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(2003) 07 KAR CK 0042

In the Karnataka High Court

Case No : Regular Second Appeal No. 583 of 2000

Abdulaziz Mohammad Isaq Kothiwale (since deceased by L.R''s.) — APPELLANT

Vs

Ismailbeg Kashimbeg Miraz and Another — RESPONDENT

Date of Decision : 28-07-2003

Acts Referred:
Limitation Act, 1963 — Section 15 (1)

Citation : AIR 2004 Kar 211

Hon'ble Judges : K. Sreedhar Rao, J

Bench : Single Bench

Advocate : S.P. Shankar, for the Appellant; I.G. Gachchinamath, for the Respondent

Final Decision : Allowed

Judgement

K. Sreedhar Rao, J.—This appeal is filed against the Judgment and Decree passed in R. A. No. 29/1991 on the file of the I Addl. Civil Judge, (Sr. Dn.), Belgaum, arising out of the Judgment and Decree passed in O. S. No. 391/1983 renumbered as O. S. No. 538/ 1999 on the file of II Addl. Munsiff, Belgaum.

2. The appellants are the legal representatives of the second defendant. The first respondent plaintiff filed a suit for specific performance of agreement for sale in respect of suit schedule house property executed by the first defendant. Earlier to agreement for sale, the suit property is mortgaged in favour of the wife of the plaintiff and the plaintiff has taken a portion of the property on lease from his wife as a tenant. An agreement of sale was entered into between the plaintiff and the first defendant under Ex. P. 1 whereunder the first defendant agreed to sell the suit properly for a consideration of Rs. 22,000/-and an advance of Rs. 2,000/- was paid. The first defendant was obliged to redeem the mortgage and thereafter to execute the sale deed by receiving the balance of sale consideration. In breach of the terms of the agreement, the first defendant sells the property in favour of the second defendant under Ex. D4 dated 24-8-1982 for

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a sum of Rs. 45,000/-. Earlier to the execution of the sale deed Ex. D. 4. The second defendant had filed a suit in O. S. No. 343/1979 against the first defendant and the plaintiff herein for a permanent injunction against the first defendant not to alienate the property in favour of the plaintiff, the temporary injunction is granted. The suit came to be dismissed as withdrawn on 17-8-1983. Thereafter, the plaintiff has filed this suit.

3. The first defendant contended that the suit is barred by time and in view of the preemption right of the second defendant, the plaintiff cannot enforce the agreement to defeat the sale made in favour of the second defendant. The trial Court found that the suit is within limitation and also that the plaintiff has a right of pre-emption and decreed the suit. The Appellate Court confirmed the findings and the Judgment and Decree of the trial Court. Aggrieved by the decree, the present appeal is filed.

4. The following points of law are formulated for consideration by the admission Judge:

"(1) Whether the Courts below were right in law in holding that the plaintiff''s suit for specific performance was not barred by the Law of Limitation ?

(1) Whether the appellants defendants were not entitled to plead the right of ''preemption'' under the customary law in the prevailing facts and circumstances and on the material on record ?"

5. It is the contention of the first respondent that in view of the temporary injunction granted in O. S. No. 343/1979, the plaintiff was prevented from filing the suit. Therefore, the limitation has to be reckoned only from the date of dismissal of the suit on 17-9-1983. It is further contended that the agreement did not specify the time for performance of the contract. It is only on redemption of mortgage, the sale deed has to be executed by first defendant by receiving the balance of sale consideration. The suit came to be filed on 6-12-1983 therefore argued that the view taken by the Courts below that the suit is in time, is valid and proper.

6. Sri S. P. Shankar, learned counsel for the Appellant has relied on the ruling of the Supreme Court in A.S. Krishnappa Chettiar and Others Vs. Nachiappa Chettiar and Others, , the following observations are made:

"(10) : Mr. Vishwanatha Sastri who appears for the appellants in these appeals has raised two contentions. The first is that the principle underlying Section 15(1) of the Limitation Act Is applicable to a case of this kind and that, therefore, the execution applications are within time. Section 15(1) of the Limitation Act runs thus :

"15(1): In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on

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which it was withdrawn, shall be excluded."

It is clear from its terms that it is restricted in its application to a case where the execution of a decree has been stayed by an injunction or an order. By no stretch of imagination can it be said that the acceptance by the insolvency Court of the composition operated as a stay of execution of the decrees for the period of four years referred to in the deed or as an injunction. Further, the second defendant was not a party to the insolvency proceedings and could; therefore, not have been entitled to the benefit of the order of the Court accepting the scheme of composition.

In the ruling of Sirajul Haq Khan and Others Vs. The Sunni Central Board of Waqf, U.P. and Others, , the following observations are made :

"(19) : The next question which calls for our decision is whether the appellants'' suit is saved by virtue of the provisions of Section 15 of the Limitation Act. That is the only provision on which reliance was placed before us by Mr. Dar on behalf of the appellants. Section 15 provides for "the exclusion of time during which proceedings are suspended" and it lays down that "in computing the period of limitation prescribed for any suit or application for the execution of a decree, the Institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn, shall be excluded". It is plain that, for excluding the time under this section, it must be shown that the institution of the suit in question had been stayed by an injunction or order; in other words, the section requires an order or an injunction which stays the institution of the suit. And so in cases falling u/s 15, the party instituting the suit would by such institution be in contempt of Court. If an express order or injunction is produced by a party that clearly meets the requirements of Section 15. Whether the requirements of Section 15 would be satisfied by the production or an order or injunction which by necessary implication stays the institution of the suit is open to argument. We are however prepared to assume in the present case that Section 15 would apply even to cases where the institution of a suit is stayed by necessary implication of the order passed or injunction issued in the previous litigation. But, in our opinion, there would be no Justification for extending the application of Section 15 on the ground that the Institution of the subsequent suit would be inconsistent with the spirit or substance of the order passed in the previous litigation. It is true that rules of limitation are to some extent arbitrary and may frequently lead to hardship; but there can be no doubt that, in construing provisions of limitation, equitable considerations are immaterial and irrelevant, and in applying them effect must be given to the strict grammatical meaning of the words used by them : AIR 1932 165 (Privy Council) ."

The decision of this Court in Mahboob Pasha Vs. Syed Zaheeruddin and Others, the following observations are made:

"14. In this regard, it is relevant to bear in mind that in construing the provisions

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of the Limitation Act, equitable considerations are immaterial and irrelevant, While applying the rules of limitation, effect must be given to the strict grammatical meaning of the words used therein. See AIR 1932 165 (Privy Council) . As it is already pointed out that the order of injunction obtained by Abdul Sattar on 28-10-1974 in O. S. No. 2095/74 was to restrain the ''appellant from alienating the suit property to the 1st respondent or to any other party. It did not restrain the respondents from filing the suit for specific performance nor the respondents were in any way prevented by reason of such an order of temporary injunction from filing the suit. Section 15(1) of the Act reads thus :

"15(1) : In computing the period of limitation for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

The facts as found by the trial Court, in our view, did not enable respondents 1 to 4 exclude the period from 28-10-1974 to 27-8-1980 because they were not prevented from filing the suit. What all Section 15(1) provides for is that the time intervening between the date on which the institution of the suit was stayed and the date on which the stay order was vacated shall be excluded in computing the period of limitation. In this case, as already pointed out, there was no order of injunction in the suit filed by Abdul Sattar restraining respondents 1 to 4 from filing a suit against the appellant for specific performance of the agreement in question. What was obtained by him was an interim order of injunction restraining the appellant from alienating the property in question in favour of respondent 1 or any other party and, therefore, Section 15(1) of the Limitation Act did not permit the trial Court to exclude the time from 28-10-1974 to 27-8-1980. By excluding that period, it held that the suit filed on 3-12-1980 was within time."

7. Although there is no time limit prescribed in the agreement for performance of the contract, to the written statement filed in O. S. No. 343/1979 by the first defendant, he denies the liability to execute the sale deed in favour of the plaintiff herein. The written statement is filed on 7-10-1980. Therefore, three years from the denial the suit should have been filed. The plea that temporary injunction is granted in O. S. No. 533/1989 would come to the aid of the plaintiff to exclude the period of limitation is untenable. The temporary injunction was granted only against the first defendant, the plaintiff although a party as second defendant, no temporary injunction was granted against him from instituting a suit and he was not otherwise prevented from filing a suit against the first defendant for seeking enforcement of the agreement. The ratio of the Supreme Court laid down in Krishnappa Chettiar''s case, Siraj Khan''s case and the ruling of this Court in Mahaboob Pasha''s case referred to above squarely applies to the facts of the case. The decisions referred by the trial Court has absolutely no bearing on the issue in question. Therefore, the order of grant of injunction in

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favour of first defendant can-not be an excuse to extend the period of limitation. Hence, the suit filed by the plaintiff is barred by limitation. Thus the point No. 1 is answered in the negative.

8. Regarding Point No. 2 : Section 231 of Mahomedan Law by Mulla relating to preemption is extracted hereunder for convenient reference:

"231. Who may claim pre-emption.-

The following three classes of persons and no others, are entitled to claim pre-emption, namely :--

(1) a co-sharer in the property (w) (Shaft-I-sharik);

A mukarraridar (lessee in perpetuity) holding under a co-sharer has no right to preempt as against another co-sharer (x) ;

(2): a participator in immunities and appendages, such as a right of way or a right of discharge water (v) (shafi-I-khalit); and

(3): owners of adjoining immovable property (z) (shafi-I-jar), but not their tenants (a), nor persons in possession of such property without any lawful title (b) (Bailie, 481). A wakif or mutawallt is not entitled to preempt, as the wakf property does not vest in him (c).

The first class excludes the second, and the second excludes the third. But when there are two or more preemptors belonging to the same class, they are entitled to equal share of the property in respect of which the right is claimed. (Baillie, 500).

A plain reading of the provision makes it clear that right of pre-emption is conferred primarily on the co-sharer; secondly, on the persons who have easementary rights and thirdly, upon the adjoining owners of the Immovable property. The provision specifically excludes the right of pre-emption of the tenants of adjoining owners. In the present case, the plaintiff is a tenant of his wife who is a mortgagee of the suit property from the first defendant whereas the second defendant being the adjoining owner has got right of pre-emption. The agreement of sale is executed by the first defendant in favour of the plaintiff cannot defeat the very right of preemption of the second defendant and the sale agreement of plaintiff cannot be enforced. Accordingly, the point No. 2 is answered in the negative.

9. In view of the reasons and discussions made above, the Judgment and decree of the Appellate Court is perverse and contrary to law. Accordingly, the Appeal is allowed. The Judgment of the Appellate Court below is set aside and the suit of the plaintiff is dismissed with costs. The first defendant is directed to refund Rs. 2,000/- with interest at 12% P. A. from the date of receipt till refund at simple rate.

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