
(2009) 09 KAR CK 0008

In the Karnataka High Court

Case No : Regular Second Appeal No's. 46 and 579 of 2005

Madhukar Vishweshwar Shet Pokle

APPELLANT

Vs

Shailesh and Others

RESPONDENT

Date of Decision : 16-09-2009

Acts Referred:

Evidence Act, 1872 — Section 50

Citation : (2010) 3 KCCR 1974

Hon'ble Judges : A.S. Bopanna, J

Bench : Single Bench

Advocate : V.P. Kulkarni, for the Appellant; Ravi G. Sabhahit, for C/Respondent 4 and 5 and L.M. Sheelvant, for GPA Holder of R1A-G R-2, R3, R-6, R-8, R-7, R-9 and R10, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Bopanna, J.—The appellant in R.S.A No. 46/2005 is the plaintiff in O.S. . No. 26/1984 which resulted in R.A No. 7/1997, The very same appellant is also the appellant in R.S.A No. 579/2005, In that case, he was the defendant in O.S. No. 202/1984 which resulted in R.A. No. 27/2003. The suit in O.S. No. 26/1984 was filed by the appellant herein and the third respondent herein seeking for a declaration that they are the owners of the suit scheduled properties and also to declare the sale deed dated 17.06.1981 and 30.05.1983 as illegal. The said suit was dismissed by the Prl. Civil Judge, Karwar on 12.01.1989. The appeal in R.A No. 7/1997 was dismissed by the District Judge at Karwar on 30.09.2004. The suit in O.S. No. 202/1984 was filed by the respondent in these appeals who was one of the defendants in O.S. No. 26/1984. The suit in question was filed seeking for declaration and possession of the suit schedule property, which in fact is also the subject matter in O.S.No26/1984. The said suit (O.S. No. 202/1984) was decreed in favour of the plaintiff by the Prl. Civil Judge (Jr. Dn.), Honnavar on 13.01.2003. The appeal in R.A No. 27/2003 was dismissed by the Civil Judge (Sr. Dn.), Honnavar on 13.12.2004. The rival contentions being similar in both the

suits, the contention pleaded in the plaint was literally the defence in the written statement. Though the two suits and regular appeals were considered and disposed of in different Courts, the conclusion of all the four Courts is the same. Hence the same appellant herein in both these appeals has suffered concurrent findings and judgment in the said two proceedings. Against such concurrent findings and judgment, the appellant is before this Court in these appeals. Since the parties are the same, dispute being on same set of facts and further since a common substantial question of law is to be considered, the appeals were heard together and is being disposed of by this common judgment.

2. Though several facts have been pleaded and contentions have also been urged, the pleading in the two sets of cases need not be restated. Only the gist of the contention which arise for consideration need to be summarised. Since some of the original parties to the suit have expired and the legal representatives are on record and further since the array of parties is with different rank in the two suits, the contesting parties would be referred in the original name of one of the rival contestants for the sake of convenience, and clarity. The reference to Sri. Madhukar would mean the appellant herein i.e., the plaintiff in O.S. No. 26/1984 and defendant in O.S. No. 202/1984. The reference to Late Timmanna Hebbar would mean the original contesting respondent in these appeals who is the plaintiff in O.S. No. 202/1984 and contesting defendant in O.S. No. 26/1984 who is presently represented by his legal representatives.

3. The gist of the contention in the realm of consideration is that the undisputed fact is that the property bearing No. 1851 (old No. 1474/A) of Honnavar T.M.C belonged to one Smt. Sulochanabai Mhapsekar who died intestate on 17.08.1966. Sri. Madhukar contends that he and the other plaintiff are the children of Smt. Ambabai, who is the sister of Smt. Sulochanabai Mhapsekar. According to him, the said Smt. Sulochanabai Mhapsekar was unmarried and therefore issueless. Hence on her death, Sri, Madhukar and another claim to have succeeded to the property in question, being the only legal representatives left behind by her, there being no other class-I heir. He therefore, disputes the contention that Smt. Sulochanabai Mhapsekar had married one Sr. Sitaram and had a son named Sri. Shashikant Mhapsekar. It is in that context, he has sought for declaration against the sale deeds and of title to the property and has alternatively claimed adverse possession. On the other hand, Sri. Timmanna Hebbar, claims to have purchased the property from Sri. Shashikant Mhapsekar, who according to him is the son of Smt. Sulochanabai Mhapsekar and therefore claims valid title and as such has sought declaration of title and possession. It is their case that Sri. Madhukar is the occupant of the building earlier on licence which has been terminated. An attempt in seeking occupancy right of agricultural lands by filing Form No. 7 by showing Smt Sulochanabai Mhapsekar was filed earlier and as such cannot now contend to be her legal representatives. Therefore, the rival contentions would indicate that the entire issue revolves around the fact as to whether Sri. Shashikant Mhapsekar is established to be the son of Smt. Sulochanabai Mhapsekar. If that has been established, he would be

entitled to succeed to the property of Smt. Sulochanabai Mhapsekar and the sale made by him to Timmanna Hebbar would remain valid. If that is not established, then the transaction between him and late Timmanna Hebbar would be invalid and the consequence would be that in the absence of any other legal representatives Sri. Madhukar and another being her nephews would succeed.

4. In this background, the substantial question of law framed for consideration at the time of admission on 10.03.2005 and 31.03.2006 respectively which is common in both these appeals is as follows:

Whether the concurrent finding of the Courts below that the deceased first defendant was the son of Sulochanabai is perverse, contrary to law and evidence on record?

5. Since the entire matter revolves around that aspect, the relevant issues framed in both the suits alone be noticed and extracted in order to consider the manner of consideration of the evidence available on the said issues.

In O.S. No. 26/1984 the additional issues reads as hereunder:

1. Whether the plaintiffs prove that, Smt. Sulochanabai Mhapsekar died issueless?
2. Whether the defendant No. 3 proves that, defendant No. 1 is the son of Sulochanabai Mhapsekar?

In O.S. No. 202/1984 the relevant issues reads as hereunder:

2. Whether the plaintiff proves that one Shashikant S. Mhapsekar is the legal heir of the deceased Sulochana Mhapsekar?

6. The plaintiff in O.S. No. 26/1984, Sri. Madhukar examined himself as PW- 6, while second plaintiff examined himself as PW-1 and witness PW-2 to PW-5 and 7 to 9 were examined and marked documents at Ex. P-1 to P-58. The third defendant examined himself as DW-1 and a witness as DW-2 and marked documents at Ex. D-1 to D-51.

7. The Plaintiff in O.S. No. 202/1984 had expired, as such one of the legal representatives Sri. Ganesh examined himself as PW-1 and marked documents at Ex. P-1 to P-53. The defendant Sri. Surendra examined himself as DW-1 and witnesses at DW-2 to 3 were examined and no documents were exhibited.

8. Though the two suits were pending before two different Courts, one at Honnavar and the other at Karwar, the evidence was analysed by the respective trial Courts and both the Courts had arrived at the same conclusion and held the above extracted relevant issues in favour of Late Timmanna Hebbar and held that Smt. Sulochanabai Mhapsekar was married to Sri. Sitaram and that Sri. Shashikant is their son. In both the cases, the respective lower Appellate Courts also upheld such findings after reappreciation of the evidence. While coming to such conclusion the Courts below apart from noticing the oral evidence has also relied on the documents at Exs. D-5 A & B, 28, 29, 31, 32, 34, 35, 40 41, 42 and

the relevant documents are noticed as Ex. P9,12 and 27 in the other suit..

9. Sri. V. P. Kulkarni, the learned Counsel for the appellant while assailing the finding on the said issues would contend that all the four Courts below have committed an error. When the relationship and status of persons is in issue, the evidence of persons having personal knowledge of relationship would be relevant as provided u/s 50 of Evidence Act. In this regard, the evidence of PW-4, 6 and 7 is that of relatives of Smt. Sulochanabai, who had stated that she was unmarried and she was spending life in temple activities. As against the same, there is no evidence to prove her marriage. The documents at Ex.D-40 to 42 would not be sufficient since they are not conclusive and D-40 has come into existence just prior to the suit at a stage when there was negotiation. As against the same, in the Gift deed and mortgage deed executed by Smt. Sulochanabai, she has not mentioned her husband's name. The photographs relied on cannot be proof of relationship since such photograph might have been taken since all were residing in the same area. It is further contended that Sri. Ramesh Dhardar who claims to be the brother of Smt. Sulochanabai cannot be true since neither do they have same surname nor is the caste same.

10. Sri Ravi Sabhahit, learned Counsel for the respondents contended that the Courts below have considered the evidence in its correct perspective. When there were documents to establish the relationship and status, the question of relying on the oral evidence of interested witnesses did not arise. The learned Counsel contends that identity of the persons seen in the photograph cannot be in dispute and the contention that the photographs has come into existence as they were all residing there cannot be countenanced when particularly the three persons alone are seen. That apart, the documents at Ex. D-40 to 42 are all public documents and in fact the evidence of PW-8 who was examined by the opposite side would indicate that it has come from proper custody and is in existence as per law. It is further contended that if in fact the appellants were related to Smt. Sulochanabai, the question of filing the Form No. 7 (Ex. D-37) at an earlier point of time indicating Smt. Sulochanabai as the landlady would not arise. Therefore, it would be fatal to contend with regard to relationship and also adverse possession. Hence the learned Counsel seeks for dismissal of both the appeals.

11. In the light of the rival contentions urged and the manner of consideration by all the four Courts, the substantial question of law framed is to be considered keeping in view the limited scope available to this Court while entertaining an appeal u/s 100 of the Civil Procedure Code. In this regard it is seen that the trial Court in O.S. No. 26/1984 has considered the evidence available on the aspect of relationship from para 13 of its elaborate judgment. In fact, each and every document and the oral evidence has been referred. Similar is the case in the other suit. Before proceeding further, considering the nature of the substantial question of law framed regarding perversity, it has to be stated that the test of perversity is;

i) Whether the evidence available on record has not been considered.

ii) Whether some material or evidence which is not available on record has been considered in arriving at a decision and

iii) Whether the conclusion based on the evidence is such that no reasonable person would arrive at such conclusion.

Hence, it has to be examined as to whether any one of the circumstances stated above exists in the instant case.

12. As already noticed, the evidence available on record is referred in detail by the Courts below and the judgments do not disclose nor has it been pointed out that any other document or evidence which is not available on record has influenced the ultimate decision. Hence the only question would be as to whether the decision is such that no reasonable person would arrive at in that background since the learned Counsel for the appellant has contended that the documents relied on does not establish the relationship and as such the oral evidence of PW-4, 6 and 7 should have been relied on.

13. In this regard, it is noticed that before referring to the said documents at Exs. 40 to 42, the trial Court has referred to the documents at Exs. P-17 to 19, 38, 45, 46, 48-50 and 52 to 56 wherein the name of Smt. Sulochanabai has been mentioned and also Ex. D-39 - reconveyance deed and has rightly held that the said documents would not help in concluding about the status of marriage. In that background the documents at Exs. P-57, 58, 58A and B and also Ex. P-33 has been referred and in that view Exs. D-7 and 8 are referred. The manner in which the same have been discussed and also thereafter proceeded to analyse the other documents which are relevant would show that there is no unreasonableness. Ex. D-40 is the certificate of death relating to registration of the death of Smt. Sulochanabai Mhapsekar in Bombay and the name is indicated as Sulochana Sitaram Mhapsekar. The date of death is indicated as 17.08.1966 and the registration is made on 24.08.1966. The document, Ex.D-41 is the Birth Certificate indicating the date of birth of Sri. Shashikant on 20.05.1933 and the name of father is indicated as Sitaram Laxman Mhapsekar and mother as Sulochana. Though the genuineness of the said document has been questioned by the learned Counsel for appellant, since it was registered on 31.12.1981, in my view that alone cannot nullify the document since such inclusion is made as per legal procedure and PW-8 who was examined on behalf of plaintiffs themselves has stated about the document. Further, Ex. D-42 is marks card of Secondary School Certificate Examination wherein the name is mentioned as Shashikant Sitaram Mhapsekar and that document is dated 01.07.1950. From the date of birth, if it is calculated it would be about 17 years of age. Though much has been made about Ex.D-41 being registered in 1981, if the said document is seen along with Ex.D-40 and D-42, the sequence would be complete to hold that Smt. Sulochanabai is the wife of Sri. Sitaram Laxman Mhapsekar and Sri. Shashikant is their son and the contents in the said documents cannot be a coincidence to relate to each other. In this regard, the trial Court has also noticed the contentions and analysed the same to come to its conclusion to rely on

Exs.D-40 to D-42 and as such there is absolutely no perversity. Hence the oral testimony of PW-4, 6 and 7 cannot in any event negative the documentary evidence. However, the trial Court has also analysed the veracity of the oral evidence. In fact, in the light of the said documents, a through analysis of the documents at Ex. P-57 and 58A and B is made. Apart from the said documents, detailed reference is made to the document at Ex. D-45, 47 and 48 being the order and deposition in R.R.T proceedings when Sri. Shashikant sought for change of revenue entries through Sri. Ramesh Dharadhar. One Smt. Sunita Mhapsekar objected to the same claiming to be the adopted daughter of Smt. Sulochanabai. Though the relationship of Ramesh Dharadhar with Smt. Sulochanabai is disputed, the same is based on assumptions with regard to surname and caste etc. In any event, the statement of Smt. Sunitha at Ex.D-48 would disclose that she admitted the relationship of Sri. Shashikanth as the son of Smt. Sulochanabai and claimed half share in the property. That apart, the evidence of DW-2 has been noticed to indicate that all the original documents relating to the property were available and the same have been handed over to the purchases. The evidence of the plaintiffs witness has been analysed from paragraph 24 onwards. In fact the documents which were material and marked as Exs.D-40 to 42 were the same documents which were marked as Exs.P9, 12 and 27 in the suit in O.S. No. 202/84 and has been accepted with similar reasoning.

14. In the backdrop of the findings and conclusion reached by the trial Court, the respective lower Appellate Courts have considered the matter and re-appreciated the evidence. More relevant would be the discussion in R.A. No. 7/1997 wherein a detailed discussion is made from para-15 onwards wherein the said documents at Ex.D-40 to 42 and Ex. P-58 to 58(b) has been discussed and a similar conclusion is reached. Once such conclusion was reached the lower Appellate Court has considered the mutual rights between the class-1 heir and the right as claimed by the sister's children and rejected the claim. The lower Appellate Court in R.A. No. 27/2003 has also adverted to these aspects of the matter from para-12 onwards wherein specific reference is made to the evidence on record. That apart, the lower Appellate Court has also considered the contention regarding adverse possession. As noticed hostile title was not asserted at the time of termination of their licence. Further, as already noticed above, Form No. 7 was filed at an earlier point in time and as such in any event cannot succeed in such contention.

15. Hence, the above discussion would disclose that the Courts below had considered the evidence available on record and arrived at a reasonable and appropriate conclusion and as such the same does not answer any one of the constituents of perversity stated above. As such, the substantial question of law framed in these appeals is answered against the appellants in both the above appeals.

In that view of the matter, the following:

ORDER

- i. The judgment and decree dated 17.02.1997 passed in O.S. No. 26/1984 and dated 13.01.2003 passed in O.S. No. 202/1984 and affirmed in R.A. No. 9/1997 on 30.09.2004 and in R.A. No. 27/2003 on 13.12.2004 are upheld.
- ii. The appeals in R.S.A. No 46/2005 and R.S.A No. 579/2005 stands dismissed
- iii. The appellant and all persons claiming under him are granted six months time to vacate and hand over vacant possession of the suit schedule property in O.S. No. 202/1984, subject to filing an undertaking affidavit within four weeks from today.
- iv. The affidavit shall undertake to pay the arrears of the mesne profits decreed and also pay the same within two months from today and also undertake to voluntarily vacate within six months without driving to execution and also not to sub-let, under-let or cause damage to the property.
- v. If the undertaking is not filed within the time or if the arrears are not paid as undertaken, the time granted would not enure to the benefit of the appellants and respondents would be entitled to execute the decree.
- vi. Parties to bear their respective costs in this appeal.