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Court : Karnataka

Decided On : Mar-01-2014

Judge : K. N. Keshavanarayana

Appeal No. : R.S.A No. 879 of 2005 (RES)

Appellant : M. Muniyappa

Respondent : M. Krishnappa

Judgement :

(Prayer: This R.S.A. is filed under Section 100 of the C.P.C., against the judgment and decree dated 18.01.2005 passed in R.A.No.29/1998 on the file of the Civil Judge (Sr.Dn) and JMFC., Chintamani, dismissing the appeal and confirming the judgment and decree dated 09.06.1998 passed in O.S.No.351/1991 on the file of the Civil Judge (Jr.Dn), Chintamani.)

1. The unsuccessful plaintiff in O.S. 351/1991 on the file of the Civil Judge (Jr.Dn.), Cliintamani, is before this Court in this second appeal questioning the legality and correctness of the concurrent judgment of the courts below dismissing the suit filed by him for possession of the suit premises and also for damages.

2. The subject matter of the suit is a portion of the premises bearing Municipal Khatha No. 1519/6841 measuring East-West: 15 ft. and North-South: 11 ft. situated in 5th Division. MNT Circle, Mehaboobnagar, Chintamani Town.

3. The appellant/plaintiff filed suit seeking a decree against the defendant for vacating the suit premises and also for recovery of damages for the wrongful use and occupation of the premises from the date of the suit till vacating of the premises. He inter alia contended that the house described in the schedule to the plaint is his self- acquired property he having purchased the site out of his personal funds and constructed a building thereon out of his hard-earned money, as such, he is the absolute owner of the entire building; that the defendant being his youngest brother requested him to permit him to reside in a portion thereof; that out of natural love and affection the plaintiff permitted the defendant to live in the suit schedule premises arid thus, the plaintiff was in permissive possession of the suit schedule premises; that the defendant after living in the said portion for over three years with the permission of the plaintiff, however later developed hostility towards the plaintiff; that the defendant deserted his wife and children without providing food and shelter to them and illegally married another girl and that the plaintiff started protecting three children of the defendant; that in the light of these developments and the hostile attitude of the defendant, the plaintiff feeling not interested to continue the defendant in possession of the premises, withdrew the permission granted and called upon the defendant to vacate the premises and also to pay the damages at the rate of Rs. 100/- p.m., for the wrongful use and occupation. However, the defendant failed to vacate the premises.

4. The defendant on his appearance before the trial court, filed his written statement denying the case of the plaintiff regarding the property being a self-acquisition of the plaintiff. He denied that the property is the self- acquired property of the plaintiff. He contended that the site was acquired from out of the joint family funds and the building was constructed thereon from out of the joint family funds and therefore, the entire property is one of the joint family properties, as such, he is in possession of the suit schedule premises in his own right as a member of the joint family and therefore, the plaintiff has no right to seek possession of the same. He denied the other allegations made in the plaint regarding deserting his wife and children etc. Therefore, he sought for dismissal of the suit.

5. In the light of the pleadings of the parties, the trial court framed the following issues: -

i) Does the plaintiff prove that the defendant was under the permissive possession of him in the suit schedule property ?

ii) Does the plaintiff further prove that he is entitled to the vacant possession of the schedule property?

iii) Does the plaintiff further prove that defendant is in wrongful possession of the suit property and hence entitled for damages as claimed?

iv) Whether the suit is bad for non-joinder of necessary parties?

v) What decree or order?

6. The parties led oral and documentary evidence in support of their respective contentions. The trial court on appreciation of oral as well as documentary evidence, by the judgment and order dated 09.06.1998 dismissed the suit answering Issue Nos. 1 to 4 in the negative holding that the suit schedule property is a joint family property comprised of the plaintiff, defendant and others and therefore, the plaintiff cannot seek the relief of possession of the suit schedule premises against the defendant. Aggrieved by the said judgment and decree, the plaintiff filed appeal in R.A. No.29/1998 on the file of the Civil Judge (Sr.Dn.) and JMFC, Cbintamani.

7. The lower Appellate Court after hearing both sides, formulated the following points for consideration: -

i) Whether the appellant/'plaintiff proves that the judgment and decree passed by the trial court is perverse and arbitrary and this court's interference is necessary?

ii) What' order?

8. On re-appreciation of the oral as well as documentary evidence, the lower Appellate Court by the judgment under appeal, concurred with the findings of the trial court and consequently dismissed the appeal affirming the judgment of the trial court. Aggrieved by the concurrent judgment of the courts below, the plaintiff is in appeal before this court.

9. On 24.04.2006, this court admitted the appeal for consideration of the following substantial questions of law:-

i) In the light of Ex. PI-Sale Deed standing in the name of the plaintiff, which js not disputed by any of the parties, whether the first Appellate Court was justified in holding that the suit schedule property does not form part of Ex.Pl?

ii) Whether the finding of the trial court that the suit schedule property is a joint family property is sustainable in the absence of any evidence adduced to show the existence of a joint family property when Ex.Pl, the sale deed stood solely m the name of the plaintiff?

iii) Whether the finding of the trial court that, any property acquired by a member of a joint family in the absence of severance of status constitutes a joint family property, is correct?

10. During the course of the argument, learned counsel for the plaintiff/appellant contended that, in addition to the above questions, the question as to whether the findings recorded by the courts below as to the nature of the property in the absence of a specific issue in that regard is in accordance with law would also arise for consideration.

11. Having heard both sides, I found considerable force in the said argument and accordingly, the said question was also raised for consideration and on that question also, arguments were heard on both sides.

12. During the course of the argument, it is brought to the notice of this court that subsequent to disposal of the appeal by the lower Appellate Court and during the pendency of this appeal, the respondent/defendant along with other members of the family has filed another suit in O.S. No.80/2013 on the file of the Civil Judge (Sr.Dn.), Chintamani, against the appellant/plaintiff and others for partition and separate possession of their shares in the properties described in the schedule to the said plaint, which includes the present suit schedule property and the said suit is being contested by the appellant/plaintiff by filing written statement.

13. As noticed supra., though the plaintiff in the plaint contended that he is the absolute owner of the entire property of which the suit schedule premises forms a part, on the ground that he acquired the site and constructed a building thereon from out of his own funds and that he permitted the defendant to live in a portion thereof, the defendant in the written statement apart from denying the case of the plaintiff, specifically contended that the suit schedule property was acquitted from out of the joint family funds, as such, the entire property is one of the joint family properties and that his possession in a portion thereof is not a permissive possession, but on his own independent right as a member of the joint family. However, the trial court in spite of such pleadings, did not frame an issue in that aspect of the matter.

14. In view of the fact that the defendant sought to non-suit the plaintiff on the ground that the suit premises is a joint family property and since fee finding thereon would have a greater effect on the relief sought by the plaintiff, in my considered opinion, it was necessary for the trial court to have framed an issue in that behalf and drawn the attention of the parties to lead evidence on that aspect of the matter. It is the contention of the learned counsel for the appellant that in the absence of a specific pleading, the plaintiff did not direct himself to lead effective evidence in that aspect of the matter and nevertheless the trial court has proceeded to record a finding on the said aspect of the matter, which has resulted in dismissal of the suit. Even before the lower Appellate Court, though such an argument was canvassed, the lower Appellate Court has not deemed it fit to consider the same and pass appropriate orders thereon.

15. Having regard to the facts and circumstances of the case and the nature of the pleadings of the parties, I find great force in the contention of the learned counsel for the appellant that non-framing of an issue as to the nature of the property as sought to be pleaded by the defendant, has resulted in miscarriage of justice in not affording reasonable opportunities to the parties to lead effective evidence on that aspect of the master. However, learned counsels appearing on both sides made a fair submission before this court that in view of the fact that the parties to the suit are now litigating the very same issue in O.S. No.80/2012 filed for the relief of partition and separate possession of several properties including the suit schedule

property in the present suit, and since the jurisdictional court is required to adjudicate the issues such as whether there exists a joint family and whether the subject matters of the said suit are all properties of the joint family, etc, the finding recorded by the courts below in this proceeding be set aside leaving the parties to seek adjudication of the said issue in the present suit pending between the parties and till such period, the possession of the suit premises by the respondent/defendant be protected. The fair submission made by the learned counsels appearing on both sides is placed on record. Having regard to the fact that the courts below in the judgment under appeal have recorded a finding on a material point without raising an issue in that regard and directing the parties to lead material evidence in that regard, the finding recorded by the courts below on that aspect of the matter required to be set aside and leave the parties to get the said issue adjudicated in the suit now pending between them in O.S. No.80/2012 on the file of the Civil Judge (Sr.Dn.), Chintamani.

16. In the light of the above discussions, the appeal is allowed- .in-part. The judgment of the courts below dismissing the suit are hereby set aside. The finding recorded by the courts below that the suit schedule propei ty is the property of the joint family comprised of plaintiff, defendant and others, is hereby set aside. It is open to the parties to seek adjudication of all those issues in the suit now pending between them before the Civil Judge (Sr.Dn.), Chintamani, in O.S.No.80/2013, to which all the members of the family are parties. The suit filed by the appellant/plaintiff for possession is disposed of holding that the plaintiff will have to work-out his remedies, if any, after the disposal of the proceeding now pending in O.S. No.80/2013. Till the disposal of the said suit, the plaintiff/defendant shall not in any way disturb the possession of the suit schedule property by the respondent/defendant. The substantial questions of law framed are answered accordingly.

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