

(1957) 08 KAR CK 0006
In the Karnataka High Court
Case No : Second Appeal No. 78 of 1952-53

Jade Bhaskara Naik

APPELLANT

Vs

Mariappala Basappa and Others

RESPONDENT

Date of Decision : 14-08-1957

Acts Referred:

Mysore Civil Procedure Code, 1911 — Section 100

Citation : AIR 1958 Kar 14 : (1957) ILR (Kar) 120 : (1957) 35 MysLJ 246

Hon'ble Judges : Das Gupta, C.J

Bench : Single Bench

Advocate : K.R. Gopi Vallabha Iyengar, for the Appellant; V. Krishnamurthy, for the Respondent

Judgement

1. The appellant before me is the purchaser of the property in suit in an execution sale. He claims a declaration that he is the hawkdar of the schedule land as he is in possession and that he is entitled to recover Rs. 676/- being the crop compensation for the year 1946-47 and Rs. 264-1-0 being the reconditioning charges, making together a sum of Rs. 940/1/-. The decree in execution of which he purchased the property in question was a decree obtained in O. S. No. 269 of 1930-40 against defendants 1 and 2 in this suit by one Yalegara Durgappa. The decree-holder, after he had obtained the said decree, assigned it to the present appellant. In execution of the said decree the property in suit was attached on 14th December 1939. It was thereafter sold, and was purchased by the present appellant. The said sale was confirmed on 31st May 1946. The plaintiff's case is that thereafter he obtained delivery of possession of the said property on 31st October 1947 through Court and has since been in possession thereof.

2. It appears that for the period between 1942 to 1947 the Military was in possession of the said property and the crop-compensation which was payable for such possession was Rs. 676/- per year. Some time in 1947, the said property was derequisitioned and Rs. 264-1-0 was awarded as reconditioning

charges to the owner of the land. It appears that on 19th May 1943 defendants 1 and 2, in whose name the khata of the suit land stood, had sold the suit property to one Bongale Kalappa.

At this stage it should be mentioned that the father of defendants 1 and 2, one Gowdara Rudrappa, and the father of defendants 3 and 4 in "this suit, Mariappala Rudrappa, were two brothers. The property in suit stood in the khata in the name of Gowdara Rudrappa and thereafter in the name of defendant 1 Mariyappa. On 28th July 1943, the said property was re-conveyed by Bongal Kalappa in favour of defendants 1 and 2, and on the same day the said defendants sold the same to defendants 3 and 4.

It appears that the crop-compensation in respect of the suit land for the year 1942-43 was paid to defendant 1 by the military authorities, and the crop-compensation for the year 1943-44 was paid to defendants 1 and 2. After their said purchase, the defendants 3 and 4 applied to the military authorities for payment of the compensation and reconditioning charges to them, and the said authorities paid Rs. 940-1-0, being the total amount of crop-compensation for the year 1946-47 and the reconditioning charges.

It is the payment of this amount which gave rise to the present suit. The plaintiff claimed that he was entitled to the said payment as he had already purchased the property in execution sale and was in possession. He filed the present suit for the relief which I have already mentioned.

3. I should have mentioned that defendants 3 and 4 claimed the property on their own right. In other words, their case was that about 30 years ago there was a partition between Mariyappala Rudrappa and Gowdars Rudrappa, and as a result of that partition the suit land came to be owned by Mariyappala Rudrappa.

After the death of Mariyappala Rudrappa it devolved on the said defendants 3 and 4, who are his sons. The case of defendants 3 and 4 also was that Mariyappala Rudrappa and after his death defendants 3 and 4 were in possession of the suit land. As for the sale deed executed on 28th July. 1943 in favour of the said defendants by defendants 1 and 2, the case of defendants 3 and 4 was that it was an unnecessary document and was obtained by way of additional safety and under the following circumstances.

On being apprised that defendants 1 and 2 had deceitfully sold away to Bongale Kalappa the suit land, they caused a notice to be issued to Kalappa and thereafter a panchayat was convened at which it was settled that Kalappa should reconvey the suit land to defendants 1 and 2 who, in turn, should reconvey it to defendants 3 and 4.

4. The first court decreed the suit in favour of the plaintiff. On appeal, the lower appellate court reversed the said decree and dismissed the suit. The present appeal has been filed by the plaintiff against the said decision of the lower appellate court.

5. The first question which arises for my consideration is whether or not, although this is a second appeal, the appellant should be entitled to dispute the findings of fact arrived at by the lower appellate court. Mr. Gopivallabha Iyengar, appearing on behalf of the appellant, contended before me that at the date when this suit was instituted, which was 18th October, 1949, the Mysore CPC was in force, and u/s 100 of the said Civil Procedure Code, a second appeal would lie among others on the ground, namely, an erroneous finding on a material question of fact in those cases in which upon any question of fact the finding of the appellate Court differs from that of the court of the first instance and in that respect Section 100 of the Mysore CPC was different from the Central CPC (Act V of 1908).

The latter Act came into force in the State of Mysore on the 1st of April, 1951. Mr. Gopi-vallabha Iyengar contended before me that the rights of the parties in this suit in the matter of appeal would, therefore, be governed by the Mysore CPC which was in force at the date of the institution of the suit. In support of that contention he relied on the decisions of the Supreme Court in the case of Garikapatti Veeraya Vs. N. Subbiah Choudhury, , in which it was held that the institution of a suit carried with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

In the case, B. R. Das, C. J, in His Lord-ship's judgment, observed, that the right of appeal is a vested right and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

On the authority of this decision Mr. Gopi-vallabha Iyengar contended that as soon as the suit was instituted, the right of appeal as embodied in the Mysore Code of Civil Procedure, which was then in force, vested in the parties thereto, and even though the Central CPC came into force in the State of Mysore on 1st April, 1951, the said right still continued. The plaintiff, therefore, had the right to prefer a second appeal not only on points of law but also on questions of fact, as allowed by the Mysore Civil Procedure Code.

6. In answer to the said contention of Mr. Gopivallabha Iyengar, Mr. Krishnamurthi, appearing on behalf of the respondents, contended that the plaintiff had no doubt a right to prefer a second appeal but, whether or not the court would hear such an appeal on fact or on law, was a matter for the court to decide and not a matter of right of the parties. In other words, his contention was that the parties, though they may have a right of appeal, have no right to contend that the court must hear the appeal on questions of fact as well,

Mr. Krishnamurthi argued that the said question namely whether or not the court would hear the appeal on facts or on law relates to a matter of procedure, i.e., the mode in which the court should conduct the hearings, and cannot be the subject matter of a right of the parties.

7. I am unable to accept the contention of Mr. Krishnamurthi on this point. Section 100 of the Mysore Civil Procedure Code, as was in force on the date of the institution of the suit, gave a right to a party thereto to prefer a second appeal not only on questions of law but also on questions of fact, and according to the decision of the Supreme Court it is a vested right which was preserved to the parties to the suit till the rest of the career of the suit.

It follows, therefore, that the said right of appeal not only on questions of law but also on questions of fact as allowed by the Mysore C. P. Code is still preserved to the parties to this suit, notwithstanding the fact that the Mysore CPC had ceased to exist and was substituted by the Central CPC at the date when the appeal came to be filed. In my opinion, it would not be correct to say that the question as to whether a case should be heard on facts or on law, is a question relating to a matter of procedure.

It is, in my opinion, the right of the parties which the law, which was in force at the date of the institution of the suit, conferred on them and to hold that the appellant cannot agitate question of fact in such appeal, although there may be divergence of opinion between the first court and the lower appellate court, would amount to curtailing the said right. This, in view of the decision of the Supreme Court to which I have referred, is not permissible. I therefore hold that the appellant has the right to agitate not only questions of law but also questions of fact in this case.

8. Coming then to the merits of this case, it seems to me that there are two fundamental questions to be decided in this appeal. One of them is the question of possession and the other the question of title. If, for instance, it is found that the plaintiff was in possession of the property in question at the date of suit, then he would be entitled to succeed, unless the contesting defendants established their title thereto.

If, on the other hand, it is found that the defendants were in possession at the said date then it would be for the plaintiff to establish his title, and unless he is able to do so the suit must fail. The question as to which of the parties was in possession at the date of the institution of the suit, in my opinion, becomes very material for the purpose of this appeal. I should, however, mention that there is the further question of adverse possession. One of the pleas of defendants 3 and 4 in this suit was that they had acquired right by adverse possession.

The said defendants, contend that even though they otherwise failed to establish their title to the suit land, they should succeed as they were in possession thereof for the period necessary to acquire title by adverse possession. With these observations, I shall first consider the question as to which of the two parties was in possession of the suit property at the date of the institution of the suit.

9. On behalf of the plaintiff, the plaintiff himself gave evidence, and his case, as I have already mentioned, was that after the sale in his favour which was

confirmed on 31st May, 1946 he obtained delivery of possession through Court. In support of his case, he filed the delivery receipt dated 31st October 1947 (which is Ex. F in this case) showing that he had obtained delivery of possession through Court.

He has also filed a certified copy of the application which he had made to the Court (Ex. L) for delivery of the suit land to him on the strength of his being the purchaser in Court-sale. Besides the said two documents, the plaintiff also relied on a receipt patta (Ex. C) issued to him by Achutha Rao, Shanbhogue, who was D. W. 1 in this suit, in respect of the said land, and a Meerasay Receipt being Ex. H also granted in his favour by one Talasar Hanumappa who is said to have cultivated the suit land for the years 1947-48.

The plaintiffs' case was that for the year 1948-49 he leased the suit land to one Basappa under a lease-deed which is Ex. J-I, and for the year 1949-50 he had leased the suit land under a lease-deed (Ex. J) to one Amaroti Basappa's son. The plaintiff has also filed in this case the receipt patta for the year 1949-50 also written and issued to him by D. W. 1 (Ex. K). It also appears from the evidence of D. W. 4, who was the Patel of Hanagavadi village since the year 1936, that since the year 1947 the suit land has been standing in the khata in the name of the plaintiff and during all the three years from 1947 he has collected kadayam in respect of the suit land only from the plaintiff and from no others.

These are the materials on which the case of the plaintiff regarding his possession of the suit land rests. I should mention that D.W.1 Achutha Rao, Shanbhogue of the village admitted in his evidence that the delivery receipt, Ex. F. was attested by him and I have already mentioned that it was he who issued to the plaintiff the receipt patta for the year 1948-49 which is Ex. G. This witness further admitted that Exhibit K. receipt for the year 1949-50 was written and issued by him to the plaintiff.

10. As against the said evidence adduced on behalf of the plaintiff the evidence given on behalf of the contesting defendants on the question as to who was in possession of the land in suit at the date of the institution of the suit does not seem to be very satisfactory. Although a number of witnesses have given evidence regarding such possession. on a proper analysis it would appear that the evidences of the said witnesses are really of no value.

D. W. 1 no doubt in his examination-in-chief said that the suit land belongs to defendant 3 and his brother defendant 4, and when he took charge of the shanbhogi office, which was in 1938-39 defendants 3 and 4 were in possession of the suit land. But in his cross-examination he said that he was not present when Military took possession from defendant 3 and he was not personally present when defendant 3 retook delivery from the Military authorities. Thus, on the material point, viz. as to who obtained possession after the military left the premises, the evidence of this witness does not seem to be of any value at all.

11-13. (After discussing the remaining evidence adduced by the defendants his

Lordship proceeded:)

14. This is the state of evidence adduced on behalf of the parties on this point. In my opinion, the evidence in this case establishes that on the date of the suit it was the plaintiff who was in possession of the suit land. The evidence of the plaintiff on this point is supported in material respects by the documentary evidence to which I have referred. I have already said that the evidence of the witnesses called on behalf of the contesting defendants cannot be relied upon for the purpose of holding that defendants 3 and 4 at the date in question were in possession of the suit land. I am also not prepared to hold that defendants 3 and 4 leased out the suit land to Koonoor Siddappa or that the said Koonoor Siddappa was cultivating the land.

15. That being my view on the question of possession, the next question I have to determine is the question of title. I have already mentioned that the declaration which the plaintiff seeks in the plaint is that he is the hawkdar of the schedule land as he is in possession. In other words, he bases his title to the suit land by virtue of his being in possession thereof, such possession having been delivered to him by the Court. In the premises, it would be, in my opinion, for the contesting defendants to establish their title to the suit land if they want to have the claim of the plaintiff dismissed. The question, therefore, is whether or not the said defendants have been able to establish their said title.

16. The contesting defendants in this case seek to base their title on a partition which, according to them, took place between their father Mariappala Rudrappa and uncle Gowdara Rudrappa. They are not basing their title on the sale deed executed by defendants 1 and 2 on the 28th July, 1943. The learned Munsiff has commented in his judgment that the said defendants could not possibly base their title on the said sale deed for the obvious reason that the same came into existence after the property was attached in execution of a decree. They therefore, according to the learned Munsiff, had to invent the theory of partition and tried to support the same as best as they could.

Whether or not that is the true position, the fact remains that the contesting defendants are basing their case on an alleged partition which, they say, took place 30 years ago and it will have to be seen how far the said defendants have been able to establish their said case. In the first place, there is no document evidencing the said partition and the proof of such partition rests merely on the oral evidence adduced on behalf of the said defendants.

Of the eleven witnesses called on behalf of the defendants, only one of them, i.e., D. W. 2 Gurusiddappa, has said in his evidence about the said partition between the father of defendants 3 and 4 and the father of defendants 1 and 2 and of the allotment of the suit land at that partition to the father of defendants 3 and 4. In his examination-in-chief all that he said was that the two Rudrappas divided in estate over 30 years ago and at that partition the suit land was allotted to the share of Mariappala Rudrappa. This is all that is said about the

alleged partition in his examination-in-chief.

It was in cross-examination that he said that he was present at the division and that the deceased Yerrappa, deceased Mariappa and deceased Rudrappa were also present at the division. Even then, the said defendant did not give any more particulars about the alleged division. Later on in his said cross-examination he said that there was no panchayati and the division was not effected on the lands and that he was not present when the two Rudrappas took possession of their shares. In my opinion, it would be unsafe to hold that there was in fact such a partition merely on the evidence of this witness.

The circumstances to which the learned Munsiff in his judgment has referred also negative the possibility of such a partition. In the first place, the khata of the suit land stood all along in the name of Gowdara Rudrappa and after his death it was continued in the name of his son, the 1st defendant. This fact is not disputed by any of the witnesses examined for the" contesting defendant. It appears from the evidence of D. W. 2 that he was the patel of Hanagavadi village from 1909 to 1918. Thereafter, the 1st defendant officiated as patel for some time.

Then again, D. W. 2 officiated as patel from 1924 to 1930. After 1930 the 2nd defendant took charge as patel. Thus defendants" witness No. 2 was, as found by the learned Munsiff, the patel of Hanagavadi village when the khata of the suit land was changed to the name of the 1st defendant. If therefore there was in fact already a partition of the suit land as alleged by this witness, it is difficult to see why the khata of the suit land was allowed to be continued in the name of Gowdara Rudrappa and in any event why even after the death of Gowdara Rudrappa, the Khata was not changed either to the name of Mariappala Rudrappa or to the names of his two sons defendants 3 and 4, but was changed in the name of the son of Gowdara Rudrappa, i.e, the 1st defendant.

It is also difficult to see why D. W. 2, who was the patel for the periods I have mentioned, did not tell the contesting defendants or their lather to get the khata changed in their names. Mr. Krishnamurthi contended before me that, under the Mysore Land Revenue Code, on the death of "a registered occupant" of an unalienated land, the Deputy Commissioner shall cause the name of his eldest son or other person appearing to be his heir to be registered in his stead.

He further contended that "registered occupant" under the said Code "signifies a sole occupant or the eldest or principal of several joint occupants whose name is authorisedly entered in the Government records as holding unalienated land whether in person or by his co-occupant, tenant, agent, servant, or other legal representative". That being so," the learned Advocate contended that on the death of Gowdara Rudrappa, who was the registered occupant of the holding in question, the name of his eldest son must come to be recorded. It however appears from the said definition of "registered occupant" that a person in order to be a "registered occupant" must satisfy two conditions namely (a) he must be the occupant either as sole occupant or as principal of several joint occupants

and (b) his name must be "authorisedly entered" in the Government record as holding an unalienated land. What that expression "authorisedly entered" means has not been made clear. I find it difficult to hold that once a name is entered in a Government record the Government has no authority to change it even if it be proved that the land no longer belongs to and is not in occupation of the said person.

That, in my opinion, does not follow from those provisions of the Mysore Land Revenue Code to which Mr. Krishnamurthi referred. In any event, Defendants' Witness No. 2 who, as I have said, was the patel of Hanagavadi village at the material time, does not offer that explanation for the continuance of the name of Gowdara Rudrappa and, after his death, of the name of his son, the 1st defendant, in the khata of the suit land. What he says is that this was so because Gowdara Rudrappa was older than Mariappala Rudrappa and both of them were joint till they divided and after Gowdara Rudrappa's death the khata continued in the name of his son, the 1st defendant. In any event, this is a circumstance which, in my opinion, militates against the contesting defendants' case, viz. that there was a partition 30 years ago.

17. The next circumstance, which is also material for the present purpose, is that the crop compensation in respect of the suit land for the year 1942-43 was paid to the 1st defendant and the compensation for 1943-44 was, paid to defendants 1 and 2. In my opinion,, the learned Munsiff was right in observing that, if defendants 3 and 4 were owners in possession of the suit land and if the Military authorities had taken possession from them then there was no earthly reason why defendants 1 and 2 should have received crop compensation from the Military authorities for those years.

On this point, the case of the contesting defendants was that the 1st defendant received crop compensation amounts for those years but paid back them to defendant 3 later on. The trial Court has not accepted that case but the lower appellate Court has taken a contrary view on this point. I find difficulty in accepting this case of the contesting defendants on this point. In the first place, no receipt or any document of any kind has been produced to support this story of repayment.

The lower appellate Court has merely relied on the evidence of defendant 3 and held on such evidence that the said compensation amounts were paid back to him by defendants 1 and 2. I cannot accept the evidence of the said defendant on this point. This witness in his cross-examination said that since the time the Military took possession he and the 1st defendant became enemies. If that is so, how could he depend on the 1st defendant for the purpose of receiving those amounts from the Military and how could defendant 1 on his part repay the said amount without taking any kind of receipt from the 3rd defendant? The learned Munsiff also, who saw the 3rd defendant giving evidence before him, has commented on the manner in which he deposed before him on certain other points,

In this connection, I should refer to the statements contained in paragraph 4 of the written statement filed by defendants 3 and 4 in which they stated that defendants 1 and 2 and defendants 3 and 4 are agnates and there exists illwill between them. The learned advocate appearing for the appellant drew my attention to the fact that one of the alleged pan-chayatdars, Gurubasappa (D. W. 8), in giving his evidence in support of the contesting defendants' ease, said that a number of persons, viz. Subbanna, Kuruvatheppa and Sivappa witnessed the 1st defendant paying off the 3rd defendant; but those persons, i.e. Subbanna, Kuruvatheppa and Sivappa, although they gave evidence before the trial Court, did not say anything about the payment being made in their presence by the 1st defendant to the 3rd defendant, nor did the 3rd defendant in his evidence say anything about their witnessing the said payments. Taking all these circumstances into consideration, I agree with the view taken by the learned Munsiff on this point.

18. The next circumstance, to which I should refer, is the obtaining of a sale deed by defendants 3 and 4 in their favour from defendants 1 and 2. In my opinion, the trial Court rightly pointed out that, if defendants 3 and 4 were the owners of the property in question having been in possession thereof for a long number of years, there was no necessity for them to take such a reconveyance of the suit land from defendants 1 and 2 under the sale deed (Exhibit HI).

The learned Advocate for the respondents drew my attention to the terms of the sale deed wherein it is stated quite clearly that defendants 1 and 2 had sold to the said defendants for Rs. 300/- the land in question which was in possession and enjoyment of the sellers (defendants 1 and 2) having been purchased from Kalappa, son of Bongale Seshappa. In the first place, there was no necessity at all for the defendants to obtain, such a sale deed. In the next place, there was also no necessity for stating in the sale deed that the property in question was in possession and enjoyment of defendants 1 and 2 having been purchased from Kalappa.

The matter does not rest there. In the sale deed it is further mentioned that in the khata the name of the 1st defendant Mariappa was recorded. It was also mentioned that defendants 1 and 2 had received the sale amount in the presence of the witnesses mentioned in the document. I have already mentioned that the ease of the contesting defendants on this point was that this sale deed and the reconveyance from Bongale Kalappa were both executed at the direction of the said panchayatdars.

I really see no reason why, if the case of the contesting defendants is true, the true facts were not mentioned in the sale deed and why it was not stated that the property in fact belonged to defendants 3 and 4 and that defendants 1 and 2 had no claim in respect thereto. Why was the whole thing put in the garb of a sale deed containing all sorts of false recitals? In any event, this is a circumstance which, to my mind, weighs heavily against the case of defendants 3 and 4.

Before concluding this part of the case, I should mention that the learned Munsiff in his judgment has mentioned that when the 3rd defendant was in the box he was asked whether it was necessary for him to make a purchase of the land which belonged to him and the said defendant admitted that it was totally unnecessary. He was then asked the reason as to why he took the sale deed from defendants 1 and 2 in respect of the suit land of which he claimed to be the owner. The learned Munsiff observed that he allowed a great length of time for the said defendant to make an answer to that question and he was unable to make any answer.

In the deposition of this witness, as recorded by the learned Munsiff, the specific question on this point and the answer thereto have been recorded by him which read as follows :

"Question: (Original in Kannada omitted) (Why did you take the sale deed in respect of your land from defendants 1 and 2?) Answer: (I allowed the witness a long time and he is unable to answer the question.) (Original in Kannada omitted). (The answer in brackets is volunteered by the witness after a long lapse of time.)"

19. Taking all the facts and circumstances and the evidence adduced in this case into consideration, I have to come to the conclusion that the view taken by the learned Munsiff is correct and the contesting defendants have entirely failed to establish their title to the suit land. There remains, therefore, the question of Adverse Possession. This question, to my mind, presents no difficulty. On the evidence given on behalf of the contesting defendants which I have carefully analysed, the said defendants have failed to establish their case of adverse possession.

In my opinion, the plaintiff has been able to establish that he was in possession of the suit land at the date of the institution of the suit. He has also established that he obtained such possession through Court having purchased the land in question in an execution sale.

20. In the result therefore, the appellant must succeed. The decree of the lower appellate Court is therefore set aside and the decree of the trial Court is restored. The appellant is entitled to the costs of this appeal.

21. Appeal allowed.