(2015) 02 KAR CK 0166

In the Karnataka High Court

Case No : Regular Second Appeal No. 273 of 2011 (SP) and R.S.A. Crob. No. 1 of 2015

Srinivas Naidu and Others — APPELLANT

Vs

Mary Prakashi Premkar and Others — RESPONDENT

Date of Decision : 12-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 39 Rule 1, Order 39 Rule 2, 151

Specific Relief Act, 1963 — Section 20

Citation : (2015) 02 KAR CK 0166

Hon'ble Judges : Ravi V. Malimath, J.

Bench : Single Bench

Advocate : C.M. Nagabhushan, Advocate for N. Murali, Advocate, for the Appellant; V. Srinivas, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Ravi V. Malimath, J.—The case of the plaintiff is that the defendants have 1/6th share in the land bearing No. 80/2 measuring 36 guntas and in Sy. No. 80/3 measuring 2 acres 14 guntas namely, in all 3 acres 10 guntas situated at Desihalli village. The entire property were the self acquired properties of the father-in-law of defendant No. 1 and the grand-father of defendants 2 & 3. Defendants 2 & 3 are the children of defendant No. 1. He was in possession and enjoyment of the properties till his death on 31-12-1992. After his death, one F.X. Anto Premkar, the husband of defendant No. 1 and the father of defendants 2 & 3 and other children succeeded to the estate. That they are in joint possession and enjoyment of the properties. He died intestate on 26-7-2011 leaving behind his wife namely, defendant No. 1 and the father of defendants 2 & 3. There is no division of the joint family properties. Defendants 1 to 3 have 1/6th share in the suit schedule properties. For the urgent need of funds to clear the debts and to invest some portion of the sale proceeds in better securities they decided to sell the suit schedule properties for a total sale consideration of

Rs. 1,55,000/-. The plaintiff agreed to purchase the share of defendants. The defendants executed an agreement of sale by receiving Rs. 1,05,000/- on 6-8-2002 and agreed to execute a sale deed by receiving balance of Rs. 50,000/-. The defendants had agreed that they would not create any charge over the suit schedule property during the subsistence of the agreement of sale. Even though the plaintiff approached the defendants on a number of occasions to execute the sale deed by receiving sale consideration, they failed to do so. That the plaintiff is fully ready and willing to perform his part of the contract. The defendants are not ready to perform their part of the contract and they have failed to do so. The plaintiff further learnt that defendants 1 to 3 are attempting to sell the suit schedule properties in favour of others. Hence, a legal notice was issued on 27-7-2005. There was no reply. Hence he filed the instant suit seeking for a decree of specific performance to direct the defendants to receive the balance consideration of Rs. 60,000/- in terms of the agreement dated 6-8-2002 and to execute a sale deed in respect of 1/6th share in the suit schedule properties at his cost and in the alternative and on failure to execute the sale deed in his favour, this Court to execute the same. On service of summons defendants 1 to 3 appeared and filed their written statement. Defendant No. 2 adopted the written statement of defendants 1 & 3. Thereafter the 4th defendant was impleaded on an application filed by the plaintiff in terms of the order passed by the trial Court dated 10-11-2006 and filed a separate written statement. Defendants 1 to 3 did not dispute the claim that they are entitled for 1/6th share. They admitted the other plaint averments. They contended that the alleged agreement of sale is concocted and forged by the plaintiff in connivance with one Ranganath and his family members. That the relief of specific performance being a discretionary relief, the same could not be exercised in favour of the plaintiff The plaintiff is not entitled for the relief that he has claimed. The litigation has been instigated by one Ranganath who has been litigating against the defendants for a number of years on various matters. That they have filed suits against the co-sharers before the City Civil Judge, KGF in O.S. No. 377/2003, consequently transferred to Bangarpet in O.S. No. 264/2004 wherein a temporary injunction to restrain the co-sharers from alienating the property. Subsequently, Ranganath in collusion with the Electricity Department changed the katha of the electric meter. Hence, they filed OS No. 47/2005 to restrain the BESOM from transferring the katha in any manner. They contend that Ranganath is the cause for the entire dispute. They have agreed to sell 1/6th share in the suit schedule properties in favour of H.S. Liyakath All for Rs. 2,50,000/- under agreement of sale dated 26-5-2003. The said Liyakath All had filed a suit against them in O.S. 105/2004 which was decreed. Ranganath has concocted the agreement of sale which is registered by impersonating defendant No. 3 Sunil by some other person and by forging the signatures. One Sunil filed a criminal case against said Ranganath and others in PCR No. 30/2005 which is pending before Additional JMFC, Bangarpet. Further, B.S. Chand Pasha filed a suit in O.S. No. 116/2004 pertaining to the very same survey number for specific performance of contract dated 2-12-2004 against Elizabath Mary and others.

Further, Syed Basha the father of defendant No. 4 filed another OS 8/2005 against Ranganath and others for permanent injunction not to interfere with the said property. One Divyamani has filed OS No. 69/1999 before the very Court with regard to the schedule properties. The said Ranganath has been the kingpin of all these litigations.

2. Defendant No. 4 in his written statement contended that defendants 1 to 3 offered to sell their 1/6th share in the suit schedule property. He has accepted the offer and the sale consideration was fixed at Rs. 2,50,000/-. He has paid Rs. 60,000/- on 26-5-2003 under an agreement of sale dated 26-5-2003.

3. Based on the above pleadings, the trial court framed the following is sues:-

"1. Whether the plaintiff proves that defendant No. 1 to 3 have agreed to sell the suit schedule properties to him for a sum of Rs. 1,50,000/-, in this they have executed an agreement on 6.8.2002 out of sale consideration they have received an amount of Rs. 1,05,000/- from him?

2. Whether the defendant No. 1 to 3 prove that plaintiff created the sale agreement for the purpose of filing this suit?

3. Whether the defendant No. 4 proves that defendant No. 1 to 3 have executed an agreement in his favour on 26.5.2003 and agreed to sell the suit schedule properties to him for a sum of Rs. 2,50,000/- and on that day received an amount of Rs. 60,000/- out of sale consideration?

4. Whether the plaintiff proves that he is ready and willing to perform his part of contract?

5. Whether the defendants 1 to 3 prove that suit of the plaintiff is barred by limitation?

RECASTED THIS ISSUE.

(For the purpose of disposal of the case, this issue taken as defendant No. 4 proves instead of defendants 1 to 3)

6. Whether the plaintiff is entitle for the relief as sought for in the plaint?

7. What order or decree?

The plaintiff examined himself as P.W. 1 and another two witnesses and got marked Exs. P-1 to P-8. On behalf of the defendants, defendant No. 1 was examined as D.W. 1 and got marked Exs. D-1 to D-6. The trial Court held Issue Nos. 1, 4 to 6 in the negative and Issue Nos. 2 & 3 in the affirmative. The suit of the plaintiff was dismissed. Aggrieved by the same, he preferred an appeal. The first appellate court allowed the appeal by partly decreeing the suit. The relief of specific performance was not granted. It ordered for refund of the amount. Hence, this second appeal by the plaintiff-appellant.

4. By the order dated 5-4-2013 the appeal was admitted to consider the

following substantial question of law:-

"Whether the Lower Appellate Court had erred in law in not granting specific performance of the agreement of sale -- Ex. P. 1, having held that the agreement -- Ex. P. 1 was proved?"

Thereafter defendants 1 to 3 filed cross objections seeking to set aside the Judgment & decree of the first appellate Court and seeking confirmation of the Judgment & decree of the trial Court. Hence, both the appeals are taken up for consideration together.

5. The learned counsel for the appellant-plaintiff contends that the first appellate court committed an error in declining to grant a decree for specific performance of contract. Having held that the agreement of sale vide Ex. P-1 has been proved the Court should have rightly exercised its discretion, in ordering decree for specific performance. On the contrary holding that the plaintiff is not in possession of the suit schedule property and in view of the fact that defendants 1 to 3 have executed an agreement of sale in favour of 4th defendant who is in possession of the suit schedule property the discretionary relief was denied. Hence he pleads that having come to the conclusion that he has proved Ex. P-1, the necessary corollary would be to decree the suit for specific performance. He contends that in a circumstance wherein an agreement has been entered into which is preconceived and intended to cheat the plaintiff, no discretion could be exercised in favour of the subsequent purchaser. In such a circumstance necessarily no premium can be put on the purchaser of the property that has been already sold. In support of his contention he relies on the Judgment in the case of Devalsab (Dead) by Lrs. Vs. Ibrahimsab F. Karajagi and Another, . Hence, he pleads that the substantial question of law be answered in his favour, by decreeing the suit for specific performance by directing execution of the sale deed.

6. On the other hand, V. Srinivas, the learned counsel appearing for respondents 1 to 3 namely, defendants 1 to 3 contends that the second appeal requires to be rejected by allowing his cross objections. He pleads that the first appellate Court completely misdirected itself in ordering for refund of the amount. That when the agreement of sale has been denied by him, the question of granting any relief with regard to repayment of any amount does not arise for consideration. That the trial court having held that the plaintiff has failed to prove Ex. P-1, the appellate Court committed an error in interfering with the same. Hence, he pleads that the appeal be dismissed and cross objections be allowed.

7. Sri C. Pattabi Raman, the learned counsel appearing for respondent No. 4 namely, defendant No. 4 supports the impugned Judgment & decree. He contends that he is the bona fide purchaser for value. That he was not aware of the previous transactions between the plaintiff and defendants 1 to 3. That he having purchased the property, the sale executed in his favour cannot be disturbed. That he had filed a suit seeking specific performance of the contract.

The said suit ended in a compromise. In terms of the compromise decree, he is entitled to retain his possession as well as for execution of the sale deed in his favour. Hence he pleads that the appeal be dismissed.

8. Heard learned counsels and examined the records.

9. In order to prove Ex. P-1 namely, the agreement of sale, the plaintiff examined himself as P.W. 1 and 2 other witnesses. P.Ws 2 & 3 are attesting witnesses. The trial Court held that P.W. 1 has stated in his evidence that talks took place before the Taluk office at Bangarpet in the presence of Jayaram and Muniswamy namely, P.Ws 2 & 3. They were both present when the advance of sale consideration was paid. However, on examination of Ex. P-1, it shows that the purchaser and seller have executed an agreement of sale on the said day, month and year written at Bangalore City. That the document shows that the plaintiff & witnesses have signed in Bangalore City. That P.W. 1 has not stated whether he has signed at Bangarpet or other places. At the time of agreement he has paid a sum of Rs. 1,05,000/- to defendant No. 1. He has not stated whether defendants 2 & 3 were present. No doubt, defendant No. 1 in her evidence has admitted her and her children''s signatures on the written statement. But only because the parties admit their signatures on the written statement and vakalath it cannot be presumed that both have admitted the agreement of sale. That it is the plaintiff who has to prove the agreement of sale and the consideration that passed on. When the defendants 1 to 3 have denied the agreement, the evidence of P.W. 1 would be doubtful. P.W. 1 has stated that he does not know whether on the basis of the say of the plaintiff he has signed on the agreement. He has not stated that defendant No. 1 brought the agreement of sale from Bangalore and thereafter he signed it. He has stated that he does not know who has written the agreement. It is on that day alone that he had seen defendant No. 1. Thereafter he has not seen him. That even if he is brought to Court he will not be able to identify him. P.W. 3 has stated that he does not know the contents of the agreement and who has executed it at Taluk Office, Bangarpet. He does not know where the agreement was typed. Therefore the trial court was of the view that the evidence of defendants 1 to 3 do not corroborate. That the agreement to sell at Ex. P-1 has not been proved. None of the evidence is trustworthy. Hence, the trial court declined to entertain the suit. On Issue No. 3 as to whether the defendant No. 4 proves that defendants 1 to 3 have executed an agreement of sale in his favour, the same was held in favour of the defendant. It held that the agreement of sale was executed on 26-5-2003. Thereafter defendant No. 4 filed O.S. No. 105/2004 and the suit was decreed. In the circumstances the present suit was dismissed. The first appellate Court reversed the findings of the trial Court. It was of the view that the reasonings assigned by the trial Court are unsustainable. It examined in detail the evidence and the material on record. On considering the cross-examination of P.W. 1 who has denied Ex. P-1, she has also denied her signature on the written statement and also that the verification is not by her. But later on when the documents were shown to her she has admitted her signature on the vakalath as well as the written statement. D.W. 1

has admitted that defendants 2 & 3 are the children and that they have put their signature in English. D.W. 1 has further admitted her signature in terms of Ex. P-4(b). She has further stated that at times she would sign as ''Mary Prakash'' and ''Mary Prakash Premkar''. However, on perusal of the admitted signature of D.W. 1 in the written statement and also on the vakalath compared with the same the signature found in the affidavit in the objections to I.As were one and the same. The signature is as affixed on Ex. P-1(a) and P-4(b). The appellate held that the signatures on the vakalath and in the written statement and affidavit and the I.As match their signatures on Ex. P-1. Even in the reply notice in terms of Ex. P-8 the very same signatures are on I.As 1 to 3. The signatures are identical. The plea of the defendants that the document is concocted was negated by the appellate Court. Having examined the signatures it was of the view that Ex. P-1 cannot be accepted as a concocted document. It was of the view that defendant No. 1 has given false evidence before the Court not only with an intention to avoid liability but also to avoid refund of the earnest money. That this aspect of the evidence was not considered by the trial Court. That the trial Court failed to perform its duty to compare the admitted and the disputed signature of the defendants. It straightaway arrived at a finding against the plaintiff in favour of the defendants without application of mind and without scrutinizing the documents. Thereafter on examination of the evidence on record the appellate Court was of the view that the finding of the trial Court was perverse and calls for interference. So far as limitation is concerned on examination of Ex. P-1, time was not fixed for the performance of the contract. However, it went on to hold that defendants 1 to 3 have executed an agreement of sale in favour of the 4th defendant. That the 4th defendant is in possession of the suit schedule property. Ex. P-1 shows that the possession was not given to the plaintiff. Under these circumstances, the plaintiff was entitled to recover advance amount only and not entitled for a decree for specific performance. Hence, the same was ordered along with interest at 6% per annum.

10. Primarily the contention of the defendants is that the plaintiffs have failed to prove Ex. P-1. That even the evidence of P.Ws 2 & 3 did not support the case of the plaintiff That P.Ws 2 & 3 have not given any cogent evidence with regard to establishing the validity of Ex. P-1. I have considered the evidence of P.Ws. 1, 2, 3 in depth. What is narrated therein by P.W. 2 is that he was present when the document was executed. That the amount of Rs. 1,05,000/- was paid to defendant No. 1 by the plaintiff and that defendant Nos. 2 & 3 have also agreed to sell the suit schedule properties. P.W. 3 in his evidence states that he does not know the contents of Ex. P-1 and who has executed to whom. Further he has not seen the amount paid. It is for this reason the trial Court was of the view that since he does not know the contents of the agreement his signatures cannot be accepted. Therefore the evidence was brushed aside.

11. I'' am of the considered view that the reasonings assigned by the trial Court are inappropriate. What is of significance concern herein is the evidence of D.W. 1 herself. She has stated that she signs as ''Mary Prakash'' as well as ''Marry

Prakash Premkar'' and that her children defendants 2 & 3 have signed in English. The trial Court failed to consider the similarity of the signatures in Ex. P-1 with that in the vakalath, written statement or the I.A.''s. It merely proceeded on the oral evidence that has been tendered. On the other hand, the appellate Court went further to examine the signatures in detail and to compare them with the signatures of defendants 1 to 3. On such comparison the appellate Court was of the view that ''it appears to the naked eye that the signatures that occurred in Ex. P-1 are the signatures of defendants 1 to 3''. When the signatures of defendants 1 & 2 are said to be proved by admission of defendants themselves, Ex. P-1 would therefore stand proved. The question of holding that the plaintiff has failed to prove Ex. P-1 therefore is erroneous. The appellate Court on appreciation of the evidence on record as well as the relevant signatures of defendants 1 to 3 has rightly held that Ex. P-1 has been proved. I do not find any error that is committed by the appellate Court that calls for any interference. The contention of the defendants that the document is concocted and has been created by the plaintiff is not supported by any material. It has remained as a mere contention. On the other hand, substantial material and evidence has been led-m by the plaintiff to show that Ex. P-1 is a true and genuine document. The evidence of defendant No. 1 herself justifies the same.

12. The contention of the 4th defendant is that he is a bona fide purchaser for value. That the agreement of sale was executed in his favour on 26-5-2003. That the defendants failed to execute the sale deed. Hence, he was compelled to file O.S. No. 105/2004 seeking for a decree for specific performance. The same ended in a compromise and therefore he has to be considered as a bona fide purchaser for value. Ex. D-5 is the order sheet of the suit filed by defendant No. 4. A reading would show that the plaint was presented on 5-11-2004. The relief is for specific performance of the sale agreement dated 26-5-2003 directing the defendants to execute the sale deed etc. for confirmation of possession etc. I.A. 2 was filed under Order 39 Rule 1 & 2 for an injunction against the defendants. I.A. 1 was filed under Section 151 of CPC to take up the case on board on the same day. The order sheet would show that notice was ordered on the next day. The learned counsel entered appearance for defendants 1 to 3 and the counsel for both the parties were present and they filed the compromise petition under Order 23 Rule 3 of CPC. The compromise petition was accepted and the suit was decreed in terms of the compromise petition. Hence, it is submitted that he being a bona fide purchaser, the decree ought to sustain his possession and ownership of the suit schedule property.

13. In identical circumstances, is the Judgment of the Hon''ble Supreme Court relied upon by the plaintiff''s counsel of a bona fide purchaser subsequent to the agreement of sale being executed. The trial court held that the sale deed executed in favour of the subsequent purchaser was illegal. Therefore the suit of the plaintiff was decreed for specific performance. Aggrieved by the same, defendant No. 2 that is the second purchaser filed an appeal before the first appellate Court. Defendant No. 1 did not file any appeal. The decree was not

challenged by him. Since the decree affects the rights of defendant No. 2 he has filed an appeal contending that he is the bona fide purchaser for value of the suit property. The appellate Court did not agree with his contention and dismissed the appeal and confirmed the Judgment & decree of the trial Court. The second appeal was preferred before the High Court. The High Court was of the view that the findings recorded by both the Courts below were correct to hold that defendant No. 2 was not aware of the transaction between the plaintiff and defendant No. 1. He cannot be held to be a bona fide purchaser as the matter was pending before the trial Court, it held that the compromise decree obtained on the same day was collusive. The Hon''ble High Court held that defendant No. 2 is in possession of the suit schedule property prior to the agreement of sale by defendant No. 1 in favour of the plaintiff However further considering the fact that the suit ended in a compromise, considering hardship of defendant No. 1 declined to confirm the decree granted by both the Courts below and directed that the plaintiff is entitled for alternative relief namely, refund of money with costs. The said Judgment was questioned before the Hon''ble Supreme court wherein at para-7 it was held as follows:

"7. ''Learned counsel for the plaintiff-appellant submitted that in fact exercise of discretionary relief in favour of Defendant No. 2 is not correct as this kind of discretion if exercised in favour of Defendant No. 2 then it is likely to lay down a bad precedent. This will give premium to unethical transaction and a bona fide purchaser will be left high and dry. learned counsel for the defendants submitted that it is true that Section 20 of the Specific Relief Act is a discretionary remedy that is not always necessary to grant a decree for specific relief if it appears to be inequitable and causes hardship to the other side. But looking to the facts of the present case we are of opinion that it will be unfair and inequitable not to grant a decree for specific relief in favour of the plaintiff-appellant herein because he is a bona fide purchaser and he has done everything which is possible, that he has purchased the stamp paper and was ready and willing to perform his part of the contract, that he went along with Defendant No. 1 to the Sub-Registrar''s office for registration but somehow Defendant No. 1 sneaked away from that place as he had already entered into another agreement to sell the present premises, so much so that a sham suit was got filed by Defendant No. 2 against Defendant No. 1 and on the same day a compromise decree was obtained. These facts go to show that there is not much equity left in favour of Defendant No. 2 as it appears that the suit by Defendant No. 2 was a pre-arranged affair with connivance with Defendant No. 1. Otherwise that suit would not have been filed on the same day and a compromise decree would not have been obtained the very same day. This shows that there was a pre-conceived agreement between Defendant Nos. 1 & 2 in order to cheat the plaintiff-appellant herein. Therefore, we are of opinion that the discretionary power exercised by learned single Judge of the High Court was not correct. In fact, it appears that Defendant No. 2 has purchased the litigation and therefore, there is no equity in his favour."

Consequently, the appeal was allowed. The Judgment & decree of the learned

Single Judge of the High Court of Karnataka in RSA 68/1994 was set aside. The decree for specific performance of the agreement of sale against defendant No. 1 was granted with consequential relief''s.

14. The facts of the above case are identical to the facts & circumstances of this case. Here too is the subsequent purchaser who filed a suit for specific performance. On the next day itself the defendant entered appearance. Thereafter the compromise petition was filed and the decree was obtained based on the same. This would clearly show that the agreement of sale executed by defendant No. 1 in favour of defendant No. 4 was a pre-conceived agreement in order to cheat the plaintiff. Under these circumstances, on applying this Judgment, I'' am of the considered view that defendant No. 4 cannot be considered to be a bona fide purchaser for value.

15. Under these circumstances, consequent to the aforesaid reasons, I'' am of the considered view that the first appellate Court committed an error in partly decreeing the suit but failed to grant the decree for specific performance of contract. Consequently, the substantial question of law is answered by holding that the first appellate Court erred in law in not granting the relief of specific performance of the agreement, having held that the agreement Ex. P. 1 was proved. Hence the appeal is allowed. The Judgment and decree dated 16-12-2010 passed in RA No. 19/2010 by the Presiding Officer, fast track Court, KGF is modified. The suit of the plaintiff is decreed. The relief of specific performance of contract is granted. The defendants 1 to 3 to execute the sale deed in favour of the plaintiff within a period of 4 weeks from the date of receipt of copy of this order and on failure the trial Court to execute the sale deed in favour of the plaintiff.

The appellant-plaintiff to deposit the balance consideration of Rs. 50,900/- before the trial Court to be handed over to defendants 1 to 3 at the time of execution of the sale deed.

Consequently, the RSA is allowed in the aforesaid terms.

Cross objections are dismissed.