

Devi Devaraj Vs. Chikkamuniyappa

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Court : Karnataka

Decided On : Sep-26-2014

Judge : R.B. Budihal

Appeal No. : Regular Second Appeal No.3082 of 2007 (P-INJ)

Appellant : Devi Devaraj

Respondent : Chikkamuniyappa

Judgement :

(Prayer: This R.S.A. is filed under Section 100 of CPC against the Judgment and Decree dated 17.09.2007 passed in R.A.No.206/1998 on the file of the sessions Judge, and Presiding Officer, Fast Track Court-II, Bangalore Rural District, Bangalore, allowing the appeal and setting aside the Judgment and Decree dated 27.10.1998 passed in O.S.No.300/92 on the file of the Addl. Civil Judge (Jr. Dn.) Bangalore.)

1. This regular second appeal is preferred by the appellant-defendant against the respondent-plaintiff being aggrieved by the judgment and decree dated 17.9.2007 passed by the Fast Track Court No.II, Bangalore Rural District, Bangalore in R.A.No.206/1998 in setting aside the judgment and decree dated 27.10.1998 on the file of the Addl. Civil Judge (Jr.Dn.), Bangalore Rural District, Bangalore in O.S.No.300/1992.

2. The facts leading to the present appeal are that respondent-plaintiff filed the suit in O.S.No.300/1992 seeking the relief of permanent injunction to restrain the defendant and others from interfering with the plaintiff's peaceful possession and enjoyment of the suit schedule property i.e., land bearing Sy.No.128 situate at Mandur village as mentioned in the schedule to the plaint. It is averred in the plaint that plaintiff is the absolute owner in peaceful possession and enjoyment of the suit schedule property. Plaintiff being a bhovi (scheduled caste) got the schedule property under a grant by the Government as per Government grant No.LND.SR.1.468/68-69 at an upset price dated 28.1.1969 by the Tahsildar, Hoskote Taluk and he is in possession of the same on the said date. He has paid the kandayam in respect of the said land and since from the date of grant he has been in peaceful possession and enjoyment of the property. The concerned survey authorities have also measured the suit schedule property and a sketch has been prepared in respect of the said property. The said land is marked in green colour in the original sketch. Plaintiff has erected 50 stone pillars on three sides namely, west, north and south of the suit schedule land and recently collected and stocked 30 stones slabs with a view to put up a small shelter. These being the state of affairs, defendant who is running a factory at Hoodi about 12 miles away from the suit land and who has no manner of right, title or interest in the suit land, attempting to disturb plaintiff's peaceful possession and enjoyment of the suit land recently. Defendant is rich and highly influential person. On 16.4.1992, Tuesday, at about 9.00 a.m. when the plaintiff went to erect the stone slabs in order to put up a shed for the purpose of shelter, defendant came near the suit land with his followers and obstructed the plaintiff from doing so and warned the plaintiff that if he does any work on the suit land he would pull down and break all the slabs. Hence, plaintiff has filed the suit.

3. Defendant has filed the written statement contending that in the schedule plaintiff has mentioned the land as bearing Sy.No.128 measuring 2 acres. Schedule is incomplete and lacks material particulars. Defendant purchased the property by a registered sale deed for a valuable consideration of Rs.48,000/-. Later, khata was changed and the defendant's name was entered in the revenue records. The land was also converted into an industrial land in terms of various statutes as applicable to the facts of the case. Defendant has also been granted

with krishi pass book showing the name of the defendant as rightful owner to the extent of 4 acres 29 guntas of the land situate in Sy.Nos.217 and 219. Sy.No.128 consist of several acres of land and in the absence of any particulars, plaintiff cannot maintain the suit at all. Plaintiff has no right so far as the lands situate in Sy.Nos.217 and 219. Plaintiff may be put to strict proof of grant by the Government as averred in paragraph No.3 of the plaint. The plaintiff has probably mistaken the land. The identity of the land is not clear from the averments made in the plaint. The sketch prepared by the plaintiff cannot be accepted. Averments made in plaint at paragraph Nos.5 and 6 are not admitted. Defendant has not done anything to destroy the plaintiff's possession. She is a practicing Doctor and has purchased the property for the purpose of having a factory for medicinal purposes. The allegations that on 16.4.1992 defendant went near the land with some followers is not correct. Plaintiff has misrepresented the entire facts at his convenience. There is no cause of action. Hence, she has sought to dismiss the suit with exemplary cost.

4. On the basis of the above pleadings, the trial Court has framed the following three issues:

- (i) Whether the plaintiff proves that he is in lawful possession of the suit property?
- (ii) Whether the plaintiff proves that defendant interfered with his possession?
- (iii) To what order and to what decree?

After considering the merits of the case, ultimately, the trial Court has dismissed the suit of the plaintiff.

5. Being aggrieved by the judgment and decree of the trial Court, the plaintiff has preferred an appeal in R.A.No.206/1998. The first appellate Court considering the judgment and decree passed by the trial Court and other materials, has ultimately allowed the appeal and set aside the judgment and decree of the trial Court and decreed the suit of the plaintiff as prayed for and defendant was permanently restrained from interfering with the peaceful possession of the suit schedule property by the plaintiff. Aggrieved by the judgment of the first appellate Court, the

defendant is before this Court in this Regular Second Appeal.

6. The appellant herein has challenged the judgment and decree of the first appellate Court on various grounds as mentioned in the appeal memorandum. This Court while admitting the appeal has framed the following substantial question of law:

"Whether in the facts and circumstances of the case, the appellate Court was justified in reversing the judgment and decree passed by the trial Court based on the Commissioner's report?"

Later, this Court has also framed two additional substantial questions of law for consideration:

(i) Whether the lower appellate Court had erred in law in accepting and acting on Ex.P8-sketch copy?

(ii) Whether the lower appellate Court had erred in law in rejecting the Commissioner's report?

7. Heard the arguments of the learned counsel appearing for the appellant-defendant and also the learned counsel appearing for respondent-plaintiff.

8. Learned counsel for the appellant during the course of his arguments has submitted that the suit filed is for bare injunction. The appellant was in lawful possession of the suit schedule property as on the date of filing the suit. Plaintiff's claim is based on Saguvali chit dated 28.1.1969. He has submitted that the sketch relied upon by the plaintiff is said to have prepared on 11.12.1986. No documents are produced by the plaintiff to show that suit property has been granted to him as alleged in the plaint. The Commissioner was appointed and he has submitted his report before the first appellate Court, but the said report is not properly considered by the first appellate Court. Except Ex.P8 sketch, no other sketch is prepared by revenue authorities and the survey authorities in respect of Sy.No.128. In the year 1992 itself hissapod was conducted and so many sub-divisions were made in the said survey number. The plaintiff has not established the identity of his property and by furnishing the false boundaries he claims

property of the appellant- defendant as his property and thereby, he has committed fraud on the Court. He has further submitted that document Ex.P4, RTC extract shows that no land has been granted to the plaintiff in R.S.A.No.128. Column No.10 of Ex.P5 shows that nature of cultivation by the plaintiff is unauthorized. The green portion marked in the sketch is R.S.No.217. The first part of the Commissioner's report is acceptable and the remaining part of the report regarding possession of the property is not acceptable. He has submitted that though the first appellate Court is considered to be Court of law and facts, the learned Judge of the first appellate Court has not at all looked into any of the documents produced by the defendant nor made any discussion about the evidentiary value of those documents and also not discussed about the oral evidence of the parties adduced before the trial Court. He has submitted that the finding of the first appellate Court is entirely based on the Commissioner's report. So far as possession aspect is concerned, Commissioner is not the competent person to say either the plaintiff was in possession or the defendant was in possession. The Court has to ascertain who is in possession looking to the oral and documentary evidence produced before it. Accordingly, the learned counsel has submitted that the judgment and decree passed by the first appellate Court is illegal, perverse and capricious. In support of his contention, learned Counsel for the appellant has relied upon the following judgments:

1. (2001) 3 SCC 179 in the case of Santosh Hazari Vs. Purushottam Tiwari
 2. AIR 1998 RAJASTHAN 224 in the case of Union of India and another Vs. M/s.Kripal Industries
 3. AIR 1996 KAR 257 in the case of Puttappa Vs. Ramappa
 4. AIR 2000 SC 426 in the case of Ishwar Dass Jain Vs. Sohan Lal (dead) by L.Rs.,
 5. AIR 1992 SC 1604 in the case of Jagdish Singh Vs. Natthu Singh
9. As against this, learned counsel appearing for the respondent plaintiff during the course of his arguments made submission that originally when the suit was filed

the subject matter of the suit was Sy. No.128, but later the said survey number has been changed to Sy. No.128/3/11. The suit land was granted to the respondent by the Tahsildar. He made the submission that though it is the case of the appellant-defendant that he has purchased the property from his vendor, but, the appellant has not placed satisfactory evidence regarding the title of his vendor. He also made the submission that the appellant did not enter into witness box and it is only the P.A. holder of the appellant gave the evidence and it cannot be relied upon. The learned Counsel made further submission that the respondent's name is Chikkamuniyappa, and in the revenue entries, it is mentioned as Chikmuniga and both are one and the same. The learned Counsel also drew the attention of this Court to the cross examination of P.Ws.1 and 2 and made submission that all the witnesses P.Ws.1 to 3 gave the consistent evidence that the plaintiff is in possession and enjoyment of the suit schedule property since from the date of the grant. In spite of that, the trial Court has not at all properly appreciated these facts and has wrongly dismissed the suit of the respondent plaintiff. The learned Counsel submitted that looking to the documents Exs.P.4 to P.7, there is no mention that the said property is standing in the name of the appellant defendant and regarding the sketch Ex.P.8, it is having the presumptory value unless it is established before the Court that the said sketch is not in accordance with the things that are existed at the site. The evidence of the plaintiffs both oral and documentary established satisfactorily that all along the plaintiff is in possession of the suit schedule property. The defendant's witnesses are related witnesses, D.W.3 admitted in his evidence that he came to the Court as per the request of the defendant and D.W.2 is also a close relative of the defendant. Hence, no importance can be attached to their evidence as they are not the independent witnesses. He made the submission that the defendant relied upon the document Ex.D.26, but prior to this document, there are no other materials to show that the defendant is owner and in possession of the said property. He has also made the submission that in the sale deed Ex.D.2, there is no reference about the mutation entries mentioned in Ex.D.26. The learned Counsel also made the submission that Ex.D.3 land conversion order is not in accordance with Section 95 of the Karnataka Land Revenue Act and submitted Ex.D.26 is a subsequent document obtained after the sale deed Ex.D.2. The learned Counsel made the submission

that Commissioner was appointed at the instance of both the parties and after the report was submitted, no objections were filed by the appellant to the Commissioner's report. The first appellate court has rightly relied upon the Commissioner's report in coming to the conclusion that it is the respondent plaintiff who is in possession of the suit schedule property. He submitted that regarding identity of the property, the boundaries given by the plaintiff are tallied with all other materials produced in the case and even to this day, the nature of the suit schedule property is agricultural land and Ragi crop was grown when the Commissioner visited the said property. The learned Counsel made the submission that the grant order under Ex.D.26 produced by the appellant is not tallying with the sketch produced in the case. Except the mutation entries mentioned under Ex.D.26, there are no other mutations. The appellant has not produced grant certificate to show the boundaries and hence, the learned Counsel made the submission that the first appellate court has considered all the materials placed on record and has rightly allowed the appeal and decreed the suit. Hence, there is no merit in the regular second appeal and the same may be dismissed. In support of his contention, the learned Counsel for the respondent has relied upon the following decisions:

1. 1992(2) KLJ 561 (Mallawwa V/s Balappa)
2. AIR 1972 SC 2299 (M. Kallappa Setty V/S. M.V. Lakshimnarayana Rao)
3. ILR 1994 KAR 2505 (B.V. Subbachari V/S. B.K. Joyappa)

10. In reply, learned Counsel for the appellant made the submission that whether the objections to the Commissioner's report have been filed or not, but even then the Court has to examine about the relevancy and admissibility of the Commissioner's report. He has also made the submission that the Grant Register Extract is produced by the appellant. Hence, submitted to allow the appeal.

11. I have perused the pleadings of both the parties presented before the trial court. The oral evidence of P.Ws.1 to 3, D.Ws.1 to 3, the documents Exs.P.1 to P.8 and D.1 to D.32 and also perused the decisions relied upon by both the Counsel which are referred above and also considered the submissions made by

both the learned Counsel during the course of their argument.

12. The plaintiff filed the suit for permanent injunction against the defendant alleging that the defendant has caused obstruction to the peaceful possession and enjoyment of the suit schedule property by the plaintiff. The plaintiff claimed that the suit schedule property was granted to him by the grant order in the year 1969 by Tahsildar, Hoskote. Since from the date of the grant, the plaintiff-respondent is in possession and enjoyment of the said property and cultivating the said land. This has been denied by the present appellant-defendant in the written statement. It is the contention of appellant-defendant that the said property was purchased by her under the registered sale deed and the survey numbers are 217 and 219 measuring 4 acres 29 guntas and defendant got it converted as industrial area. The defendant has also challenged in the written statement that the property claimed in the suit is not the property alleged to have been granted to the plaintiff respondent by the order of the Tahsildar. Hence the defendant has challenged the very identity of the suit schedule property.

13. The parties before the trial court examined the witnesses and produced the documents as mentioned above. After considering the said materials, the trial Court dismissed the suit holding that the plaintiff has failed to establish that the suit schedule property was granted to him under the grant and also observed that the identity of the property is not established by him. When the appeal was preferred before the first appellate court, challenging the correctness and legality of the judgment and decree of the trial court, the first appellate court after considering the merits has allowed the appeal and decreed the suit of the respondent plaintiff and granted permanent injunction against the appellant- defendant herein.

14. Perusing the judgment of the first appellate court which has been challenged before this Court in this regular second appeal, it is seen that the first appellate court has mainly relied upon the Commissioner's report and on the basis of the said report, it has come to the conclusion that the respondent-plaintiff is in possession and enjoyment of the suit schedule property. Except Commissioner's report, the first appellate court has not at all referred to oral and documentary evidence produced by both the sides.

15. Order XLI Rule 31 of CPC is to the following effect:

The judgment of the appellate Court shall be in writing and shall state -

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

16. So looking to this provision, the first appellate court being the court of law and facts has to consider the factual aspects so also the legal aspect applicable to the case. In this case, though there is oral evidence of P.Ws.1 to 3 and D.Ws.1 to 3 and also the documents Exs.P.1 to P.8 and D.1 to D.32, the first appellate court has not at all referred to the oral and documentary evidence produced by the parties in the case and not at all discussed as to the relevancy of the documents produced in the case. On the basis of the Commissioner's report, the first appellate court has held that possession of the respondent-plaintiff has been proved. Perusal of the provisions of Order 26 Rule 9 of CPC under which provision the Commissioner has been appointed, it clearly goes to show that the Commissioner can be appointed to make local investigation of the property in dispute and to submit his report regarding the existing things which he has seen at the time of his inspection. He cannot give opinion as to whether the plaintiff or the defendant is in possession of the said property. It is for the Court after considering the oral and documentary evidence produced by the parties so also the Commissioner report filed in the case to take a decision in the matter as to who is in possession of the said property. But looking to the judgment of the first appellate court, it clearly goes to show that only on the basis of the Commissioner's report, the first appellate court has come to the conclusion that the respondent plaintiff is in possession of the suit schedule property, ignoring all other materials i.e., oral and documentary evidence produced by the parties.

17. I have perused the decisions and principles enunciated in the decisions relied upon by Counsel on both sides. Perusing all these materials on record, I am of the opinion that the first appellate court has not at all taken into consideration the entire materials placed on record and hence, the judgment and decree passed by the first appellate court is not in accordance with the mandatory provision of Order XLI Rule 31 of CPC.

18. In this regard, I am referring to the decision of the Hon'ble Supreme Court dated 8.2.2011 in Civil Appeal No.1467/2011 (arising out of SLP (C) No.19632/2007). In paragraph Nos.21 and 22 of the said judgment, the Hon'ble Supreme Court has discussed in detail about Order XLI Rule 31 of CPC, which is as follows:

" Order XLI, Rule 31 CPC provides for a procedure for deciding the appeal. The law requires substantial compliance of the said provisions. The first appellate Court being the final court of facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The first appeal is a valuable right and the parties have a right to be heard both on question of law and on facts (vide: Moran Mar Basselios Catholicos and Anr. V. Most Rev. Mar Poulouse Athanasius and Ors., AIR 1954 SC 526; Thakur Sukhpal Singh V. Thakur Kalyan Singh and Anr., AIR 1963 SC 146; Santosh Hazari V. Purhottam Tiwari, AIR 2001 SC 965; Madhukar V. Sangram, AIR 2001 SC 2171; G. Amalorpavam and Ors. v. R.C. Diocese of Madurai and Ors., (2006) 3 SCC 224; Shiv Kumar Sharma v. Santhosh Kumari, (2007) 8 SCC 600; and Gannmani Anasuya and Ors. v. Parvatini Amarendra Chowdhary and Ors., AIR 2007 SC 2380) The first appellate Court should not disturb and interfere with the valuable rights of the parties which stood crystallised by the trial Court's judgment without opening the whole case for re-hearing both on question of facts and law. More so, the appellate Court should not modify the decree of the trial Court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate Court would fall short of considerations expected from the first appellate Court in view of the provisions of Order XLI, Rule 31 CPC and such judgment and order would be liable to be set aside. (Vide B.V. Nagesh and Anr. v. H.V. Sreenivassa

Murthy, JT (2010) 10 SC 551). "

19. Therefore, the judgment and decree of the first appellate court is illegal and perverse and capricious approach is taken by the first appellate court in deciding the matter. Therefore, it is necessary for this Court to allow the appeal and to set aside the judgment and decree of the first appellate court and remand the matter to the first appellate court to dispose of the same in accordance with the provisions of Order XLI Rule 31 of CPC.

20. Hence, the appeal is allowed. The judgment and decree dated 17.9.2007 passed by the Fast Track Court No.II, Bangalore Rural District, Bangalore in R.A No.206/1998 is hereby set aside and the matter is remanded back to the first appellate court to decide the appeal afresh after giving both sides an opportunity to submit their arguments and then to dispose of the same in accordance with law.

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