In other words, it does not reveal whether the said timber logs were measured ''without removing the bark'' at the middle of each log or by removing the same. This document also does not disclose when exactly, i.e., on which date and between what timings, the said logs were measured and, whether the same were measured in the presence of the Plaintiff or his agent/representative. The evidence of the Plaintiff that they were not measured in his presence has remained unchallenged.

15. Further, the auction was proposed to be held on the said date right from 10.00 a.m. and it was not for the sale, only of the jack timber logs in question but also other categories of timber. Therefore, as rightly submitted by the

Learned Counsel of the Appellant-Plaintiff, the logs in question, the approximate measurement of which was stated in Ex. Pl/Dl sale notification as 68.000 Cubic Meters, were not actually measured on the date of auction, i.e., 14.10.1999 itself. Since the auction sale was commenced from 10.00 a.m. itself, the second Defendant must have got the said logs measured after the auction sale only.

16. D.W. 1, who is none other than the second Defendant, the Deputy Commissioner of Forests, has clearly stated in his cross-examination that the total measurement of the logs in question as being 56.229 Cubic Meters was arrived at by measuring some of the logs with the bark thereon. Thus, it is quite clear that all the said jack timber logs in question were not measured by removing the bark at the middle of each log but measurements were taken including the bark, which, as contended by the Plaintiff, is in violation of mandatory provisions of Section 61(6)(ii) of Karnataka Forest Code, 1976.

17. Section 61(6)(ii) of Karnataka Forest Code, 1976, which provides for the procedure to be adopted while measuring timber logs reads as under:

Section 61(6): The measurement of the converted material obtained from each tree felled, viz., logs pieces, poles, firewood stacks, etc., should be done at the stump-site by a responsible official not lower in rank than a Forester. It is his duty to examine the stump and the number and stamp marked on it and compare the outturn of the converted material with the estimated yield of the tree as noted in the Marking and Felling register and satisfy himself that all the economically utilizable material has been converted from the tree, that there is no avoidable wastage during conversion and that the converted material obtained from the tree is fully accounted for. The stump of the tree should be stamped by a presented hammer mark by the official measuring the timber after satisfying himself that no wrong tree has been felled. The following instructions regarding the measurement of logs should be strictly adhered to:

(i) The length of the log shall be measured from the first felling cut i.e., that cut extending farthest into the length from the butt end of the nearest cut at the top end and it should be done to the nearest 5 cm;

(ii) In a log of regular taper, the mean girth shall be measure at the mid-length of the log but not over the bark or any protuberances;

(iii) In a log with an irregular taper three girth measurements shall be taken i.e., one at the mid-length, an one at each end. all under bark and free of protuberances, the mean girth being obtained by taking the average of these three measurements;

(iv) The girth measurements should be done to the nearest centimeter;

(v) The volume of the log in Cubic meters should be reckoned up to three places of decimals.

18. Thus it is clear, from a plain reading of Clause (ii) of Sub-section (6) of

Section 61 of the Karnataka Forest Code, 1976 extracted above, that measurement of the girth of the timber log shall not be taken over the ''bark, or any protuberances'' and this is mandatory. In other words, it is mandatory that the measurement of the girth of the log shall have to be taken at. its mid length, only after the bark is removed but not over the bark. In view of the evidence of D.W. 1 in his cross-examination that the measurements of the jack timber logs in question were taken without removing the bark it is clear that the measurements of the jack timber logs in question were taken in gross violation of the mandatory provisions of Section 61(6)(ii) of the Karnataka Forest Code, 1976. Therefore, we are of the considered opinion that the findings of the Trial Court that the Plaintiff failed to prove that timber log should be measured only after removing the bark thereon and that the quantity of jack timber logs purchased by him measured only 31 Cubic Meters and not 56.229 Cubic Meters as stated by the Defendants and that the Defendants proved that the timber logs in question measured totally 56.229 Cubic Meters and Plaintiff agreed to buy the same in the auction accepting the said measurements, are quite erroneous and therefore the same cannot be sustained.

19. It is not in dispute that in case of failure on the part of the successful bidder in making payment of the balance 75% of the sale price within 90 days from the date of auction, 25% of the sale price deposited by the successful bidder on the date of auction shall stand forfeited. It is stated in Ex. P2 Confirmation Order that the Plaintiff shall deposit balance 75% of the sale price within 3 months from the date of sale i.e., on or before 13.01.1999. But the Plaintiff did not deposit the same within the said period. However, on the representation being made by the Plaintiff, the second Defendant, by his order dated 16.07.1999 extended the time for making payment of balance 75% of the bid amount till 13.09.1999.

20. Learned HCGP strongly contended that since the Plaintiff did not make payment of balance 75% of the sale price within the period of 90 days from the date of auction, nor did he make his representation to the 2nd Defendant seeking extension of the said period before the expiry of the said period, 25% of the bid amount deposited by the Plaintiff stood forfeited automatically, therefore, the Plaintiff cannot seek refund of the said amount. It is not in dispute that the second Defendant, by exercising his discretion, was pleased to extend the period fixed for payment of balance 75% of sale price till 13.09.1999. If the earnest money stood forfeited automatically consequent upon failure on the part of the Plaintiff in making payment of the balance 75% of the sale price within 90 days from the date of auction, there could be no occasion for the 2nd Defendant to extend the time for payment of balance sale price. Therefore this contention of the learned HCGP cannot be accepted.

21. Ex. P4 is the letter dated 16.07.1999 addressed by the Plaintiff to the second Defendant, through which the Plaintiff informed the second Defendant that after receipt of confirmation order dated 4.10.1998, he (Plaintiff) went to Government

Timber Depot and measured the jack timber logs which were purchased by him in the auction and found that they measured totally 31 Cubic Meters only but not 56.229 Cubic Meters as stated in the confirmation order (Ex. P2) and therefore, he should be delivered 56.229 Cubic Meters of the said timber logs but not 31 Cubic Meters thereof. This letter (Ex. P4) is not in dispute. Ex. P5 is another letter dated 19.07.1999 written by the Plaintiff to the second Defendant which is also not in dispute. In this letter, the Plaintiff claimed refund of earnest money Rs. 3,70,000/- with interest thereon @ 18% p.a. as the jack timber logs sold to him in the auction did not measure 56.229 Cubic Meters as stated in the confirmation order, but they measured only 31 Cubic Meters, he was not prepared to accept the same.

22. Ex. P6 is the letter addressed by the second Defendant to the Plaintiff. This letter is written in response to the letter of the Plaintiff dated 19.07.1999 (Ex. P5). It is stated in this letter (Ex.P6) that since the Plaintiff did not raise any objection on the date of auction as to the measurement of the said timber logs, his request for delivery of timber logs measuring 56.229. Cubic Meters or to refund Rs. 3,70,000/- being 25% of the sale price with interest thereon at 18% p.a. is rejected.

23. From the above correspondence between the Plaintiff and the 2nd Defendant (Exs. P4, P5 and P6), it is clear that the reason for the Plaintiff for not making payment of the balance 75% of the bid amount on or before 13.09.1999, as extended by the second Defendant vide order dated 16.07.1999 (Ex. P3), was that there was bonafide dispute as to the correctness of the measurements of timber logs in question. Besides this, as observed by us supra, the measurements of the timber logs in question were made contrary to the mandatory provision of Section 61(6)(ii) of Karnataka Forest Code, 1976 and therefore the timber logs in question did not measure totally 56.229 Cubic Meters as contended by the Defendants. Therefore, we are of the considered view that the Plaintiff cannot be found fault with for not making payment of 75% of the bid amount within the said period.

24. It is not in dispute that till the date of the filing of the said suit, the jack timber logs in question were not put to re-auction. It is only during pendency of the said suit, the said timber logs were put to re-auction. DW1, who is none than the second Defendant, has not stated in his evidence whether the Forest Department sustained any loss on account of sale of the said timber logs by way of re-auction. He has also not stated in his evidence that the Plaintiff was intimated by him about re-auctioning of the said timber logs.

25. Considering all the facts and circumstances of the case, we are of the opinion that the second Defendant took the measurements of the timber logs in question quite contrary to the mandatory provisions of Section 61(6)(ii) of the Karnataka Forest Code, 1976, and the details of measurements were not given to the Plaintiff before he participated in the auction and that there was valid and acceptable reason for the Plaintiff for not making payment of the balance 75% of

bid amount (sale price) within the stipulated period i.e., on or before 13.01.1999, within the period extended by 2nd Defendant till 13.9.1999. Therefore the Plaintiff is entitled to the refund of Rs. 3,70,000/- being 25% of the bid amount that was paid by him on the very date of auction sale.

26. During the course of his arguments, Learned Counsel for the Appellant-Plaintiff made a submission that though the Plaintiff has not established that he is entitled to interest on the said amount @ 18% p.a., the second Defendant may be directed to pay to the Plaintiff only Rs. 3,70,000/- without any interest thereon. This submission of the Learned Counsel for the Appellant-Plaintiff deserves acceptance.

27. For the reasons aforesaid, while answering both the points raised for our consideration in this appeal, in the ''Negative'' and in favour of the Appellant-Plaintiff, we pass the following,

ORDER

The present appeal is allowed in part. The impugned judgment and Decree dated 02.02.2006 passed in O.S. No. 55/2000 by the learned Civil Judge, (Sr. Dn.) Madikeri, Kodagu District, dismissing the said suit is hereby set aside. The said suit is hereby decreed partly holding that the Plaintiff is entitled to the refund of a sum of Rs. 3,70,000/- being 25% of the bid amount, which was paid by him on the date of auction sale.

(ii) Defendant Nos. l and 2 shall refund the said amount to the Plaintiff within three months from the date of drawing of the decree. Decree shall be drawn accordingly.

No order as to costs in this appeal.

