

(2002) 11 KAR CK 0016

In the Karnataka High Court

Case No : Regular Second Appeal No. 806 of 2002

Sannu and Another

APPELLANT

Vs

Smt. Sanni Kom. Somayya and Others

RESPONDENT

Date of Decision : 25-11-2002

Acts Referred:

Karnataka Land Reforms Act, 1961 — Section 133, 48 A

Citation : (2002) 11 KAR CK 0016

Hon'ble Judges : B. Padmaraj, J

Bench : Single Bench

Advocate : Sriyuths Noel Gonsalves, Suresh S. Bhat and E.V. Ramanna, for the Appellant; S.R. Hegde Hudlamane, for R1 to R8/Caveators, for the Respondent

Final Decision : Dismissed

Judgement

Padmaraj, J.—Heard the arguments of the learned Counsel appearing for the appellants as well as the learned Counsel for the respondents/ caveators and carefully perused the case papers including the impugned Judgments passed by both the Courts below, with their assistance.

2. The plaintiffs are the appellants herein. They filed a suit for partition and separate possession of their 1/2 share in the suit properties and also for declaration that the Mutation Entry bearing No. ME 98 of Kerehittalu village is null and void and not binding on the plaintiffs. The plaintiffs and the defendant Nos. 9 and 10 are the children of one Somayya Gonda through his 1st wife. The defendant No. 1 Smt. Sanni is the 2nd wife of the said Somayya Gonda. The defendant Nos. 2 to 8 are the children of the deceased through his 2nd wife. The suit properties were the tenanted properties. During the life time of the deceased Somaiah, he filed an application for grant of occupancy rights in respect of these lands before the concerned Land Tribunal and he was accordingly granted the occupancy rights in respect of these suit lands. The said Somayya Gonda had died on 14.3.1995. Before that it is stated in the year 1993 Somayya Gonda and the defendants had filed a joint vardhi and pursuant to which the disputed

mutation entry No. 98 of Kerehittalu village came to made during the life time of the deceased Somayya Gonda which was alleged to be without notice to the appellants. Though the appellants stated to have preferred an appeal against such mutation entry, the same was partly allowed, but confirmed the entry. Thereafter it is stated that the appellants filed the present suit. The appellants/plaintiffs claimed that the suit properties are the joint family properties and hence they have got a share. The defendant No. 1 filed the written statement which was adopted by the defendants 2 and 3. The defendant Nos. 4 and 8 were minors and they were duly represented by their mother guardian the defendant No. 1. They denied that the suit properties are the joint family properties. They further set up a registered Will dated 10.3.1980 executed by Somayya Gonda bequeathing the suit properties in their favour. They also contended that in an oral partition which took place on 12.8.1972, a land bearing Sy.No. 1/1 was given to the plaintiff No. 1 by the deceased Somayya Gonda and hence he ceased to be a member of the joint family. On these and other contentions taken by them, they contended that the appellants/ plaintiffs are not entitled to any share in the suit property. The defendant No. 5 also filed the written statement and she took more or less the same contention. The Trial Court decreed the suit holding that the plaintiffs 1 and 2 are entitled to 1/11th share each in the suit property. On appeal, the appellate Court allowed the appeal and set aside the Judgment and Decree of the Trial Court. Hence this Second Appeal by the appellants/plaintiffs.

3. Learned Counsel for the appellants has vehemently contended before me that when it is an admitted fact that the suit lands were tenanted lands granted to the deceased Somayya, the Courts below ought to have referred the question whether the lands in question were of the joint family or only of Somayya Gonda as it was the Tribunal which has jurisdiction to decide on this aspect of the matter. He contended that the Court below could not have taken it upon itself to decide the said question in view of the law laid down by the Hon'ble Supreme Court in the case of MUDAKAPPA v. RUDRAPPA. While placing reliance upon the said decision, he contended that when the question arises whether the member or joint family is the tenant, that question should be decided by the Land Tribunal alone u/s 48A r/w Section 133 of the Karnataka Land Reforms Act and not by the Civil Court. He therefore contended that the Judgment and Decree passed by both the Courts below is one without jurisdiction. He further contended that this being a question of law, it can be raised even in the second appeal as it relates to the jurisdiction of the Court. He further contended that the Courts below ought to have seen that the jurisdiction of the Civil Court was excluded in view of Section 133 of the Karnataka Land Reforms Act and that being so, the finding of the Court below as to whether the suit property is the exclusive property or the joint family property is without jurisdiction and as such liable to be set aside. He further contended that the question whether the deceased had right to bequeath the property in favour of the respondents/defendants would hinge upon the finding whether the properties are the joint family properties or the individual

properties of Somayya and hence it was necessary to refer the question to the Land Tribunal for its decision and the Courts below having failed to do so, the finding that the Will is valid and Somayya had the right to bequeath the same to the defendants/respondents is vitiated and liable to be set aside. He also contended that the Court below erred in finding that if the defendants are able to prove the Will, then the plaintiffs have no share in the suit properties and erred in proceeding to take points 1 and 2 for consideration together without framing point as to whether the suit properties are the joint family properties or the self acquired. 1. Mudakappa Vs. Rudrappa and others, properties of the deceased Somayya. He contended that the questions involved in the suit would revolve round the point whether the lands in question were joint family properties or the exclusive properties of the deceased Somayya and on this point it is only the Tribunal which has jurisdiction and not the Civil Court. He therefore contended that the substantial questions of law as proposed in the memorandum of appeal would arise for consideration in this Second Appeal filed by the appellants. He further contended that the joint family was only in respect of the suit property and not in respect of the land bearing Sy.No. 1/1. He therefore contended that the contention of the other side that Sy.No. 1/1 was given to the share of the plaintiff No. 1 is not correct and proper. While elaborating this submission, he contended that the land bearing Sy. No. 1/1 is concerned, the occupancy rights were conferred in the joint names of the 1st plaintiff and one Sanni who is the maternal aunt of the plaintiff No. 1 and if in fact the said property was a joint family property, it could not have been granted in the joint names of the 1st plaintiff and one Somayya. Further while drawing my attention to the definition of the joint family as defined u/s 2(A)(17) and Section 21 of the Karnataka Land Reforms Act, he contended that for the purpose of joint family, it is not the holding which is relevant but what is relevant is that the joint family was undivided and that if the tenant dies as an undivided member of a joint family, the property in question shall devolve upon the surviving members of the said family. This being the position of law, he contended that when the deceased Somayya had died and there being no division in the joint family, the property shall devolve upon the surviving members of the joint family, of which the deceased was also a member. Under the circumstances, he contended that the plaintiffs will certainly have a share in the property which has been rightly found by the Trial Court and wrongly reversed by the 1st Appellate Court.

4. As against this, the learned Counsel appearing for the respondents/cavettos has contended that the jurisdiction point which is now sought to be raised by the appellants for the first time in the second appeal was never raised before the Courts below. According to the learned Counsel for the respondents/cavettos point which is not raised before the Court below cannot be raised for the first time in the Second Appeal. In support of this contention, he has relied upon the two decisions of the Hon'ble Supreme Court reported in 1997 Supreme Appeals Reporter 282(Headnotes A & B) & 1998 Supreme Appeals Reporter 716 (Head Notes A and B). While placing reliance upon these two decisions, he contended

that the appellants are not allowed to set up a new plea in the Second Appeal not supported by the pleadings or the evidence on record. Further while placing reliance upon a decision of this Court in the case of Narayana and Others Vs. A. Sadashiva and Others, he contended that it is essentially a question of fact as to whether the tenancy rights on the basis of which the deceased Somayya sought and obtained occupancy rights was a joint family tenancy or not and it is for the Civil Court to decide the issue when the proceedings before the Land Tribunal stood terminated long before the litigation in question. While elaborating this submission, he contended that in the instant case it is not in dispute that the deceased Somayya in his individual name filed an application for grant of occupancy rights before the Land Tribunal and the Land Tribunal after due enquiry conferred occupancy rights in respect of the suit lands in favour of the deceased Somayya and which finding of the Land Tribunal has become final and conclusive in 1975 and it is only subsequently after the death of the deceased Somayya, the appellants herein sought to claim a share therein on the ground that it is a joint family property and that being so, it was well within the jurisdiction of the Civil Court to decide the issue which arose for determination in the suit and the same could not have been referred to by the Civil Court to the Land Tribunal as the Land Tribunal had already decided the matter and it was not entitled under law to reopen or to review its decision. He further contended that in the instant case the Trial Court as well as the 1st appellate Court have both recorded a concurrent finding that the lands in question were the self acquired properties of the deceased Somayya and the Trial Court only on the ground that Section 21 of the Karnataka Land Reforms Act is a bar, did not recognise the Will. But the 1st Appellate Court on a correct and proper appreciation of the law on the point and in view of the decision of the Hon''ble Supreme Court in the case of SANGAPPA v. LAND TRIBUNAL ILR 1999 KAR 863 held that the bar u/s 21 will not operate when the assignment under the Will is in favour of his heirs. He therefore contended that no substantial question of law will arise for consideration in this Second Appeal filed by the appellants.

5. Having heard the submissions on both sides and having carefully perused the case papers as well as the decisions relied upon by the learned Counsel on either side, the short question that would arise for consideration is whether this Second Appeal filed by the appellants involves any substantial questions of law as proposed by the appellants in their memorandum of appeal?

6. It has to be stated at the outset that generally an appellant is not to be allowed to set up a new plea in the second appeal otherwise than a jurisdictional one not supported by the pleadings or the evidence on record unless of course the appeal involves a substantial question of law. In the instant case the question which is now sought to be raised by the appellants being one of a jurisdictional question, it could be raised even for the first time in the second appeal. Now the question is whether the substantial question as proposed with regard to the jurisdiction arises in the Second Appeal? It is no doubt true as has been held by the Hon''ble Supreme Court in the decision relied upon by the learned Counsel

for the appellants reported in Mudakappa Vs. Rudrappa and others, that when a question arises whether the member or joint family is the tenant, that question should be decided by the Tribunal alone u/s 48A r/w Section 133 of the Karnataka Land Reforms Act and not by the Civil Court. But in the instant case it is not in dispute that the Land Tribunal had already granted the occupancy rights in favour of the deceased Somayya as far back as on 7.11.1975. The said finding has become final and conclusive. There appears to be no serious dispute that the occupancy rights were conferred by the Tribunal in the name of the deceased Somayya. The dispute between the parties arose only after such occupancy rights were conferred and also after the death of the deceased Somayya on 14.3.1995. When once the occupancy rights are granted, the leasehold rights stand converted into freehold rights without damaging the rights of the occupant family or any member thereof and it is always open to the member or the members of the family to claim their share or right in the Civil Court over the lands on which occupancy rights were granted by establishing their right or interest in the property. Obviously for that reason alone, the appellants/plaintiffs filed the suit for partition before the Civil Court. It is no doubt true that during the pendency of the suit, the question arose whether the lands in question are the joint family properties or the individual properties of the deceased Somayya. But then this question could not have been referred to the Land Tribunal for the reason that the Land Tribunal had already conferred occupancy rights in favour of the deceased Somayya and there is no provision under the Karnataka Land Reforms Act for reviewing the claim or for recalling the claim for tenancy rights and that too after a lapse of more than 20 years. Furthermore it appears to me that the appellants/ plaintiffs sought to claim a share in the suit property only after the death of the deceased Somayya and their claim appears to be that they have a share in the property which was left behind by the deceased Somayya. In that event there could be no question of referring the issue to the Land Tribunal. Even otherwise, as I have already stated when the matter has already been decided by the Land Tribunal, the question of referring the issue back to the Land Tribunal did not arise and since it is a question which has arisen after the Land Tribunal granted the occupancy rights in favour of certain person, it was required to be decided by the Civil Court. Now coming to the merits of the case, it has to be pointed out that there is a concurrent finding recorded by both the Courts below that the suit properties were the self acquired properties of the deceased Somayya. This is essentially a finding of fact recorded by both the Courts below on consideration of the entire materials placed on record. It would be of some relevance to note here itself that even the Trial Court had recorded a finding that the lands in question were not the joint family properties, but the self acquired properties of the deceased Somayya. The said finding recorded by the Land Tribunal was not questioned by the appellants. It is to be seen therefore that the plaintiffs also did not seriously dispute the fact that it was the self acquired property of the deceased Somayya. The said concurrent finding recorded by both the Courts below is essentially a finding of fact supported by evidence and hence it is binding on this Court and this Court in the Second Appeal cannot interfere

with the said finding. On the question of jurisdiction of the Civil Court to entertain the suit, as I have already stated, there being already a finding given by the Land Tribunal conferring occupancy rights in favour of the deceased, the Civil Court could not have referred any issue for decision to the Land Tribunal. In fact it is the plaintiffs who came to the Court seeking the relief of partition and separate possession of their alleged 1/2 share in the suit property. That being so, it is not open to the plaintiffs now to contend in the Second Appeal that the Civil Court had no jurisdiction to decide the controversy between the parties. That apart, as I have already stated it is not in dispute that the Land Tribunal had already conferred the occupancy rights in respect of the suit lands on the deceased Somayya somewhere in the year 1975 and the said order of the Land Tribunal has become final and conclusive. There is nothing to show from the order of the Land Tribunal that the occupancy rights were conferred on the deceased Somayya as a member of the joint family for and on behalf of the said joint family. It is also not the case of any of the parties that the deceased Somayya was conferred with occupancy rights for and on behalf of the joint family. On the other hand the order of the Land Tribunal would indicate that the deceased Somayya had applied for occupancy rights and the same after due enquiry has been conferred upon him. Thus the Land Tribunal had ceased of the matter and it cannot reopen the matter one again. Therefore the question of referring any issue to the Land Tribunal on the facts and in the circumstances of the case did not arise for the reason that the Land Tribunal had already conferred occupancy rights and when once the Land Tribunal had granted occupancy rights, it is not entitled under law to review the same. As I have already stated the dispute between the parties had started only after the death of the deceased Somayya and the real question in controversy was about the sharing of the property as the legal heirs of the deceased Somayya. This being the nature of dispute between the parties, the question of referring the same to the Land Tribunal did not arise and it is only for the Civil Courts to decide as to who should succeed to the estate of the deceased. In this regard, it was found by the 1st Appellate Court that the deceased Somayya did not die intestate and he has left behind him a Will. Therefore the property should go by the testament of the deceased. Since the said Will was executed in favour of his own legal heirs, Section 21 of the Karnataka Land Reforms Act was not a bar as has been held by the decision of the Hon''ble Supreme Court reported in ILR 1999 KAR 863 relied upon by the learned Counsel for the respondents/ caveators. The 1st Appellate Court has found on facts that the execution of the Will as well as its genuineness stood proved from the evidence on record. This is again a finding of fact recorded by the 1st Appellate Court and hence it is essentially a finding of fact supported by evidence which cannot be interfered with by this Court in the Second Appeal. Therefore the 1st appellate Court was right in holding that by virtue of the Will of the deceased testator, it is the defendants who are entitled to hold the suit properties. The said view taken by the 1st appellate Court cannot be said to be either perverse or illegal. Therefore having given my anxious consideration to the entire matter in issue, I am of the considered view that no substantial question

of law will arise for consideration in this Second Appeal filed by the appellants. Hence this Second Appeal filed by the appellants is liable to be dismissed summarily and it is accordingly dismissed. No costs.