

IN THE COURT OF THE PRL. SENIOR CIVIL JUDGE & CJM AT
SHIVAMOGGA

Dated this the 14th day of December, 2018.

Present: Lakshminarayana Bhat K., B.A., LL.B.,
Prl. Senior Civil Judge & C.J.M.
Shivamogga.

R.A.No.3/2014

Appellant : Smt.Sharadamma, Head Mistress,
Government High Primary School,
Huchangamma Temple Street,
Vidyanagara, Shivamogga City.

(By District Government Pleader)

-Vs-

Respondent : Smt.H Rojamani W/o Rudrappa,
Aged 54 years,
R/o No.3820, 1st Main, 16th Cross,
Tilak Nagar Extension,
Mysore City.

(Exparte)

Date and nature of the : Judgment and decree passed in
OS.126/2011 dt.26.06.2013
passed by the learned IV Addl.
Civil Judge & JMFC, Shivamogga.

Date of Institution of the Appeal : 01.01.2014

Date of judgment of appeal : 14.12.2018

Total Duration : Year/s Month/s Day/s
-04- -11- -13-

(Lakshminarayana Bhat K.)
Prl. Senior Civil Judge and CJM,
Shivamogga.

J U D G M E N T

The defendant in O.S.126/2011 on the file of IV Addl.Civil Judge and JMFC, Shivamogga has preferred this appeal under Order XLI Rule 1 of Code of Civil Procedure 1908.

2. As per judgment dated 26.06.2013, the suit filed by the plaintiff for permanent injunction came to be decreed and the defendant is the appellant and plaintiff is the respondent in this appeal. The parties to this appeal are referred to as per their respective ranks before the trial court.

3. As per the plaint averments, plaintiff is the absolute owner in possession of suit schedule property purchased as per registered sale deed dated 20.02.1986. In pursuance of the aforesaid sale deed, katha was changed in the name of plaintiff and she has claimed to be the owner in possession of the property. It is pleaded, the defendant is having no right over the suit schedule property interfered with the possession and enjoyment of the plaintiff over the said property. The alleged interference of the defendant is pleaded as cause of action for the suit. In the above circumstances, the plaintiff has sought a decree for permanent injunction restraining the defendant her men and supporters from interfering with the peaceful possession and enjoyment of the suit schedule property.

4. After service of summons, the defendant entered appearance and filed written statement contending that the suit is not maintainable for want of statutory notice under Section 80 of Code of Civil Procedure. It is further pleaded the suit is bad for non-joinder of necessary parties as the defendant is working as headmistress of Government School and hence State Government

is also a necessary party. The defendant has shown ignorance the plaintiff is the owner in possession of suit schedule property or she had purchased the said property as per the registered sale deed. She has also denied alleged interference in the possession and enjoyment of the suit schedule property. It is submitted the school was established in the year 1973 and adjoining the building, there is a school play ground. The school property is surrounded by a fence with stone pillars. The description of the suit schedule property is not correct and property claimed by the plaintiff does not fall with the boundaries. The plaintiff is having no right or possession over school play ground. The cause of action pleaded in the plaint is not correct and for the aforesaid reasons she has prayed for dismissal of the suit.

5. In the light of above rival pleadings of the parties, trial court has framed the following issues:

- (1) Whether the plaintiff proves that she is in possession and enjoyment of the suit schedule property as on the date of filing of the suit?
- (2) Whether the plaintiff proves the interference by the defendant as alleged in the plaint?
- (3) Whether the plaintiff is entitled for the relief of permanent injunction as sought for?
- (4) What Order or Decree?

6. In discharge of the burden to prove the aforesaid issues before the trial court, the SPA holder of the plaintiff was examined as PW-1 and produced documents marked as per Ex.P1

to Ex.P7. Defendant was examined as DW-1 and has produced Ex.D1 to Ex.D3 documents.

7. After analyzing pleadings of the parties, oral and documentary evidence, the trial court answered issue No.1 to 3 in the affirmative and decreed the suit of the plaintiff by granting permanent injunction.

8. Aggrieved by the aforesaid judgment, defendant has preferred this appeal under the following grounds. In all she has taken 10 grounds in the memorandum of appeal and they are

(a) The suit is bad for non-joinder of necessary parties and without arraying State Government and concerned department as a party to the suit resulted in non-compliance of statutory requirement.

(b) The trial court ought to have dismissed the suit as not maintainable.

(c) The trial court ought to have dismissed the suit for want of notice under Section 80 of CPC.

(d) The judgment of the trial court is against documentary and oral evidence produced by the defendant.

(e) The trial court has ignored the boundaries as shown in the suit schedule is not correct.

(f) The trial court erred in decreeing the suit even though the plaintiff has failed to prove his possession over the suit schedule property.

For the aforesaid and other grounds stated in the appeal memo, the defendant/appellant has prayed for allowing the appeal by setting aside the judgment and decree of the trial court and to dismiss the suit of the plaintiff.

9. At the time of preferring the appeal, the defendant has also filed IA No.I under Section 5 of Limitation Act to condone the delay in preferring the appeal. As per order dated 02.08.2018 IA No.I came to be allowed and delay in filing the appeal has been condoned. In this appeal, even after service of notice to the address shown in the plaint, the respondent/plaintiff failed enter appearance and notice returned with an endorsement addressee left. Therefore, appellant/defendant has taken notice through substitute service by way of paper publication. But the respondent/plaintiff has failed to enter appearance and therefore, she is placed exparte.

10. Heard arguments. The trial court records have been secured.

11. After analyzing the pleadings of the parties, oral and documentary evidence placed on record before the trial court and after hearing arguments of District Government Pleader, at this stage, the points that arises for my determination are:

(1) Whether the appellant/defendant has made out the trial court has erred in entertaining the suit when the plaintiff has failed to comply notice under Section 80 of CPC?

(2) Whether the suit is bad for non-joinder of State Government as party to the suit?

(3) Whether the findings of the trial court that plaintiff has proved possession of the suit schedule property and defendant has failed to prove existence of the school property is not correct?

(4) Whether the impugned judgment of the trial court is erroneous and requires interference by this court?

(5) What order?

12. My findings on aforesaid points are:

Point No.1 : In the negative

Point No.2 : In the negative,

Point No.3 : In the negative

Point No.4 : In the negative

Point No.5 : As per the final order,

for the following:

REASONS

13. Point No.1 to 4: The plaintiff has filed suit for permanent injunction restraining the defendant from interfering with her possession and enjoyment of the suit schedule property. As per the plaint schedule description, the suit schedule property is a vacant site bearing No.136-975-990/1-119 situated in Ward No.17, Shivamogga City Municipality, Vidyanagar, measuring 38x64 feet within the boundaries as shown in the plaint. The defendant is working as Headmistress in Government Higher Primary School, Huchangamma Temple Street, Vidyanagara, Shivamogga, is not disputed. The plaintiff has admitted the western boundary in the plaint schedule as school property. Therefore, the suit is filed against the defendant headmistress in her official capacity that she has interfered with plaintiff's possession and enjoyment of suit schedule property.

14. The defendant in their written statement has specifically pleaded suit is bad for non-joinder of necessary parties and the State Government is a necessary party to the suit. They

have further contended suit is also not maintainable for want of notice under Section 80 of CPC.

As per Section 80 of CPC, no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of.

(c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district; and, in the case of a public officer, delivered to him or left at this office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

The Hon'ble Apex court in the judgment reported in AIR 1963 SC 424 has held even in the suit for injunction filed against Government or whether the relief claimed includes the relief of injunction, the suit has to be preferred by issuing notice under Section 80 of CPC.

16. The defendant being headmistress of the school and in her official capacity she is performing her duties. Therefore, in the present suit Deputy Commissioner or the State Government or the departmental head of defendant Government school is also a proper and necessary party to the suit. Hence, the suit against the defendant without impleading head of the department or Deputy Commissioner it is bad for non-joinder of necessary party. The suit is also not maintainable for want of notice under Section 80 of CPC. At the time of filing of the suit, plaintiff has also not filed any

application under Section 80(2) of CPC, dispensing to issue notice before filing of the suit.

17. The defendant in their written statement and affidavit evidence has contended that adjoining the school building there is play ground and the plaintiff has tried to interfere and encroach the said property. In the written statement para No.11 the defendant has denied any interference with the possession and enjoyment of the suit schedule property of the plaintiff. PW-1 during his cross examination admitted the defendant is headmistress in the school. The plaintiff during his cross examination deposed the defendant has removed the fence drawn around the school property. But in the plaint averments or affidavit evidence of PW-1 there is no whisper regarding this aspect. It appears the defendant is not having any individual interest to encroach or interfere with the possession of plaintiff in the suit schedule property.

18. The plaintiff has produced copy of registered sale deed 26.02.1986 relating to suit schedule property as per Ex.P2. She has not produced primary evidence, the original sale deed. Ex.P3 is the copy of the assessment register extract appearing in the name of plaintiff. Ex.P7 is the assessment extract relating to the property of the school and column No.1 is appearing in the name of Government Higher Primary School and extent of the property in co. NO.9 is shown as 62 x 125 feet. Ex.D1 is not an authenticated property document to prove the right title and possession of school property.

19. The plaintiff has sought for permanent injunction against the defendant's interference and it is not disputed suit

schedule property is a vacant site. It is not the case of the plaintiff as per her pleadings or evidence that suit schedule property is surrounded by a fence. Defendant being Head Mistress and person in-charge of the school is authorized to protect the school property and therefore, any act of the defendant or steps taken for protection and maintenance of the school property cannot be considered as interference. The trial court has not considered non-joinder of necessary parties and want of notice under Section 80 of CPC while decreeing the suit. The plaintiff has not produced any sketch relating to suit schedule property. The plaintiff during his cross examination specifically admitted adjoining school building existences the school play ground. PW-1 further admitted during his cross examination that there is no boundary mark to identify the suit schedule property. As per his evidence, the defendant has removed the boundaries stones cannot be accepted. During cross examination PW-1 it is suggested that the plaintiff himself is trying to encroach the school property. For the aforesaid reasons, the trial court has erred to entertaining suit, in the absence of statutory notice under Section 80 of CPC. The suit is for permanent injunction filed only against the defendant headmistress of the school without making the Deputy Commissioner or concerned head of the education department of the Taluk is bad in law and not maintainable. In the result suit is bad for non-joinder of necessary parties. The trial court has grossly erred in granting a decree for perpetual injunction in favor of the plaintiff. Therefore the appeal is liable to be allowed and judgment and decree of the trial court has to be set aside. For the above reasons warrants interference in the judgment of the trial court. In the above circumstances, my findings on point No.1 to 4 are in negative and I proceed to pass the following:

O R D E R

Appeal filed by the appellant/defendant under Order XLI Rule 1 of C.P.C is allowed.

Judgment and decree passed in O.S.No.126/2011 dated: 26.06.2013 on the file of learned IV Addl. Civil Judge and JMFC, Shivamogga is set aside. The suit of the plaintiff is dismissed with costs.

Draw decree accordingly.

Send back the trial court records with a copy of this judgment.

(Dictated to the stenographer, computerized by her and then corrected and pronounced by me in open court on this the 14th day of December, 2018.)

(Lakshminarayana Bhat K.)
Prl. Senior Civil Judge and CJM,
Shivamogga.

Judgment pronounced in the open court
(vide separate judgment)

O R D E R

Appeal filed by the appellant/defendant
under Order XLI Rule 1 of C.P.C is allowed.

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O.S.No.126/2011 dated: 26.06.2013 on the
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the plaintiff is dismissed with costs.

Draw decree accordingly.

Send back the trial court records with a
copy of this judgment.

Prl. Sr. Civil Judge and CJM,
Shivamogga.

