

(2011) 11 KAR CK 0206

In the Karnataka High Court

Case No : Regular Second Appeal . No. 93 of 2007

D.L. Srinivasa Shetty Represented By His Pa Holder Sir. D.L.
Gopala Krishna Shetty

APPELLANT

Vs

S.P. Krishnachari

RESPONDENT

Date of Decision : 29-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2011) 11 KAR CK 0206

Hon'ble Judges : B. Manohar, J

Bench : Single Bench

Advocate : P. Mahesha and Sri. B.J. Krishna, for the Appellant; H.C. Kavitha, for R1 to R5, for the Respondent

Final Decision : Dismissed

Judgement

B. Manohar

1. Though the matter is listed for admission, with the consent of the parties, the appeal is taken up for final disposal.

2. Appellant who is the plaintiff in O.S. No. 381/1989 has filed this second appeal, being aggrieved by the judgment and decree dated 24-07-2006 made in R.A. No. 40/1997 passed by the Civil Judge (Sr.Dn.) Hunsur confirming the judgment and decree dated 19-4-1997 made in O.S. No. 381/1989 passed by the Court of Munsiff and JMFC at H.D. Kote, wherein the suit filed by the plaintiff was dismissed by the court below.

3. The facts of the case are as follows:

The plaintiff filed a suit seeking for declaration declaring that he is the absolute owner of the suit schedule property and also for consequential relief of permanent injunction restraining the defendants from interfering with the possession and enjoyment of the suit schedule property. In the plaint, it is

contended that the land bearing Katha No. 748, site No. 281 measuring 15 feet East to West and 100 feet North to South situated at Sargur Town, H.D. Kote Taluk was purchased by the plaintiff from one S.P. Siddaehari S/o. Puttaswamachar under the registered sale deed dated 25-1-1972. After purchasing the said property, he got changed the katha in his name and he has also paid arrears of tax from 1965-66 to 1972-73. Thereafter, he made an application to the Sargur Municipality for grant of permission to construct the shop premises and after obtaining the permission on 15-5-1980 constructed two shop premises and let out a small portion of the vacant site to one Nagarajegowda to run a Bunk Shop and he is receiving rent from Sri. Nagarajegowda. The first defendant is the grandson of Thayamma who is the elder sister of Puttaswamachar. He is the Municipal Councilor and powerful person in the locality and he got changed katha in his name though he has no right, title in respect of the suit schedule property and sold the suit schedule property bit by bit to the defendants No. 2 to 5. On the basis of the said sale deed, defendants 2 to 5 started interfering with the possession and enjoyment of the plaintiff in respect of the suit schedule property. In view of that, the plaintiff filed a suit seeking for declaration as well as permanent injunction.

4. In pursuance to the notice issued by the Trial Court, defendants 1 to 5 appeared through the counsel and filed their joint written statement denying the assertion made by the plaintiff in the plaint with regard to ownership of the land and contended that the plaintiff has no right, title in respect of the suit schedule property. Siddachari who is the alienee of the suit schedule property has no right or title to alienate the property. Hence, the plaintiff will not get any right over the said property and also contended that the plaintiff is the permanent resident of Bangalore and was never in possession of the suit schedule property; hence he is not entitled for any injunction.

5. According to the defendants, Puttaswamachar is the original katheddar of the suit schedule property. He had executed a registered gift deed dated 15-8-1944 gifting the suit schedule property in favour of his elder sister Thayamma. Since then she has been in exclusive possession and enjoyment of the said property till her death. She executed a Will dated 30-6-1982 bequeathing the property in favour of the first defendant. On the basis of the said Will, the first defendant got changed the katha in his name and he was in possession of the suit schedule property till he sold the same bit by bit to defendants 2 to 5 under the registered sale deeds dated 11-8-1986, 1-9-1986, 10-9-1986 and 2-2-1987 for a valuable consideration of Rs. 5,000/- each. Since then, defendants 2 to 5 are in respective possession of the suit schedule property purchased by them. It was further contended by them that the suit filed by the plaintiff is not maintainable on the ground that the plaintiff without seeking for declaration and cancellation of the sale deed executed in favour of defendants 2 to 5, has sought to declare him as the absolute owner of the suit schedule property. It is also contended that the suit filed by the plaintiff is barred by limitation and sought for dismissal of the same.

6. On the basis of the pleadings of the parties, the Trial Court framed following issues:

- (i) Whether the plaintiff proves his title to the suit schedule property?
- (ii) Whether he proves his possession of the suit schedule property?
- (iii). Whether the suit is barred by time?
- (iv) Whether this court has no pecuniary jurisdiction to try the suit?
- (v) Whether the Court fee paid is not sufficient?
- (vi) Whether the suit is not maintainable for the reasons as contended in para 8 of the written statement?
- (vii) Whether the plaintiff is entitled to the declaration sought for?
- (viii) Whether the plaintiff is entitled to the relief of permanent injunction sought for?
- (ix) What decree or order?

7. The plaintiff in order to prove his case, examined his Power of Attorney as P.W.1 and also examined one other witness as P.W.2 and got marked the documents as Ex.P. 1 to Ex.P.9. On behalf of the defendants, the first defendant was examined as D.W. 1 and also examined another witness as D.W.2 and got marked the documents as Ex.D1 to Ex.D16.

8. The Trial Court considering the oral and documentary evidence let in by the parties held issues 1 to 3, 7 and 8 in the negative and issue No. 6 in the affirmative and no finding has been given on issues 4 and 5. Consequently, by its judgment and decree dated 19-4-1997 dismissed the suit filed by the plaintiff holding that the plaintiff is not entitled for the relief sought for by him.

9. Being aggrieved by the judgment and decree passed by the Trial Court, the plaintiff preferred R.A. No. 40/1997 on the file of the Civil Judge (Sr.Dn.) Hunsur, contending that the judgment and decree passed by the court below is contrary to law. The Trial Court has not properly appreciated the oral and documentary evidence adduced by the plaintiff and wrongly concluded that the property said to have been gifted/executed by Puttaswamachar in favour of Smt. Thayamma and the suit schedule property as one and the same. The Trial Court erred in holding that the suit is not maintainable for the relief of declaration, injunction without seeking for the relief of cancellation of sale deeds executed in favour of defendants 2 to 5. The judgment and decree passed by the Trial Court is opposed to law, facts and probabilities of the case, hence sought for allowing the appeal by setting aside the judgment and decree passed by the Trial Court.

10. The lower Appellate Court after considering the arguments addressed by the parties, framed the following points for its consideration:

- (i) Whether the plaintiff-appellant was successful in proving his title and possession over the suit schedule property?
- (ii) Whether suit filed was well within time?
- (iii) Whether the findings given by the Trial Court on issue Nos. 1 to 3, 6 to 8 are correct?
- (iv) Whether judgment and decree of the Trial Court needs to be interfered with?
- (v) What order?

11. The lower Appellate Court on reappreciating the oral and documentary evidence adduced by the parties held point Nos. 12, and 4 in the negative and point No. 3 in the affirmative, consequently, by its judgment and decree dated 24-7-2006 dismissed the appeal confirming the judgment and decree passed by the Trial Court.. Being aggrieved by the judgment and decree passed by the courts below, the plaintiff-appellant preferred this appeal.

12. Sri. P. Mahesh, learned counsel appearing for the appellant contended that the judgment and decree passed by the courts below are erroneous, illegal either under law or on facts of the case. The finding of the court below that S.P. Siddachari son of Puttaswamachar has no right to alienate the property in favour of the appellant is also misconceived. The gift executed by Puttaswamachar in favour of Thayamma in the year 1944 is not acted upon. The mutation entry in respect of the suit schedule property stands in the name of Puttaswamachar. Further the Will executed by Thayamma in favour of first defendant was also not proved in accordance with law. Hence, the judgment and decree passed by the court below is perverse and sought for setting aside the same by allowing this appeal.

13. On the other hand, Smt. H.C. Kavitha, learned counsel appearing for respondents 1 to 5 argued in support of judgment and decree passed by the courts below. She has contended that the father of Siddachari gifted the property in favour of Thayamma who is his elder sister as per the registered Gift Deed dated 15-8-1944. She has been in actual possession and enjoyment of the said property till her death. She has executed a Will on 30-6-1982 bequeathing the said property in favour of the first defendant who is the grandson of Thayamma. The first defendant by virtue of the Will executed by his grandmother on 30-0-1982 he became the absolute owner and got changed the katha in his name and alienated the property in favour of defendants 2 to 5. Hence, the question of Siddachari selling the suit schedule property in favour of the plaintiff does not arise. He has no right or title to alienate the property. Both the courts on appreciating the oral and documentary evidence came to the conclusion that the appellant is not entitled for any relief and dismissed the suit as well as the appeal filed by him. The finding recorded by the courts below is purely a question of fact and the same is not liable to be interfered by this court exercising its power u/s 100 of CPC and sought for dismissal of the same.

14. I have carefully considered the arguments addressed by the parties and perused oral and documentary evidence let in by the parties.

15. Having heard the learned counsel for the parties, the point for consideration in this appeal is as to whether the appellant has made out any case for interference with the concurrent findings recorded by the courts below?

16. It is the case of the plaintiff that originally Puttaswamachar is the owner of the property. After his death, his son Siddachari sold the suit schedule property in favour of the plaintiff on 21-1-1972. Since then he has been in possession and enjoyment of the property getting the katha changed in his name. He has obtained permission from the TMC Sargur for construction of two shop premises and given on rent the vacant site in favour of Nagarajegwoda for setting up of a Bunk Shop. However, the defendants are interfering with his possession and enjoyment and sought for a declaration and injunction against the defendants. On the other hand, the case of the defendants is that Puttaswamachar, the father of Siddachari has gifted the suit schedule property in favour of his elder sister Thayamma as per the registered gift deed dated 15-8-1944 and she bequeathed the suit schedule property as per the Will dated 30-6-1982 in favour of the first defendant and the first defendant alienated the property in favour of defendants 2 to 5. Hence, the plaintiff has no light in respect of the suit schedule property.

17. The plaintiff in order to prove his case examined himself through Power of Attorney as P.W.1 and got marked the documents as Ex.P. 1 to Ex.P.7. In his evidence he has deposed that the suit schedule property belonged to Puttaswamachar, he has sold the said property in favour of one Narasimhegowda as per Ex.P.8. The said Narasimhegowda sold the said property in favour of Siddachari as per the sale deed Ex.P.9. Siddachari sold the said property in favour of the plaintiff as per Ex.P.2. He has constructed 2 shops after obtaining permission from the Competent authority and leased a portion of property to run a bunk shop. In the cross-examination he expressed his ignorance about the facts of the case. He also admitted that he do not know as to when Puttaswamachar died and how many sons he had. He further admitted that the 2nd defendant is in possession of some vacant site, and he does not know from what date he kept a chop in the suit schedule property.

18. P.W.2 is an independent witness. Though he has deposed in his examination-in-chief that the plaintiff is in possession, in the cross-examination he has admitted that defendant No.2 is in possession of the suit schedule property.

19. The first defendant was examined as D.W.1. He has reiterated the contentions taken in the written statement and contended that as per the registered gift deed Ex.D.6 dated 15-8-1944, his grandmother Thayamma became the absolute owner. In turn, she has bequeathed the said property as per Ex.D.7 the Will dated 30-6-1982 bequeathed the property in favour of the first defendant, hence Siddachari has no right to alienate the property. Nothing contrary has been elicited in the cross-examination. He has examined one

Madaiah as D.W.2 to show that the defendants are in possession of the suit schedule property.

20. The records clearly disclose that originally Puttaswamachar is the owner of the property. As per the registered gift deed dated 15-8-1944, he gifted the property in favour of his elder sister Thayamma. Thayamma bequeathed the said property as per the Will dated 30-6-1982 in favour of the first defendant who is the grandson of Thayamma. From the date of the gift deed, Puttaswamachar ceased to be the owner of the property. Hence, the question of selling the suit schedule property in favour of Narasimhegowda as per Ex.D.8 and Narasimhegowda in turn selling the property in favour of Siddachari as per Ex.D.9 does not arise. Siddachari is not the owner of the property to alienate the suit schedule property in favour of the plaintiff. The plaintiff has not produced any material to show that Siddachari is the owner of the suit schedule property, so that he has right to alienate the property. The said Siddachari though available, he was not examined to prove his case before the Trial Court, and even though the plaintiff is available, he has also not stepped into the witness box. The plaintiff has failed to prove that Siddachari is the owner of the properties. Though the property was gifted in the year 1944, the katha continues to be in the name of Puttaswamachar. It appears that, taking advantage of the same. Sale deeds Ex.P.8, Ex.P9 and Ex.P2 have been executed, though the Puttaswamachar has no right in the suit schedule property. The respondents have produced necessary materials to show that the suit schedule property has been gifted to his grandmother and she bequeathed the said property in favour of the first defendant. On the basis of the said document, mutation entries have been mutated in his name and he became the absolute owner of the suit schedule property. Hence the question of declaring the plaintiff as absolute owner does not arise. Since the plaintiff is not in possession, granting permanent injunction does not arise. Hence, I hold the point framed in this appeal against the appellant.

21. Both the courts have concurrently held that plaintiff is not the owner in possession and enjoyment of the suit schedule property. The finding recorded by the courts below is purely a question of fact and the appellant has not made out any case to interfere with the order passed by the court below. There is no substantial question of law to be decided in this appeal Accordingly, the appeal is dismissed.

22. Parties to bear their own costs.