

Sadashiva Devadiga Vs. Muddu Devadiga

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Court : Karnataka

Decided On : Jan-04-2006

Reported in : AIR2006Kant83; 2006(4)KarLJ151

Judge : Huluvadi G. Ramesh, J.

Acts : [Specific Relief Act, 1963](#) - Sections 38 and 41

Appeal No. : R.S.A. No. 493 of 2001

Appellant : Sadashiva Devadiga

Respondent : Muddu Devadiga

Advocate for Def. : S.S. Sripathy, Adv.

Advocate for Pet/Ap. : B.V. Krishna, Adv.

Disposition : Appeal dismissed

Judgement :

Huluvadi G. Ramesh, J.

1. This second appeal is by the defendanant being aggrieved by the judgment and decree passed by thelearned II Additional civil judge (Sr.Dn.) D.K. Mangalore, in R A No. 122/1992 in allowing the appeal filed by the plaintiff.

2. Plaintiff filed a suit for declaration to declare that he has preferred his title over C schedule property by adverse possession and also for permanent injunction. C schedule property is a portion of S. No. 28/8 measuring about 10 cents and contains fence, field, bund, trees and is situated at Madya village of Mangalore Taluk. According to the plaintiff he is in lawful possession of the same as a long standing tenant. The disputed property is in between S. No. 28/9 and 28/8 and it appears to be part of 28/8. Plaintiff claims to be in lawful possession and also filed a suit for declaration that he has perfected title by adverse possession on the ground that occupancy rights were granted in his favour as tenant and the defendant is the owner of S. No. 28/8 situated on the northern side of schedule B property. C schedule property is a field bund on the northern side of plaint B schedule property. Plaintiff states that there is also a fence which separates the remaining portion Of S. No. 28/8. Jackfruit and tamarind trees exist on the field bund. Plaintiff states that defendant has no manner of right, title and interest. Suit was resisted by the defendant contending that as per the survey report disputed property belongs to him and the trees at the bund in the C Scheduleproperty also belong to him. Boundary has been fixed not only by the survey department but also by the Assistant Commissioner. Mangalore, after proper, enquiry. Defendant states that plaintiff has deliberately sup-pressed the fact regarding survey and the existence of the kattapuni and the trees thereon in the property of the defendant in S. No. 28/8 and has made out a false case. Based on the pleadings as many as five Issues were raised and also report of the Commissioner was obtained. After trial and hearing the parties, the trial Court dismissed the suit of the plaintiff for injunction. Thereafter plaintiff preferred appeal before the Additional Civil Judge (Sr. Dn.) Mangalore, wherein appeal was allowed. Meanwhile, plaintiff had given up claim for adverse possession. As such plaintiff was granted an order of permanent injunction against which this appeal is by the defendant. At the time of admission on 16-2-2004, the following substantial questions of law were raised for consideration in this appeal:

1. Whether the lower appellate Court is justified in granting a decree for perpetual injunction when the plaintiff has filed a memo giving up his claim of adverse possession in respect of 'C schedule property?

2. Whether the injunction granted against an absolute owner is justified when the plaintiff has withdrawn his claim of adverse possession?
3. Heard the learned Counsel for the respective parties.
4. learned Counsel for the appellant submits that the lower appellate Court while reversing the finding of the well reasoned judgment of the trial Court has passed an erroneous order and sought to set aside the same. He also referred to the decision reported in 1995 AIR SCW 2425 wherein the Apex Court held that injunction may be given to protect the possession of owner or the person in lawful possession. It also observed further it is not mandatory for mere asking such a relief should be given. Injunction is a personal right under Section 41(j) : the plaintiff must have personal interest in the matter. Interest or right not shown to be in existence cannot be protected by injunction. It also made clear that it is equally settled law that injunction would not be issued against the true owner and injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession. Injunction cannot be granted against the true owner of the land and defendant being the true owner injunction granted against him by the lower appellate Court is contrary to the settled position and pointed out Section 41(j) of the Specific Relief Act.
5. Per contra learned Counsel for the respondent submitted that his possession cannot be treated as unlawful possession nor as a trespasser and contended that he was in possession openly and uninterruptedly. Although he had no clear title by adverse possession he has given up his claim. He was in possession for several years. learned Counsel relied upon the decision reported in 1982 (2) Kant LJ 301 and submitted that in the decision cited plaintiff was in possession of the suit property not to the adverse interest of the defendant and not as a trespasser.
6. The trial Court has given a finding that plaintiff has failed to show that he has perfected his title over the C schedule property. Further it is also noted that plaintiff has failed to prove interference with the peaceful possession of the C schedule property. Plaintiff having lost his case before the survey authorities and also on coming to know that suit land falls within the land of defendant suppressed the real facts. Plaintiff originally filed the suit for bare injunction and described the suit land

in Sy. No. 28/9. He produced various documents regarding survey and tried to make out case of adverse possession but failed. As such it was of the view that C schedule property is the property of the defendant and it is in his possession.

7. As per the Commissioner's report green colour shown in Annexed sketch, the land comes under S. No. 28/8 and it measures about 600 square links. It is in possession and enjoyment of the plaintiff and is portion of the plaintiffs field bund. As per the finding given by the Commissioner on the spot inspection field, bund, trees and fence are the part and parcel of Sy. No. 28/ 9. The lower appellate Court having noted the factual possession on the basis of the Commissioner's report as well as the ratio laid down by this Court and Apex Court in various decisions has come to the conclusion that plaintiff is entitled for injunction. In the meanwhile plaintiff has given up his claim for adverse possession and the Court decreed the suit for permanent injunction.

8. In the decision reported in 1982 (2) Kant LJ 301 in the case of Venkatarayappa, M. v B.V. Lakshminarayana this Court referring to Section 38 of the Specific Relief Act in a suit for injunction based on possession has held that plaintiffs suit for permanent in junction to restrain the defendant from interfering with the possession and enjoyment, the finding was that plaintiff was in possession of the disputed portion since a considerable period of time. Held that finding was sufficient for the Court to presume that the plaintiff was in lawful possession and it was not necessary for the Court to go into the question of title. It further held that if a party has proved that he was in possession of a piece of land over a considerable period peacefully enjoying the same, the inference is that he has been in lawful possession. It is also further held that plaintiff has pleaded alternatively acquisition of title by adverse possession, it cannot be said that his very case in the plaint was that he was in unauthorised occupation or was enjoying the property as a trespasser.

9. Of course in the above cited decision, Court based on proof of possession has held that plaintiff could be granted permanent injunction and there was no necessity of going into the question of title. It is not the case of plaintiff that his possession is neither unlawful nor he is a trespasser. Under such circumstances

there cannot be any impediment for the defendant as well to recover possession by filing suit and the question of limitation also does not arise. Conduct of the defendant if any in the circumstances would be treated as permitting the plaintiff to continue as a licensee or in permissive possession. As the law demands that person who is in possession shall not be thrown out except by due course of law, it is for the plaintiff to seek his possession by recourse to law. However in the instant case it appears this piece of land admittedly belongs to defendant which as per the Commissioner report plaintiff is in lawful possession and also consists of valuable trees and sufficient space. In the circumstances while not finding fault with the order of the lower appellate Court in granting order of permanent injunction against the defendant, it is made clear that it is for the defendant to have a recourse to law by issuance of legal notice to the plaintiff and seek for mesne profits. In the event plaintiff resists the possession, defendant can file a suit seeking possession and for mesne profits. Defendant will be entitled to plead for exemplary damages to meet out the litigation expenses. If the defendant files a suit for possession, the concerned Court shall dispose of the matter expeditiously at the most within six months from the date of service of notice. While answering the substantial questions of law in favour of the respondent, the appeal is dismissed with the above observation. Parties to bear their own costs.

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