

I.A.No.VIII

Applicant: 1. Sri. Satish Krishna Sail.
(Orig.Deft.No.4)

Vs.

Opponents: Shaikh Ummer Hassan Haji Shaikh
(Orig.Plffs.) Ahamad, since deceased by his LRs.
1. Smt. Naseemabi W/o. Shaikh
Ummar Hasan *and others.*

ORDERS ON I.A. NO.VIII

This is an application filed by the learned counsel for the defendant No.4 under the provisions of Order 14 Rule 1, 4 and 5 R/W. Section 151 of C.P.C. to frame additional issues raised in the written statement of defendants No.1 and 4 and additional written statement of defendants No.1 and 4 to the following effect.

1. Whether the suit of the plaintiffs is maintainable without seeking the relief of possession against the plaintiffs in O.S.No.70/79, on the file of then Munsiff Court, Karwar and without impleading the plaintiffs or if died their legal heirs to this suit?
2. In view of the finding given on possession that plaintiffs in O.S.No.70/79 are in lawful possession, without dispossessing them

under due process of law, whether this suit is maintainable?

3. Whether this suit is hit by Rule of Resjudicata in view of judgment and Decree passed in O.S.No.70/79, on the file of Hon'ble Munsiff Court, Karwar, which was modified in R.A.No.29/88 and 30/88, on which basis this suit is filed on the issue of possession between same parties and in respect of same properties?
4. Whether the suit of plaintiffs is barred under Order 2 Rule 2 of C.P.C.?
5. Whether the suit of the plaintiffs is hopelessly time barred?
6. Whether the suit is barred under Sec.135 of Karnataka Land Revenue Act, as it is filed after 3 years from the Order passed by Deputy Commissioner, Uttar Kannada, Karwar, dated 7-2-87 in Case No.RB/RTC/SR/84.
7. Whether the plaintiffs prove that the relief of declaration that Sale Deed is not binding and for independent relief of Permanent Injunction is proper and correct and in accordance with law?

2. It is stated in the memo of facts on behalf of defendant No.4 that the plaintiffs have filed the suit for Partition and Separate Possession of half share in the suit schedule properties under the wrong impression that they

are in actual possession on the date of suit, even though this court has passed the judgment and decree in O.S.No.70/79 that plaintiffs in that suit and defendants No.2 and 3 in this suit with other plaintiffs are in lawful and actual possession and irrespective of the judgment and decree passed by this court restraining the plaintiffs or not to dispossess the plaintiffs in O.S.No.70/79 without due process of law, holding that plaintiffs predecessor in interest acquired half right as per registered Sale deed without possession. The plaint was subsequently amended to avoid the court fee on the relief of declaration that the registered sale deed is not binding on them. The additional written statement were filed by the defendants No.1 and 4 and raised the issues narrated in accompanying application in the pleadings. But, the court has not framed the additional issues which were very much necessary and important to adjudicate the suit effectively and render true and correct justice to the parties to the suit. Therefore, if the said issues are not framed, great injustice and hardship will be caused to the defendants and plaintiffs also. It is on these grounds, the defendant No.4 has prayed for allow the application.

3. The plaintiffs have resisted the application by filing objections contending that the application is not maintainable either under law or on facts. The additional issues as sought for in the application are baseless and cannot be framed in a suit for partition. The defendant No.4 has sought for to frame the additional issues just to confuse and mislead the court. The additional issues are all unconnected to the pleadings. The judgment passed in O.S.No.70/1979 was challenged by filing R.A.No.29/1988 and RA No.30/1988. Both the appeals were clubbed together and disposed off by common Judgment dated 23.8.2003 by the Civil Judge Senior Division Court, Karwar, wherein, it was declared that the father of the plaintiffs viz. Shaikh Umar Hussain has half right in the suit property and has filed the suit for partition and get their share separated. Now, the judgment of the Appellate court has to be seen and not the trial court. Therefore, the additional issues now requested to be framed in this case by the defendant No.4 by referring judgment in O.S.No.70/1979 are not maintainable.

4. It is further contended that the defendant No.4 has filed this application to drag on the proceedings. The evidence of the plaintiff has already been commenced. Now, the case is posted for cross-examination of P.W.1. But, instead of conducting cross-examination of P.W.1, the defendant No.4 has filed this application with false grounds. The application is not even supported with the affidavit. The defendants are neither attending the court nor they are interested in conducting the case. The intention of the defendants is only to drag on the proceedings. P.W.1 at present is residing at Bangalore and has attended the court on all dates of hearing from Bangalore. In order to harass the plaintiffs, the defendant No.4 has filed the present application. The court after going through the pleadings of the parties, has framed proper and correct issues and therefore, the application deserves to be dismissed with costs. It is on these grounds, the plaintiffs have prayed for dismissal of the application with costs.

5. I have heard the arguments on both the sides and perused the I.A., Memorandum of facts, objections and pleadings of both the parties and entire records.

6. Now the points that would arise for my consideration are as under :

1. Whether the additional issues sought to be framed under the application are just and necessary to adjudicate the real controversy between the parties and whether the defendant No.4 has made out sufficient grounds to frame additional issues based on the pleadings raised in the written statement of defendants No.1 and 4 and additional written statement of defendants No.1 and 4 and whether the application filed under the provisions of Order 14 Rule 1, 4 and 5 R/W. Section 151 of C.P.C. is deserving to be allowed?
2. What order?

7. On considering the arguments of learned counsels for both the sides and the pleadings of both the parties, now, my answers to the above points are as under:

Point No.1 : In the **affirmative**.

Point No2 : As per final order,
for the following:

REASONS

8. **Point No.1**:- The learned counsel for the defendant No.4 has argued with force that the plaintiffs have filed the suit for Partition and Separate Possession of their half share in the suit schedule properties under the wrong impression that they are in actual possession on the date of suit. The plaintiffs have amended the plaint to avoid the court fee on the relief of declaration that the registered sale deed is not binding. The defendants No.1 and 4 have filed additional written statement and raised the issues narrated in the accompanying application in the pleadings. But, the court has not framed the said issues which are very much necessary to adjudicate the real controversy between the parties. Therefore, the application is deserves to be allowed.

9. Per contra, the learned counsel for the plaintiffs has argued with force that the court has already framed the issues based on the pleadings of both the parties. The additional issues sought to be framed under the application

are all unconnected to the pleadings. The judgment passed in O.S.No.70/1979 was challenged in R.A.No.29/1988 and RA No.30/1988 and they were clubbed together and disposed off by common judgment dated 23.8.2003, wherein, it was declared that the father of the plaintiffs viz. Sri. Shaikh Umar Hussain has got half right in the suit schedule properties and has filed the suit for Partition and get his share separated. Therefore, the judgment of appellate court has to be seen and not the judgment of trial court. The evidence of the plaintiffs' side is already commenced and the case is set down for cross-examination of P.W.1. But, instead of conducting the cross-examination of P.W.1, the defendant No.4 has filed application so as to drag on the proceedings and also to harass the plaintiffs.

10. It is further contended that P.W.1 is residing at Bangalore and he has attended the court on all the dates of hearing from Bangalore and in order to harass the plaintiffs, the defendant No.4 has filed the application. Based on the pleadings of both the parties, the court has already framed the issues and therefore, the application has to be dismissed with costs.

11. In the light of the arguments canvased on both the sides, I have carefully gone through the pleadings of both the parties and additional issues sought to be framed under the application and also records.

12. According to plaintiffs that after the death of their father, they were in possession of the suit schedule properties along with first defendant as tenants in common and the sale deed dated 12.6.2008 executed by defendants No.1 to 3 in favour of defendant No.4 is not binding on their share and therefore, they are entitled for half share in the suit schedule properties. Hence, the plaintiffs have filed this suit for Partition and separate Possession of half share in the suit schedule properties and to declare that the sale deed dated 12.6.2008 executed by defendants No.1 to 3 in favour of defendant No.4 in respect of suit schedule properties is not binding on the plaintiffs to the extent of half share in the suit schedule properties and consequential relief of permanent injunction restraining the defendant No.4 from developing or alienating the suit schedule properties.

13. The defendants have appeared before the court through their learned counsels and filed the written statement denying the material averments made in the plaint and the plaintiffs have been called upon to prove all the material averments made in the plaint. The first defendant has contended that he is in actual possession of the suit schedule properties to the knowledge of husband of first plaintiff and other plaintiffs and he has perfected his title over the half share claimed by the plaintiffs by way of adverse possession. The defendant No.4 has contended that he is a bonafide purchaser of suit schedule properties under the registered sale deed dated 12.6.2008 executed by the defendants No.1 to 3.

14. Based on the above pleadings, my learned Predecessor-in-office has framed the following issues on 23.11.2018.

1. Whether the plaintiffs prove that after the death of their father the plaintiffs were all in joint possession of the suit schedule properties along with defendant No.1?

2. Whether the defendant No.1 proves that he is in actual possession of the suit schedule properties to the knowledge of husband of plaintiff No.1 and other plaintiffs and he perfected his title over the half share claimed by the plaintiff, by way of adverse possession?
 3. Whether the defendant No.4 proves that he is bona-fide purchaser of suit schedule property under a registered sale deed dtd: 12.6.2008 executed by the defendant No.1 to 3?
 4. Whether the plaintiffs further prove that the said sale deed dtd: 12.6.2008 executed by defendant No.1 to 3 in favour of defendant No.4 is not binding on the share of the plaintiffs?
 5. Whether the plaintiffs are entitled for half share in the suit schedule properties?
 6. What order or decree?
15. On behalf of plaintiffs, the plaintiff No.6 has been examined as P.W.1 and got the documents marked as Exs.P.1 to P.13.

16. It is at this stage of proceedings and when the case is set down for cross-examination of P.W.1, the defendant No.4 has filed the present application seeking to frame additional issues as sought for in the application.

17. As per the provisions of Order 14 Rule 1 of C.P.C., issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other and each material proposition affirmed by one-party and denied by the other shall form the subject of distinct issue i.e. issues of fact and issues of law.

18. As per the provisions of Order 14 Rule 4 of C.P.C. where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may subject to any law for the time being in force compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

19. As per the provisions of Order 14 Rule 5 of C.P.C. the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed. The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

20. As could be seen from the materials placed on record including order-sheet dated 9.12.2020, the learned counsel Sri. KRD filed additional written statement of defendant No.4. The learned counsels for defendants No.1 and 2(a) to 2(c) have filed memo for having adopted the additional written statement of defendant No.4.

21. Thereafter, the case was posted for objections to I.A.No.XII. After disposal of I.A.No.XII, the case was posted for cross-examination of P.W.1. But, it is to be noted here that the defendants No.2(a) to 2(c) and defendant No.4 in their additional written statement have specifically

contended that the suit of the plaintiffs is not maintainable without seeking the relief of possession against the plaintiffs in O.S.No.70/1979 on the file of the then Munsiff Court, Karwar without impleading the legal heirs of plaintiff and also in view of findings given on possession that the plaintiffs in O.S.No.70/1979 are in lawful possession.

22. The defendants No.2(a) to 2(c) and defendant No.4 also taken a specific stand in their additional written statement that the suit of the plaintiffs is hit by the principles of res-judicata in view of judgment and decree passed in O.S.No.70/1979 on the file of the then Munsiff Court, Karwar which is modified in R.A.No.29/88 and 30/88, on which basis this suit is filed on the issue of possession between same parties and in respect of same properties and the suit of the plaintiffs is also barred under Order 2 Rule 2 of C.P.C. and the suit of the plaintiffs is also barred by law.

23. The defendants No.2(a) to 2(c) and defendant No.4 also taken a specific contention that the suit is also barred under Sec.135 of Karnataka Land Revenue Act, as it

is filed after 3 years from the Order passed by Deputy Commissioner, Uttar Kannada, Karwar, dated 7.2.1987 in Case No.RB/RTC/SR/84. But, no additional issues have been framed based on the contention taken by the defendants No.2(a) to 2(c) and defendant no.4 in their written statement.

24. Under these circumstances, it is just and necessary to frame the additional issues based on the contention taken by the defendants No.2(a) to 2(c) and defendant No.4 in their written statement and additional written statement. The issues sought to be framed under the application has to be taken into consideration while frame additional issues. It is in this sense, I hold that the additional issues sought to be framed under the application are just and necessary to adjudicate the real controversy between the parties and the application filed by the defendant No.4 under the provisions of Order 14 Rule 1, 4 and 5 R/W. Section 151 of C.P.C. is deserves to be allowed. Hence, ***I answer point No.1 in the affirmative.***

25. **Point No.2**:- In view of my findings on point No.1, I proceed to pass the following:

:ORDER :

I.A.No.VIII filed by the defendant No.4 under the provisions of Order 14 Rule 1, 4 and 5 R/W. Section 151 of C.P.C. is hereby allowed.

There is no order as to costs.

Call on for additional issues by
22.4.2021.

(Dictated to the Stenographer, transcribed by her, revised and corrected by me, signed and then pronounced in the Open Court on this the **12th Day of April, 2021.**)

(N.M. Ramesha)
Prl. Senior Civil Judge,
Karwar.

