
(2015) 03 KAR CK 0194
In the Karnataka High Court
Case No : MSA No. 100083/2014

Zareenabegum Moiddinkhan Kakati

APPELLANT

Vs

Dastgir Kutboddin Murgod and Others

RESPONDENT

Date of Decision : 06-03-2015

Acts Referred:

Citation : (2015) 03 KAR CK 0194

Hon'ble Judges : S.N. Satyanarayana, J.

Bench : Single Bench

Advocate : M.G. Naganuri, L.M. Heggannavar and Rekha Patil, for the Appellant

Judgement

S.N. Satyanarayana, J.—Sole defendant in O.S. No. 161/2002 on the file of the Principal Civil Judge (Jr.Dn.) Khanapur has come up in this miscellaneous second appeal impugning the divergent finding rendered by the lower appellate Court in setting aside the judgment and decree passed by the trial Court and consequently remanding the matter for fresh consideration after framing of issues with reference to limitation, which was raised by the plaintiffs in the original suit, as against the counter claim of defendant in the said suit, who is appellant herein.

2. The brief facts leading to this miscellaneous second appeal are as under:

"Suit in O.S. No. 161/2002 is filed for the relief of permanent injunction claiming title to suit property bearing TPC Nos. 747/1 and 747/1A, which is said to have purchased by plaintiffs under registered sale deed dated 13.12.1983. In the said suit, defendant who is appellant herein filed written statement raising counter claim regarding her title to suit property bearing TPC No. 747/1A, contending that, in the said portion, the plaintiffs have put up unauthorized construction, which should be removed and accordingly, sought for the relief of mandatory injunction. In the said suit, the trial Court has framed the following issues.

i) Whether the plaintiffs proves that, they are in possession and enjoyment of the suit property measuring 72 x 46 feet?

- ii) Whether the plaintiffs further proves that, unnecessarily defendant is trying to interfere with their possession?
- iii) Whether the defendant proves that plaintiffs constructed a structure by encroaching an area of 8x3 feet?
- iv) Whether the defendant proves that without seeking a relief of declaration the present suit is not maintainable?
- v) Whether the defendant is entitle for the relief of mandatory and permanent injunction as sought for?
- vi) Whether the plaintiffs are entitle for the relief of permanent injunction as sought for?"

Thereafter, the trial Court by recording the evidence on behalf of the plaintiffs and defendant, who is also counter claimant, dismissed the suit of the plaintiffs for the relief of permanent injunction.

3. Being aggrieved by the same, one of the plaintiffs, i.e., plaintiff No. 2 in O.S. No. 161/2002 filed an appeal in R.A. No. 241/2008. The plaintiff No. 1 did not join plaintiff No. 2 in filing the appeal before the lower appellate Court for the reason that at the relevant time, he was one of the accused in a scam case. The appeal filed before lower Court was in challenging the rejection of her prayer for permanent injunction and also challenging the grant of mandatory injunction in favour of original defendant in the trial Court. In the said proceeding, the lower appellate Court having noticed that the relevant issues regarding limitation not being framed by the trial Court with reference to the relief of mandatory injunction in the counter claim, felt that the matter should be remanded to trial Court for fresh consideration in directing the trial Court for framing additional issues in the original suit on the counter claim filed by defendant in the said suit and thereafter to dispose of the matter on merits, by recording evidence on the said issues.

4. Being aggrieved by the same, defendant in the original suit who is also counter claimant for the relief of mandatory injunction has come up in this miscellaneous second appeal challenging the order of remand on the ground that with the assistance of other materials which are already available on record, the lower appellate Court by itself could have framed the additional issues and thereafter could have referred the matter to the trial Court under Order 41 Rule 25 and after securing the opinion of the trial Court on the additional issues, could have disposed of the appeal on merits, instead of remanding the entire matter for fresh consideration.

5. In this matter, the appellant who is defendant in the original suit was heard. The judgment of the lower appellate Court, which is under challenge is looked into along with the judgment of the trial Court, in which the lacuna was noticed by the lower appellate Court. On going through both the judgments, it is clearly seen that the observations of the lower appellate Court in non framing of issues

by the trial Court with reference to the defence raised by the plaintiffs against the counter claim appears to be just and proper. In that view of the matter, this Court find, remanding the matter for fresh consideration is also in order. However, the apprehension of the defendant who is appellant herein that instead of the matter being remanded in its entirety, the lower appellate Court could have framed additional issues and thereafter could have referred the matter for opinion as contemplated under Order 41 Rule 25 cannot be considered, for the reason that, as and when the matter is sent back for re-trial on that aspect, the trial Court will have to re-appreciate the entire evidence, which is already available on record and also in respect of the evidence which has to be adduced by the parties with reference to additional issues to be framed and thereafter, the trial Court is required to decide the issues on the basis of the entire pleadings and evidence available on record. Therefore, securing an opinion on additional issues, thereafter deciding the matter may not be correct in the facts and circumstances of the case. Even otherwise, the result would be one and the same.

6. In that view of the matter, this Court find no justifiable grounds are made out to admit this miscellaneous second appeal to consider the correctness or otherwise of the order of remand passed by the lower appellate Court in R.A. No. 241/2008. Accordingly, this miscellaneous second appeal filed by defendant in O.S. No. 161/2002 is hereby dismissed.