

(2008) 03 KAR CK 0073

In the Karnataka High Court

Case No : Regular Second Appeal No. 312 of 2002

Radha Bai Gaonkar Since deceased by her Legal
Representatives Premabai Gaonkar, Manjunath and Sheetal

APPELLANT

Vs

Sangawwa Guddadamath and Others

RESPONDENT

Date of Decision : 06-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 109, 53 A

Citation : (2009) 1 KCCR 845

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : S.J. Puranik, for the Appellant; Mahesh Wodeyar, for R1 to R4, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—This Second Appeal u/s 100 of the CPC is by the first defendant in OS No. 9 of 1991 on the file of the court of the Principal Civil Judge (Jr. Dn.,] Dharwad who has suffered a decree for yielding possession in favour of the plaintiffs in the suit and which Judgment and decree came to be affirmed by the lower appellate court in RA No. 42 of 1998 on the file of the II Additional Civil Judge [Sr. Dn.,] Dharwad.

2. It is because of such concurrent failures, the present second appeal.

3. The suit was on the premise that the plaintiffs 1 to 5 and defendants 2 to 5 constituted members of the joint family; that a particular family property, namely, agricultural land measuring an extent of 2 acres 3 guntas bearing block No. 572 of Kelageri Village in Dharwad Taluk had been in possession of the first defendant purporting to be based on an agreement to sell dated 20.3.1975 executed by the defendants 2 to 5; that the plaintiffs are not parties to the agreement; that the agreement had been entered into amongst the defendants 1 to 5 without notice to the plaintiffs without there being concurrence and behind

their back; that as plaintiffs are not parties to the agreement, it does not bind their share of properties in the joint family and therefore the plaintiffs are entitled to recover possession from the first defendant, prayed for decree to this effect. The plaintiffs also sought for mesne profits.

4. It is also the further plea in the plaint that though the first defendant had been put in possession of the subject property under the agreement dated 20.3.1975, the first defendant had not chosen to get regular sale deed executed in her favour till the filing of the suit; that as there were some differences amongst the first defendant and defendants 2 to 5 on the other side, defendants 2 to 5 had filed OS No. 37 of 1983 as on 8.2.1983 on the file of the Principal Munsiff, Dharwad, impleading the first defendant as party, for a declaration that the so called deed of agreement for sale is not agreement for sale but is only mortgage transaction and had sought for declaration to this effect; that the said suit came to be dismissed as withdrawn on 25.2.1989 with liberty to the plaintiffs therein to file a fresh case and after withdrawal of the suit there were some attempts to settle the matter amongst the parties and though the first defendant had even agreed to deliver possession of the suit schedule property, but that having not happened and the agreement dated 20.3.1975 not binding on the plaintiffs, the plaintiffs have filed a suit for recovery of possession as the first defendant though was called upon to hand over possession had not delivered possession and therefore it became necessary to file the suit.

5. On service of notice, the first defendant who was the agreement holder and who was admittedly in possession of the subject land contested the suit, defendants 2 to 5 though entered appearance did not file any written statement, did not take up any stand either supportive or adverse to the plaintiffs and did not lead any evidence.

6. In the statement filed on behalf of the first defendant, it was specifically pleaded that the suit was barred by limitation as the suit for recovery of possession is filed beyond twelve years of the date of the agreement when the first defendant entered into possession of the land and therefore the suit was liable to be dismissed. It was also pleaded that the agreement was entered into by the defendants 2 to 5 to save the other family properties as a decree which they had suffered at the hands of the society and a Bank was about to be executed and therefore the defendants 2 to 5 had entered into an agreement and had received payments upto Rs. 4,600/- as against the actual sale consideration of Rs. 5,000/- for the property, but had failed to execute the sale deed though the first defendant was ready and willing to pay the balance amount of Rs. 400/-.

7. It was also pleaded that the first defendant being ready to pay the balance amount and to perform her part of the contract and the defendants 2 to 5 alone being not interested in fulfilling their obligation under the agreement and the first defendant having been put into possession is entitled to protect her possession in terms of Section 53-A of the Transfer of Property Act, 1882 [for short, TP Act] as the agreement had been performed in part and in performance of which the first

defendant had been put in possession of the land in question.

8. It was also pleaded that the suit as framed was not tenable for the reason that the plaintiffs had neither sought for declaration about the agreement where upon the consequential relief of possession can be sought for nor the plaintiffs having sought for partition and separation of their shares in the joint family, the suit as framed for mere recovery of possession of subject land which had been admittedly put in possession of the first defendant by the other members of the family is not tenable and therefore sought for dismissal of the suit on such premise also.

9. In the light of such pleadings, the trial court framed the following issues:

1. Do Plaintiffs prove that the suit land was the joint family property of Plaintiffs and defts 2 to 5 and thereby they are all actual owners having title over the same?

2. Do Plaintiffs further prove that the regd. Agreement of sale dt. 20.3.1975 executed by defts. 2 to 5 in favour of deft, in respect of suit property is not binding on them as it is illegal, void and unenforceable?

3. Whether the plaintiffs are entitled for future mesne profits?

4. Whether the plaintiffs prove that they are entitled for relief sought for?

5. Whether the suit valued and the court fee paid by the plaintiffs are not proper?

10. The parties went on trial on such issues. On behalf of the plaintiffs one S.G. Guddadamath, who is the power of attorney holder, was examined as PW1 and documentary evidence as per Exp1 to 7 were marked. Exp2 being the wardi for mutating the entries in the name of the male members of the family on the death of Siddaveerayya, who appears to have died in the year 1971, Exp3 is the record of rights for the year 1989-90 showing the names of defendants 2 to 5 as owners; Exp4 and 5 being agreements, one original and the other corrected copy thereof, of the year 1975 and the pleadings and order in OS No 37 of 1983 constitute the rest of the documentary evidence Exp6 to 8.

11. On behalf of the defendants, first defendant got examined one Tukaram her husband's younger brother as DW1 and one E K Halakatti - attesting witness to the agreement - has been examined as DW2. The very original and corrected agreement were marked as ExD1 and 2.

12. The trial court, on examination of such evidence, answered all the issues in the affirmative and in favour of the plaintiffs and accordingly decreed the suit, directing the first defendant to delivery possession of the suit schedule property within three months.

13. Aggrieved first defendant appealed. The plaintiffs and defendants 2 to 5 were impleaded as respondents in the appeal. It was urged that the admissions elicited from PW1 virtually indicated that the agreement had been executed for

legal necessity of the family and not considering such admissions has resulted in judgment and decree of the trial court vitiated; that the trial court was in error in concluding that the agreement for sale was time barred, in the sense, could not be enforced and therefore the first defendant cannot seek protection u/s 54 of the TP Act to defend her possession which was not the correct appreciation of legal position; that the trial court was in error in concluding that the first defendant had not made out her case of readiness and willingness to perform her part of the obligation; that the trial court is in error in not dismissing the suit as time barred and therefore the appeal should be allowed. First defendant-appellant has also filed an interlocutory application for framing additional issues such as whether the suit is in time, whether the suit is maintainable without seeking for a declaration, whether the defendant No. 1 is entitled for protection u/s 53-A of the TP Act etc.

14. The learned judge of the lower appellate court, on hearing the arguments addressed by the learned Counsel on behalf of the parties, formulated the following points for determination:

- 1) Whether the plaintiffs prove that the suit land is the joint family property of the plaintiffs and the defendants 2 to 5?
- 2} Whether the plaintiffs further prove that the agreement of sale in respect of the suit land is not binding on them?
- 3) Whether there is necessity of frame the additional issues as proposed in IA-2?
- 4) Whether the plaintiffs are entitled for the reliefs claimed?
- 5) Whether the interference in the judgment and decree passed by the trial court is necessary?
- 6) What order?

15. The learned judge of the lower appellate court answered points 1, 2 and 4 in the affirmative and points 3 and 5 in the negative and accordingly dismissed the appeal. In so far as the IA-2 for raising additional issues is concerned, the learned judge of the lower appellate court has opined that the application has to be dismissed, in view of the answer given by the court on points 1 to 6.

16. It is aggrieved by these two failures, the present second appeal by the first appellant.

17. This Court while admitting this appeal, had formulated the following substantial question of law for examination:

1. Whether the court below could have decreed the suit for possession when admittedly the deceased first appellant was in possession of the suit schedule property under an agreement of sale and on such circumstance, whether in view of Section 53-A of TP Act, the defendant is entitled to defend his [her] possession?

18. Sri S J Puranik, learned Counsel for the appellants has submitted that an additional question of law also arises i.e. the question of limitation and the courts below not addressing this question and not framing a specific issue on limitation, but even though answered the question on limitation against the first defendant, is a substantial error in law committed by the courts below and this aspect also requires examination.

19. Learned Counsel for the appellants has drawn attention to the averments in the plaint and has submitted that the plaint averments clearly indicate the knowledge of the plaintiffs with regard to the possession of the suit schedule property with the first defendant in terms of the agreement of the year 1975 itself, that indicating the settlement amongst first defendant and defendants 2 to 5 failing in the year 1989 and thereafter as defendants 2 to 5 kept quiet, the plaintiffs got cause of action to file the suit, is only a simulated cause of action and a suit for recovery of possession when it was within the knowledge of the plaintiffs that the first defendant was in possession of the subject land under the agreement of the year 1975, unless brought in within 12 years from that date, is barred by limitation, even in terms of Article 65 of the schedule to the Limitation Act Learned Counsel would also submit that backed by Article 109, which is the proper Article and which is applicable to the present situation, as it is a transaction which had been entered into on behalf of the family, which is sought to be got over in terms of a plaint averment and if so, it is only Article 109 which should have been referred to by the court below are not applicable in terms of Section 109 and it is beyond time and the suit is required to be dismissed.

20. Drawing attention to the plaint averments in para-5, wherein it is pleaded that there was no partition in the family even as on date and in the light of the specific plea of the defendant No 1 in para-6 of the written statement, submits that the suit as brought by the plaintiffs is not tenable, as the plaintiffs even as per the pleadings, are entitled only for claiming a share in the property and in the entire property and having not sued for their share in the property, the relief of recovery of possession cannot be granted as the suit is not tenable.

21. With regard to the question of first defendant's entitlement to protect her possession in view of the provisions of Section 53-A of the TP Act, learned Counsel for the appellants submits that when once courts below found that the possession of the first defendant was not illegal and she had been put in possession pursuant to the agreement as part performance of the agreement and she continued to be in possession irrespective of other developments, that possession is protected u/s 53-A of the TP Act, particularly when the first defendant had pleaded that she was ready and willing to perform her part of the obligation and it was only defendants 2 to 5 who had not performed their part of the contract and therefore courts below are in error in decreeing the suit for recovery of possession and notwithstanding the provisions of Section 53-A of the Act.

22. One another submission on behalf of the appellants is that the plaintiffs

having put the first defendant in possession, they are not entitled for suing for recovery of possession, as the plaintiffs are claiming interest only as members of the family and the agreement having been executed by the other members of the family, it equally binds on the plaintiffs also and therefore the plaintiffs cannot seek for recovery of possession unless the agreement is declared to be invalid, illegal and that this relief having not been sought for, the suit for recovery [of possession} is not tenable.

23. Appealing on behalf of the respondents-plaintiffs in the suit, Sri Mahesh Wodeyar, learned Counsel, has vehemently urged that the courts below have rightly decreed the suit and no interference is warranted; that the agreement of sale having been put to use by the first defendant and there being no possibility or the first defendant showing any action for enforcing the agreement at any point of time, the first defendant is not entitled to claim the benefit of Section 53-A of the TP Act. It is submitted that the first defendant having not shown her readiness and willingness to perform her part of the obligation and that going against first defendant, the prayer u/s 53-A is not available even in terms of the very provision and when once it is found that the first defendant cannot link up her possession on the basis of Section 53-A of the TP Act and when once it is declared that the transaction does not bind the plaintiffs or at any rate on their shares, it is inevitable that the suit should be decreed and rightly decreed by the courts below and there is no need to interfere with the judgment and decree passed by the courts below. In this regard, learned Counsel for the respondents placed reliance on the decision of the Supreme Court in the case of A. Lewis v. T. Ramamurthy AIR 2007 SCW 7356 and submits that the Supreme Court had occasion to interpret Section 53-A of the TP Act vis-a-vis part performance of a contract and held that this provision is not available to a transferee who remained as such and therefore the courts below have rightly decreed the suit, rejecting the defence of part performance and no interference is called for.

24. Even with regard to the question of limitation, it is submitted that it is only Article 65 of the limitation Act which is attracted and the plaintiffs having realized that the possession of the first defendant has become adverse to their interest only in or around the year 1989, when the defendants 2 to 5 did not put into action the effort to recover possession from the first defendant though a suit filed by them against the first defendant was withdrawn with liberty to take fresh action and only thereafter that the plaintiffs realized that the first defendant is not acting on the understanding and continued to remain in possession being adverse to the interest of the plaintiffs, they had filed the suit in the year 1991 within two years from such assertion and as such it is well within the limitation and therefore the question even if examined on this aspect should be answered in favour of the plaintiffs and the judgments and decrees of the courts below sustain and the appeal be dismissed.

25. The question as to the first defendant was entitled to the benefit of Section 53-A of the TP Act does arise in the course of the judgments. There is no dispute

with regard to the existence of the agreement of the year 1975 executed by the defendants 2 to 5 in favour of first defendant. The case of the plaintiffs was that it does not bind their share, as it had been executed without their consent and behind their back. It may be noticed that except for the fourth plaintiff, other plaintiffs are female members in the family. Only the fourth plaintiff can be taken as a member of the joint family, who also could have sued for partition in the family properties. In so far as the female members are concerned, while the first plaintiff being the wife of Siddaveerayya and mother of defendants 2, 3 and 4, can definitely claim a share in the property that would have come to the share of her husband Siddaveerayya, who died in the year 1971, filing a suit for recovery of possession of the suit land in the year 1991 in respect of a right which accrued in the year 1971 and on the premise that she gets a right only in the year 1989, is clearly a position not acceptable either on facts or in law. Assuming that Siddaveerayya and his brother Gurusiddayya - fifth defendant - being sons of Sangayya, constitute a joint family in respect of the properties left behind by Sangayya, after the death of Siddaveerayya in or around the year 1971, so far as Sangawwa is concerned, she can claim a share in the property that Siddaveerayya himself could have inherited on a notional partition prior to his death and nothing more.

26. In so far as plaintiffs 2, 3 and 5 are concerned, they being the wives of sons of Siddaveerayya, are not entitled to claim any share in the joint family by themselves. They are also not competent to question the acts of their husbands in executing an agreement of the year 1975 in respect of a family property, which their respective husbands might have inherited or succeeded after the death of their mother in the year 1971. Assuming that in terms of Section 6 of the Hindu Succession Act, 1956, even after the death of Siddaveerayya, the family could have remained joint with the defendants 2 to 5 constituting members of the joint family, then, it is only the fourth plaintiff, who is also a member of this family, who can, if at all, complain of the transaction not binding and his share and it was not for any family necessity etc.

27. In so far as the legal necessity as pleaded is concerned, while it cannot have much role to play in the present situation, as it was not the case of the plaintiffs that the transaction was not for legal necessity or family necessity, but what all pleaded in the plaint was that the transaction having taken place behind the back of the plaintiffs and without their consent does not bind them. If at all the fourth plaintiff alone who has a share in the joint family property could raise this plea and that plea having not been raised, the question of examining the aspect of legal necessity does not arise. But more importantly, the fourth plaintiff who alone could have made out a case, having not supported the plaint averments by examining himself, but the only witness who has been examined on behalf of the plaintiffs being a person as power of attorney holder and even his evidence having virtually again against the plaintiffs themselves, it should be said that the plaintiffs have not made good even the version as in the plaint and the trend of documentary evidence ExP2 and 3 only goes to show that it was only male

members who are acting and the female members who are in the knowledge and did not oppose or protest at any point of time.

28. The fact that defendants 2 to 5 have filed an earlier suit to get over the agreement by pleading that it should be construed as a mortgage deed and having sought for a declaration from the court and having withdrawn the suit with liberty to file a fresh suit on the same cause of action and that having been pleaded in the plaint, it should be taken that the plaintiffs who are in the knowledge of all these developments all along, it is as though because of a particular understanding of the plaintiffs, the possession of the first defendant becomes adverse to the plaintiffs only in the year 1989 or thereafter. The first defendant, on the other hand, had been in possession as an agreement holder under the agreement of the year 1975 and having paid major part of the sale consideration and being put in possession. This aspect has never disputed. In fact in terms of the evidence on record, as against the total sale consideration of Rs 5,000/- a sum of Rs 4,600/- has already been paid and what was required to be paid was only Rs 400/- and it is the case of the first defendant that this amount was withheld only because the defendants 2 to 5 are not ready and willing to perform their part of the obligation to execute sale deed but kept on postponing with one or the other reason etc.

29. While the pleading in the plaint does not indicate that the first defendant was at fault for non-execution of the sale deed pursuant to the agreement of the year 1975, on the other hand, first defendant has specifically pleaded that she was ready and willing to perform her part of the obligation all along and had also paid substantial sale consideration, if one looks at the normal conduct of parties and preponderance of probabilities, no blame can be laid at the door of first defendant for non-execution of the agreement of sale in her favour. The fact that the defendants 2 to 5 had filed a suit and withdrawn it thereafter, the plaintiffs - their wives, mother and another person - who does not even enter the box have filed the suit clearly indicates that not only the cause of action was simulated purporting to be in the year 1989 and thereafter, but it is only a collusive effort on the part of the plaintiffs and defendants 2 to 5 to defeat the right of first defendant from whom defendants 2 to 5 have received substantial part of the sale consideration and also put the first defendant into possession, a possession of the first defendant from the year 1975 being not disputed in her right as agreement holder, definitely adverse to the interest of not only defendants 2 to 5, but also the plaintiffs, who are all members of the same family as claimed, a suit filed in the year 1991 should be held to be clearly barred by law of limitation even by applying the period as indicated in Article 65 of the Schedule to the Limitation Act.

30. The plaintiffs in fact suing for recovery of possession only as part of the joint family even as per the plaint averments, there cannot be a dichotomy of the possession of the first defendant becoming adverse from one point of time and from the same members and from a later point of time as against the plaintiffs

alone The courts below having opined that the possession of the first defendant is not illegal, but is one under the agreement of the year 1971 and valid one and the suit for recovery of that possession, assuming on behalf other members of the family, having not been laid within 12 years therefrom, the suit is clearly barred by limitation.

31. Even on the aspect of Section 53-A of the TP Act having been claimed by the first defendant, I find that on the facts of the present case and in the light of the pleadings of the parties and the evidence on record indicating that the first defendant was all along ready and willing to perform her part of the obligation and in fact more than fulfilled her part of the obligation lay having paid all but a sum of Rs 400/- of the sale consideration, it should be held that the first defendant is definitely entitled to claim the benefit of her possession pursuant to the part performance in terms of Section 53-A of the TP Act and the courts below have committed a clear error in law and in decreeing the suit for recovery of possession, notwithstanding the first defendant taking a defence claiming benefit of part performance u/s 53-A. This finding definitely calls for interference for being reversed.

32. In so far as the reliance placed by the learned Counsel for the plaintiff on the decision of the Supreme Court in the case of A. Lewis [supra], is concerned, I am of the clear view that the ratio clearly does not apply to the present situation, inasmuch as it is to be taken that the first defendant while had pleaded that she is ready and willing to perform her part of the obligation and evidence also indicated that she is more than willing in having paid the sale consideration and only a small part of it viz., Rs 400/- remained to be paid, there being not even a clear plea on the part of the plaintiffs to indicate that the first, defendant was not ready and willing to perform her part of the obligation under the agreement, except the plea that she had not got. the sale deed executed, which, by itself cannot indicate any default on the part of the first defendant, the decision relied upon is of no avail to the plaintiffs to further case in this appeal.

33. Though no question of law has been framed as to whether the suit was maintainable in the present form, particularly a suit for recovery of possession, I am of the view that the suit itself was not tenable for the reason that the suit was one, more for recovery of possession, though the plaintiffs had indicated that the possession of the first defendant in respect of the suit schedule property was only under the agreement of the year 1975, unless a declaration was sought for with regard to the validity of the agreement and unless the plaintiffs who had claimed as members of the joint family had sued for their share of property, the suit as filed only for recovery of possession was not tenable in law. Even here, it should be noticed that the defendants 2 to 5 also having interest in the very property, if at all to the extent of plaintiffs' share alone, the transaction does not bind them and if partition should have taken place for working out equities, all such properties could have been allotted to the share of defendants 2 to 5 and the plaintiffs, if in the event are getting a share, could have been given a share

in the other available properties, but that aspect becomes hypothetical, as the plaintiffs had never claimed for their share of the properties by seeking partition. In any view of the matter, the suit was not tenable.

34. In the result, this second appeal is allowed, judgments and decrees passed by the courts below are set aside and the suit of the plaintiffs is hereby dismissed, Parties to bear their own costs.