Akkamma vs Vemavathi on 25 November, 2021

Author: Aniruddha Bose

Bench: Aniruddha Bose, L. Nageswara Rao

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5884 OF 2009

Akkamma & Ors. …..Appellant(s)

Versus

Vemavathi & Ors. …Respondent(s)

JUDGMENT

ANIRUDDHA BOSE, J.

The appellants before us are the plaintiffs in a suit instituted in the year 1987 by their predecessor Arakeri Abbaiah claiming for declaration of ownership of certain immovable property comprising of 10.54 guntas situated in Vibhuthipura Village, Krishnarajapura Hobli, Bangalore South Taluk. Relief was also claimed in that suit in the form of injunction directing the defendants therein not to interfere with his peaceful possession and enjoyment of the suit□property. On his death, Arakeri Abbaiah's legal representatives were brought on record. In this judgment, we shall refer to Arakeri Abbaiah as the original plaintiff. He was the son□in□law of the first defendant in the suit□ Muniyappa. Both the defendants have passed away subsequently and their legal representatives are on record. The original second defendant was the son of the first defendant at the time the suit was instituted. Prior to this suit, another suit was filed by the original plaintiff involving broadly the same immovable property in the year 1982. We shall discuss about the said suit later in this judgment and the two suits shall be henceforth referred to by their years of institution, i.e. 1982 suit and 1987 suit respectively. The case of the original plaintiff before the Trial Court was that he had purchased the suit land from its erstwhile owner, Papaiah under a registered sale deed dated 29th May, 1972. The total area of the land that the original plaintiff claimed to have had purchased was 1 acre 15 guntas and the disputed property forms part of that block of land. In the plaint, the original plaintiff's case was that he was in exclusive possession and enjoyment of the suit land ever since the date of purchase.

2. The subject-suit, i.e. the 1987 suit was founded, inter-alia, on the allegation that the defendants were making attempts to interfere with the original plaintiff's peaceful possession and enjoyment of the property. It was specifically alleged that on 15 th February, 1987 the defendants interfered with the peaceful possession and enjoyment of the suit land. It has also been alleged in the plaint that attempt to trespass into the suit scheduled property was repeated by the defendants on 25th February, 1987. In the 1987 suit, as we have already indicated, reliefs claimed included declaration to the effect that the original plaintiff was the absolute owner of the suit land and prayer was also made for permanent injunction.

3. The original plaintiff had instituted the earlier suit in the Court of XVIII Additional City Civil Judge at Bangalore City. The 1982 suit was for perpetual injunction, and the claim for injunctive relief was similar to that asked for in the 1987 suit though not on the same allegation of interference. The earlier suit was registered as O.S. No. 3029/82. The said suit was dismissed by the Trial Court on the ground that the plaintiff could not establish his lawful possession. The decision of the Trial Court in the 1982 suit was appealed against by the predecessor of the present appellants, but that appeal was also dismissed by the High Court of Karnataka on 25th November, 1986. It was thereafter the suit, from which the present appeal arises, was instituted showing threats of dispossession on the aforesaid two dates. This suit was contested by the defendants by filing written statement and they had set up title for themselves. The defendants raised the plea of purchase of the suit land in benami transaction, and the first defendant claimed to be the real owner of the suit land. The said suit was dismissed on 7th November, 1997. It has, however, been stated in the list of dates contained in the paperbook that the Trial Court did not accept the defendants' plea of benami transaction.

4. This judgment was appealed against by the plaintiff before the High Court. In appeal, the legal representatives of the original plaintiff were brought on record. The appeal was allowed by the High Court and the matter was remitted to the Trial Court. In the judgment of the High Court delivered on 19th August, 2004 by which the matter was remanded, it was, inter-alia, held and directed:-"4. In this suit, the plaintiff has produced R o R extracts marked at Exs. P-4 to P.6 to prove his possession around the date of the suit. The Plaintiff, on his part, has tendered evidence. The Defendants although filed Written Statement, have failed to cross-examine the Plaintiff witnesses and failed to let in their evidence The dismissal of earlier injunction Suit would not come in the way of the plaintiff to file a Suit to seek comprehensive relief of declaration of title. But the earlier Suit for permanent injunction was dismissed on the ground that the Plaintiff failed to prove his possession. The RoR extracts produced by Plaintiff at Exs. P. 4 to P. 6 show that Plaintiff is in possession. The trial court without reference to the said evidence, has mechanically come to the conclusion that the filing of the present suit is not maintainable in view of the dismissal of the earlier suit and the related regular first appeal. In that view of the matter, it is just and necessary that the judgment of the Trial Court has to be set aside.

5. Accordingly, the impugned judgment of the trial court is set aside and the matter is remitted to the Trial Court for fresh disposal in accordance with Law. If Defendants participate and request for summoning PW 1 and PW 2 for the purpose of Cross-examination, the request is to be granted and so also Defendants should be permitted to adduce their evidence. No fresh notices need be issued to

the parties by the Trial Court. Parties are directed to appear before the Trial Court on 06/09/2004. LCRs to be transmitted forthwith. The suit is to be disposed of by the end of December 2004. The legal representatives of the appellant Plaintiff are entitled to get themselves impleaded in the suit by filing a memo and getting the cause title amended accordingly. It is said that PW 1 is dead. The Plaintiff is also entitled to adduce additional evidence if he so desires." (quoted verbatim from the copy of the judgment as reproduced in the paperbook)

5. On remand, the Court of VIII Additional City Civil Judge at Bangalore City in the judgment delivered on 18 th December, 2004 found that the plaintiffs (the plural form is being used as the suit was being prosecuted from that point of time by legal representatives of the deceased plaintiff) had proved ownership to the suit property. But on the aspect of possession and obstruction thereto, the finding of the Court went against the plaintiffs. The defendants' stand that the plaintiffs were never in possession of the property and there was no cause of action for the suit was upheld. The Trial Court went against the plaintiffs mainly on the ground that the plaintiff could not establish that he was in possession. The Trial Court referred to the evidence of the plaintiff witness no. 1, i.e. the original plaintiff who had admitted that his father□in□law was in possession of the suit land and was cultivating thereon. In the 1987 suit, the original plaintiff could not demonstrate as to how he came in possession of the suit□land after dismissal of the 1982 suit. This suit was dismissed, inter□alia, on the following reasoning:□"(i) Though the plaintiff had admitted that the first defendant was in possession and cultivation of the suit land, he did not ask for relief for possession.

(ii) Mere suit for declaration was not maintainable without the relief for possession. By declaring the plaintiff was the owner of the property, no purpose would be served."

6. It was also held in that judgment that the suit was time□barred. On the point of limitation, it was held by the Trial Court, on remand:□"15. .....Further the dispute of title is confirmed by filing the Written Statement by the Defendant No. 1 on 28/01/1983 but the Plaintiff filed the present suit on 02/03/1987 after lapses of 4 years 2 months. The Plaintiff had to file this suit within 3 years from the date of filing the written statement by the present Defendant in O.S 3029/82. But filed after 4 years two months. So, the Suit filed by the Plaintiff for declaration of title is barred by time. Accordingly I answer Issue No. 5 in affirmative." (quoted verbatim from the copy of the judgment as reproduced in the paperbook)

7. Against this judgment of dismissal, the plaintiffs approached the High Court of Karnataka. The appeal was registered as Regular First Appeal No. 331 of 2005 and was ultimately dismissed on 21 st July, 2008.

8. We find from the judgment under appeal that in course of hearing before the High Court, the plaintiffs sought to amend the plaint seeking alternative relief of possession of the suit property from the defendants. On that point, the High Court has observed and held:□"6. .....The dispute between the parties is pending from the year 1982. The Trial Court vide judgment dated 7.9.1985 in O.S. No. 3029/82 held that plaintiffs were not in possession and enjoyment of the schedule property as on the date of filing the suit in the year 1982. After lapse of 26 years, the plaintiffs are now filing the application seeking amendment of plaint for alternative relief for recovery of possession of the

schedule property. I perused the affidavit filed and I am not satisfied with the explanation of the Plaintiffs for delay in filing the application for amendment. It is not a case where the Plaintiffs were not aware of the fact, that the Trial Court in its judgement dated 7.9.1985 in O.S. No. 3029/82 held that the Plaintiff was not in possession of the schedule property. At this length of time, if the application of Plaintiff is allowed, it will lead to de□novo trial. Therefore, the application of the Plaintiff for amendment of the plaint is hereby rejected." (quoted verbatim from the copy of the judgment reproduced in the paperbook)

9. The High Court's opinion was based on the reasoning contained in an earlier decision of the same High Court, the case of Sri Aralappa vs. Sri Jagannath & others (ILR 2007 Kar 339). In this judgment, it was held:□"31. Even if the plaintiff comes to Court asserting that he is in possession and that if it is found after trial that he was not in possession on the date of the suit, even then, the suit for declaration and permanent injunction is liable to be dismissed as not maintainable, as no decree for permanent injunction can be granted if the plaintiff is not in possession on the date of the suit. In such circumstances, it is necessary for the plaintiff to amend the plaint before the judgment and seek relief of possession. Therefore, a suit for declaration of title and permanent injunction, by the plaintiff who is not in possession on the date of the suit, when he is able to seek further relief of recovery of possession also, omits to do so, the Court shall not make any such declaration and the suit is liable to be dismissed as not maintainable".

10. Before us, it has been urged on behalf of the appellants that having regard to the provisions of Section 34 of the Specific Relief Act, 1963, the suit ought not to have been dismissed as along with claim for declaration, injunctive relief was also asked for. Section 34 of the 1963 Act reads:□ "Discretion of court as to declaration of status or right. – Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.
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> Explanation. – A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee." The aforesaid provision of law has been construed uniformly in a series of judgments. In the case of M. K. Rappai and Ors. vs. John and Ors. [(1969 (2) SCC 590] dealing with a similar provision in Section 42 of the Specific Relief Act, 1877, which was identically phrased, it was held:□"12. .....a bare declaration of right will be within the mischief of Section 42 of the Specific Relief Act, 1877 and Section 34 of the Specific Relief Act, 1963." Same proposition of law has been followed in Ram Saran and Anr. vs. Smt. Ganga Devi [(1973) 2 SCC 60], Vinay Krishna vs. Keshav Chandra and Anr. [(1993) Supp 3 SCC 129] and Anathula Sudhakar vs. P. Buchi Reddy (Dead) By LRS. And Ors. [(2008) 4 SCC 594].

11. The High Court, on factual score, observed in the judgment under appeal:□"8. I am in full agreement with the view taken by the learned Single Judge in Aralappa's case. In the instant case the finding of the Trial Court in O.S. No. 3029/82 stating that the Plaintiffs were not in possession and enjoyment of the schedule property had become final. It is not the case of Plaintiff that subsequent to judgement in O.S. No. 3029/82 he recovered the possession of the schedule property. That being the situation, there was no impediment for the Plaintiff's to seek the relief for recovery of possession when they filed O.S. No. 1014/87. The Plaintiffs having omitted to seek further relief of possession they are not entitled for declaring and injunction. The reasoning of the Trial Court in the impugned judgment is in accordance with law and the same is supported by evidence on record. I find no justifiable ground to interfere with the impugned judgment passed by the Trial Court." (quoted verbatim from the copy of the judgment as reproduced in the paperbook)

12. The position here is that the original plaintiff sued for declaration of title and possession in the 1987 suit. The first Court found the original plaintiff not to be in possession. It is true that reliefs claimed by the original plaintiff were both for declaration and injunction, but the latter having failed to establish possession of the suit land, his case for injunction restraining the defendants from interfering with the suit land failed. The plaintiffs want us to proceed on the basis that since the Trial Court found ownership of the suit property having been proved, possession should have been presumed. In two High Court decisions, Devish vs. M.K. Subbiah and Ors. (AIR 1970 Mys 249) and Navalram Laxmidas Devmurari vs. Vijayaben Jayvantbhai Chavda (AIR 1998 Guj 17), the presumption of law that possession follows tittle has been highlighted.

13. Our attention has also been drawn to certain portions of M. Krishnaswamy's "Law of Adverse Possession" (12 th Edition). In this commentary, the author has summarised the legal position in relation to presumption of law in relation to vacant lands in the following manner: □"Possession is not necessarily the same as actual user. To prove possession, it is not necessary, generally, to prove user of land. If the land is of such a nature as to render it unfit for actual enjoyment in the usual modes, it may be presumed that the possession of the owner continues until the contrary is proved.

The jurisprudential concept of possession is made up of two ingredients: (i) the corpus: and (ii) the animus. Corpus means actual exclusive physical CONTROL over the property denoting physical possession. The animus denotes the intention and exercise of right to possess the property as owner to the exclusion of others. These, two ingredients put together go to constitute legal possession. Thus, the mere throwing of Gudha (Garbage) over an open plot of land for a very long period much more than even 12 years will not constitute legal possession of the persons throwing Gudha and muchless can such user ripen into adverse possession so as to extinguish the title of the rightful owner."

14. But these statements of law would not operate in this case, as the original plaintiff in the earlier suit had admitted possession as also use of the subject□land by the first defendant. No case of granting right of user has been made out either. Neither the plaintiff has alleged casual use of the subject□land by the first defendant. The original plaintiff's claim for possession was rejected in the 1982 suit and in the subsequent suit also, which gives rise to this appeal, the plaintiffs could not demonstrate repossession of land on the basis of which he could obtain injunctive relief from

disturbance of possession. In both the two reported decisions in the cases of Devish (supra) and Navalram Laxmidas Devmurari (supra) referred to earlier, the first two Courts – being the Courts of fact had come to affirmative finding about the plaintiffs' possession of the suit property. So far as the proceeding before us is concerned, the finding of the First Court is otherwise. The plaintiffs sought to introduce prayer for recovery of possession to cure the defect of not having made out a case on that count by way of amendment of plaint at the appellate stage. The High Court rejected this prayer. We have quoted earlier in this judgment the reason for such rejection. We are in agreement with the High Court on this point. While in a situation of this nature, amendment of plaint could be asked for (Vinay Krishna vs. Keshav Chandra and Anr.), such a plea ought to have been made within the prescribed limitation period. This position of law has been clarified in the case of Venkataraja and Ors. vs. Vidyane Doureradjaperumal (Dead) Through Legal Representatives and Ors. [(2014) 14 SCC 502]. In this case, it has been held:□"24. A mere declaratory decree remains non□executable in most cases generally. However, there is no prohibition upon a party from seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendants to raise the issue at the earliest. (Vide Parkash Chand Khurana vs. Harnam Singh and State of M.P. vs. Mangilal Sharma)."

15. We agree with that part of the decision of the High Court in which it has been held that possession of the suit property was not established by the plaintiffs and hence injunctive relief could not be granted. As we have already recorded, we are also in agreement with the High Court's reasoning for rejecting the plea for amendment. But we do not agree fully with the entire reasoning of the High Court for dismissal of the appeal as spelt out in the said judgment. The bar contained in proviso to Section 34 of the 1963 Act, in our opinion, could not be applied in the case of the plaintiffs as consequential relief for injunction from interference with the suit□land was claimed. The prohibition contained in the proviso to Section 34 would operate only if the sole relief is for declaration without any consequential relief. In the plaint of the 1987 suit, relief for injunction was asked for. Such dual relief would protect the suit from being dismissed on maintainability ground. It is a fact that the plaintiff ought to have had asked for recovery of possession, given the factual background of this case, but the plaint as it was originally framed reflected that the original plaintiff was in possession of the suit land. Such plea rightly failed before the Trial Court and the First Appellate Court.

16. The prohibition or bar contained in proviso to Section 34 of the 1963 Act determines the maintainability of a suit and that issue has to be tested on the basis the plaint is framed. If the plaint contains claims for declaratory relief as also consequential relief in the form of injunction that would insulate a suit from an attack on maintainability on the sole ground of bar mandated in the proviso to the aforesaid section. If on evidence the plaintiff fails on consequential relief, the suit may be dismissed on merit so far as plea for consequential relief is concerned but not on maintainability question invoking the proviso to Section 34 of the 1963 Act. If the plaintiff otherwise succeeds in getting the declaratory relief, such relief could be granted. On this count, we do not accept the ratio of the Karnataka High Court judgment in the case of Sri Aralappa (supra) to be good law. In that decision, it has been held:□"31. Even if the plaintiff comes to Court asserting that he is in possession and that if it is found after trial that he was not in possession on the date of the suit, even then, the suit for declaration and permanent injunction is liable to be dismissed as not maintainable, as no

decree for permanent injunction can be granted if the plaintiff is not in possession on the date of the suit. In such circumstances, it is necessary for the plaintiff to amend the plaint before the judgment and seek relief of possession. Therefore, a suit for declaration of title and permanent injunction, by the plaintiff who is not in possession on the date of the suit, when he is able to seek further relief of recovery of possession also, omits to do so, the Court shall not make any such declaration and the suit is liable to be dismissed as not maintainable".

17. So far as the reliefs claimed in the suit out of which this appeal arises, prayer for declaration was anchored on two instances of interference with the possession of land of the plaintiffs and injunctive relief for restraint from interference with the property was also claimed. But possession of the said property by the original plaintiff was not established. The alternative relief sought to be introduced at a later stage of the suit was also found to be incapable of being entertained for the reason of limitation. Thus, the foundation of the case of the plaintiffs based on these two factual grounds collapsed with the fact-finding Courts rejecting both these assertions or allegations. But that factor ought not to be a ground for denying declaration of ownership to the plaintiffs. There is no bar in the Specific Relief Act, 1963 in granting standalone declaratory decree. The Trial Court came to a positive finding that the original plaintiff was the owner of the suit-property. But it held that in absence of declaration of relief of possession by the plaintiff, declaration of title cannot be granted. We have already expressed our disagreement with this line of reasoning. It seems to be a misconstruction of the provisions of Section 34 of the 1963 Act. The Trial Court and the High Court have proceeded on the basis that the expression "further relief" employed in that proviso must include all the reliefs that ought to have been claimed or might have been granted. But in our view, that is not the requirement of the said proviso. This takes us to the corollary question as to whether the 1987 suit could have been held to be barred under the principle contained in Order II Rule 2 of the Code of Civil Procedure, 1908. In our opinion, the said provisions of the Code would not apply in the facts of this case, as the denial of legal right in the 1987 suit is pegged on two alleged incidents of 15 th and 25th February, 1987. These allegations can give rise to claims for declaration which obviously could not be made in the 1982 suit. The claim for declaratory decree could well be rejected on merit, but the suit in such a case could not be dismissed invoking the principles incorporated in Order II Rule 2 of the Code of 1908.

18. The High Court has proceeded on the footing that in the subject-suit, the original plaintiff must have had asked for relief for recovery of possession and not having asked so, they became disentitled to decree for declaration and possession. But as we have already observed, the proviso to Section 63 of the 1963 Act requires making prayers for declaration as well as consequential relief. In this case, if the relief on second count fails on merit, for that reason alone the suit ought not to fail in view of aforesaid prohibition incorporated in Section 34 of the 1963 Act.

19. Having opined on the position of law incorporated in Section 34 of the 1963 Act, we shall again turn to the facts of the present case. The first suit was for perpetual injunction, in which the original plaintiff lost for failing to establish possession. In the second suit (the 1987 suit), reliefs were claimed for declaration based on allegation of subsequent disturbances and on that basis injunctive relief was asked for. The plaintiffs' claim for being in possession however failed. Thus, no injunction could be granted restraining the defendants from disturbing or interfering with the original

plaintiffs' possession of the suit land. But as the Trial Court found ownership of the original plaintiff was proved, in our view the original plaintiff was entitled to declaration that he was the absolute owner of the suit property. There is no bar in granting such decree for declaration and such declaration could not be denied on the reasoning that no purpose would be served in giving such declaration. May be such declaratory decree would be non-executable in the facts of this case, but for that reason alone such declaration cannot be denied to the plaintiff. Affirmative finding has been given by the Trial Court as regards ownership of the original plaintiff over the subject-property. That finding has not been negated by the High Court, being the Court of First Appeal. In such circumstances, in our opinion, discretion in granting declaratory decree on ownership cannot be exercised by the Court to deny such relief on the sole ground that the original plaintiff has failed to establish his case on further or consequential relief.

20. In these circumstances, we sustain the judgment of the High Court that the plaintiffs were not entitled to injunctive relief as prayed for and also the rejection of the plaintiffs' plea for introduction of relief for possession. But at the same time, we set aside that part of the judgment by which it has been held that the plaintiffs were disentitled to declaration of ownership of the property. We accordingly hold that the plaintiffs are entitled to declaration that they are owners of the suit property and there shall be a decree to that effect.

21. The appeal is party allowed in the above terms.

22. There shall be no orders as to costs.

.....J. (L. NAGESWARA RAO) .....J. (ANIRUDDHA BOSE) NEW DELHI;

NOVEMBER 25, 2021