

(2015) 08 KAR CK 0022
In the Karnataka High Court
Case No : R.S.A. No. 5309/2012

Uddappa Shivaputrayya Wadiyar and Others

APPELLANT

Vs

Venkatesh Balaji Kulkarni

RESPONDENT

Date of Decision : 19-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Easements Act, 1882 — Section 15
Evidence Act, 1872 — Section 114

Citation : (2015) 08 KAR CK 0022

Hon'ble Judges : B. Veerappa, J.

Bench : Single Bench

Advocate : H.M. Dharigond, Advocate, for the Appellant; Girish S. Hiremath, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

B. Veerappa, J.—This is an unsuccessful plaintiffs' regular second appeal filed against the judgment and decree dated 11.04.2011 made in RA No. 38/2008 on the file of the Presiding Officer, Fast Track Court, Bailhongal confirming the judgment and decree dated 05.08.2008 made in O.S. No. 64/2005 on the file of the Principal Civil Judge (Jr. Dn.) & JMFC, Bailhongal dismissing the suit for declaration and permanent injunction.

2. It is the appellant - plaintiffs' case before the Trial Court that suit property bearing Govankoppa G.P. No. 146 which is the open space east west 10 feet and south north 10 feet as shown in the hand sketch map ABCD and it is a road to go to the property bearing No. 148 which is the suit property having the following boundaries to the east and west the defendant's property to the north the road and to the south the G.P. No. 148 plaintiffs property.

3. It is further contended that the suit property in G.P. No. 148 which is the property purchased by one Shivaji Appaji Kulkarni on 19.10.1977 and he is the owner in possession of the same. The suit property bearing G.P. No. 146 is

originally owned by Shivaji Kulkarni which is purchased about five years back by the defendant. It is further averred that one Shivaji Kulkarni left the road in G.P. 146 to go to the said property bearing GP No. 148 by the plaintiff, hence, in the sale deed it is mentioned as private road towards the north. Hence, the plaintiff is using the said road for carrying his cart, wood and other things, such as, agricultural implements from that road since from the date of the purchase. These things are within the knowledge of defendant and his father. Hence, there was no interference and obstruction to the plaintiff to move from this road till 19.10.1977. The plaintiff has got thus easementary right over the said road. It is further averred that the defendant has now with evil intention to obstruct and close the road has collected mud and stones in Panchayat No. 146 for which the plaintiff objected and asked him not to construct the compound. Hence, a complaint was filed in Dodwad Police Station as per advice of the police. The defendant has also not taken any permission for the said construction from the gram panchayat and hence, the plaintiff has filed his objections before the Gram Panchayat for the said illegal act of the defendant. It is further averred that defendant is a rowdy man having relationship with goonda people and he is indulged in obstructing the plaintiff from using the said road without having any right, title or interest and he has denied easementary right of the plaintiff Hence, the plaintiff was constrained to file the suit seeking for declaration.

4. The defendant filed his written statement denying the plaint averments and contended that the suit filed by the plaintiff is false, frivolous and vexatious and that the plaintiff has not come to court with clean hands and he has suppressed all the material facts of the case and contended that it is false that suit property is G.P. No. 146 of Govankoppa village measuring East-West 10 feet, North-South 10 feet, as shown in the letters "ABCD" and it is also denied that there is a road or way in G.P. No. 146 for approaching the G.P. No. 148 passing through G.P. No. 146. The boundaries and the hand-sketch are also denied. It is further contended that the G.P. Nos. 146 and 147 of Govankoppa village are purchased by the defendant in the year 1999 from Annaji Kulkarni, Muralidhar Kulkarni and one Nagesh Shivaji Kulkarni and in the sale deed the boundaries of both the properties are mentioned as to the East house property of defendant, to the west house property of Shivaputrappa Gidamudi and Ayyappa Norajappanavar, to the north government road, and to the south by open space of the plaintiff and defendant. There is no mention in the sale deed about the road or private way to plaintiff in G.P. No. 146 to approach his property bearing G.P. No. 148. It is also contended that the said G.P. Nos. 146, 147 and 148 were previously one property G.P. No. 109 only. Out of the said G.P. No. 109 the plaintiff has purchased open space in the year 1977 measuring east west 21 feet and north south 28 feet from said Kulkarm and the G.P. No. 109 is changed by the GP at the time fixing the property assessment as 146, 147 and 148. The plaintiff purchased G.P. No. 148 from Shivaji Kulkarm and he is in possession of the same as owner. But it is denied that defendant has purchased this from Shivaji Kulkarm 5 years back. It is denied that said Shivaji Kulkarni has given way to the

plaintiff passing through G.P. No. 146 and it is also denied that there is private or public road or way in G.P. No. 146 and in the sale deed it is falsely mentioned that there is private road in the Northern side of G.P. No. 146 and also denied that the plaintiff is using the said property from the date of purchase for carrying gross wood, etc., and for his cart and defendant and his father had knowledge about it. The defendant further specifically contended that plaintiff has got public road to the southern side of his property. The suit property is the backyard of the plaintiffs property to the northern side and hence, question of causing disturbance to plaintiff does not arise as there is no road or way in the suit property or in G.P. No. 146. The plaintiff has no right, title or interest by way of way in the G.P. No. 146. The defendant has stored his building materials for construction of the compound wall in his property for get safe his cattle grass and other things. The plaintiff is causing obstruction for the defendant to get construct his compound wall to his Property No. 146. It is also admitted by the defendant that he has lodged complaint in Dodwad Police Station as against the plaintiff and police warned the plaintiff The defendant has given application to the gram panchayat for permission. It is not necessary to give notice to the plaintiff to get construct his compound wall and the plaintiff with malafide intention claiming right over suit property, etc. Therefore, he sought for dismissal of the suit.

5. On the basis of the pleadings, the trial court framed the following issues:

"(1) Whether the plaintiff proves that he is having easementary right of way by prescription in an extent of east west 10", south north 10" in the suit schedule property bearing G.P. No. 148?

(2) Whether the plaintiff proves the alleged interference caused by the defendant obstructing the plaintiffs easementary right of way with an attempt to make construction of the wall in the suit property?

(3) Whether the plaintiff proves that he is entitled for the relief of easementary right of way as sought for?

(4) Whether the plaintiff is entitled for the relief as sought for?

(5) What order or decree?"

6. In support of the plaintiffs case plaintiff No. 1 (a) has got examined himself as P.W. 1 and also got examined two more witnesses as P.W. 2 and 3 and got marked documents as Ex. P.1 to P.9. The defendant has got examined himself as D.W. 1 and examined 4 witnesses as D.W s. 2 to 5 and marked documents Ex. D.1 to D.13.

7. Learned Counsel for the plaintiff remained absent at the time of arguments and hence, the trial court considering the entire material on record has recorded a finding that the plaintiff failed to prove that he is having easementary right of way by prescription in an extent of East West 10" and North South 10" in the suit schedule property bearing G.P. No. 148 and also failed to prove the alleged

interference caused by the defendant obstructing the plaintiffs easementary right of way with an attempt to make construction of the wall in the suit property and the plaintiff is not entitled to any relief of easementary right. Accordingly, the suit came to be dismissed.

8. Aggrieved by the said judgment and decree of the trial court, the plaintiff filed an appeal in R.A. 38/2008 before the Presiding Officer, Fast Track Court, Bailhongal, who after hearing both parties by his impugned judgment and decree dated 11.4.2011 dismissed the appeal and confirmed the judgment and decree of the trial court.

9. Against the said concurrent finding of fact of both the courts below, the present appeal is filed.

10. I have heard the learned Counsel for the parties to the lis.

11. Sri. H.M. Dhangond, learned Counsel for the appellants strenuously contended that the impugned judgment and decree passed by the courts below is without properly appreciating the oral and documentary evidence on record and the vendor, namely, Shivaji Kulkarni, has given easementary right in G.P. No. 146 and the same has been incorporated in the registered sale deed since from the date of purchase, the father of appellants and appellants were using the said private road from the date of purchase till the date of filing of suit. The said material evidence has not been considered by both the courts below. Therefore, he sought to set aside the judgment and decree of the courts below.

12. Pert contra, Sri. Girish S. Hiremath, learned Counsel for respondent sought to justify the impugned judgment and decree of the court below.

13. The trial court considering the entire materials on record recorded a finding that even though sufficient time was granted to the plaintiffs they have not appeared before the court to give their cross-examination and hence, it is clear that there is no corroboration to the case of the plaintiff. On the other hand, it is the contention of the defendant side that the sale deed Ex. P.3 on which the plaintiff is basing his easementary right is not correct. It is contended by defendant side that there is no mention in the sale deed about the road or private way to the plaintiff in G.P. No. 146 to approach his property in G.P. No. 148. In order to prove his sale deed by adducing the cross examination of his witnesses, plaintiff has not tried to cross-examine his witnesses P.W. 2 and P.W. 3 and thus sale deed remained unproved. Further looking to the evidence of defendant side, the son of the original owner through whom the plaintiff is stated to have purchased the suit property and on which document the plaintiff is stating that he has got right of easementary to pass through property of defendant, but he has clearly stated in his oral evidence that his father has not given any right of easementary to plaintiffs and contends that the sale deed to that effect are not true and it is false one. It is the plaintiff who has to prove that he has got easmentary right to pass through the property of defendant to go to his property. The plaintiff cannot take the benefit of the other side, by standing

on his own feet he has to prove his case. Ultimately, the trial court has held that the plaintiff has not proved his case by cross-examination to prove that there is road to his property. Therefore, the trial court dismissed the suit.

14. On re-appreciating the entire material on record, the lower appellate court framed issue and answered the issue in the negative and recorded a specific finding that from the entire evidence it is revealed that defendant has purchased G.P. Nos. 146, 147 of Govankoppa village in the year 1999 from Annaji Kulkarni, Muralidhar Kulkarni and Nagesh Kulkarni. The boundaries of both properties are mentioned, but there is no mention about the private road or way to G.P. No. 148. Further the plaintiff failed to prove the alleged sale deed. Absolutely there is no evidence to show pathway. Even on perusal of evidence of defendant the plaintiff has got road to Southern side of his property. Moreover, the alleged witnesses for the plaintiff are not subject to cross-examination. Therefore, plaintiffs failed to prove averments of the plaint and documents. Therefore, he concurred with the finding recorded by the trial court and dismissed the appeal.

15. It is the specific case of the plaintiff that he has got road through G.P. No. 146 to reach his property G.P. No. 148. The plaintiff has not produced any material to show that he is using the suit pathway. Section 15 of the Indian Easements Act, 1982, reads as under:

"15. Acquisition by prescription.--Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure is or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,

the right, to such access and use of light or air, support, or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

By a reading of the said section, it is clear that the plaintiff has to show that he or his predecessors have been using the property nearly for more than 20 years and admittedly in the present case, the plaintiff has not produced any material to show that there was pathway in G.P. No. 146 to reach his land in G.P. No. 148. Therefore, the plaintiff is not entitled to any relief before the court. It is also not in dispute that P.W. 1 and two witnesses P.Ws. 2 and 3 have filed affidavits of evidence and they were not available for cross-examination by the defendant.

Therefore, an adverse inference has to be drawn against the plaintiff in view of the provisions of Section 114 of the Indian Evidence Act.

16. The Hon"ble Supreme Court while considering the provisions of Section 114 in the case of Vidhyadhar Vs. Manikrao and Another, has held as under:

"15. It was defendant No. 1 who contended that the sale deed, executed by defendant No. 2 in favour of the plaintiff, was fictitious and the whole transaction was a bogus transaction as only Rs. 500/- were paid as sale consideration to defendant No. 2. He further claimed that payment of Rs. 4,500/- to defendant No. 2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by defendant No. 1 as he did not enter into the witness box. He did not state the facts pleaded in the written statement on oath in the Trial Court and avoided the witness box so that he may not be cross examined. This, by itself, is enough to reject the claim that the transaction of sale between defendant No. 2 and the plaintiff was a bogus transaction.

16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh vs. Gurdial Singh and Another AIR 1927 230 (Privy Council) . This was followed by the Lahore High Court in Kirpa Singh vs. Ajaipal Singh and Others AIR 1930 1 (Lahore) and the Bombay High Court in Kirpa Singh vs. Ajaipal Singh and Others AIR 1930 1 (Lahore) . The Madhya Pradesh High Court in Kirpa Singh vs. Ajaipal Singh and Others AIR 1930 1 (Lahore) , also followed the Privy Council decision in Sardar Gurbakhsh Singh vs. Gurdial Singh and Another AIR 1927 230 (Privy Council) . The Allahabad High Court in Sardar Gurbakhsh Singh vs. Gurdial Singh and Another AIR 1927 230 (Privy Council) held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Sardar Gurbakhsh Singh vs. Gurdial Singh and Another AIR 1927 230 (Privy Council) , drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box."

17. In view of the aforesaid reasons and in the absence of any material to prove that plaintiff has got road to reach his property in G.P. No. 148 passing through G.P. No. 146, which cannot be accepted and admittedly the plaintiff has got public road to the southern side of his property as contended by the defendant, is not disputed by the plaintiff Therefore, both the courts below based on the oral and documentary evidence on record concurrently held that the plaintiff failed to prove his case of having easmentary right by way of prescription to extent of 10 "East West and 10" South-North in the suit schedule property to reach his G.P. No. 148, is based on the cogent legal evidence and appellant has not made out any prima facie case to interfere with the finding of fact by the courts below in exercise of powers under the provisions of Section 100 of Code of Civil Procedure.

No substantial question of law involved in the present case. Accordingly, the RSA is dismissed at the stage of admission.