

(2011) 03 KAR CK 0373

In the Karnataka High Court

Case No : Regular Second Appeal No. 857 of 2000

Sri Dattatraya Gosavi

APPELLANT

Vs

Sri Sadashiv Gosavi and Others

RESPONDENT

Date of Decision : 15-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2011) 03 KAR CK 0373

Hon'ble Judges : D V Shylendra Kumar, J

Bench : Single Bench

Advocate : C.R. Goulay and Sri Sunil Desai as Amicus Curiae, for the Appellant;

Judgement

Hon"ble Mr Justice D V Shylendra Kumar

1. Second appeal by the plaintiff in OS No 137 of 1992, on the file of Civil Judge (Jr. Dn), Belgaum, who sued for partition and a share in the two items of suit schedule properties- 1) a piece of agricultural land measuring 1 acre 7 guntas situated at Uchagaon village, Belgaum taluk and district and 2) a house property bearing VPC No 416/2, Maruti Galli, Uchagaon - the plaintiff claiming 1/4th share along with the first defendant father, second defendant mother and third defendant brother, the other members of the family, and defendants 4 to 7 being children/legal heirs of one Shankarrao Desai, in whose favour had been executed a sale deed in respect of the agricultural land way back in the year 1967 by the first defendant and the suit having been dismissed by the trial court and the result in the first appeal by the plaintiff being no different, the second appeal by the unsuccessful plaintiff u/s 100CPC. This second appeal has a history behind it. It came to be dismissed by this court once earlier as per judgment and decree dated 22-1-2001, dismissed at the admission stage, as a learned judge of this court found there was no scope for even admitting the appeal within the jurisdiction of 100 CPC.

2. Undaunted plaintiff had carried the matter to the Supreme Court seeking

special leave and the Supreme Court granted leave converting into Civil Appeal No 4812 of 2002. The Supreme Court in terms of its judgment and order dated 7-10-2010 having set aside the judgment of this court, dismissing the appeal at the stage of admission, having remanded the matter to this court for rehearing of the second appeal after framing substantial questions of law with the following observations:

The matter is remanded to the High Court for rehearing of the second appeal after framing substantial question of law. We, however, make it clear that we have not made any observations on the merits of other question which may be involved in the matter. We have only confined our observations and findings on the limited question discussed above. Since the matter is pending for a long time, we request the High Court to explore the possibility of deciding the matter as early as possible preferably within a period of six months from the date of production of this order before the High Court.

The appeal is thus allowed to the extent indicated above. The parties are left to bear their own costs.

The matter is yet again listed before this court for admission.

3. The matter being already eleven years old before this court and coming back to this court after ten years of initial disposal. No wonder Sri Sunil Desai, learned counsel appearing on behalf of Sri C R Goulay, counsel for the appellant on record, submits that the counsel has already returned all case papers to the party and is handicapped for making any submissions not only for making any submissions not only for want of case papers but also for want of instructions from the party.

4. The matter having come back from the Supreme Court and being listed for admission and as this appeal u/s 100 CPC, cannot be admitted unless the high court is satisfied that there are substantial questions of law arising from out of the judgments of the courts below and warranting correction at the hands of high court with wrong findings recorded by the courts below, Sri Sunil Desai, who was most reluctant to make submissions and was requested for assisting the court as amicus curiae and was made available with the courts records, appeal papers, lower court records and remand papers from the Supreme Court.

5. Sri Sunil Desai has made a commendable job and has acted as amicus curiae and assisted the court in understanding the facts by taking me through pleadings of the parties, issues framed by the trial court, judgment of the trial Court, points determined by the first appellate court for examination, judgment of the first appellate Court and scope of Section 100 CPC appeal before this court.

6. I have also looked into the plaint, written statement, issues framed and the judgment of the trial court as well as judgment of the lower appellate court. I have bestowed my attention on the scope for identifying the existence and arisal of any substantial question of law which has been decided erroneously by the

courts below and which warrants a correction within the scope of an appeal u/s 100 CPC.

7. The suit for partition by one son impleading his parents and his brother along with the legal heirs of the purchaser of one of the suit schedule properties is not merely for 1/4th share but also for a declaration that the sale transaction of the year 1967 in favour of father of defendants 4 to 7 was not a real transaction; that the document was not a real document but it was a sham document, not acted upon by the parties; that the father of the plaintiff had remained in possession all along and the other suit schedule property viz., house property, built on a land of which is claimed to have been acquired from out of the fund generated from the joint family nucleus and construction put up contributions made by the plaintiff and third defendant, who are employed and had remained outside their native village and house and therefore also having characterized as joint family property, was required to be shared in equal proportion, was a suit which was not contested by the other members of the family, but on the other hand father, the first defendant - in fact had filed written statement not only lock, stock and barrel conceding the plaintiff's case but also totally supporting the case of the plaintiff and the other member of the family - third defendant - brother of plaintiff, not caring to either support or oppose the plain averments, the contest to the suit was only between the plaintiff and the defendants 4 to 7, who are legal heirs of the purchaser of one of the two suit schedule properties.

8. In a situation where there was virtually no contest for the joint family nature of the property and the entitlement of the plaintiff for getting 1/4th share in the joint family properties if any available, and only the defendants 4 to 7 contested the suit by filing separate written statement contending that the transaction of the year 1967 by first defendant in favour of father of defendants 4 to 7 was not a sham transaction but a true and genuine transaction, a bona fide transaction for valuable consideration; that there was no occasion for the trial court to set aside the same and it does bind other defendants, as the parents who were living separately were left to live for themselves and neither the plaintiff nor the third defendant had supported the parents and prayed for dismissal of the suit in so far as the suit item No 1 was concerned and did not join issue on the sharing of suit item No 2 house property amongst the members of the family.

9. In a situation of this nature, the trial court very rightly framed the following issues:

1. Whether the alleged sale deed dated 20.04.1967 is not acted upon and is null, sham, bogus and colourable document without any authority?
2. Whether the plaintiff is entitled for partition and separate possession of 1/4th share in the suit property by equitable division?
3. Whether defendant No. 1 proves that he is in actual possession and enjoyment of suit property?

4. Whether the genealogy given in plaint para No. 2 is correct?
5. Whether defendant No. 4 to 7 prove that on 20.04.1967 defendant No. 1 has sold the suit property to the father of defendants 4 to 7 for valuable consideration of Rs. 1, 500/- to meet expenses of his family and on the same day put the deceased father of defendant Nos. 4 to 7 in actual possession of suit property?
6. Whether defendant No. 1 proves that he has executed agreement in favour of deceased Shankar Rao that the suit land would be enjoyed for a period of 25 years and on completion of the said period it was agreed to repay Rs. 1, 500/- by defendant No. 1 ?
7. Whether it is further proved that the deceased father of defendants 4 to 7 agreed to reconvey the land to defendant No. 1 after lapse of 25 years?
8. Whether defendants 4 to 7 prove that they have inherited the suit property after the demise of their father and now they are in actual possession and enjoyment of suit property? Alternatively whether defendants 4 to 7 prove they are in lawful possession, use and enjoyment of suit property by way of ad verse possession?
9. Whether Court fee paid is proper?
10. What order or decree?

and also the additional issue regarding suit being barred by limitation in so far as it relates to the relief against the defendants 4 to 7 are concerned.

10. On appreciation of oral and documentary evidence adduced by the parties, with the plaintiff having examined four other witnesses apart from himself and the first defendant - father of plaintiff - having fully supported the case of the plaintiff, seventh defendant having deposed for the contesting defendants and the documentary evidence in the form of Ex P1 to 33 constituting the documents marked on behalf of the plaintiff and Ex D1 - sale deed dated 20-4-1967 and copies of mutation entries, record of rights constituting the documentary evidence of contesting defendants and on appreciation of the same, the learned judge of the trial court having answered the issue Nos. 1 to 4 in the negative, issue No 5 in the affirmative, issues 6 and 7 in the negative, issue Nos. 8 and 9 in the positive and additional issue regarding limitation having gone against the defendants, ultimately dismissed the suit. The finding that the plaintiff had not made out a case for declaration in so far as suit item No 1 property is concerned and in so far as suit item No 2 property, not having impleaded the sisters who had share in the property and having sought for a share without impleading sisters, dismissed the suit.

11. The lower appellate court in the appeal by the plaintiff formulated the following points:

1. Whether the alleged sale deed defendant: 20.04.1967 is not acted upon and is

null sham, bogus and colourable document without any authority?

2. Whether deft. No. 1 proves that he is in actual possession and enjoyment of suit property?

3. Whether defts. 4 to 7 prove that on 20.04.1967 deft No. 1 had sold the suit property to the father of defts. 4 to 7 for valuable consideration of Rs. 1, 500/- to meet expenses of his family and on the same day put to the deceased father of the defts. 4 to 7 in actual possession of suit property?

4. Whether deft. No. 1 proves that he has executed agreement in favour of deceased Shankar Rao that the suit land would be enjoyed for a period of 25 years and on completion of the said period it was agreed to repay Rs. 1, 500/- to deft. No. 1 and defts. 4 to 7 agreed to reconvey the suit land to the deft. No. 1 after lapse of 25 years?

5. Whether defendants 4 to 7 prove that on the demise of their father, they have inherited the suit land and are in actual possession and enjoyment of the suit land?

6. Whether defts. 4 to 7 prove that suit is barred by limitation?

7. What order or decree?

for determination in the wake of the judgment and decree of the trial court and the submissions made at the Bar.

12. Points 1, 2, 4 and 6 were answered in the negative and points 3 and 5 were answered in the affirmative and therefore the first appellate court found no occasion to disturb the judgment and decree passed by the trial court and so also dismissed the cross-appeal that had been filed by the defendants 4 to 7. It is in respect of such concurrent findings and twin failures of the plaintiff the present second appeal, after one round of journey to Supreme Court.

13. Even after elaborate examination of the judgments under appeal, I do not find any substantial question of law which arises from out of the judgments meriting admission within the scope of Section 100 CPC.

14. The Supreme Court observed that in the earlier round, the learned judge of this court had wrongly observed that there was no plea of suit item No 1 property being a joint family property and therefore the plaintiff could not succeed in so far as this item for partition and this finding being not supported by record, particularly the plea in para-4 of the plaint, which was comprehensive enough to imply that suit item No 1 property also a joint family property, if not an express plea to this effect and being of the opinion that the judgment of this court in dismissing the appeal on such premise is not sustainable, has remanded the matter to this court to look into the matter afresh without being bogged down or hindered by the observation made by the Supreme Court and to examine the matter for hearing after the matter is admitted.

15. A jurisdiction of this court u/s 100 CPC is well delineated and is restricted to correcting the errors of law that too errors in law of substantial nature. This aspect of the matter has been emphatically reiterated even by the Supreme Court time and again and the Supreme Court on many occasions, in a good number of cases has observed that the high court cannot entertain an appeal u/s 100 CPC even assuming that some findings as recorded by the courts below are not sustainable, as the scope for correction of question of fact gets concluded in the first appellate stage and it is only if a question of law of substantive nature is decided in an erroneous or wrong manner, there is scope for examination of such judgments for correction u/s 100 CPC appeal.

16. In the instant case, the suit though styled as a suit for partition, in substance it is a disguised suit in the cloth of a suit for partition, but in reality a suit for setting aside the sale transaction in favour of the father of defendants 4 to 7 executed by the first defendant way back in the year 1967 and the suit having been filed in the year 1992. Though the learned judges of the trial court and the first appellate court have held the issue of limitation against the defendants, it does not in any way detract from the merits of the case and the findings on this aspect being that the transaction was genuine transaction, as recorded by the courts below, and not a sham transaction as was sought to be made out goes against the plaintiff.

17. If the defendants 1 to 4 are not raising a murmur and conceding the plaint averments in toto and even the first defendant in the witness box fully supporting the case of the plaintiff, it was a suit without contest for partition. The so-called suit for partition is only a ruse for getting the sale deed executed in favour of father of defendants 4 to 7 set aside.

18. The courts below have, on examination of the evidence on record, negated the case of the first defendant that where as the sale deed in question is a registered document, which is marked as exhibit P1, and the version of the first defendant - DW1 - that it was a mortgage deed and not a sale deed, having been disbelieved on facts and even in law and the courts below having found that as between two documents of the same date, one registered prevail over the other unregistered document and thereby an impediment in law even to accept the Ex P2 - the so-called mortgage deed - the sale deed emerged at triumphantly, whereas Ex P2 mortgage deed was miserably frowned upon and could not even stand. In this state of affairs, the courts below found it rather difficult to set aside the sale transaction. In a collusive suit amongst members of the family filed only to the detriment of the purchaser for consideration under a sale deed executed by the karta of the family way back in the year 1967 and the suit having filed only in the year 1992 and the first defendant - father -himself providing all ammunitions for filing a suit of this nature and even has admitted and as found by the courts below and that also reflects on the bona fides of the plaintiff in filing the suit for partition.

19. The cup of sorrow of the plaintiff overflowed when the courts below found

that the plaintiff had not impleaded his sisters - four in number - as parties to the suit for partition, though they were entitled for a share only in the other joint family house property which was in the possession of the defendants 1 and 2. Though technically, the suit was dismissed, in fact, the dismissal of the suit is no bar if the members of the family are genuinely interested in sharing this property amongst themselves and no one comes in their way and therefore it was only proper for the courts below to dismiss the suit on this ground for not impleading necessary parties, as there was no guarantee that the plaintiff and defendants 1 to 3 will yield proper share to the sisters and at any rate the suit was dismissed by the courts below if the suit is decreed even as on today, the sisters are inevitably necessary parties and therefore their non-impleadment does not sustain the suit.

20. In this view of the matter, as I find no question of law-much less a substantial question of law which has been wrongly decided by the courts below and as there is no scope for admitting this second appeal, this appeal is dismissed at the admission stage yet again. I place on record my appreciation of the assistance rendered by Sri Sunil Desai, acted as amicus curiae at the instance of the court and the High Court Legal Services Authority is directed to pay a sum of Rs. 5, 000/- as fee to the learned counsel, who has rendered assistance to the court for disposal of this appeal, which has acquired the status of a "senior citizen" in this court.