

(2003) 07 KAR CK 0079

In the Karnataka High Court

Case No : Regular Second Appeal No. 665 of 1999

Sangappa Veerappa Katarki

APPELLANT

Vs

Bhimappa Yamanappa Chabbi

RESPONDENT

Date of Decision : 08-07-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : AIR 2003 Kar 462 : (2004) 1 CivCC 47 : (2004) 1 CTLJ 140 : (2003) ILR (Kar) 3259 : (2003) 6 KarLJ 213 : (2003) 3 KCCR 186 SN : (2004) 1 RCR(Civil) 90

Hon'ble Judges : K. Bhakthavatsala, J

Bench : Single Bench

Advocate : S.B. Hebballi, for the Appellant; Jeevan Neerlagi, for the Respondent

Final Decision : Allowed

Judgement

Bhakthavatsala, J.—This is Plaintiff's Regular Second Appeal filed u/s 100 of the Code of Civil Procedure, challenging the judgment and decree dated 25.6.1999 passed in R.A. No. 44/98 on the file of the I Additional Civil Judge (Sr. Dvn.), Bagalkot, allowing the Appeal and setting aside the judgment and decree dated 6.3.1998 passed in O.S No 46/96 on the file of the Principle Civil Judge (Jr. Dvn.), Bagalkot.

2. The Respondent has entered appearance through his Advocate, Sri Jeevan Neerlagi.

3. For the purpose of convenience and better understanding, the Appellant and the Respondent herein are referred to as "the Plaintiff" and "the Defendant" as arrayed in the Original Suit.

4. The brief facts of the case leading to the filing of the Appeal may be stated as under:-

The Plaintiff filed a Suit against the Defendant praying for a decree, directing the

Defendant to repay the earnest amount with interest at the rate of 24% per annum, which he had paid to the Defendant, under an agreement of sale dated 18.10.1993, who agreed to sell eastern 4 acres of land bearing Sy No 109/27 of Gaddankeri Village, for a sum of Rs. 72,000/- and received an earnest money of Rs. 10,000/- from him. Further, the Defendant agreed to execute sale deed in respect of the above-said land in favour of the Plaintiff after the land is converted for non-agricultural purposes. The Plaintiff and the Defendant had agreed that within three months from 18.10.1993, the Plaintiff has to pay an amount of Rs. 25,000/- to the Defendant towards sale consideration.

Accordingly, on 15.4.1994, as per the request of the Defendant, the Plaintiff paid a sum of Rs. 25,000/- to the Defendant towards sale consideration, and the Defendant, after receiving the amount of Rs. 25,000/- from the Defendant, has executed a supplementary agreement in favour of the Plaintiff. But, the Defendant failed to get the land converted and execute sale deed in respect of the abovesaid and in favour of the Plaintiff inspite of repeated request. Therefore, on 29.7.1995, the Plaintiff issued a legal notice to the Defendant calling upon him to repay the earnest amount of Rs. 35,000/- in all within seven days, but in-vain. Therefore, the Plaintiff filed a Suit for recovery of earnest amount of Rs. 35,000/- and interest of Rs. 5,066/- in all amounting to Rs. 40,066/-

The Defendant entered appearance before the Trial Court and filed written statement admitting that he is owner of the Suit land, but denied the averments with regard to execution of agreements (Exs. P1 and P2) and recovery of Rs.40,066/-. The case of the Defendant, as pleaded in the written statement, is that the Plaintiff approached him and persuaded him to convert the land for nonagricultural purposes and assured the Defendant that he would take the responsibility of converting the land for non-agricultural purpose and on that score, the Plaintiff took signature on bank papers for giving application to the concerned authority, and the Plaintiff has received a sum of Rs. 5,000/- from the Defendant to meet the expenditure, but the Plaintiff has concocted a false agreement of sale and the Defendant is not at all liable to pay any amount to the Plaintiff.

In view of the pleading on record, the Trial Court framed certain issues.

In support of the case of the Plaintiff, he got himself examined as P W-1 and got marked Exs-P1 to P5 In rebuttal, the Defendant got examined himself as D.W-1 and one Yallappa as D.W-2. Thereafter, the learned trial Judge heard arguments and after perusing evidence and material on record, answered Issue Nos. 1,4 to 7 and 10 in the affirmative and Issue Nos. 2, 3, 8, and 9 in the negative Issue No. 11 was answered partly in the affirmative and partly in the negative, and ultimately decreed the Suit of the Plaintiff directing the Defendant to pay a sum of Rs. 35,000/- along with interest at the rate of 12% per annum from the date of Suit till realisation. Feeling aggrieved, the Defendant preferred R-A No. 44/98 on the file of I Addl. Civil Judge (Sr. Dvn.), Bagalkot.

The Plaintiff entered appearance before the first Appellate Court. The first Appellate Court, after hearing arguments of the learned Counsels for the parties, formulated the following points for consideration:-

(i) Whether the plaintiff proves that on 18.10.1993 he paid Rs. 10,000/- and on 15.4.1994 paid another Rs. 25,000/- to the defendant towards the advance amount on agreement of sale and in consideration of that the defendant executed an agreement of sale on 18.10.1993 agreeing to sell the suit land to the plaintiff?

(ii) whether the plaintiff is entitled to the reliefs claimed?

(iii) Whether the interference by this Court is necessary in the judgment and decree passed by the trial Court?

(iv) What order?

For the reasons recorded by the first Appellate Court, answered Point Nos 1 and 2 in the negative and Point No 3 in the affirmative, and allowed the Appeal and set aside the judgment and decree passed in O.S. No. 46/96 on the file of principle Civil Judge (Jr. Dvn.), Bagalkot, and accordingly dismissed the Suit in O.S. No. 46/ 96. This is impugned in this Appeal.

5. Heard arguments of the learned Counsel for the parties.

6. During the course of argument, the learned Counsel appearing for the Appellant cited the following decisions:-

(i) SANTOSH HAZARI vs PURUSHOTTAM TIWARY (DEAD) BY LRS. ILR 2001 KAR 3385

(ii) SUNKAMMA vs H RAMAYYA REDDY AND OTHERS ILR 2000 KAR 192

(iii) Shekarappa Veerappa Harayabal Vs. Mahammadsab Maliksab Nadaf,

7. On the other hand, the learned Counsel appearing for the Respondent Cited the following decisions on the point, a finding of fact, which is against the weight of the evidence, does not project a question of law, much less a substantial question of law:-

(i) DEITY PATTABHIRAMASWAMY vs S HANYMAYYA AND OTHERS AIR 1959 SC 57

(ii) R. Ramachandran Ayyar Vs. Ramalingam Chettiar,

(iii) Dnyanoba Bhaurao Shemade Vs. Maroti Bhaurao Marnor,

(iv) Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others,

(v) Ram Kumar Agrawal and Another Vs. Thawar Das (Dead) Through Lrs.,

8. On 26.11.2001, when the matter had come up before the learned Single Judge of this Court, he admitted the Appeal on the substantial question law viz, "Whether the Court below was justified in reversing the judgment and decree

passed by the Trial Court by misreading the two agreements ie, Ex P1 and Ex P2?"

9. The very first contention of the learned Counsel for the Respondent is that in view of the decisions cited by him , the substantial question of law formulated for consideration is not a substantial question of law.

10. Though the learned Counsel appearing for the Respondent/ Defendant cited certain decisions on the point that the substantial question of law formulated for consideration is not a substantial question of law, I would like to take judicial notice and refer to the recent decision of the Apex Court, reported in Bondar Singh and Others Vs. Nihal Singh and Others, the said decision of the Apex Court rendered by three Judges Bench on the point of substantial question of law with reference to Section 100 of the Code of Civil Procedure, holds the field. The ratio laid down by the Apex Court in the above said case (vide para-4- at page-163 is as follows:-

"Before we proceed further it is necessary to notice a preliminary argument raised by the learned counsel for the appellants. It was contended that the question of possession is a question of fact and the High Court while exercising power u/s 100 of the Code of Civil Procedure, had no jurisdiction to upset the findings on this question recorded by the lower appellate Court. An appeal u/s 100 CPC can be entertained by the High Court only on a substantial question of law. There can be no quarrel with the legal proposition. The scope of powers of the High Court u/s 100 CPC is a matter of settled law. The learned Counsel for the appellant cited several judgments in support of his contention. We do not consider it necessary to discuss these decisions because so far as the question of powers of High Courts u/s 100 CPC is concerned, it needs no discussion. If the findings of the subordinate Courts on facts are contrary to the evidence on record and are perverse, such finding can be set aside by the High Court in appeal u/s 100 CPC. A High Court cannot shut its eyes to perverse findings of the Courts below. In the present case the findings of fact arrived at by the lower appellate Court were contrary to the evidence on record and, therefore, perverse and the High Court was fully justified in setting aside the same resulting in the appeal being allowed and suit being decreed." (emphasis supplied)

11. In view of the above-said recent decision of the Apex Court, the decisions cited by the learned Counsel for the Respondent/ Defendant on the point that substantial question of law formulated by this Court for consideration, does not project a question of law, much less a substantial question of law, are of no avail.

12. With regard to merits of the Case is concerned, according to the Plaintiff, Ex P1, was executed on 18.10.1993 by the Defendant agreeing to sell the Suit land for a sum of Rs. 72,000/- and received a sum of Rs. 10,000/- towards earnest money. Again on 15.4.1994, the Defendant executed supplementary agreement in his favour receiving a sum of Rs. 36,000/- towards sale consideration. The Plaintiff, has got himself examined as P.W-1 and got marked agreement of sale

(Ex P1), supplementary agreement (Ex P2), copy of legal notice (Ex P3), postal acknowledgment (Ex P4) and record of rights in respect of the Suit land (Ex P5) P W-2- Prakash Veerabhadrappe Handi has deposed that he wrote Ex P1 on 18.10.1993 and Ex P2 on 15.4.1994. He has further deposed that the Defendant subscribed his thumb impression to the agreement of Sale (Ex P1) and subsequently to Ex P2 on the relevant dates, and Exs. P1 and P2 were witnessed by two persons each. The Plaintiff has not examined any of the attesting witnesses to Ex P1. One of the attesting witnesses, Sri Sakarappa Bharamappa Kundargi to Ex P2 has been examined as P W-3, but he has not supported the case of the Plaintiff. It is elicited in the cross-examination of P.W-3 that P.W-3 himself, the Defendant and Bharamappa Hanamappa Toragasti (attesting witness) belong to the same caste and residents of same Village. Therefore, the learned Trial Judge accepted the contention of the learned Counsel for the Plaintiff that P.W-3 colluded with the defendant and therefore he did not support the case of the Plaintiff.

13. On the other hand, in order to prove the case of the Defendant, he got himself examined as D W-1 It is in his evidence that he has not received any amount of Rs. 10,000/- from the Plaintiff on 18-10-1993 under Ex P1. He has further deposed that the Plaintiff took his signature on blank papers stating that his signatures were required for the purpose of getting the land converted for nonagricultural use, and the Defendant had paid a sum of Rs. 5,000/- to the Plaintiff to meet conversion expenses. The Defendant has got examined one Yellappa Bharmappa Talawar as D.W-2. What D.W-2 has stated in his evidence is that the Defendant paid a sum of Rs. 5,000/- to the Plaintiff in his presence in order to meet the expenditure relating to land conversion D.W-2 has further deposed that in his presence, Plaintiff took signature of the Defendant on bond paper and the Defendant never offered to sell the Suit land to the Plaintiff.

14. With reference to the evidence of D.W.-2, the learned Trial Judge has observed that D.W.-2 has not stated the date, month and the year, in which the Plaintiff took the signature of the Defendant on blank bond paper and the Plaintiff received a sum of Rs. 5,000/- from the Defendant. It has been elicited in the cross-examination of D.W-1 that no land situated near or surrounding the Suit land had been converted for non-agricultural purpose, so as to convert the Suit land for non-agricultural use. Except the self-serving testimony of D Ws-1 and 2, the Defendant has not produced an iota of documentary evidence to prove his case.

15. I have carefully examined Exs.P1 and P2 Ex P1 is in hand writing on non-judicial one sheet stamp paper purchased on 18.10.1993. Ex P2 is also in hand writing reduced on a non-judicial one sheet stamp paper purchased on 15.4.1994. At the concluding portion of the Ex P1, there are three thumb marks, said to be of the Defendant and two attesting witnesses. Ex P2 bears two thumb marks and one signature, said to be that of the Defendant and two attesting witnesses. The Defendant's thumb mark on Ex P1 is in blue ink, whereas the

thumb mark of the Defendant of Ex P2 is in black ink. The case of the Defendant is that the Plaintiff took signatures, but Exs. P1 and P2 do not bear the signature of the Defendant, but they bear only thumb impressions. The Defendant has not given any reasons why he has put thumb impressions on Ex P1 in blue colour and Ex P2 in black colour ink. P W-3, one of the attesting witnesses to Ex P2 has not denied his signature of Ex P2, though he turned hostile to the Plaintiff.

16. In the instant case, even if the Plaintiff does not prove Ex P1, the Plaintiff is entitled to succeed in the Suit solely on the basis of Ex P2. Though it is described as supplementary, but all the material particulars contained in Ex P1 have been repeated in Ex P2 also. Since the Defendant has taken the contention that he had signed the papers for the purpose of conversion of the land and not for alienating the land, heavy burden lies on the Defendant to prove his case, but the Defendant has not discharged his burden satisfactorily. Though Ex P2 reveals that the Plaintiff paid a sum of Rs. 36,000/- since while issuing legal notice, it was mentioned as only Rs. 35,000/-, the Plaintiff has restricted his claim of refunded only to that extent.

17. The learned Trial Judge has rightly answered the material issues in favour of the Plaintiff and decreed the Suit. But, the First Appellate Court, without making proper appreciation of documents and evidence on record, has reversed the judgment and decree of the Trial Court.

18. In my opinion, the finding of fact arrived at by the Lower Appellate Court are contrary to the evidence on record and therefore, perverse. Hence, I answer the substantial question of law formulated at the time of admission, in the negative, in favour of the Appellant/ Plaintiff and against the Respondent/Defendant.

19. Therefore, I pass the following order:-

The Appeal is allowed. The judgment and decree dated 25.6.1999 passed in R.A.No. 44/98 on the file of the I Additional Civil Judge (Sr. Divn.), Bagalkot, are set aside and the judgment and decree dated 6.3.1998 passed in O.S. No. 46/96 on the file of the Principal Civil Judge (Jr. Divn.), Bagalkot, are restored.