
(2008) 03 KAR CK 0066

In the Karnataka High Court

Case No : Regular Second Appeal No. 847 of 2001

Dada Rao since deceased by LRs (Prabhavathi Rao and Others)

APPELLANT

Vs

Madhu since deceased by LRs (Sri. Pandari and Sri. Gopal), Hanmanth, Suryabhan and Prabhu

RESPONDENT

Date of Decision : 04-03-2008

Acts Referred:

Transfer of Property Act, 1882 — Section 3

Citation : (2008) 03 KAR CK 0066

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : B.C. Rajeeva, for G.S. Visweswara Associates, for the Appellant; Manikappa Patil, for C/R2, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—This second appeal is by the sole defendant in O.S. No. 129/93 on the file of the Civil Judge, Basavakalyan, who has suffered a decree in favour of the plaintiffs declaring that the plaintiffs are the owners in possession of the suit lands and being restrained from interfering with the peaceful possession and enjoyment of the suit lands by the plaintiffs. The judgment and decree has ultimately been affirmed by the lower appellate court in Regular Appeal No. 5/96 in terms of the judgment and decree dated 24.8.2001. Against these, the second appeal by the defendant.

2. The second appeal is mainly canvassed on two questions of law which have been framed by this Court at the time of admission viz.,

1) Whether the suit filed by the plaintiff is barred by time?

2) Whether the courts below were justified in holding that the sale made in favour of appellant under Exs.D1 and D2 were for legal necessity?

and contentions revolving around these questions.

3. The brief facts leading to the above appeal are, that the LR's of one Ramji, three sons and one grand son through a pre deceased son had filed the suit for declaration that two sale transactions, one dated 16.12.1965 executed by Ramji in favour of the defendant conveying an extent of 2 acres 4 guntas of land in S. No. 29/ 2 of Gutti village, Basavakalyan Taluk, and another sale deed dated 1.6.1966, parties being the same, conveying another extent of 1 acre 8 guntas in the very survey number (marked as D1 and D2 respectively) are sham, nominal and bogus sale deeds, that the plaintiffs be declared as owners in possession of the land in S. No. 29/2 measuring to an extent of 2 acres 12 guntas and further that, an order passed by the Assistant Commissioner, Basavakalyan in case No. SDB/REV/APP1/191-92 dated 18.11.1991, an order passed in exercise of the Appellate power by the Assistant Commissioner reversing the order passed by the Tahsildar mutating the names of the plaintiffs in the revenue records to be null and void and for consequential perpetual injunction to restrain the defendant from interfering and obstructing with the peaceful possession and enjoyment of the plaintiffs over the suit land and for other reliefs.

4. The case of the plaintiffs was that the subject lands were joint family properties; that Ramaji, the kartha of the family had, it appears, executed two sale deeds without any necessity or for proper consideration; that the sale deeds were never acted upon, the plaintiffs who were not of age at that time, were not aware of the said sale deeds; that Ramaji died in the year 1980 whereafter the plaintiffs had taken steps to have the names of the other members of the family entered in the revenue records including the survey No. 99/2, but they have been orally informed by the Tahsildar that in respect of this survey number, the name of Ramaji had continued without the plaintiffs being aware of the same, but later, on coming to know about the entries to be not mutated in favour of the plaintiffs by the revenue authorities, plaintiffs had given an application in the year 1980; that though the Tahsildar mutated the entries, the defendant who had filed objections to change the entries on the premise that he had become the owner of the lands in question through the sale deeds of the years 1965, 1966 had preferred the appeal to the Assistant Commissioner who had allowed the appeal; that to get over such an order, plaintiffs had filed writ petition before this Court, but the said writ petition was disposed of on 24.1.1982 indicating that the plaintiffs have to approach the Civil Court for declaration of title in the specified land and therefore, had filed the present suit praying for reliefs indicated above. On issue of notice, defendant entered appearance and contested the suit, filed written statement denying the plaint averments.

5. It was specifically pleaded that the plaintiffs who had not taken any steps for getting over the sale deeds for over 36 to 37 years, cannot file this suit at this point of time for any relief; that the defendant was in possession of the lands for more than 37 years to the knowledge of the very persons including the villagers that such possession is not only adverse to the plaintiffs' interest, but to the knowledge of every one has perfected the title to the properties; that the plaintiffs are not entitled for the declaration sought for; that the vendor Ramji

had executed two sale deeds which were not fictitious or created document; that the sale deeds were for valid consideration; that the sales were for legal and family necessities; that as the sale deeds were hit by the provisions of Fragmentation Act, the village patvari and village accountant had not effected the mutation and therefore, the entries in the revenue records were not found in the name of the defendant and as such, it is continued in the name of Ramji; that after the repeal of the Fragmentation Act, the defendant had filed application for entering his name in the revenue records and the Assistant Commissioner, Basavakalyan, after verifying all these aspects has rightly passed the order in favour of the defendant; that Ramji himself has kept quiet for fifteen years after the sale deed, but had not taken any steps to get the sale deeds set aside; that the sale deeds were real and not got up or bogus as claimed by the plaintiffs; that the plaintiffs having not cared to get their names mutated for over 12 years thereafter, the suit is clearly barred by limitation. The circumstance wherein the revenue authorities have mutated the names of the plaintiffs in respect of other lands, but did not do so in respect of the suit land is a circumstance which would indicate that the property had been sold to the knowledge of the plaintiffs who have kept quiet even after 1980 when mutations in respect of the said lands were not effected in favour of the plaintiffs and therefore, pleaded for dismissal of the suit with costs.

6. In the light of such pleadings the trial Court framed following issues and one additional issue.

1. Whether the plaintiffs prove that they are the owners of the suit land bearing Sy. No. 29/2 measuring 03 acres 12 guntas?
2. Whether the plaintiffs prove that they are in lawful possession of the said suit land?
3. Whether the plaintiffs prove that the sale deeds dated 16.12.1965 & 1.6.1966 are nominal, sham and bogus?
4. Whether the plaintiffs are entitled to a declaration that they are owners of the suit land?
5. Whether the plaintiffs are entitled to perpetual injunction?
6. What decree or order?

Additional Issue 1:

Whether the defendant proves that the impugned sales were for the legal necessity or for the benefit of late Ramji?

7. Parties went to trial on such issues.

8. On behalf of the plaintiffs, second plaintiff Hanmanth was examined as PW1 and two other witnesses one Venkat was examined as PW2- a neighbour and another person by name Srimanth was examined as PW3- also a land owner

adjacent to the suit lands, to support the case of the plaintiffs that the suit lands were in their possession and cultivation of the plaintiffs. Documentary evidence- Exs.PI to P24 were got marked. On behalf of the defendant, apart from the defendant himself being examined as DW1, five other witnesses were examined, one Madav Rao was examined as DW2- attesting witness to the sale deed dated 1.6.1966, another attesting witness by name Niverthi examined as DW3 unfortunately did not come out with any positive evidence in favour of the defendant, but deposed as "I tell that it is very difficult these days to the people who want to tell the truth", scribe of exhibits D1 and D2 - Syed Khadar was examined as DW4, a resident of the village Dashrath Rao as DW5, another resident having his lands by the south of the suit lands by name Narayan as DW6 and yet another neighbour Rangrao s/o. Gopal Rao was examined as DW7. Documentary evidence on behalf of the defendant comprised of exhibits D1 and D2 -original sale deeds themselves, exhibits D3, D4, D13, D14 and D15- land revenue receipts and other documents- extract of revenue records to indicate that the defendant had paid land revenue and had taken other steps to have his name figured in the revenue records.

9. The trial Court on appreciation of such documentary and oral evidence, opined that the plaintiffs have proved their case that they are the owners in possession of the suit land measuring 2 acres 12 guntas in S. No. 29/2. It was also held that the plaintiffs were in lawful possession of the suit land that they having proved that sale deeds are nominal, sham and bogus, are entitled for declaration as owners of the land. The additional issue regarding sales being for legal necessity for the benefit of the family was, answered against the defendant and holding that the defendant had failed to prove that it was for legal necessity and accordingly, decreed the suit.

10. The defendant appealed against the judgment and decree to the lower appellate court. The lower appellate court in the first instance remanded the matter by allowing the appeal and setting aside the judgment and decree of the trial Court in terms of its order dated 26.7.1989 with a direction to frame additional issues as regards the plea of bar of limitation for suit and plea for adverse possession taken by the defendant in addition to the additional issue already framed by the trial Court in the suit and to give further opportunity to both the parties to lead evidence on the said issues and then to dispose of the suit afresh.

11. As against this order, the plaintiffs preferred miscellaneous second appeal to this Court in MSA No. 2359/99 which came to be allowed in terms of the order dated 13.10.1999 as under:

The order of the first appellate court that the entire matter be remanded, appears in the circumstances of the case to be inappropriate as the parties had tendered evidence in support of their case. Order 42 Rule 25 CPC empowered the court to raise additional issues and call for findings on the additional issues raised after recording such evidence as the parties may tender and on receipt of

such /hidings, decide the matter on merits. In the instant case, the first appellate court had not really examined any of the other issues that were recorded by the trial Court. In the circumstances, it appears to me that the order of the first appellate court should be modified by setting aside the order of remand of the entire matter to the trial Court for adjudication afresh. The order of the first appellate court regarding additional issue of limitation is modified as thus: The first appellate court shall call for a finding from the trial Court on the additional issues raised by it in para 17 of its order as also on the additional issue raised by the trial Court regarding legal necessity (for alienation) and the parties shall be at liberty to tender evidence on the four issues referred to above and thereafter the first appellate court shall hear the entire appeal on merits, ft is further clarified that the finding on the additional issue recorded by the trial Court regarding legal necessity is set aside. The trial Court is directed to record such further evidence as may be tendered by the parties and thereafter render a fresh finding on the additional issue regarding legal necessity and thereafter render fresh findings on the additional issues framed in para 20 of the first appellate court's judgment. The first appellate court may specify a date within which time the findings ought to be submitted by the trial Court. The parties shall appear before the first appellate court for receiving further instructions on 20th November, 1999.

The first appeal was restored to the lower appellate court, but in the light of the option given to the lower appellate court to call for findings on the additional issue, the lower appellate court called for such findings from the trial court. The two additional issues on which the trial Court was required to render its findings were, in addition to the first additional issue viz. that of the sale transactions being for legal necessity of the family were:

- i) Whether the defendant proves that he has perfected his title by adverse possession?
- ii) Whether the suit is barred by limitation?

12. When the matter came back to the trial Court, the defendant led additional evidence through the oral evidence of DW7.

13. The trial Court rendered its findings on the additional issues on the over all examination of the entire evidence till date, additional issue No. 1 regarding the transaction being for legal and family necessities was answered in favour of the defendant and the additional issue regarding limitation was also answered in favour of the defendant holding that, the suit was beyond time and that the third additional issue regarding adverse possession was held in favour of the defendant based on the very sale deeds, with the learned trial Judge being of the view that as Ramji was the owner and sale deeds recited that the purchaser has been put in possession, it should be taken that the purchasers are in possession of the suit lands as on that day i.e. from the year 1965-66 and accordingly, can claim adverse possession against the plaintiffs and forwarded such findings to

the appellate Court.

14. The learned Judge of the appellate Court while re-examining the appeal and in the light of these additional findings recorded by the trial Court and also on the basis of the arguments addressed on behalf of the appellant formulated the following points afresh for its determination:

- 1) Whether the respondents/plaintiffs proves that they are the owners of the suit land?
- 2) Whether the respondents/plaintiff's proves that they are in lawful possession of the suit land?
- 3) Whether the respondent/plaintiffs proves that the sale deeds dated 16.12.1965 and 1.6.1966 are nominal, sham and bogus?
- 4) Whether the appellant/defendant proves that he sale deeds dated 16.12.1965 and 1.6.1966 executed by deceased Ramji in his favour are for legal necessity or for the benefit of the family of deceased Ramji?
- 5) Whether the appellant/defendant proves that he perfected ownership title to the suit land by adverse possession?
- 6) Whether the suit is barred by limitation?
- 7) Whether the judgment and decree dated 4.4.1996 passed in OS.NO. 129/1993 by the Civil Judge (SD), Basavakalyan are erroneous, oppose to law and probabilities of the case?
- 8) What decree or order?

15. The learned Judge of the Appellate Court after hearing the learned Counsel for the appellants and the respondents and after perusing that the authorities relied upon by the learned Counsel for the parties, answered the points 1 to 3 in favour of the plaintiffs, as had been originally done by the trial Court, and points 4 to 7 against he defendant holding that the defendant was unable to prove that the sale deed executed by Ramji was for legal necessity and for the benefit of the family, that the defendant had failed to prove that he has perfected his title by adverse possession and also reversed the findings regarding limitation holding that the suit was not barred by limitation and therefore, the judgment and decree passed by the trial court did not call for interference and accordingly, dismissed the appeal. It is against such concurrent decrees that the present second appeal by the defendant.

16. Sri. B.C. Rajeeva, learned Counsel for the appellants, has put forth various contentions to make home the point that two questions of law, as had been framed by this Court at the time of admission, had been answered wrongly by the lower appellate court and called for correction at the hands of this Court.

17. It is very vehemently urged that the evidence on record very strongly probalilise the case of the defendant that the plaintiffs had the knowledge of the

two transactions viz. the two sale deeds given from the year 1980 and at any rate, from the year 1984 onwards even as per the admission of PW1 and a suit filed in the year 1991, 1992 i.e. eight years after the plaintiffs had come to know of the sale transactions, is clearly barred by limitation in view of Article 58 of the schedule to the limitation and submitted that having regard to the nature of relief sought for, it is only Article 58 that is attracted to the present situation and not Article 113, the residuary article, as the starting point for limitation is, the point of time when the right to sue accrues in terms of Article 58 and right to sue can be said to have accrued even as per the pleadings either in the year 1980 or later in the year 1984 and as per the admission of PW1 and in the light of such submission, submitted that the mere statement of plaintiffs that they were not aware of the sale transactions till the year 1991 when the defendant by filing objections to their applications for mutating their names in the revenue records had indicated that the two sale transactions by objections and that was the starting point for limitation cannot be accepted for the reasons that if the plaintiffs' names were not mutated in the revenue entries along with other lands which belonged to Ramji in the year 1980 as is evident from the perusal of Ex.D17 and in the light of the provisions of Section 3 of the Transfer of Property Act, particularly, the meaning of the phrase "a person is said to have notice of the fact when actually knows that fact, or when but for willful abstention from an enquiry or search which he ought to have made, or but for gross negligence he would have known and has submitted that if the plaintiffs had failed to make such enquiry either in the year 1980 or in the year 1984, they having failed in acquainting themselves with necessary information and having acted carelessly or negligently, it should be deemed that they had the knowledge of the two sale transactions and even if they could not have known, they could have come to know after a reasonable enquiry and therefore, the suit is clearly barred by limitation. In this regard the learned Counsel has taken me through the evidence of PW1 and Ex.D17 to indicate that the revenue authorities had not mutated the names of the plaintiffs in the subject suit lands whereas, the other lands of Ramji has been mutated the names of the plaintiffs, which itself could have put the plaintiffs on alertness and on notice about any other possibilities.

18. With regard to the other question that the sale transaction being for legal and family necessities or otherwise, submission of Sri. Rajeeva, learned Counsel for the appellant is that the very admission on the part of the plaintiffs and their witnesses that Ramji had executed a good number of sale transactions in and around the period when two sale transactions under Exhibit-D 1 and Exhibit-D2 had been executed; that the plaintiffs themselves had admitted that the other sale transactions are for legal necessities and likewise the witnesses who had been examined on behalf of the plaintiffs also had admitted that the other transactions were for legal necessities and therefore to contend that only two transactions in favour of the defendant were not for legal necessity and that it was a sham, nominal and forged document is clearly against the run of evidence; that it can even be presumed that even the two transactions in favour of the

defendant are also for legal necessities, particularly, when the plaintiffs were not able to establish that Ramji was a person with any bad habits or had been otherwise squandering the properties of the family. In support of such admission, learned Counsel for the appellant has taken me through the evidence of PW-1, particularly, in the cross examination and the documents such as other sale transactions by Ramji in favour of third parties Exhibit-P24, supporting evidence of DWs-2, 6 and 7 and therefore submits that the lower appellate court was clearly in error in reversing the findings recorded by the trial court, particularly, on the two aspects regarding limitation and the defendant proving that his transactions were for legal necessities and therefore submits that this appeal should be allowed and the Judgments and decrees passed by the courts below set aside and the suit dismissed.

19. On the other hand, Sri. Manikappa Patil, learned Counsel for respondent No. 2 in the appeal and plaintiff in the suit, has submitted that the plaintiffs were never aware of sale transactions in the year 1991 until when the defendant for the first time in the objections filed to the application of the plaintiffs for changing the revenue entries indicated the two sale transactions; that they were never in the knowledge or privy to the sale transactions; that the sale transactions were themselves not for real consideration or adequate consideration but nominal transactions even on perusal of the consideration mentioned in the documents and the mere fact that PW-1 had indicated that he made another attempt for having the entries mutated four years earlier has been wrongly portrayed as four years after the initial request for change of mutation in the year 1980; that four years time is with reference to the date of deposition in the year 1994 and therefore knowledge is only in the year 1990 etc.

20. It. is also submitted that the plaintiffs had simply pleaded the assurance given by the Tahsildar that the entries had been mutated and were not aware of the entries being not mutated only in respect of two subject lands and came to know about it only in the year 1990 when they had taken steps to have that also mutated in their name.

21. So far as legal necessity is concerned, learned Counsel points out to the evidence of defendant's witnesses themselves and urges that no one has spoken about the legal necessities in respect of two transactions including the defendant and burden being on the defendant to have proved the existence of legal necessities and having made enquiries and having admitted that he had not made such enquiries, the finding has been rightly answered by the lower appellate court and therefore no interference is called for.

22. The limited question in the second appeal is as to whether the lower appellate court has answered the two questions correctly and on the appreciation of the evidence before the court.

23. So far as the limitation is concerned, whether it is Article-58 as urged by learned Counsel for the appellant or Article-115 residuary article which is three

years from the date of cause of action which can be in terms of Article-58 three years from the date when the cause of action accrues and not necessarily the date when the plaintiffs plead awareness or knowledge of the transactions. It is for this reason, learned Counsel has relied upon Section 3 of the Transfer of Property Act, 1882.

24. The entire submission mainly proceeds on the premise that the plaintiffs had admitted they had learnt about the mutation entries being not made in the name of the plaintiffs four years after the first request was made i.e., in the year 1984. The relevant portion of the cross examination is pointed out. A perusal of this part of the evidence while can give an impression that the application for the first time was given four years after the death of their father in terms of Exhibit.D17.

It is actually mutated in the year 1980 the year of death of their father itself But, the question,

when did you file your application before the Village Accountant?

Answer; about four years ago

does not necessarily lead to the inference that it was in the year 1984. But, this inference is sought to be drawn by the learned Counsel for the appellant by answering to the next question that is,

Question: You have told that you filed your 1st application after the death of your father during 1980. After how many years you filed your 2nd application?

Answer: After about 4 or 5 years.

is taken to be an admission that second application itself was filed in the year 1984-85 and therefore cause of action is from that date.

25. Unfortunately, no one has placed the second application before the court. The second application on the other hand is as contended and as is obvious on a Perusal of the record made in the year 1991 to which the defendant filed objections and had indicated in the written objections about the sale transactions. Therefore, if one has to go by the preponderance of probabilities, the version that application was made about four years ago from the time when the witness has deposed i.e., 23.7.1994 to take it to 1990 is to be accepted rather than to construe that as an admission to indicate that the application had been made in the year 1984 or 1985.

26. But, this apart, the fact that in terms of the two sale transactions, the defendant's name was never mutated in the revenue records and the fact that the plaintiffs continue to remain in possession as had been found by both the courts below is a strong circumstance to indicate that the plaintiffs had no real cause of action to come up with a suit seeking either for declaration or for restraint order as they did not encounter any interference or disturbance from the defendant till then. The defendant who claims right, title and interest to the property through two sale transactions of the year 1965 and 1966 keeping quite

till 1990 or 1991 is a strong circumstance that the defendant himself had understood the sale transaction as not a real transaction. Not acting upon the sale transaction goes against the defendant and not asserting his right under the sale transactions till then probabalises the case of the plaintiffs that it was a sham, nominal and bogus transaction. The consideration mentioned in the sale transactions also is an indication that it was either not a true sale transaction for a proper consideration nor that it was a transaction for necessity as the sale consideration put together from the two transactions is about Rs. 3,000/- + Rs. 1,000/- whereas the evidence is that said Ramji had spent about Rs. 50,000/- for the marriages and therefore was in need for selling the property. The properties sold were two parcels, first one measuring 2 acres 4 guntas in Sv. No. 29/2 for a sum of Rs. 3,000/- and the other measuring 2 acres 9 guntas in Sy. No. 29/1 for a sum of Rs. 1,000/- in itself is an indication that the transactions cannot be for adequate consideration. This becomes obvious as even if 2 acres 4 guntas are sold for Rs. 3,000/- in the year 1965, in the year 1966 1 acre 8 guntas + 2 acres of land sold for mere Rs. 1,000/- is a very strong circumstance against the presumption of a proper consideration for the sale.

27. But, this aspect apart, the defence put up by the defendant to indicate that the defendant could not take steps for mutating his name in the revenue records due to the provisions of the Karnataka Prevention of Fragmentation & Consolidation of Holdings Act, 1966, on the face of it falls to ground as in the year 1966, the Act was not in force and nothing came in the way of the defendant having his name mutated till the year 1969 when the Act came into force for the first time and even thereafter the extent of holding of the defendant if the two sale transactions are taken being 3 acres 12 guntas in Sy. No. 29/2 which is an extent above a fragment and if it is not a fragment, it does not come in the way even if the Act was in force.

28. The defendant not acting upon to take any steps till the year 1990 when he gets alerted because of the application by the plaintiffs for having their names mutated which was published in chavadi and seeks to file objections is a very strong circumstance against the defendant to accept his version that either the transaction was genuine or that he had been put in possession of the same from the year 1965-66 itself.

29. Even this conduct of the defendant and the plaintiffs' claim that they had continued to remain in possession of the property also goes in favour of the plaintiffs for the purpose of limitation as if the plaintiffs had remained in possession of the property in question and there was no disturbance to their possession which is probabalised by the supporting oral evidence of PWs-1 to 3 and the revenue records never having shown the name of the defendant as a cultivator or person in possession, it cannot be said that the plaintiffs if they had filed a suit in the year 1992, it is barred by limitation as the plaintiffs had continued to remain in possession of the property and under the impression that they are the owners of the property and the time such impression is sought to be

disturbed by any adverse claim, that can be taken to be the starting point for limitation.

30. Accordingly, I answer the two questions which had been determined for examination by this court to have been rightly answered by the lower appellate court and they do not call for any interference at the hands of this court in the second appeal which is hereby dismissed.

31. Parties are left to bear their own costs throughout.