

**(2024) 02 KAR CK 0035**

**In the Karnataka High Court**

**Case No :** Regular Second Appeal No. 3008 Of 2007 (INJ)

Mohammed Yunus S/O Ismail Sab

APPELLANT

Vs

Honnamma W/O Kotrappa Since Dead By Lrs & Others

RESPONDENT

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**Date of Decision :** 16-02-2024

**Acts Referred:**

Hindu Succession Act, 1956 — Section 8

**Citation :** (2024) 02 KAR CK 0035

**Hon'ble Judges :** H.P. Sandesh, J

**Bench :** Single Bench

**Advocate :** B.M. Siddappa, P.M. Siddamallappa

**Final Decision :** Dismissed

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## **Judgement**

H.P. Sandesh, J

1. This appeal is filed challenging the judgment and decree dated 31.08.2007 passed in R.A.No.386/2001 by the Civil Judge (Sr. Dn.), Holalkere.
2. The parties are referred to as per their original rankings before the Trial Court to avoid confusion and for the convenience of the Court.
3. The case of the plaintiff before the Trial Court the plaintiff is the owner in possession of the suit schedule property having purchased the same from one Holiyappa S/o Hotappara Nagappa of Malladihalli village for valuable consideration under the registered sale deed dated 23.01.1993 and paying kandayam to the government having got mutated the revenue entries in his favour. The plaintiff further stated that the defendants are the strangers to the suit schedule property. The land of defendant No.1 is situated on the southern side of the suit schedule property and the defendants have put an eagle eye on the suit schedule property and having no manner of right, title or interest over the suit schedule property, the defendants are trying to interfere with the suit schedule property. Hence, the plaintiff has filed the suit for the relief of permanent injunction.

4. In pursuance of suit summons, defendant No.1 has filed the written statement which was adopted by the other defendants and all of them have denied the plaint averments. It is contended that one Holiyappa S/o Nagappa had filed a suit in O.S.No.216/1983 against defendant No.1 relating to the suit schedule property and the same came to be dismissed. The suit schedule property was given to defendant No.1 under the registered Will and she has been in possession of the suit schedule property since the death of Neelamma who has executed the Will in favour of defendant No.1 in respect of Sy.No.35/3 was got phoded as 35/3a and 35/3b and the entries in the revenue records are wrongly mentioned and the said mistake has been carried out based on the registered Will but the boundaries of the suit land are correctly mentioned. On the basis of the said mistake, Holiyappa S/o Nagappa has filed a suit which was dismissed and after having failed in the suit, the said Holiyappa S/o Nagappa with a mala fide intention and to cause trouble to this defendant has set up the plaintiff to file the suit based on the fraudulent sale deed. The said Holiyappa has no right to execute the sale deed in respect of the suit schedule property. The plaintiff will not get any title in respect of the suit schedule property under the said sale deed. Hence, the suit is vexatious.

5. The Trial Court taking into note of the pleadings of the parties, framed the following Issues:

1. Whether the plaintiff proves that he is in possession and enjoyment of the suit schedule property by him, and causing obstructions to the suit schedule property from the defendants?

2. Is there cause of action for the suit?

3. Whether Court fee paid is sufficient?

4. What order or decree?

6. The Trial Court after framing of the Issues, allowed the parties to lead their evidence. In order to prove the case of the parties, the plaintiff himself examined as PW1 and also examined two witnesses as PW2 and PW3 and got marked the documents at Ex.P1 to P8. On the other hand, defendant No.1 examined herself as DW1 and got marked the documents at Ex.D1 to D4. The Trial Court having considered both oral and documentary evidence placed on record granted the decree of permanent injunction in favour of the plaintiff. Being aggrieved by the judgment and decree of the Trial Court, an appeal was filed by defendant No.1 in R.A.No.386/2001 before the First Appellate Court. The First Appellate Court considering the grounds urged in the appeal, formulated the following points:

1. Whether the lower Court is justified in decreeing the suit of the plaintiff?

2. Whether the judgment and decree of the lower Court is required to be interfered with in this appeal?

7. The First Appellate Court having considered both oral and documentary

evidence placed on record, reassessed the evidence available on record and comes to the conclusion that the Trial Court is not justified in decreeing the suit of the plaintiff hence, answered point No.1 as negative and point No.2 as affirmative in coming to the conclusion that the judgment of the Trial Court requires interference. Being aggrieved by the judgment and decree of the First Appellate Court, the present second appeal is filed before this Court.

8. The grounds urged by the learned counsel for the appellant that First Appellate Court grossly erred in considering the title to the property while answering the question whether the plaintiff is in possession and enjoyment of the suit schedule property as on the date of filing of the suit and ought not to have gone to consider the question of title when the suit is filed only for the relief of bare injunction. The First Appellate Court grossly erred in taking into consideration the stray admission of the plaintiff in the cross-examination and comes to the conclusion that the plaintiff not at all enquired with regard to the title to the property while purchasing the land in question without taking into consideration of the fact that what were the entries in the revenue records as on the date of purchasing of the suit schedule property by the plaintiff and the very approach of the First Appellate Court is erroneous. Defendant No.1 has not produced any RTC extracts or any documents to show that defendant No.1 and her mother were in occupation and enjoyment of the land in question as on the date of purchasing of the property by the plaintiff. The First Appellate Court grossly erred in holding that the Trial Court failed to club both the cases while recording the evidence and the reasoning of the First Appellate Court for setting aside the judgment and decree passed by the Trial Court is bad in law. The counsel also prayed this Court to admit the appeal and frame the following substantial question of law:

1. Whether the First Appellate Court is right in law in setting aside the judgment and decree passed by the Trial Court without there being any valid reasons and without finding any arbitrariness, perversity and illegality in the judgment and decree passed by the Trial Court?

2. Whether the First Appellate Court is right in law while considering the possession of the plaintiff as on the date of filing of the suit in making rowing enquiry with regard to source of title to the property?

3. Whether the First Appellate Court is right in law in holding that the plaintiff has failed to prove his possession as on the date of filing of the suit though the sale deed and revenue records clearly goes to show that the plaintiff is in possession and enjoyment of the land in question?

9. This Court having considered the grounds urged in the appeal, while admitting the appeal framed the following substantial question of law:

“Whether the First Appellate Court was justified in holding that notwithstanding the sale deed on which the appellant had relied since there was a suit for declaration filed by defendant No.1 and the same having been dismissed though

reversed in the First Appellate Court, and in the face of appellant herein having challenged the same by way of a second appeal, whether the First Appellate Court was justified in applying the same in negating the sale deed of the appellant.”

10. The learned counsel for the appellant would vehemently contend that the First Appellate Court committed an error in reversing the finding of the Trial Court considering the title of the plaintiff and the First Appellate Court ought not to have considered the title and fails to take note of the very case of the plaintiff since there was a sale deed in his favour and possession has been delivered in his favour. On the other hand, it is the contention of the learned counsel for the respondents that the First Appellate Court has rightly appreciated and considered the comprehensive suit filed by the plaintiff in other suit and also taken note of the admission given by PW1 in the cross-examination. Having considered the grounds urged in the appeal as well as the oral submission and also considering the substantial question of law framed by this Court that whether the First Appellate Court was justified in holding that notwithstanding the sale deed on which the appellant had relied since there was a suit for declaration filed by defendant No.1 and the same having been dismissed though reversed by the First Appellate Court and in the face of appellant herein having challenged the same by way of second appeal, whether the First Appellate Court was justified in applying the same in negating the sale deed of the appellant, this Court has to reanalyze the material available on record since there is a divergent finding.

11. The case of the plaintiff before the Trial Court that he had purchased the suit schedule property from one Holiyappa and he has been in possession of the same. On the other hand, it is the contention of defendant No.1 that property was bequeathed in her favour by her mother. Whether the plaintiff has been in possession of the suit schedule property or not has to be looked into since the relief is sought only for permanent injunction. It is not in dispute that the plaintiff in support of his case examined himself as PW1 and also examined two witnesses as PW2 and PW3 and got marked the documents at Ex.P1 to P8. On the other hand, the defendants relied upon the certified copy of the judgment passed in M.A.No.50/1983, copy of atlas and RTC extracts.

12. Having perused the documents available on record it discloses that the plaintiff has filed a memo stating that original documents are produced in O.S.No.139/1998 and the judgment passed in O.S.No.139/1998 is challenged in R.A.No.62/2002. But both the suits i.e., O.S.Nos139/1998 and 500/1993 are in respect of very same Sy.No.35/3a. The present suit is filed by the subsequent purchaser from one Holiyappa who claims that gift deed was executed in his favour by his mother Ningamma. On the other hand, Honnamma who is the granddaughter of Gangappa had filed another comprehensive suit in O.S.No.139/1998. This suit is against the judgment passed in O.S.No.500/1993. The suit in O.S.No.500/1993, the plaintiff in O.S.No.139/1998 is defendant No.1 and also two other defendants for the relief of declaration and permanent

injunction. It has to be noted that when two suits are filed in respect of very same Sy.No.35/3a, the Trial Court ought to have clubbed the same and recorded the common evidence but not done the same and individually decided the suits. The First Appellate Court also taken note of the suit filed in O.S.No.139/1998 which is a comprehensive suit. When the present suit is filed for the relief of permanent injunction, the Court has to look into the fact that whether the plaintiff is in possession of the suit schedule property as on the date of filing of the suit and whether there was any interference in respect of the suit schedule property by the defendants. I have already pointed that defendant No.1 only filed the written statement and other defendants have adopted the same.

13. It is not in dispute that the plaintiff has relied upon the registered sale deed dated 23.01.1993. It is also the case of defendant No.1 that the said Holiyappa has no right to sell the suit schedule property and the suit schedule property was given in her favour by way of Will in the year 1981 itself. The plaintiff in his evidence contended that he has purchased the suit schedule property from Holiyappa on 23.01.1993 and the same is in his possession and the defendants have no right over the same. When PW1 was subjected to cross-examination, he categorically admitted that he did not verify that how his vendor got the property and also he did not enquire with him that how he got the property. In the cross-examination, a suggestion was made that defendant No.1 was growing crop in the suit schedule property but the said suggestion was denied and also denied the possession of the defendant No.1 in the cross-examination. But PW1 in his cross-examination claims that he is in possession and in order to prove the same, he has examined one witness as PW2 who reiterates the evidence of PW1. PW2 also in his cross-examination categorically admits that prior to the possession of the property by the plaintiff, he do not know who was in possession of the property. The evidence of PW2 is clear that he does not know who was in possession prior to the possession of the plaintiff. It is also important to note that in the cross-examination he categorically admits that he has no land of his own near the suit schedule property and also he categorically admits that the plaintiff had taken him for coolie work and he had gone there once and thereafter he has not at all gone there. Hence, it is clear that PW2 is a coolie of PW1 and he says that he had gone only once but he claims that the plaintiff is in possession of the suit schedule property. Thus, the Court has to look into the fact that whether his evidence can be considered as credible evidence. The said fact is also taken note by the First Appellate Court while considering the evidence of PW1 and PW2 in paragraph 19.

14. The other witness is PW3. He also claims that the suit schedule property was in possession of Holiyappa and the plaintiff has purchased the same from Holiyappa. This witness also in the cross-examination admits that he does not know his survey number property. But he deposed with regard to the suit schedule property and in the cross-examination, he admits that he is having the habit of consuming alcohol and on the date of giving evidence also he came in a drunken stage. Hence, the First Appellate Court comes to the conclusion that his

evidence is not a credible evidence.

15. The Trial Court also taken note of the evidence of DW1 wherein she claims that the property was gifted to her and her father's name is Holiyappa and grandfather is Gangappa. The suit schedule property is in her possession and it has come to her from her mother through Will. Defendants also mainly relies upon the document at Ex.D1 which is the certified copy of the judgment passed in M.A.No.50/1983 and other documents at Ex.D2 to D4 are against the documents at Ex.P1 to P8. No doubt, Ex.P1 is the sale deed under which the plaintiff had purchased the property from Holiyappa. It is admitted by the plaintiff in his cross-examination that he is a doctor. The Trial Court fails to take note of the answer elicited from the mouth of PW1 that he is the doctor by profession. But in the cross-examination he also admitted that same is not mentioned in the sale deed but he categorically admits that he never did any agricultural work.

16. This Court also while considering the other connected appeal taken note of the fact that the property bearing Sy.No.35/3 belongs to Gangappa. It is also taken note of the fact that Gangappa had executed a gift deed in favour of his grandson through his daughter Ningamma and made the provision in the year 1954 itself in respect of half portion of the property towards southern side. The said Gangappa retained remaining half portion of the land in Sy.No.35/3. It is also made an observation that if Gangappa really intend to give the entire property to the Ningamma or her son, he would have gifted the property in entirety. The fact that Holiyappa who is the son of Gangappa pre-deceased Gangappa is also not in dispute. This Court also taken note of the fact that the mother of defendant No.1 i.e., Neelamma was paying the tax in respect of the remaining property bearing Sy.No.35/3a retained by Gangappa and the Will was executed in favour of defendant No.1 in the year 1981 itself by said Neelamma who is the daughter-in-law of said Gangappa after the death of Gangappa.

17. It is also important to note that the vendor of the present plaintiff claims title in respect of this property under the document of gift deed of the year 1983 and already the property was conveyed in favour of defendant No.1 under the Will in the year 1981 itself. This Court also taken note of the fact that all the revenue entries are found in respect of Sy.No.35/3a though it stands in the name of different persons and the same is consequent upon mentioning of Sy.No.35/3b in the Will executed by the mother of defendant No.1. But immediately after the gift made in favour of defendant No.2, phodi was effected and retained portion of land by Gangappa is mentioned as Sy.No.35/3a. There was no testamentary document in favour of the vendor of the plaintiff by said Gangappa. But the vendor of the plaintiff claims the title based on the gift deed executed in the year 1983 by Ningamma. The Ningamma was not having any right though she is the daughter of Gangappa when the said Gangappa already made the provision in respect of half of the portion in favour of her son by executing a gift deed in the year 1954 itself. The material discloses that during the lifetime of said Gangappa,

the suit schedule property was in his possession and after his death, his daughter-in-law i.e., Neelamma and her daughter was in possession of the suit schedule property since her husband already pre-deceased by said Gangappa. Defendant No.1 is the daughter of said Neelamma. When this Court considered the fact that comprehensive suit was filed by defendant No.1 and also the First Appellate Court while appreciating the evidence taken note of the said fact and in connected matter also same has been discussed by this Court. In respect of half portion of the land, on account of death of original propositus Gangappa, his daughter-in-law who is the wife of his son Holiyappa and also defendant No.1 who is the granddaughter of said Gangappa comes under class-I heir under Section 8 of the Hindu Succession Act, 1956 wherein it discloses that if son pre-deceased, his children will also come under class-I heirs. Hence, the document of Will executed in favour of defendant No.1 by her mother will prevail and the plaintiff relies upon the document of sale deed of the year 1993 which is subsequent to the Will and also the title of which the vendor of the plaintiff claims is also subsequent to the Will. All these factors were taken note of by the First Appellate Court.

18. It is also specific case of the defendants that vendor of the plaintiff earlier also filed a suit in O.S.No.216/1983 against defendant No.1 relating to the suit schedule property and the same came to be dismissed on the ground that the suit schedule property was given to defendant No.1 under the registered Will and she has been in possession of the suit schedule property since the death of her mother Neelamma who has executed the Will in favour of defendant No.1. It is also the case of the parties that the entries in the revenue records are wrongly mentioned and the said mistake has crept in the registered Will and as a result, the plaintiff is claiming title over the suit schedule property based on the sale deed executed on mistaken entry found in the Will. The First Appellate Court also taken note of the boundaries which are mentioned in the Will and the boundaries will prevail. When such being the case, I do not find any error committed by the First Appellate Court on re-appreciation of evidence available on record and the Trial Court committed an error in coming to the conclusion mainly relying upon the sale deed at Ex.P1 in granting the decree in favour of the plaintiff for the relief of permanent injunction. The Trial Court ought to have considered both the suits together when the claim was made in respect of very same Sy.No.35/3a by both the parties but considered both the suits independently and passed separate judgments which led the Trial Court to consider the material available on record erroneously. When this Court and the First Appellate Court taken note of the material available on record together arising out of the appeals in both the suits, I do not find any error committed by the First Appellate Court in reversing the finding of the Trial Court. Hence, the First Appellate Court was justified in holding that the sale deed on which the appellant had relied, the same does not convey any right and the First Appellate Court comes to the conclusion that the material available on record is very clear that the vendor was not in possession and hence, he cannot convey any possession in favour of the appellant herein

and the First Appellate Court was justified in applying the same in negating the sale deed of the appellant since in respect of very same Sy.No.35/3a two suits are filed and the First Appellate Court appreciated the material available on record reanalyzing the same. Hence, I answer the substantial question of law accordingly and no merit in the appeal to reverse the finding of the First Appellate Court.

19. In view of the discussions made above, I pass the following:

ORDER

The appeal is dismissed.