

(2005) 12 KAR CK 0001

In the Karnataka High Court

Case No : Regular Second Appeal No. 1034 of 2005

H.C. Nagappa (deceased) by L.Rs.

APPELLANT

Vs

Thairunnisa (deceased) by L.Rs.

RESPONDENT

Date of Decision : 12-12-2005

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : AIR 2006 Kar 112 : (2006) 4 CivCC 205 : (2006) 2 RCR(Civil)
12204 : (2006) 2 RCR(Civil) 244 : (2006) 1 RCR(Rent) 297

Hon'ble Judges : V.G. Sabhahit, J

Bench : Single Bench

Advocate : K. Raghavendra Rao, for the Appellant; Vasanthi Associates, for the Respondent

Final Decision : Dismissed

Judgement

V.G. Sabhahit, J.—This appeal by the plaintiff is directed against the judgment and decree dated 17th January, 2005 passed by the Fast Track Court, Tarikere in R.A. No. 50 of 1991 dismissing the appeal and confirming the judgment and decree passed by the Court of Munsiff, Tarikere in O.S. No. 237 of 1989, dated 29th June, 1991 dismissing the suit of the plaintiff for specific performance of agreement of sale executed by the defendant or in the alternative refund of advance amount or in the alternative if the Court comes to the conclusion that there is cancellation of agreement of sale, to declare that the plaintiff has perfected his title by adverse possession.

2. I have heard the learned Counsel for the appellant. The learned Counsel for the appellant submitted that the appellant had filed an application for amendment of the plaint to include additional particulars regarding revenue entries by adverse possession and the same has been concurrently rejected by the First Appellate Court as in the plaint itself there is an alternate prayer to declare that the plaintiff has perfected his title by adverse possession, if the Court holds that agreement of sale has been cancelled with effect from 1-1-1971.

3. I have considered the contentions of the learned Counsel with reference to the material on record. The plaintiff filed the suit seeking for specific performance of the contract, wherein the defendant agreed to sell the schedule property in favour of the plaintiff by an agreement of sale dated 19-9-1968 for a consideration of Rs. 30,000/- and received an advance amount of Rs. 5,500/- and thereafter, the plaintiff made payment amounting to Rs. 7,600/- and though the plaintiff is ready and willing to complete his part of contract, the defendant did not execute the sale deed. It is averred that if the Court comes to the conclusion that if the agreement of sale has to be cancelled by the notice issued by the defendant, the plaintiff may be declared as an owner by adverse possession as he has been in possession of the property for more than 12 years adverse to the interest of the defendant. The suit was resisted by the defendant denying the averments and execution of agreement of sale and further averred that even otherwise, by notice dated 1-1-1971, the alleged agreement has been cancelled and the plaintiff is not, entitled to specific performance nor declaration of title by adverse possession as the plaintiff was not in possession pursuant to agreement of sale under part performance of contract. The Trial Court framed appropriate issues having regard to the pleading and reliefs. On behalf of the plaintiff, the plaintiff was examined as P.W. 1 and he also examined P. W. 2 to P.W. 4 and got marked Exs. P. 1 to P. 36. On behalf of defendant, defendant was examined as D.W. 1 and Ex. D. 1 was got marked. The Trial Court after considering the contention of the parties and the material on record, answered issues against the plaintiff and held that the plaintiff is not entitled for any of the relief sought for in the suit and accordingly, dismissed the suit of the plaintiff by judgment dated 29th June, 1991. Being aggrieved by the said judgment and decree, the plaintiff preferred Regular Appeal No. 50 of 1991 and in the appeal, the plaintiff filed a memo stating that the appellant is not interested in pursuing the relief for specific performance of agreement of sale and return of the advance amount as claimed in the suit and confines his prayer for declaration of title by adverse possession and also filed an application LA. No. 17 under Order 6, Rule 17 to delete the averment made in the plaint regarding the prayer for specific performance and prays to include regarding ingredients of adverse possession at paragraph 12 to the effect that the plaintiff has been in long and undisturbed possession. The First Appellate Court by judgment dated 17th January, 2005 held that the application filed under Order 6, Rule 17 is liable to be dismissed and held that the plaintiff has failed to prove that he has perfected/his title by adverse possession as the plaintiff claimed to be in possession pursuant to agreement to sale under the part performance u/s 53 of the Transfer of Property Act, 1882 and if an amendment was sought before the First Appellate Court on 3-3-2000 for giving up the prayer for specific performance, the plaintiff could not have claimed adverse possession. However, the First Appellate Court held that the plaintiff proved that he was put in possession of the schedule property and he has been in possession and he can be evicted only in accordance with law and the possession can be taken only after informing the plaintiff and accordingly, with the said observation, dismissed the appeal and the application filed by the

plaintiff before the First Appellate Court. Being aggrieved by the same, the plaintiff has preferred second appeal.

4. It is clear from the perusal of the material on record that the plaintiff claimed specific performance of the agreement of sale dated 19-9-1968 averring that the defendant had put the plaintiff in possession of the schedule property pursuant to part performance of agreement of sale and he was in possession of the schedule property pursuant to said agreement of sale and as such, the prayer for specific performance of agreement of sale and in the alternative, if the Court comes to conclusion that the agreement of sale has been cancelled, the plaintiff may be declared as the owner of the schedule property by adverse possession and the Trial Court after considering the material on record held that the plaintiff is not entitled to any of the reliefs sought in the suit, has sought to file an appeal challenging the same. It is also clear from the perusal of the judgment of First Appellate Court that the prayer for specific performance under part performance of contract and in the alternative, for refund of advance amount was given up by filing a memo dated 3-3-2000. It is well-settled that a person who claims to be in possession of the schedule property pursuant to agreement of sale, u/s 53 of the Transfer of Property Act cannot claim adverse possession and wherefore, the question of plaintiff claiming adverse possession in the light of prayer for specific performance do not arise. If at all, the said prayer could be considered only from the date of filing of the memo. In view of the matter, since the First Appellate Court has rejected the application for amendment and has held that the plaintiff is in possession of the property and he could be evicted only in accordance with law by the defendant by filing a suit for possession, it is open to the plaintiff-appellant to raise such contention that are open to him in the said suit for possession as the application for amendment of plaint to include the additional ingredients of adverse possession has been rejected. Accordingly, I hold that the finding recorded by the Courts below do not arise any substantial question of law to be decided in this case.

5. Accordingly, appeal is dismissed with the said observations.