

(2014) 11 KAR CK 0192
In the Karnataka High Court
Case No : Regular Second Appeal No. 1811/2007

Lakshmamma

APPELLANT

Vs

Javaregowda Since

RESPONDENT

Date of Decision : 13-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 96

Karnataka Co-operative Societies Act, 1959 — Section 101, 101(2)(b)(iv), 118, 3, 70

Citation : (2014) 11 KAR CK 0192

Hon'ble Judges : A.V. Chandrashekara, J

Bench : Single Bench

Advocate : B.S. Nagaraja, Advocate for the Appellant; T.S. Mahantesh, Advocate for the Respondent

Judgement

A.V. Chandrashekara, J.—Defendant Nos. 1 and 2 of an original suit bearing O.S. No. 165/1993 which was pending on the file of the Court of the then Munsiff and JMFC, Hunsur, have filed this second appeal, since the suit filed by the first respondent as plaintiff against them for the reliefs of declaration of title and possession of Schedule "B" properties has been decreed and the appeal filed before the First Appellate Court in R.A. No. 63/1996 is dismissed.

2. Respondent No. 2 herein is the third defendant in the said suit. Parties will be referred to as plaintiff and defendants as per their ranking given in the Trial Court. First respondent-plaintiff is dead and his legal representatives have been brought on record.

3. Facts leading to the filing of the suit in O.S. No. 165/1993 are as follows:

"One person by name Kullegowda, son of Javaregowda had three sons. They are (1) Madegowda, (2) Ningegowda and (3) Javaregowda. Third son Javaregowda S/o. Kullegowda is the plaintiff. Second defendant-Kullegowda the second appellants is the first son of Madegowda. First defendant Lakshmamma, is the wife of second defendant. Third defendant Sathyanarayana is stated to have

purchased the suit schedule properties in an auction conducted by the Primary Land Development Bank, Hunsur Taluk."

Lands in Sy. Nos. 44/2, 44/4, 45 and 46 and 60/3 belonged to the joint family of Kullegowda and his sons. The said Kullegowda died when plaintiff was hardly 10-12 years. Madegowda, being the eldest son of Kullegowda, became the Manager of the joint family and managed the joint family properties and even celebrated marriages of his brothers when they were residing as undivided members of the joint family.

Madegowda died a year prior to the filing of suit i.e., he died somewhere in 1992. He was speechless 4-5 years prior to his death because of paralytic attack. When Madegowda was hale and healthy, he had effected partition of the joint family properties amongst himself and his brothers orally in the presence of well wishers and relatives of the parties. According to the plaintiff, all the three sons of Kullegowda had been allotted 1/3rd share each in all the survey numbers. Partition is stated to have taken place in the year 1964-65. After the oral partition, the parties had intimated the revenue authorities to effect khata and accordingly khata had been changed into the name of the respective sharers through proper mutation proceedings vide MR 4/64-65. All the three sons were enjoying their respective shares separately as absolute owners.

Defendant Nos. 1 and 2 dispossessed the plaintiff from schedule "B" property, the share allotted to him all of a sudden and plaintiff was shocked to know that his lands had also been mortgaged by Madegowda to obtain loan and that he did not repay the same. As a result of the same, the entire extent of lands in all these three survey numbers came to be auctioned by the Primary Land Development Bank-mortgagee and third defendant is stated to have purchased "A" schedule property, which is inclusive of the share of the plaintiff, at a public auction. Later on, he is stated to have sold the same in favour of defendants 1 and 2. Plaintiff had to file a suit for the reliefs of declaration that he is the owner of schedule "B" properties and for possession and also for mesne profits under Order 20 Rule 12 of CPC.

4. Defendants 1 to 3 chose to file a detailed written statement admitting the relationship of the parties. According to the defendants, plaintiff was not given any share in lands bearing Sy. Nos. 44, 45 and 46 and that he had been given a share only in Sy. No. 60. Madegowda had mortgaged schedule "A" properties measuring 11 guntas in Sy. No. 44/4, 2.24 acres in Sy. No. 45, 1.33 acres in Sy. No. 46 to obtain loan. Since he could not repay the loan, he became defaulter and the mortgaged lands were brought into public auction and third defendant purchased the same and the auction was confirmed. Later on defendant Nos. 1 and 2 have purchased the same for valuable consideration vide sale deed dated 06.12.1990. Suit is stated to be not maintainable for not making Primary Land Development Bank, as a party.

5. With these pleadings, they had requested the Trial Court to dismiss the suit.

On the basis of the above pleadings, following issues came to be framed:

"1. Whether the plaintiff proves that he has inherited the "B" schedule property through a family partition took place in 1964-65?

2. Whether the plaintiff proves that though he is the owner of "B" schedule property his brother Madegowda borrowed loan by mortgaging suit properties?

3. Whether the sale held by the P.L.D. bank in favour of 3rd defendant is invalid?

4. Whether defendants 1 to 2 proves that the plaintiff was not given any share in S. Nos. 44, 45 and 46 and he was allotted share only with S. No. 60?

5. Whether the defendants 1 and 2 prove that they acquired valid title to the suit properties through a registered sale deed dated 6.12.1990?

6. To what decree or order?"

6. Javaregowda himself has been examined as PW1 and two witnesses have been examined on his behalf about the partition that took place between himself and his brothers and the enjoyment of the properties by the sons of Kullegowda, after the partition. In all five witnesses have been examined on behalf of the defendants.

7. 26 exhibits have been got marked on behalf of the plaintiff and 13 exhibits have been got marked on behalf of the defendants. Ultimately, suit came to be decreed on 27.09.1996 answering issues 1 to 3 in the affirmative and issues 4 and 5 in the negative. It is this judgment and decree which was called in question before the Court of Civil Judge (Sr.Dn.), Hunsur, in R.A. No. 63/ 1996 under Section 96 CPC.

8. Several grounds had been urged before the Appellate Court. After hearing the arguments, the learned Judge of the First Appellate Court has dismissed the appeal and thereby confirming the judgment and decree passed by the Trial Court.

9. Following are the substantial questions of law framed by this Court after hearing the learned counsel appearing for the appellants:

"1. Whether in the light of the provisions of Section 89-C(3) of the Karnataka Co-Operative Societies Act, 1959, the suit as brought by the respondent/plaintiff for declaration of title was maintainable?

2. Whether the judgments of the courts below are perverse on account of non-consideration of the effect of Section 89-C(3) of the Karnataka Co-operative Societies Act, 1959?

3. Whether the suit filed by the respondent/ plaintiff was maintainable without impleading PLD Bank which sold the suit schedule property in public auction in exercise of its power as mortgagee?"

10. Learned counsel for the appellants has vehemently argued that PLD Bank, Hunsur to which lands had been mortgaged by Madegowda is a necessary party in the light of mortgaged properties being sold in a public auction by the same Bank. He has relied upon a decision reported in the case of Cheepoorappanavara Munisami Vs. Gangamma, . Relying upon the said decision, learned counsel for the appellants has relied upon Section 89C(iii) of the Karnataka Co-operative Societies Act, 1959. According to him, Section 89C(iii) is comprehensive enough to include even the ground and circumstances authorizing the sale, as the remedy of the aggrieved party is only by way of claiming damages. Hence it is contended that it was not competent for the plaintiff to question the sale which was duly held under Section 89A of the Act, and subsequently, confirmed by the authorities concerned.

11. He has placed reliance upon another decision of this Court in the case of Vadigeri Jambanna Vs. Hospet Co-operative City Bank Ltd., . According to him, Section 118 of the said Act, creates a bar on the jurisdiction of the Civil Courts and the bar is dependent on the provisions of the Act in this regard. It is argued that sub-section (2) of Section 101 read with Rule 38(5) of the Rules provide that any person who is aggrieved by a sale effected under the provisions of the Act has to file his objection before the Sale Officer for setting aside the sale at the first instance. It is argued that in case such claim or objection is rejected, then only the party against whom an order is made can institute a suit in a Civil Court to establish his right, as per Section 101(2)(b)(iv) of the above Act.

12. Apart from these two decisions, learned counsel for the appellants has relied upon yet another decision of this Court in the case of Suresh Zingade Vs. The Managing Director, Karnataka Milk Federation and The General Manager, Karnataka Milk Federation, . It is argued that a claim arising in context of dispute between agent and society and touching upon business activities of society, there is a bar provided under Section 70 of the Act, and therefore, suit is not maintainable.

13. Per contra, learned counsel appearing for the first respondent-plaintiff relied upon a decision of this Court in the case of Vinayaka Griha Nirmana Sahakara Sangha Ltd. Vs. Karnataka Appellate Tribunal, . What is held in the said decision is that the dispute relating to title and possession of land cannot be a dispute within the meaning of sub-section (1) of Section 70 of the Act. As such, dispute does not relate either to the constitution, management or the business of the Co-operative Societies. It is argued that the bar under Sub-section (3) of Section 70 of the Act, only relates to the issue being raised in Civil Court and is not applicable to the Appellate Authority under Section 71 of the Act.

14. Admittedly, the dispute between the plaintiff and defendant Nos. 1 to 3 is in regard to the title set up by the plaintiff relating to "B" schedule properties, which is a part and parcel of "A" schedule property and mortgaged by deceased Madegowda in favour of PLD Bank, Hunsur. Consequently, relief of possession is based upon the main relief of declaration of title sought for by the plaintiff. Both

the Courts have specifically held that Madegowda had effected division of all the joint family properties during his lifetime between himself and his two brothers and all of them had got 1/3rd share each. It is in this regard, the evidence of defendant No. 1 examined as DW2 is relevant. She is none other than daughter-in-law of deceased Madegowda and the wife of second defendant-the son of the deceased Madegowda. She has relied upon the sale deed executed by third defendant in her favour as well as in favour of her husband vide Ex. D2 relating to the schedule "B" properties.

15. She has specifically deposed in her cross-examination conducted on 23.08.1996 that her father-in-law had divided lands in all the survey numbers into three equal parts between himself and his brothers and they have been cultivating their respective shares. She has further admitted in her cross-examination that her father-in-law had mortgaged only his share to the bank in order to obtain loan. She has feigned ignorance about the extent of land mortgaged to the bank. Her cross-examination further discloses that her father-in-law died five years prior to her examination and herself, her husband and inlaws were living separately. She has feigned ignorance about the total extent of lands in Sy. Nos. 44/2, 44/4, 45 and 46. But she has admitted in her cross-examination that total extent of land in Sy. No. 44/4 is 36 guntas, 5.20 acres in Sy. No. 45 and 3.33 acres in Sy. No. 46 and 2.07 acres in Sy. No. 60/3.

16. The common written statement of defendant Nos. 1 to 3 discloses about the averment in regard to the allotment of share to the plaintiff in Sy. No. 60 only. Both the Courts have specifically held that defendants have failed to prove that land in Sy. No. 60 had been allotted to his share and he was not allotted any share in other four survey numbers. The very cross-examination of DW2 stares at the very defence taken in the written statement. The relevant portion of the cross-examination dated 23.08.1996 demolishes the case of the defendants. These aspects have been considered by the Trial Court as well as the First Appellate Court, at length.

17. The assertion of PW1 that lands in all the survey numbers were divided amongst themselves is supported by the entries found in Record of Rights, geni and pahani patrikas marked as Exs. P3 to P22. The names of Madegowda, Javaregowda and Ningegowda are found in column No. 9 to an extent of 1/3rd share each and this is reflected in the index of lands and Record of Rights marked as Exs. 23 to 25. Even Col. No. 18 of index of lands at Exs. P23 to 25 the Index of Land discloses that there was division and 1/3rd share had been allotted to them.

18. If the family was joint then the name of Madegowda alone would have found a place as the Manager. The very fact that the names of these three persons found in revenue records with 1/3rd share each against the names of these three persons would establish that there was a division between Madegowda and his two brothers in respect of the lands and 1/3rd share had been given.

19. In order to bring the suit within the bar contemplated under Section 3 sub-section (3) of Section 70 of the Act, there should be a dispute touching upon the constitution, management or the business of a Cooperative Society. In the present case, the dispute between the parties relates to the title to the lands in question. Plaintiff claims land by virtue of partition effected between himself and his two brothers by none other than Madegowda the Manager. Third defendant has claimed title by virtue of a sale deed executed by the Society. Admittedly, the said Madegowda, could not have mortgaged all the lands inclusive of the lands held by the plaintiff and another brother.

20. Ex. P2 is the mortgage deed executed vide registered mortgaged deed on 30.06.1975 by Madegowda in favour of the Bank. The schedule appended to the said mortgage deed discloses that 31 guntas of land in Sy. No. 44/4, 5 acres 8 guntas in Sy. No. 45 and 3.27 guntas in Sy. No. 46 had been mortgaged and by the time he mortgaged, he had no absolute title in respect of the extent shown in Ex. P2. He had only 1/3rd share in respect of these lands and by that time, there was already a partition between them. It is not the case of the defendants that Madegowda, being the Manager of the joint family had mortgaged these properties for the benefit of the family. As already discussed the RTCs prior to 1976 depict the names of the three brothers in Col. Nos. 9 as well as 10. If there was no division by metes and bounds between the three brothers, names of three brothers would not have been shown in Col. Nos. 12(2) of RTCs column earmarked for implicating the names of the persons in their possession.

21. The defendants have filed pahanis for the year 1989-90 only that too after the sale of schedule "A" lands by PLD Bank in favour of defendants and not prior to that. As already discussed, RTCs and revenue documents filed by the plaintiff disclose that there was already division and 1/3rd share had been allotted in all these properties to the plaintiff. If really the entire extent of land bearing Sy. No. 60/3 alone had been allotted to the plaintiff, the name of the plaintiff would not have been entered in Col.9 in Exs. D3 to D5 produced by the very defendants.

22. It is pertinent to note that the boundaries of 11 guntas, 2.24 acres and 1.33 acres mentioned in the sale certificate Ex. D1 are similar to the boundaries mentioned in mortgage deed Ex. P2 and the same is in respect of entire lands measuring 31 guntas in Sy. No. 44, 5.08 acres in Sy. No. 45 and 3.27 acres in Sy. No. 46. On comparing the sale certificate marked as Ex. D1 and mortgaged Deed Ex. P2, it is clear that the Bank has sold out actually the entire lands to defendant No. 3 by mentioning the less extent i.e., 11 guntas, 2.24 acres and 1.33 acres. It is pertinent to remember that boundaries always prevail over survey number and therefore, the boundaries mentioned in the sale deed executed in favour of third defendant by the Bank would include the entire share of the plaintiff. Thus the Bank could not have been sold the entire extent of lands under the guise of the boundaries mentioned in the sale deed.

23. Plaintiff is not directly or indirectly questioning the authority of the Bank in obtaining mortgage deed and granting loan. Plaintiff is virtually challenging the

authority of Madegowda to execute a mortgage deed inclusive of the share held by him after actual division several decades ago. Therefore, the decision reported in Vinayaka Griha Nirmana Sahakara Sangha Ltd. Vs. Karnataka Appellate Tribunal, is aptly applicable to the facts of the case. The other decisions are not applicable to the facts of the present case. Therefore, plaintiff was not expected to challenge the proclamation made by the Bank or Sale Officer or the auction conducted thereafter. Hence the suit filed for the reliefs of declaration of title and possession is perfectly maintainable and impleading of PLD Bank was not at all required in the present case. Section 89(C)(iii) of the Act, is not applicable to the present case.

24. Hence, substantial question of law No. 1 is answered in the affirmative, substantial question of law No. 2 is held in the negative and substantial question of law No. 3 is answered in the affirmative. Both the Courts have assessed the evidence on the touchstone of intrinsic probabilities. They have adopted right approach to the real state of affairs. No illegality or perversity is found in the judgments. Consequently, there are no merits in the appeal.

ORDER

Appeal is dismissed. Parties to bear their own costs.