

(2009) 08 KAR CK 0010

In the Karnataka High Court

Case No : Regular Second Appeal No. 716 of 2002

Shappa alias Ishwarappa

APPELLANT

Vs

Kalakappa and Others

RESPONDENT

Date of Decision : 12-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, Order 6 Rule 4
Specific Relief Act, 1963 — Section 34

Citation : (2009) 6 KarLJ 301

Hon'ble Judges : H.N. Nagamohan Das, J

Bench : Single Bench

Advocate : Suresh P. Hudedagaddi, for the Appellant; S.R. Hegde, for Respondent-1 and K.N. Mahabaleshwar Rao, for Respondents-2 and 3, for the Respondent

Final Decision : Allowed

Judgement

H.N. Nagamohan Das, J.—Appellant is the defendant and respondents are the plaintiffs before the Trial Court. In this judgment for convenience the parties are referred to their status before the Trial Court.

2. Plaintiffs contend that the plaint schedule properties originally belong to one Andawwa. The defendant by playing fraud and by misrepresentation obtained a registered gift deed dated 25-10-1957 from Andawwa. During the lifetime of Andawwa, she came to know about the registered gift deed in the year 1970. Thereafter, the plaintiffs and Andawwa initiated legal proceedings against defendant in O.S. No. 9 of 1970 for decree of permanent injunction. So also the defendant filed O.S. No. 10 of 1970 against Andawwa and plaintiffs for decree of permanent injunction. These two suits O.S. Nos. 9 and 10 of 1970 came to be returned for want of jurisdiction.

3. Thereafter, the defendant filed O.S. No. 96 of 1972 against the plaintiffs and Andawwa for decree of permanent injunction and the same came to be decreed. Aggrieved by the judgment and decree in O.S. No. 96 of 1972, the plaintiffs and

Andawwa filed an appeal in R.A. No. 5 of 1986 and the same came to be dismissed. Further, this Court in RSA No. 15 of 1987 confirmed the judgment of Trial Court and the lower Appellate Court and dismissed the second appeal and the operative portion reads as under:

Accordingly, I do not think that any substantial question of law arises for consideration in this appeal. To avoid further controversy between the parties, it is also made clear that all other findings and observations except finding on the question of lawful possession are left open to be decided in properly instituted suit of title.

4. After the disposal of RSA No. 15 of 1987, the plaintiffs filed O.S. No. 51 of 1987 against the defendant for declaration of title on the basis of the Will dated 2-2-1970 said to have been executed by Andawwa or in the alternative to declare the title by law of adverse possession and for permanent injunction. The plaintiffs further pray that the gift deed dated 25-10-1957 as not binding on them and alternatively prayed for recovery of possession.

5. The defendant entered appearance before the Trial Court and filed written statement inter alia contending that Andawwa transferred the plaint schedule properties in favour of the defendant under a registered gift deed dated 25-10-1957 and since then he is in lawful possession and enjoyment of the schedule properties. The defendant contends that Andawwa after executing the gift deed had no right to bequeath the schedule properties in favour of the plaintiffs under the Will dated 2-2-1970. The suit of the plaintiffs is barred by limitation and not maintainable. On these grounds the defendant opposed the claim of the plaintiffs. On the basis of the pleadings, the Trial Court framed the following 14 issues for its consideration:

1. Whether the plaintiff proves that the gift deed executed by deceased Andawwa dated 25-10-1957, in favour of defendant is liable to be cancelled and not binding on him?

2. Whether the plaintiff proves that deceased Andawwa and subsequent to her, the plaintiff perfected their title by principles of adverse possession, in the event of proof of gift deed dated 25-10-1957?

3. Whether the plaintiff proves that he has become absolute owner in possession of the suit property by virtue of the Will executed by deceased Andawwa dated 2-2-1970 in his favour?

4. Whether the plaintiff is entitled for the relief of declaration of title and for consequential relief of injunction?

5. Whether the plaintiff is entitled for possession of result property in the alternative?

6. Whether the defendant proves that deceased Andawwa executed gift deed date 25-10-1957 in his favour in respect of the suit property and that he is in

lawful possession and enjoyment of the same since then?

7. Whether the defendant proves that this suit is hit by principles of res judicata?

8. Whether the defendant proves that the Court fee paid is insufficient?

9. Whether the defendant proves that the suit is hit by misjoinder of causes of action and multifariousness?

10. Whether the suit is not maintainable without bringing the suit for cancellation of gift deed dated 25-10-1957 and the judgment and decree in O.S. No. 96 of 1972?

11. Whether the suit is not maintainable u/s 34 of the Specific Relief Act, 1963?

12. Whether the suit is hit by Section 27 and Article 58 of the Limitation Act, 1963?

13. Whether the defendant is entitled for compensatory costs and if so, to what amount?

14. What decree or order?

6. Before the Trial Court, plaintiffs examined 5 witnesses as P.Ws. 1 to 5 and got marked Exs. P. 1 to P. 37. The defendant examined four witnesses as D.Ws. 1 to 4 and got marked Exs. D. 1 to D. 43. The Trial Court after hearing arguments on both the sides and on appreciation of the pleadings, oral and documentary evidence on record, held that the gift deed dated 25-10-1957 as valid, binding on the parties and defendant is in lawful possession and enjoyment of the schedule properties. Consequently the Trial Court vide judgment dated 7-1-1991, dismissed the suit of plaintiffs. Aggrieved by this judgment of the Trial Court, the plaintiffs filed an appeal in R.A. No. 14 of 2000 before the lower Appellate Court. After hearing the arguments on both the side, the lower Appellate Court framed the following two points for its consideration:

1. Whether the judgment and decree passes by the lower Court are illegal, perverse and capricious?

2. Whether the interference by this Court into the judgment and decree of the lower Court is necessary?

7. The lower Appellate Court on re-appreciation of the entire material on record, passed the impugned judgment holding that the gift deed dated 25-10-1957 is not valid and the defendant has not derived any title in the schedule properties. The lower Appellate Court further held that defendant was not put in possession of the plaint schedule properties under the gift deed dated 25-10-1957. Consequently under the impugned judgment, the lower Appellate Court allowed the appeal R.A. No. 14 of 2000, set aside the judgment of the Trial Court and decreed the suit of plaintiffs directing the defendant to deliver the possession of the plaint schedule properties to the plaintiffs. Hence, this second appeal by the defendant.

8. At the time of admission of this second appeal on 6-8-2002, this Court framed the following two substantial questions of law:

1. Whether the suit filed by the plaintiff was maintainable in view of the question of limitation as well as the question of res judicata involved in the matter?

2. Whether the judgment passed by the Court below is in accordance with Order 41, Rule 31 of the Civil Procedure Code, 1908 and whether the same is contrary to law laid down by the Hon"ble Supreme Court in Madhukar and Others Vs. Sangram and Others, ?

9. At the time of final hearing, this Court after hearing for some time, reframed/ modified the substantial questions of law as under:

(1) Whether the lower Appellate Court is legally correct in holding that the registered gift deed dated 25-10-1957 as invalid?

(2) Whether the lower Appellate Court is correct in holding that plaintiffs are the owners of schedule property?

(3) Whether both the Courts below are legally correct in holding that the suit of plaintiffs is in time u/s 27 and Article 58 of the Limitation Act?

10. Heard arguments on both the sides and perused the entire appeal papers.

11. Admittedly, late Andawwa was the owner of plaint schedule properties. Andawwa during her lifetime executed a registered gift deed on 25-10-1957 in favour of the defendant. Plaintiffs claim that they are the legatees under a Will dated 2-2-1970 executed by Andawwa. Plaintiffs are not claiming any independent title in the schedule property. On the other hand, plaintiffs are claiming their title to the schedule property through the original owner Andawwa. Andawwa is a party to the registered gift deed dated 25-10-1957. Keeping alive the registered gift deed dated 25-10-1957, plaintiffs are not entitled to seek declaration of title in respect of the properties covered under the gift deed. Therefore, it is necessary for the plaintiffs to seek cancellation of the gift deed dated 25-10-1957 or to declare that the same is void in law. In the instant case, the plaintiffs have neither sought for cancellation of the gift deed nor to declare the same as void. Therefore, the plaintiffs are not entitled to maintain the suit.

12. The plaintiffs contend that the registered gift deed dated 25-10-1957 is not binding on them on the ground that the same is obtained by the defendant by playing fraud on the original owner Andawwa. In para 3 of the plaint, it is pleaded that when Andawwa was ill, the defendant by playing fraud obtained the gift deed. The details of fraud is not pleaded as required under Order 6, Rule 4 of the CPC. It is mandatory for the plaintiffs to furnish the details of fraud like what was the illness, up to what date the illness continued, further the illness was so severe that Andawwa could not take a rational judgment, the nature of fraud etc. Further, the defendant must be made known specifically the nature of fraud played by him so as to defend himself. In the absence of necessary details

relating to fraud the pleading in the plaint is totally inadequate and thus, the plaintiffs have failed to prove and establish the plea of fraud played by the defendant in securing the gift deed dated 25-10-1957.

13. The plaintiffs witness P.W. 1 before the Trial Court deposed stating that defendant obtained the gift deed by using force and coercion on Andawwa. At another breach, P.W. 1 deposes that Andawwa was suffering from Tuberculosis and the defendant took her under the pretext that she will be shown to a doctor and thus, misrepresenting and playing fraud upon her, the gift deed was obtained by the defendant. This evidence on record is not only contrary to the pleadings but the same is inconsistent. Except the oral interested testimony of P.W. 1, there is no other evidence on record in support of the plea relating to fraud. Thus the plaintiffs have miserably failed to prove and establish that defendant by playing fraud, obtained the gift deed from Andawwa.

14. It is not in dispute between the parties that defendant filed O.S. No. 96 of 1972 against the plaintiff and Andawwa for a decree of permanent injunction restraining them from interfering with the defendant's possession and enjoyment of the schedule properties and on contest, the same came to be decreed as per Ex. P. 19. Plaintiffs and Andawwa questioned the decree in O.S. No. 96 of 1972 before the First Appellate Court in R.A. No. 5 of 1986 and the same came to be dismissed as per Ex. P. 20. Further, the plaintiffs and Andawwa approached this Court in RSA No. 15 of 1987 and the same came to be dismissed.

15. It is not in dispute that the properties mentioned in the gift deed are the subject-matter in O.S. No. 96 of 1972. The claim of defendant in O.S. No. 96 of 1972 is based on the registered gift deed dated 25-10-1957. This Court by considering the entire pleadings, evidence and the gift deed, held that the question of lawful possession of defendant as final. The lower Appellate Court by ignoring this finding of this Court in RSA No. 15 of 1987, committed an error in holding that defendant has not acquired the possession of plaint schedule properties under the gift deed. Thus, the finding of lower Appellate Court is illegal and perverse.

16. The lower Appellate Court mainly relied on a stray admission made by the defendant in the course of cross-examination stating that he got into possession of the plaint schedule properties are temporary injunction was granted in O.S. No. 96 of 1972. The lower Appellate Court committed an error in solely relying on a stray admission of D.W. 1 in his evidence. A Division Bench of this Court in Parameshwari Bai Vs. Muthojirao Scindia, ", held as under:

Stray evidence elicited in the cross-examination could hardly be construed as admission. Before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive. There should not be any doubt or ambiguity about the alleged admission and to examine whether there is ambiguity in the admission, it would be necessary for the Court to read the other

parts of the evidence and the stand taken by him in the pleadings.

17. In view of the law declared by this Court in Smt. Parameshwari Bai's case, it is necessary to examine the fact situation in the present case. The registered gift deed is of the year 1957. On the basis of this gift deed in O.S. No. 96 of 1972, a Competent Civil Court held that defendant is in possession and enjoyment of the plaint schedule properties. This judgment of the Trial Court in O.S. No. 96 of 1972 is confirmed by the First Appellate Court in R.A. No. 5 of 1986 and this Court in second appeal in RSA No. 15 of 1987. Further, the defendant in his written statement in the present suit specifically pleaded that he is in possession and enjoyment of the plaint schedule properties from the year 1957. Even in the Examination-in-Chief, D.W. 1 deposes that he is in possession of the plaint schedule properties from the year 1957. Immediately after the stray admission in the cross-examination, D.W. 1 in the next sentence denied the suggestion that he was not given possession on the date of gift deed. Therefore, the entire evidence on record is required to be considered while appreciating a stray admission made by the defendant. The lower Appellate Court committed an error in segregating the stray admission of defendant from other evidence on record. Therefore, the lower Appellate Court committed an illegality in relying on the stray admission of D.W. 1.

18. The decision relied on by the learned Counsel for the plaintiff in Smt. S.V. Kunhima Vs. B.N. Viswanath, ", has no application to the facts on hand. Learned Single Judge of this Court in Smt. S.V. Kunhima's case noticed the fact that the admission made by the witnesses is not ambiguous and the same was clear specific and with proper understanding of the question. But in the instant case, the stray admission made by defendant is ambiguous. In the pleadings, in the evidence, in the gift deed, in the revenue records and the finding of this Court in RSA No. 15 of 1987, specifies that defendant is in possession of plaint schedule property from the year 1957 and on the other hand, the stray admission in the cross-examination of D.W. 1 states that defendant came into possession after temporary injunction order was granted in O.S. No. 96 of 1972. Therefore, the stray admission of D.W. is ambiguous. Further, the stray admission is to be read with the contents of a registered gift deed which had come into existence in the year 1957. Therefore, the law declared by this Court in Smt. S.V. Kunhima's case is of no assistance to the plaintiffs.

19. D.W. 1 is the donee under the gift deed and D.W. 2 is the attesting witness to the gift deed. The lower Appellate Court on the basis of some inconsistency in the evidence of D.Ws. 1 and 2, held that the gift deed is not proved. It is to be remembered that gift deed was registered in the year 1957. D.Ws. 1 and 2 deposed before the Court in the year 1990. There is a gap of nearly 33 years from the date of deed to the date of giving evidence before the Court. This long gap of 33 years is the material point required to be taken into consideration while assessing the inconsistency in the evidence of D.Ws. 1 and 2. Further, the inconsistency pointed out by the lower Appellate Court will not go to the root of

the matter and shake the very foundation of a registered document. The minor inconsistencies of these two witnesses will not take away a presumption as to official acts done by the Sub-Registrar in the course of registering the gift deed in question. Thus the lower Appellate Court committed an illegality in holding that gift deed as invalid.

20. It is necessary for the lower Appellate Court to consider the entire evidence by applying its mind independently. The lower Appellate Court while doing so shall consider the reasoning of the Trial Court and thereafter, give its reasons for not agreeing with the findings of the Trial Court. This is the view taken by this Court in the case of Padmashree S.N. Swamy Vs. Smt. Gowramma, In the instant case, the lower Appellate Court has not considered the entire evidence on record. Further no reasons are assigned to differ with the reasoning of the Trial Court. Therefore, the entire approach adopted by the lower Appellate Court is contrary to the law declared by this Court in Padmashree S.N. Swamy's case. For the reasons stated above, the question of law (1) is answered in the affirmative.

21. Since the gift deed dated 25-10-1957 executed by Andawwa in favour of defendant is held as valid, the plaintiffs will not derive any title in the schedule properties under the Will dated 2-2-1970. On the date of executing the Will on 2-2-1970, Andawwa has no right to bequeath the schedule properties in favour of the plaintiffs. Therefore, the plaintiffs do not derive any right, title and interest in the schedule properties. Hence, question of law No. 2 is held in affirmative.

22. The prayer of plaintiffs for declaration of title in the plaint schedule properties is based on a Will dated 2-2-1970 executed by the original owner Andawwa. Plaintiffs in the plaint pleaded that they have perfected their title by law of adverse possession. On the basis of this pleading, the Trial Court framed issue 2 relating to adverse possession. But in the course of evidence, the plaintiffs admitted that defendant is in possession and enjoyment of the plaint schedule properties. Further both the Courts below noticed the fact that in the absence of necessary pleading and evidence relating to adverse possession held that plaintiffs have miserably failed to prove that they have established their title by law of adverse possession. In the plaint, the plaintiffs have also prayed for alternative relief of recovery of possession of plaint schedule properties. Therefore, the relief of recovery of possession is a consequential relief to the main relief relating to declaration of title. Therefore, the relief of possession of suit schedule properties was claimed as a consequence of declaration of title would be governed by Article 65 and not Article 58 of the Limitation Act. Therefore, both the Courts below committed an error in bringing the claim of plaintiffs under Article 58 of the Limitation Act. Since the claim of plaintiffs is governed by Article 65 of the Limitation Act, the suit is required to be filed within 12 years from the date of defendant's possession become adverse to the plaintiffs.

23. It is not in dispute that right from the year 1970, both the parties are before the Court agitating their right and possession over plaint schedule properties.

Right from the year 1970, the plaintiffs are aware of the fact that there is a registered gift deed of the year 1957 in favour of the defendant executed by Andawwa. Further, it is seen from the record that this Court in RSA No. 15 of 1987 held that all other findings and observations except finding on lawful possession of defendant in O.S. No. 96 of 1972 are left open to be decided in properly instituted suit of title. This finding in RSA No. 15 of 1987 will not take away the effect of Article 65 of the Limitation Act. Once the clock of limitation commences, the same cannot be stopped. Therefore, the suit filed by the plaintiffs in the year 1987 is hit by law of limitation. Accordingly, the question of law No. 3 is held in affirmative holding that the finding of both the Courts below stating that the suit of plaintiffs is within the limitation as bad in law.

24. For the reasons stated above, the following:

ORDER

- (i) The appeal is hereby allowed.
- (ii) The impugned judgment and decree dated 9-7-2002 in R,A. No. 14 of 2000 passed by the District Judge, Gadag, is hereby set aside.
- (iii) The judgment and decree of the Trial Court dated 7-1-1991 in O.S. No. 51 of 1987 passed by the Civil Judge at Gadag, is restored and confirmed.
- (iv) Parties to bear their own costs.