

(2015) 08 KAR CK 0082
In the Karnataka High Court
Case No : C.R.P. No. 464/2004 (RES)

Rudrappa

APPELLANT

Vs

Mahadeo Ishwar Kamble and Others

RESPONDENT

Date of Decision : 25-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 — Section 4, 4(1), 5
Limitation Act, 1963 — Section 5
Specific Relief Act, 1963 — Section 34

Citation : (2015) 08 KAR CK 0082

Hon'ble Judges : K.N. Phaneendra, J.

Bench : Single Bench

Advocate : R.M. Kulkarni, Advocate for G. Balakrishna Shastry, Prasanna V.R. and Ravishankar Shastry, Advocates, for the Appellant; S.B. Hebballi, Advocate, for the Respondent

Final Decision : Allowed

Judgement

K.N. Phaneendra, J.—Heard the learned counsel for the petitioner and the learned Counsel for respondent No. 1(b) to 1(d). Perused the records available on record.

2. Originally, a regular second appeal was filed before this Court in R.S.A. No. 222/2001 calling in question the judgment and decree passed in O.S. No. 312/1988 dated 29.07.1991 on the file of III Additional Munsiff, Belgaum, which was confirmed in the judgment and decree dated 13.12.2000 in R.A. No. 174/1991 on the file of II Additional Senior Civil Judge, Belgaum. While permitting to convert the said appeal to Civil Revision Petition on 03.02.2004 this Court observed that the appellant was not a party in the suit but affected by the decree, preferred first appeal, in which he filed applications for condonation of delay under Section 5 of Limitation Act and also application under Section 96 of Code of Civil Procedure for permission to prosecute the appeal. The first

appellate Court dismissed both the applications and consequently dismissed the first appeal. This Court had further observed that there is mistake on the part of the first appellate Court in drawing the decree, when the appeal was dismissed on the ground of limitation, the decree should not have been drawn. Therefore, held that the second appeal is not maintainable on the orders passed on the interlocutory applications. The request of the appellant to convert the proceedings into civil revision petition was granted, I.A. Nos. 1 and 3 were allowed, legal representatives of the first respondent were permitted to come on record and consequently to amend the cause title. Consequent upon the said order of this Court, the said regular second appeal has been converted into this civil revision petition numbered as 464/2004.

3. The facts of the case as could be seen from the judgment of the trial Court in O.S. No. 312/1988 and also in R.A. No. 174/1991 are that, one Sri Mahadev Eshwar Kamble has filed a suit against one Smt. Padmavathi Mahadeo Juvekar and three others, for declaration that the plaintiff is the permanent lessee of the property bearing VPC No. 817/1 and 817/2 (old VPC Nos. 806) situated at Kalmeshwar road, Madhavapur Vadagaon-Belgaum measuring 60" x 40" and also for permanent injunction restraining the defendant Nos. 1 to 4 therein from interfering with the peaceful possession and enjoyment of the plaintiff over the suit schedule properties. It is also an undisputed fact as admitted by the petitioner herein that he purchased the suit schedule property from Sri Atul Mahadeo Juvekar-defendant No. 3 in O.S. No. 312/1988 in the year 1989, precisely on 02.06.1989 during the pendency of the suit and he has been in possession and enjoyment of the property bearing No. 817/1 which was purchased under the said sale deed.

4. It is the case of the petitioner further that he was not aware of the suit pending between the parties and even the defendant No. 3 in the said suit had not brought to the notice of the Court with regard to the selling of the property in favour of the petitioner nor the petitioner had any knowledge, in order to participate in the said suit. But, ultimately the right of the petitioner herein was affected by the said judgment and decree passed by the trial Court. Therefore, claiming that he was not a party to the suit, by explaining the above said factual aspects, filed an appeal before the first appellate Court and sought permission of the first appellate Court to permit him to prosecute the appeal challenging the judgment and decree in O.S. No. 312/1988. He also filed applications I.A. No. 1 for condonation of delay of 85 days in preferring the appeal and LA No. 2 u/S. 96 of CPC seeking permission of the first appellate Court to permit him to prosecute the appeal. The first appellate Court has dismissed I.A. Nos. 1 and 2. As could be seen from the judgment of the first appellate Court, the first appellate Court never touched upon the merits of the case considering the case of the appellant. As per the judgment and decree passed by the first appellate Court, it only concentrated on I.A. Nos. 1 and 2 holding that the appellant had knowledge of the original suit before the trial Court, inspite of that, he did not make any efforts to contest the said suit by impleading himself as one of the parties. Therefore, he

is not entitled to prefer the appeal. Consequently, the first appellate Court has observed that though he has knowledge of the judgment and decree passed by the trial Court, he has not preferred appeal and there is delay of 85 days which is not properly explained and on that ground also the appeal was dismissed.

5. The learned Counsel for the petitioner submitted that the order passed by the appellate court in RA No. 174/1991 is not in accordance with law and the same is liable to be set aside and the matter requires to be remitted to the appellate court for disposal as the first Appellate Court has disposed of the case passing orders only on IA Nos. 1 & 2.

6. The trial Court in OS No. 312/1998 has passed a decree in favour of the plaintiff, wherein the defendants have virtually not contested the proceedings at all. The appellant is the purchaser of one of the suit schedule properties from one of the defendants who was not made as a party before the trial Court. Therefore, the said decree affected the rights of the appellant, he sought for permission to challenge the said order. There is delay of 85 days, which has not been condoned by the first Appellate Court and consequently, the permission was also refused to the appellant to prosecute the appeal. The said two orders are illegal and the same are liable to be set aside and the matter requires to be sent back to the first Appellate Court.

7. Per contra, the learned Counsel appearing for respondent Nos. 1(b) to 1(d) submits that the appellant though had knowledge of the OS No. 312/1988, has not impleaded himself before the trial Court. More over, it is the case between the plaintiff and the defendants and the said decree is only binding upon the plaintiffs and defendants to the suit and it does not bind the appellant. Therefore, the defendant has no locus standi to question the judgment and decree passed by the trial Court by way of filing any appeal. He has got independent right to file a separate suit against the persons who denied his title or for any other relief. However, the learned Counsel contended that Section 34 of the Specific Relief Act comes into play, which shows that the plaintiff can file a suit only against those persons, who actually deny the title of the plaintiff and interfere with his possession and the suit can be filed for various reliefs. It is not the case of the plaintiff that this particular petitioner has denied the plaintiffs title at any time or interfered with his possession. Therefore, the appellant has no cause of action against the plaintiff to prefer any appeal. Hence, the petition deserves to be dismissed as the first Appellate Court has properly considered the delay in filing the appeal and also the locus standi of the appellant.

8. Having heard the arguments of the learned Counsels, now, the court has to ascertain whether, the appellant has got locus standi to prefer the appeal and delay if any in filing the appeal deserves to be condoned and whether the appellant has got any right to proceed with the appeal.

9. As rightly observed by this Court earlier, it is only order on I.A. Nos. 1 and 2 passed by the first appellate Court and not on merits. Therefore, the petitioner

has preferred this revision petition questioning the said order passed by the first appellate Court. The above said factual aspects inevitably go to show that the appellant who has purchased the property during the pendency of the suit has taken possession of the property, i.e., VPC No. 817/1 from its previous owner-his vendor - Shri Atul Mahadeo Juvekar-defendant No. 3. It is the case of the petitioner that defendant No. 3 was not in possession of the property after the sale. Further added to that, the petitioner has also brought to the notice of the first appellate Court with regard to the subsequent events taken place after filing of the suit showing that the plaintiff was never in possession of the property as on the date of the suit and the petitioner has been in possession of the property so far as VPC No. 817/1 after its purchase. Therefore, the petitioner contended that, if the first appellate Court would have granted opportunity to the appellant he would have established at least to show that plaintiff was not entitled for any injunction as such because he was never in possession of the property as on the date of the suit itself. In this background this Court has to see whether the first appellate Court has passed order properly and correctly on I.A. Nos. 1 and 2.

10. Records disclose that the first appellate Court has observed at paragraph No. 15 with reference to I.A. No. 1 that the appellant was having knowledge of the suit in O.S. No. 312/1988. This inference was drawn by the first appellate Court relying upon a portion of the affidavit filed in support of I.A. No. 1. The first appellate Court had observed that the affidavit reveals that the appellant had purchased the suit property from the defendant in the year 1989 during the pendency of suit in O.S. No. 312/1988. Therefore, it drawn an inference, this is an admission on the part of the appellant that he was very much aware of the pendency of the dispute between the plaintiff and the defendants. Therefore, inspite of knowing the judgment and decree in time, he has not filed the appeal. The said observation, in my opinion, is the wrong conception or misconception of facts, by the first appellate Court because of the simple reason in I.A. No. 1 filed u/S. 5 of the Limitation Act and the affidavit filed in support of the application clearly disclose that the appellant has specifically taken up the contention that one Juvenekar-3rd defendant in the original suit has sold the suit schedule property in VPC No. 817/1 to the appellant under a registered sale deed in the year 1989. Since the date of purchase he has been in actual possession and enjoyment of the suit schedule property. He, with a view to construct building in the suit property started fixing boundaries on his plot. In the previous week prior to filing of appeal he tried to fix boundaries. At that time the respondent No. 1- Mahadeo Ishwar Kamble (plaintiff) objected him from fixing the boundary on his plot and claiming the property rights on the strength of the decree passed in O.S. No. 312/1988. Then only he came to know about the decree, immediately he obtained certified copy of the judgment and decree passed in the said suit and filed the appeal.

11. The appellate Court without reading and understanding the entire affidavit filed in support of the application only extracted particular isolated lines in the affidavit to draw an inference. Even such an inference is not proper because the

purchase of property as stated by the appellant is only a prelude to his right to file an appeal and he has explained when he actually come to know about the decree passed by the trial Court. Therefore, this fact is not properly appreciated by the first appellate Court while dismissing the interlocutory applications.

12. Further added to the above, the first appellate Court has also observed that though I.A. Nos. 1 and 2 were filed by the appellant but they did not lead any evidence. Instead of adducing evidence before the Court the counsel for the appellant straight away proceeded to argue on merits of the appeal. While arguing, learned counsel for the appellant has not whispered anything about the delay, but the delay application was very much pending before the Court supported by the affidavit and also the objection filed by the other side. The Court did not consider the contents of the affidavit filed in support of I.A. No. 1 or I.A. No. 2. Therefore, in my opinion, the first appellate Court has committed a serious error in not considering I.A. No. 1 in proper perspective, contentions or the grounds urged in the affidavit, whether the same grounds are sufficient to condone the delay or not.

13. Now coming to the second part of the order with reference to I.A. No. 2 passed by the Court. The appellant has categorically stated in I.A. No. 2 that he purchased the property from defendant No. 3 during 1989 then the suit was very much pending but it was not within his knowledge. Therefore, he has stated he was not a party to the said proceedings and knowing fully well his vendor-defendant No. 3 in the suit has also not disclosed the said fact before the trial Court nor made any attempt to make the appellant also a party to the said proceedings. Further added to that, the defendants in the original suit did not file their written statement and lead any evidence. Therefore, the petitioner herein pleaded that there must be some collusion between the plaintiff and defendants. The defendant No. 3 who actually had no possession over the property, as the defendant No. 3 had already parted with the possession of the property in favour of the appellant for his gain, he must have lost all interest over the property because he had already received considerable amount from the appellant. Therefore, he had no subsisting interest or possession over the property but he has not brought to the notice of the Court with regard to the alienation made therein. Therefore, virtually the Court has granted an exparte decree in favour of the plaintiff, which affected the rights of the appellant. Therefore, he requested the Court that, because of want of knowledge about the pendency of the suit, as rights of the appellant has been affected and also because a decree has been granted by the trial Court against his vendor, he is a proper person to prefer the appeal against the said judgment. This particular aspect has not been properly appreciated by the trial Court to ascertain whether any of his right has been affected during the pendency of the suit, whether he is a proper and necessary party to the suit and the court has adjudicated rights of the parties affected during the pendency of the suit, then the appellate Court ought to have considered whether he is entitled to prefer an appeal or not. In this way the first appellate Court has not properly appreciated the affidavit filed in support of I.A.

No. 2.

14. Apart from the above, some more important aspects, the first appellate Court has also appreciated certain facts at paragraph No. 17 which is also relevant, which create doubt as to whether plaintiff was in possession of the property as on the date of the suit or not. At the first instance, the first appellate Court had appreciated the facts that the plaintiff in O.S. No. 312/1988 apart from filing the suit parallelly also filed during the pendency of the suit, (precisely on 17.09.1991), an application u/S. 4 of the Karnataka SC/ST (Prohibition of Transfer of Certain Lands) Act, for cancellation of the sale deed and seeking possession before the Assistant Commissioner, Belgaum, in respect of VPC No. 817/1 and 817/2. On 06.08.1993, i.e., subsequent to the filing of the suit and during the pendency of the first appeal 174/91 the Assistant Commissioner, Belgaum, holding that the sale in favour of the respondents, i.e., in favour of the appellant and another insofar as V.P.C. No. 817/2 as illegal and hence ordered resumption of the land by issuing direction to the Tahasildar, Belgaum under Section 5 of the said Act. Challenging the said order the appellant herein has preferred a W.P. No. 12747/94 apart from filing appeal against the judgment and decree passed by the trial Court before the first appellate Court, challenging the order of the Assistant Commissioner.

15. The learned Single Judge of this Court has dismissed the said writ petition confirming the order of the Assistant Commissioner. Being aggrieved by the said order the appellant Rudrappa filed W.A. No. 5627/97 dated 12.08.1989. The said Writ appeal came to be allowed holding that the provisions of SC/ST Act are not applicable and the allegations made in respect thereof pertaining to the said properties are valid and Assistant Commissioner had no jurisdiction to entertain the application u/S. 4(1) of the PTCL Act. Consequently, the order passed by the Assistant Commissioner was quashed upholding the sale deeds in favour of the appellant and another. This proceeding clearly indicates and creates a serious doubt with regard to the possession of the plaintiff over the said property particularly in VPC No. 817/1, which was purchased by the appellant as on the date of the suit and the decree. When the appellate Court was fed with these circumstances and also the appellate Court has in detail discussed about this particular aspect, in my opinion, it ought to have permitted the petitioner to challenge the judgment of the trial Court by properly considering the applications filed under I.A. Nos. 1 and 2. Therefore, looking from the above said circumstances, I am of the opinion there is no delay deliberate, intentional or unreasonable in preferring the appeal. Actually the delay of 85 days had been properly explained by the appellant in the affidavit filed in support of the application.

16. The first appellate Court had also not properly appreciated contents of the affidavit filed in support of I.A. No. 1 in proper perspective. Further added to that, in view of the above said circumstances, subsequent events being taken place, the first appellate Court had to consider whether the plaintiff was in

possession and enjoyment of the property as on the date of the suit and the judgment, whether the trial Court was right in granting injunction order as such. Therefore, these important aspects have to be looked into by the Court on merits of the case. The appellant may not get an independent right over the property but he virtually steps into the shoes of the original vendor and decree also binds him. Therefore, I am of the opinion, an opportunity should have been given to question the said judgment and decree passed against him, which virtually affected his right as he is the subsequent purchaser of the said property.

17. Under the above said circumstances, I am of the opinion, the first appellate Court has committed a serious error in rejecting I.A. Nos. 1 and 2. In my opinion, I.A. Nos. 1 and 2 deserves to be allowed and the matter has to be remanded to the first appellate Court for disposal on merits of the case. With these observations the following order is made.

The petition is allowed. Judgment passed by the first appellate Court in R.A. No. 174/91 dated 13.12.2000 is hereby set aside. Consequently, I.A. Nos. 1 and 2 filed by the appellant are hereby allowed. Delay of 85 days in filing the appeal is hereby condoned and appellant is permitted to prosecute the appeal challenging the judgment and decree passed in O.S. No. 312/1988.

The first appellate Court has to secure presence of the parties and dispose of the appeal in accordance with law preferably within six months from the date of receipt of the copy of this order. All the contentions of the appellant and the respondents are kept open to be considered by the first appellate Court.

Office is hereby directed to send back the records of the trial Court and the first appellate Court, to the first appellate Court along with a copy of this order, forthwith.