

(1980) 08 KAR CK 0020
In the Karnataka High Court
Case No : RSA 526/74

Ningappa by Lrs.

APPELLANT

Vs

Siddagowda and Others

RESPONDENT

Date of Decision : 11-08-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (1981) 1 KarLJ 48

Hon'ble Judges : N. R. Kudoor, J

Judgement

N.R. Kudoor, J.-The legal representatives of the original plaintiff in O.S. No. 123 of 1968 on the file of the Munsiff, Channarayapatna, are the appellants in this second appeal.

2. The original plaintiff one Ningappa brought the suit O.S. No. 123 of 1968 for a declaration of his title to and for possession of the suit schedule property measuring 7 guntas in Sy. No. 210/1 of Gollara Hosahalli Village in Channarayapatna Taluk on the ground that he purchased the suit property from the 1st defendant Siddegowda under a sale deed dated 5-10-1967 at Ex. P-1. Alternatively he has sought for allotting the suit property to the share of the 1st defendant by effecting a general partition of all the family properties belonging to the family of the 1st defendant and possession of the suit property. He has made the other members of the family of the 1st defendant as parties and also included all the properties belonging to their family in the suit.

3. The 1st defendant filed a written statement wherein he has admitted having executed the sale deed in favour of the plaintiff. However, the suit was contested by defendants 2 to 4 inter alia contending among others that the 1st defendant had relinquished his rights in the family properties in favour of the 4th defendant under a relinquishment deed dated 26-9-1967 at Ex, D-1 and as such the 1st defendant had no right, title and interest in the suit property for being conveyed to the plaintiff under the sale deed dt. 5-10-1967 and finally prayed for the dismissal of the suit.

4. The learned Munsiff, on the appreciation of the evidence adduced in the case, recorded his findings on the relevant issues against the plaintiffs holding that the right, title and interest of the 1st defendant in the family properties was extinguished as a result of the release deed executed by him in favour of the 4th defendant as per Ex. D-1; that the release deed under Ex. D-1 takes priority over the sale deed Ex. P-1 in favour of the plaintiff and that the plaintiff has failed to prove that the suit property can be equitably allotted to the share of the 1st defendant so as to give title to the plaintiff over the suit property. Finally the learned Munsiff dismissed the suit as per his judgment and decree dt. 26-3-1973. The plaintiff being aggrieved by the said judgment and decree, took up the matter in appeal to the Court of the Civil Judge at Hassan in R.A. No. 83/73. The learned Civil Judge formulated three points for his decision. They were, (1) Is it shown by the appellant that Ex. D-1 is antedated? (2) Has the appellant proved partition? and (3) Whether Ex. D-1 takes away the rights of the 1st defendant? After hearing the arguments and scrutinising the evidence on record, he recorded his findings in the negative as regards point Nos. 1 and 2 and in the positive regarding point No. 3. Finally he dismissed the appeal as per his judgment and decree dt. 14-11-73. The plaintiff filed the present second appeal against the judgment and decree of the lower appellate Court. During the pendency of the second appeal, the plaintiff died and his legal representatives were brought on record.

5. It is contended by Sri Kadidal Manjappa, the learned Advocate for the appellants, that the finding of the Courts below that the release deed Ex. D-1 executed by the 1st defendant in favour of the 4th defendant had priority over the sale deed Ex. P-1 executed by the 1st defendant in favour of the plaintiff was based on no evidence. He further contended that the lower appellate Court has gone wrong in placing the burden upon the plaintiff to prove that the release deed Ex. D-1 was antedated even though the trial Court has raised the correct issue placing the burden on defendants 2 to 4 to show that the release deed had priority over the sale deed in favour of the plaintiff. On these grounds, he contended that the judgment and decree of both the Courts below shall have to be set aside and the suit brought by the plaintiff for the alternative relief of general partition and allotting the suit property to the share of the 1st defendant be decreed so as to work out the equity in favour of the plaintiff regarding the suit property by virtue of the sale deed Ex. P-1 executed by the 1st defendant in favour of the plaintiff.

6. Per contra, it was argued by Sri B.V. Krishnaswamy Rao the learned Advocate appearing for defendants 2 and 3, that the finding of the Courts below that the release deed Ex. D-1 had priority over the sale deed Ex. P-1 executed by the 1st defendant in favour of the plaintiff and that Ex. D-1 had extinguished the right, title and interest of the 1st defendant in his family properties being a concurrent finding of fact, this Court cannot interfere with the same in the second appeal. In support of his contention, he placed reliance on a decision of the Supreme Court in *Ramappa v. Bojappa*, AIR. 1963 SC. 1633.

7. In view of the rival contentions canvassed on either side, the only point that arises for my determination in this appeal is whether this Court can interfere with the finding of the Courts below that the release deed Ex. D-1 had priority over the sale deed Ex. P-1 executed by the 1st defendant in favour of the plaintiff in respect of the suit property.

8. It is relevant to state the material facts in order to appreciate the rival contentions. Defendants 1 to 3 are the sons of the 4th defendant. The suit property belongs to the family of the defendants. The 1st defendant executed a registered sale deed dt. 5-10-1967 as per Ex. P-1 in respect of the suit property which is seven guntas of land comprised in Sy. No. 210/1 of Gollar Hosahalli village of Channarayapatna Taluk on the ground that the suit property was allotted to the share of the defendant under a partition. Since the 1st defendant did not give possession of the suit property, the plaintiff brought the suit for declaration of his title to and for possession of the suit property and in the alternative for a general partition of all the family properties belonging to the defendants and to allot the suit property to the share of the 1st defendant and then deliver possession of it to the plaintiff and also for payment of mesne profits at the rate of Rs. 200 both past and future and costs.

9. The 1st defendant admitted execution of the sale deed Ex. P-1. Defendants 2 to 4 resisted the suit on the ground that there was no partition in their family, that the 1st defendant continued to be joint with the other members of the family and that the 1st defendant had released his right, title and interest in the joint family properties in favour of the 4th defendant under a registered release deed dt. 26-9-1967 at Ex. D-1 and hence the 1st defendant had no right, title and interest in respect of the suit property to be conveyed to the plaintiff as per the sale deed Ex. P-1.

10. If the release deed Ex. D-1 was executed on 26-9-1967, then it would necessarily follow that the 1st defendant had no right, title or interest in his family properties on 5-10-1967 when he sold the suit property to the plaintiff under Ex. P-1. On the other hand, if Ex. D-1 came into existence subsequent to the date of Ex. P-1, the plaintiff would acquire title to the extent of 7 guntas of land sold by the 1st defendant in his favour even if the plaintiff failed to prove that the 1st defendant got the suit property to his share under a family partition in the family of the defendants.

11. As regards the partition pleaded by the plaintiff under which the 1st defendant got the suit property to his share, both the Courts below have recorded a concurrent finding on the basis of the evidence, that there was no partition in the family of the defendants and that the 1st defendant got the suit property to his share under such a partition. Sri Kadidal Manjappa, the learned Advocate for the plaintiffs, has not challenged that finding of the Courts below and, in my view, rightly since it was a finding, pure and simple on a question of fact.

12. Now turning to the other contention that the finding of the Courts below regarding the priority of the release deed Ex. D-1 over the sale deed, that it was not based on any evidence and that the lower appellate Court has gone wrong in placing the burden on the plaintiff to prove that the document Ex. D-1 was antedated, it must be noticed that the release deed Ex. D-1 was dated 26-9-1967, whereas it was got registered on 22-12-1967. In between these two dates the sale deed Ex. P-1 came into existence which was on 5-10-1967. There is no dispute that Ex. P-1 was duly registered and the execution of the document Ex. P-1 was admitted by the 1st defendant in his written statement. Now as regards the document Ex. D-1, the defendants have examined besides the 4th defendant as DW. 3 in whose favour the document Ex. D-1 was executed, examined the two attestors as DWs. 1 and 2. Both DWs. 1 and 2 have stated in their evidence that the 1st defendant had executed a release deed in favour of the 4th defendant as per Ex. D-1 to which they were the attestors. It is also seen from their evidence that the document in question was written by one Gopalaiah. However, they do not say in their evidence that the document Ex. D-1 was executed on 26-9-1967. On the other hand, as to the execution of the document Ex. D-1 DW. 1 in his cross-examination has stated that the document was written at Channarayapatna just behind the Sub-Registrar's Office and immediately the document was presented for registration. The evidence of DW. 2 is that the document was written in the Taluk Office premises and as soon as the document was written, it was presented to the Sub-Registrar's Office. Now coming to the evidence of DW. 3, she too has not stated in her evidence that the document Ex. D-1 was executed on 26-9-1967. All that she has stated in her chief-examination was that the 1st defendant had executed the release deed in her favour as per Ex. D-1. In her cross-examination as to the execution of the document, she has stated that Ex. D-1 was written near the Sub-Registrar's Office, that the document was presented for registration immediately, that she paid Rs. 500 in the presence of the Sub-Registrar and another Rs. 500 before the attestors. Thus, it is obvious from the evidence of DWs. 1 to 3 that their evidence does not support the case of the defendants that the document Ex. D-1 was executed on 26-9-1967. There is no other evidence adduced by the defendants except the document Ex. D-1 to show that the document was executed on 26-9-1967, but it was presented for registration on 22-12-1967. On the other hand, the evidence in the cross-examination of DWs. 1 to 3 all unequivocally goes to show that the document Ex. D-1 was written and executed in the Taluk Office premises behind the Sub-Registrar's office at Channarayapatna and on the same day the document was presented before the Sub-Registrar, obviously for registration. Thus, on one hand, we have the evidence of DWs. 1 to 3 show that the document Ex. D-1 came to be written and executed on the same day the document was presented in the Sub-Registrar's office for registration. On the other hand, we do not have any evidence to show that the document was executed on 26-9-1967 and it was presented later for registration on 22-12-1967. No doubt both the Courts below have recorded a concurrent finding that the document Ex. D-1 was really executed on 26-9-1967 and as such that

document has priority over the sale deed Ex. P-1, the sale deed in favour of the plaintiff which was executed on 5-10-1967 by the 1st defendant. To record such a finding the Courts below have referred to the evidence of DWs. 1 to 3 and also the evidence of PWs. 3 and 5. PW. 3 has merely stated in his evidence that the 1st defendant had settled the property in favour of the 4th defendant without stating the time or the date of the settlement of the property by the 1st defendant in favour of the 4th defendant. PW. 5 has stated in his evidence that a week after the execution of the sale deed Ex. P-1 by the 1st defendant in his favour, he went to take possession of the suit property when the 4th respondent protested on the ground that she had purchased the suit property. Certainly the evidence of PWs. 3 and 5 would not support the case of the defendants nor it would afford any basis for the finding recorded by the Courts below that the release deed Ex. D-1 was really executed on 26-9-1967. I have already referred to the evidence of DWs. 1 to 3. Their evidence would not show that the document Ex. D-1 was really executed on 26-9-1967. That being the case, as rightly contended by Sri Kadidal Manjappa, the learned Advocate for the plaintiff, the finding of the Courts below that Ex. D-1 was really executed on 26-9-1967 and as such it has priority over the sale deed Ex. P-1 was based on no evidence.

13. Now coming to the lower appellate Court, the lower appellate Court has placed the burden on the appellant to show that Ex. D-1 was antedated. In other words, the lower appellate Court thought that it was for the plaintiff to show that the document Ex. D-1 was not executed on 26-9-1967. In so doing, the lower appellate Court has failed to notice the issues raised by the trial Court on this aspect and, if I may say so, the trial Court has correctly framed the issues placing the burden on the defendants to show that Ex. D-1 was executed on 26-9-1967 though it was registered on 22-12-1967 and as such that document had priority over Ex. P-1 the sale deed in favour of the plaintiff. The lower appellate Court has considered the evidence in recording its findings on a wrong approach to the case, placing the burden on the plaintiff to show that the deed Ex. D-1 was not executed on the date it represents on the document viz, 26-9-1967.

14. In this context, I may refer to a decision of the Supreme Court in *Ramachandra v. Ramalingam*, AIR 1963 SC 302 and the relevant portion as found at para 12 reads as follows:

"It is necessary to remember that S. 100(1)(c) refers to a substantial error or defect in the procedure. The defect or error must be substantial-that is one fact to remember; and the substantial error or defect should be such as may possibly have produced error or defect in the decision of the case upon the merits-that is another fact to be borne in mind. The error or defect in the procedure to which the clause refers is, as the clause clearly and unambiguously indicates, an error or defect connected with, or relating to, the procedure; it is not an error or defect in the appreciation of evidence adduced by the parties on the merits. That is why, even if the appreciation of evidence made by the lower appellate court is

patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect in the procedure. On the other hand, if in dealing with a question of fact, the lower appellate court has placed the onus on a wrong party and its finding of fact is the result, substantially, of this wrong approach, that may be regarded as a defect in procedure;"

It is also held in the same ruling that if a conclusion of fact recorded is not supported by any evidence, it would amount to a substantial defect or error in the procedure. It is further laid down that the second appellate court can disturb the findings of the courts below if the findings of fact are vitiated on account of substantial error or defect in the procedure and the substantial error or defect is such as may possibly have produced error or defect in the decision of the case upon merits. On the facts of the present case discussed above, applying the principles laid down by the Supreme Court in the above decision, I am inclined to hold that the finding of the courts below regarding Ex. D-1 that it had priority over the sale deed Ex. P-I on the ground that Ex. D-I was executed on 26-9-1967 is clearly illegal and liable to be interfered with. The ruling in Ramappa's case, AIR. 1963 SC. 1633, cited by Sri Krishnaswamy, the learned Advocate for defendants 2 and 3, does not support his contention, since that decision has laid down that the findings recorded by the Courts of fact on a question of fact cannot be disturbed in second appeal on the ground of sufficiency or adequacy of evidence, since that is a question to be considered only by the Courts of fact and not by a Court in the second appeal.

15. In view of the conclusion reached by me on the point raised for determination in this second appeal, the judgment and decree of both the Courts below dismissing the suit brought by the plaintiff shall have to be set aside and the suit brought by the plaintiff as regards his alternative relief to a general partition in the family of the defendants and to allot the suit property to the share of the 1st defendant shall have to be decreed.

16. In the result, for the reasons stated above, the appeal is allowed. The judgment and decree of both the courts below dismissing the suit are set aside. The suit brought by the plaintiff regarding his alternative relief of general partition in the family of the defendants and to allot the suit property to the share of the first defendant and deliver possession to the plaintiff is decreed with costs throughout.