

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 30TH DAY OF MARCH 2012

BEFORE :

THE HON'BLE MRS.JUSTICE B S INDRAKALA

WRIT PETITION No. 31487/2010 (GM-CPC)

BETWEEN:

P.Ramakrishnappa
S/o late Chikka Katappa
Aged about 63 years,
Resident of No.130,
Yellappa Garden,
Banagiri Nagar,
BSK III Stage,
Bangalore-560 085.

.. Petitioner

(By Sri H.N.Verikatesh, Advocate)

AND:

K.Ramakrishna
S/o Manikappa
Aged about 60 years,
Resident of No.2,
Yeralaji Venkatappa Lane,
Sadarapatrappa Road,
Tigalarapet,
Bangalore-560 002.

.. Respondent

This Writ Petition is filed under Articles 226 & 227 of the Constitution of India praying to call for records in O.S.No.3830/1995 on the file of XXXVII Addl.City Civil & Sessions Judge (CH-38) Bangalore City, including the order



dated 15.9.2010 passed on I.A.No.IV and peruse the same and to quash the order passed on IA.No.IV dated 15.9.10 in OS.No.3830/95 on the file of learned XXXVII Addl.City Civil & Sessions Judge (CH-38) Bangalore City, vide Annexure-E.

This Writ Petition coming on for preliminary hearing in 'B' group this day, the Court made the following:

ORDER

Heard the learned counsel for the petitioner. None appears for the respondent in spite of service of notice.

2. The above writ petition is filed challenging the order dated 15.9.2010 passed on IA IV filed under Order VI Rule 17 of Code of Civil Procedure (hereinafter referred to as 'C.P.C.' for short) by the plaintiff in OS 3830/95 on the file of XXXVII Addl.City Civil & Sessions Judge, (CCH-38), Bangalore City, by which order the said IA IV was allowed. The petitioner herein amongst other grounds has contended that the Court below ignored :

-the inordinate delay in seeking the proposed amendment

- the fact of change of nature of the proceedings itself

Order

- the stage at which I.A. is filed and also failed to consider the fact that the suit itself had become infructuous etc.,

3. Under Order VI Rule 17 of C.P.C., the plaintiff filed I.A.No.IV seeking for amendment of the plaint by introducing additional paragraph-4-A and also seeking additional relief of declaration and mandatory injunction, declaring that the plaintiff is entitled for easementary rights of light and air which is affected by the alleged illegal construction put up by the defendant and also for a mandatory injunction to demolish the property mentioned therein and described as 'B' schedule property.

4. On perusal of the copy of the plaint vide Annexure- 'A' to the writ petition, it is seen that the suit is filed in the year 1995 seeking bare injunction restraining the defendant from putting up construction in violation of the approved plan and causing loss and damage to the property of the plaintiff. Admittedly, the BBMP is not a party to the suit and what is the approved plan is also not forthcoming in

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the plaint. The plaintiff has described the cause of action as hereunder :

" The cause of action for the suit arose in the last week of May 1995 when the defendant all of a sudden accelerated the construction of his building."

The learned counsel appearing for the petitioner further submitted that an order of temporary injunction which was passed *ex parte*, was vacated by the order dated 20.11.1995 - copy of which is filed at Annexure-`B'. On perusal of the said order passed at Annexure-`B', in paragraph-12 it is observed as hereunder :

" It may once again be repeated that there is nothing on record to show the plaintiff was ever enjoying the passing of light or air for any appreciable period of time across the defendant's property to claim an easement by prescription nor any easement of necessity for the beneficial enjoyment of the plaintiff's property created by virtue of the earlier partition during the year 1938 and the latter on during



the year 1956, thereby subjecting the enjoyment of the defendant's property to any form of restrictions. The defendant's property cannot be treated as a servient heritage at all under any circumstances with reference to the plaintiff's property."

5. However, it is seen that as the said order has become conclusive, the observations made in the said order have also remained unchallenged. In the circumstances, the nature of relief by way of proposed amendment is not only barred by limitation, but, the plaintiff is also barred from taking such plea inconsistent with the observations made in the said order. At this juncture, it is to be noted that, if the proposed amendment is permitted to be carried out, the said amendment will naturally date back to the date of the plaint, in which event, the observations made by the Trial Judge at Page-13 of the order that, "however, allowing of this application is subject to the question of limitation regarding relief sought by the plaintiff against the defendant with respect of the suit property", is not proper. When once the

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amendment is permitted to be carried out, the question of limitation does not arise at all.

6. Thus, considering the totality of the case as such i.e., as the suit is filed only against the appellant and BBMP is not a party to the proceedings; as the details of the sanctioned plan are not forthcoming; also in view of the observations made while disposing of the application filed under Order 39 Rules 1 and 2 of C.P.C. which has become conclusive, and further considering the submission that the proposed amendment changes the very nature of the proceedings; also alter the cause of action, if any, etc., the I.A.IV filed under Order VI Rule 17 r/w. Section 115 of C.P.C. is liable to be dismissed. Consequently, the impugned order is also liable to be quashed. Accordingly, the following order is made :

The impugned order dated 15.9.2010 passed on I.A.No.IV in O.S.No.3830/1995, pending disposal on the file of XXXVII Addl.City Civil & Sessions Judge (CCH-38),

[Signature]

Bangalore City, is hereby quashed. Writ Petition is **allowed** accordingly.

Sd/-
JUDGE

*bk/-