

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 20TH DAY OF DECEMBER, 2024

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

REGULAR SECOND APPEAL NO.67/2018

BETWEEN:

1 . MOOKALERA A. THAMMAIAH
S/O AIYAMMA,
AGED ABOUT 75 YEARS,
R/O HALLIGATTU VILLAGE,
PONNAMPET NAD,
VIRAJPET TALUK,
KODAGU DISTRICT-571216. ... APPELLANT

(BY SRI SHARATH S. GOWDA, ADVOCATE)

AND:

1 . MOOKALERA N. DEVAIAH
S/O NANJAPPA,
AGED ABOUT 75 YEARS,
R/O HALLIGATTU VILLAGE,
PONNAMPET NAD,
VIRAJPET TALUK,
KODAGU DISTRICT-571216. ... RESPONDENT

(BY SRI B.S.SACHIN, ADVOCATE)

THIS R.S.A. IS FILED UNDER SECTION 100 OF CPC,
AGAINST THE JUDGMENT AND DECREE DATED 07.10.2017
PASSED IN R.A.NO.9/2007 ON THE FILE OF THE SENIOR CIVIL
JUDGE, VIRAJPET, DISMISSING THE APPEAL AND CONFIRMING
THE JUDGMENT AND DECREE DATED 31.01.2007 PASSED IN

O.S.NO.128/1997 ON THE FILE OF THE ADDITIONAL CIVIL JUDGE (JR.DN) AND JMFC VIRAJPET.

THIS R.S.A. HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 10.12.2018 THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE H.P.SANDESH

CAV JUDGMENT

1. Heard the learned counsel for the appellant and also the learned counsel for the respondent.

2. The parties are referred to as per their original rankings before the Trial Court, in order to avoid confusion and for the convenience of the Court.

3. This R.S.A is filed against the concurrent finding of granting of permanent injunction in respect of the suit schedule property in O.S.No.128/1997 on the file of Addl. Civil Judge (Jr. Dn) & JMFC and R.A.No.9/2007 on the file of Sr. Civil Judge, Virajpet.

4. The factual matrix of case of the plaintiff before the Trial Court that he has filed the suit for declaration to declare that plaintiff is the owner of the suit schedule

property and also for consequential relief of permanent injunction restraining the defendant from interfering with plaintiff's possession over the suit schedule property and defendant has appeared and filed the written statement denying the case of the plaintiff.

5. The Trial Court framed the issues and additional issues and allowed the parties to lead evidence and plaintiff got examined his brother and power of attorney holder M.N.Muthappa as PW1 and also examined two witnesses as PW2 and PW3. The defendant has also adduced the evidence as DW1 and got examined the surveyor as DW2 and DW3 and defendant got summoned the proceedings in MCD No.201/1999 DTP: CRC:331:2002-2003 dated 18.11.2002 on the file of Tahasildar, Virajpet. The defendant got exhibited the documents Ex.D1 to Ex.D23.

6. The Trial Court after having appreciated both oral and documentary evidence placed on record, answered the issue No.1 as negative and did not accept the

contention that the plaintiffs are the absolute owners of the suit schedule property. However, comes to the conclusion that plaintiffs have proved issue No.2 having cultivated the coffee about 20 years back and obtained CRC and also answered the issue No.3 that defendant having no right, title or interest in the suit schedule property and attempted to destroy the fence and answered the issue No.4 as negative in coming to the conclusion that plaintiff is not entitled for the relief of declaration and answered issue No.5 that plaintiff is entitled for a permanent injunction as sought. The contention of the defendant that schedule shown in the suit is not in proper and the plaintiff is attempting to encroach thrashing yard which belongs to the defendant has been answered as negative and additional issue No.1 is framed as whether the suit is bad for non-joinder of necessary parties is answered as affirmative and additional issue No.2 whether the defendant prove that his son Aiyappa is in possession of 0.36 acres in Sy.No.62 now

bifurcated as Sy.No.62/2 as averred in paragraph No.22 of the written statement is answered as left open and granted the relief of permanent injunction in favour of the plaintiff declined to grant the relief of declaration. The plaintiff did not choose to file any appeal against the judgment and decree of the Trial Court rejection of declaratory relief however, the appellant herein has filed appeal in R.A.No.9/2007. On re-appreciation of evidence, the First Appellate Court confirmed the judgment of the Trial Court and hence, the present appeal is filed before this Court and this Court having considered the grounds urged in the appeal memo while admitting the second appeal, framed the following substantial question of law:

“ Whether the Trial Court and First Appellate Court are justified in facts and circumstances of the matter in granting the permanent injunction in respect of entire extent of land measuring 1 acre and 18 guntas in Sy.No.62, despite there being a report of the Commissioner indicating the appellant/defendant No.1 being in

possession of an extent of 36 guntas of land which is assigned in Sy.No.62/2 as found in the Commissioner report and in the sketch at Ex.D9?"

7. The counsel in support of his argument, he vehemently contend that Sy.No.62 measuring to an extent of 1 acre 80 cents of land which is originally belongs to the family of Devaiah and suit schedule is entire extent of 1 acre 80 cents which has been disclosed in the suit and also brought to the Court notice, the family propositus Devaiah had 2 wives Nanjavva, Umavva and through the Nanjavva, Appanna and Kalayya there are 2 sons and branch of the Kalayya having sons and the plaintiffs family represents the branch of Kalayya and defendant is also represents the branch of the very same Kalayya.

8. The counsel would vehemently contend that the plaintiff cannot claim ownership and possession in respect of 1 acre 80 cents in Sy.No.62 and the property in Sy.No.62

was divided on 17.04.1924 between Devaiah and his sons Kalayya, Appanna, Nanjappa, Kushalappa and Ponnappa and in the said partition, the left side of Oni upto the stream was allotted to Kalayya and remaining portion is allotted to then 3 minors Nanjappa, Kushalappa and Ponnappa. The counsel relied upon the document Ex.D17 and counsel also relies upon Ex.D18 to show that on 25.02.1941 that Kalayya and his sons partitioned the property in Sy.No.62 which had fallen to their share, which is reduced in writing by mahazar in terms of Ex.D18, subsequently defendant and his brother Kariyappa who are the sons of Iyamma have again partitioned which is reduced to writing as per mahazar dated 14.07.1969 and in terms of the said partition, the sons of defendant Aiyappa has applied for grant of CRC in respect of Sy.No.62 and consent form is also signed by the Devaiah and his brothers Uthappa and Kuttappa recognizing the right and possession of the defendant in Sy.No.62 vide consent form dated

30.11.2000 also marked as Ex.D10. The counsel would vehemently contend that Ex.D17, Ex.D18 and Ex.D10 clearly discloses the division among the family members.

9. The counsel would vehemently contend that these documents are not discussed in the judgments of both the Courts and commissioner report is without surveying and measuring the property in question, given the report, but reports that the property of plaintiff and defendant is separated by distance of 3 ½ feet stated but does not measure the extent of possession of Plaintiff and defendant in Sy.No.62. The First Appellate Court also fails to take note of the commissioner report and mere change of entry in revenue documents will not confirm the title or change the nature of the property. On the other hand, as the signature of the plaintiff in Ex.D10 is not disputed. Hence, plaintiff cannot claim title along with possession to the entire extent of 1 acre 80 cents.

10. It is contended that both the Trial Court as well as First Appellate Court fails to consider the Ex.D17, Ex.D18 and Ex.D22. The counsel would vehemently contend that even though commissioner was appointed, not demarcated regarding possession is concerned and hence, made a request to appoint a Court Commissioner. The counsel for respondent not objected for appointment of Court Commissioner and hence, this Court appointed the fresh Court Commissioner of ADLR, Virajpet and ADLR, Virajpet also submitted the Commissioner report identifying the property Sy.No.62/1, Sy.No.62/2 and also the Oni which separates the property of the plaintiff and defendant and extent of possession with the plaintiff and defendant and though counsel for respondent sought time to file objections to the commissioner report, but not filed objections to the commissioner report.

11. The counsel appearing for the respondent would vehemently contend that both the Trial Court as well as

First Appellate Court having taken note of material on record, appreciated both oral and documentary evidence and rightly comes to the conclusion that plaintiffs are in possession to the extent of 1 acre 80 cents and it does not requires any interference.

12. Having heard the appellant's counsel and also the counsel appearing for the respondent. The main dispute is with regard to whether the plaintiff is in possession of the entire extent of 1 acre 80 cents since he claims both declaration and permanent injunction. Admittedly, the suit for declaration is not granted in favour of the plaintiff and issues are answered as negative. However, granted the relief of permanent injunction and while passing an order by the Trial Court when the claim was made by the defendant that they have been in possession to an extent of 0.36 acres even though additional issues are framed by the Trial Court but while answering the same, left open the same. When the plaintiff seeks the relief of permanent injunction

and issue No.5 is also framed. The main contention of the appellant before this Court that plaintiff is not in possession to the entire extent of 1.80 cents and when the defendant also took the specific defense in the written statement that the son Aiyappa is in possession of 0.36 acres of land in Sy.No.62 which is now bifurcated as Sy.No.62/2 and the same is left open and crucks of the issue before this Court is also with regard to the extent of 0.36 acres. The Commissioner is also appointed before the Trial Court and Commissioner submitted the report, but only he went to the spot and given the report that distance between the properties of plaintiff and defendant is about 3 ½ feet and both the properties are fenced with barbed wire fence having wooden poles and Kachi plants. The age of fence is about 10-15 years while answering the memo of instructions of the plaintiff and also while answering the memo of instructions filed by the defendants comes to the conclusion that there is a drying yard adjacent to the suit

schedule property and the same is also old and a stone pole has been erected in its centre and there is foot path of about 3 ½ feet to 4 feet to reach the drying yard and all around the drying yard is cultivated with coffee, but not given any report with regard to the extent of possession of the plaintiff and defendant. During the course of argument, this Court having found that there is no any material with regard to the possession in the commissioner report, appointed a fresh Court Commissioner of ADLR and ADLR submitted the Commissioner report.

13. Having perused the Commissioner report it is very clear that both the Sy.No.62/1 and Sy.No.62/2 were measured as directed by this Court and also specifically stated in the report that out of Sy.No.62/1 to the extent of 1 acre 44 guntas, 1 acre 20 guntas is within the possession of the plaintiff and they also made the statement before the ADLR at the time of inspection and also identified 4 cents of the Oni which is in existence in the Sy.No.62/1 only and

also the Commissioner had identified 20 cents of land in Sy.No.62/1 and also 23 cents of land in Sy.No.62/2 is in possession of the defendant and also the cultivation and same is mentioned during the spot inspection and also stated in respect of Sy.No.62/2 remaining extent of 13 cents is in possession of Sri.M.K.Manukumar other than the plaintiff and defendant. This Commissioner report is not objected by both of them though the respondent took time to file statement of objection to the commissioner report but not filed any objections to the commissioner report. Having perused the commissioner report, it is very clear that the defendant is in possession in terms of the report in both the Sy.No 62/1 and Sy.No.62/2 to the extent of 43 cents, but the very claim of the defendant before the Trial Court is with regard to the possession is claimed as 0.36 acres and not 43 cents and while granting the relief of permanent injunction, Court has to take note of the possession and also the plaintiff and defendant were

present before the Commissioner when he had conducted the spot inspection and measured the land, when such being the case, when the defendant claims that he has been in possession only to the extent of 36 cents and also records reveals that land is jamma land and there was partition in the year 1924 in terms of Ex.D17 and the same is also registered document and among the branches of the original propositus Devaiah, partition was taken place and also mahazar was conducted in terms of Ex.D18. Apart from that the admitted document of Ex.D10, it is very clear that the plaintiff and their brothers have given consent for taking the CRC to the defendant and when such consent was given and brought to the notice of this Court and the same has not been disputed. The plaintiff cannot claim suit for the relief of permanent injunction to the entire extent of 1.80 cents. This Court also while admitting the appeal framed the substantial question of law whether both the Courts despite there being a report of the commissioner

indicating the appellant/defendant No.1 being in possession of an extent of 0.36 acres of land which is assigned in Sy.No.62/2 as found in the commissioner report and in the sketch at Ex.D9, committed an error. The Commissioner report which I have already referred, it bifurcates the land of the plaintiff and defendant but actual measurements which is in possession of the plaintiff and defendant has not been mentioned and disclosed. However, Ex.D9-sketch bifurcates property bearing Sy.No.62/2 and Sy.No.62/1 as per the present commissioner report is in possession of the defendant and also earlier sketch discloses total extent is 1 acre in Sy.No.60 and Sy.No.62/2, 36 cents also shown and 1 acre 44 guntas shown in Sy.No.62/1 and total extent is mentioned as 1 acre 80 cents.

14. The main contention of the defendant that he is in possession of 0.36 acres and now the commissioner report also though says that 43 cents, but defendant actual claim before the Trial Court to the extent of 0.36 acres and

when such material available before the Court, it is a fit case to allow the second appeal by answering the substantial question of law that the defendant is in possession of the extent of 0.36 cents and though present commissioner report says 0.43 acres but his own claim is 36 cents both in respect of Sy.No.62/1 and Sy.No.62/2. In Sy.No.62/1, he is possession to the extent of 20 cents and in Sy.No.62/1 to an extent of 23 cents in different survey numbers but when the commissioner identified his possession, though it is for 43 cents, but actual claim is only 36 cents in the written statement and hence the claim of the defendant is also restricted to the tune of 0.36 acres and hence answered point as affirmative.

15. In view of the discussions made above, I pass the following:

ORDER

- i) The second appeal is ***allowed***.

ii) The judgment and decree in passed in O.S.No.128/1997 and R.A.No.9/2007 is modified to the extent of granting permanent injunction excluding 0.36 acres which is in possession of the appellant.

Sd/-
(H.P. SANDESH)
JUDGE

RHS