

(1987) 04 KAR CK 0011

In the Karnataka High Court

Case No : Regular Second Appeal No. 185 of 1987

Veerabhadrappa Veerappa Mallihalli @ Aladakatti	APPELLANT
Vs	
Bashettappa Dodda Adivappa Kalangi	RESPONDENT

Date of Decision : 03-04-1987

Acts Referred:

Limitation Act, 1963 — Article 58

Citation : (1987) 2 KarLJ 253

Hon'ble Judges : K. A. Swamy, J

Judgement

K.A. Swamy, J.-Appellant is the defendant. Respondent is the plaintiff. The respondent brought the suit O.S. No. 51 of 1981 for rectification of the sale-deed Ext. P. 1 dated 3-7-1967. The rectification sought for is in respect of survey number of the land sold under the sale deed.

2. According to the case of the respondent-plaintiff, in the sale-deed, due to mutual mistake instead of mentioning Survey No. 352/1B/1, Survey No. 252/1B/1 is mentioned; that he came to know of it only in the month of July 1980. The suit is filed on 30-6-1981.

3. The appellant contested the suit and raised various pleas including the plea of limitation. The trial Court raised the following issues:

(1) Whether the plaintiff proves that wrong survey number is shown due to mutual mistake of plaintiff and defendant in suit sale deed?

(2) Whether the suit is in time?

(3) Whether plaintiff is entitled for rectification as prayed for?

(4) Whether Sub Registrar is necessary party as contended by the defendant?

(5) Whether the suit is maintainable without the relief of declaration and injunction?

(6) Whether the plaintiff proves that the suit sale deed was executed by the

defendant?

It answered Issue Nos. 1 to 4 and 6 in the negative and it further held that no finding was required to be recorded on Issue No. 5. It accordingly dismissed the suit.

4. The lower appellate Court on consideration of the evidence on record, has reversed the findings of the trial Court on Issue Nos. 1 to 3 & 6.

It has answered point No. 2 in the affirmative and reversed the judgment and decree of the trial court and decreed the suit.

5. Having regard to the contentions urged by Sri M. Rama Bhat, learned counsel for the appellant, the following three points arise for consideration:

1) Whether the lower appellate court is right in holding that the suit is in time?

2) Whether the finding recorded by the lower appellate court that there was a mutual mistake as to the survey number mentioned in the sale deed calls for interference?

3) Having regard to the facts and circumstances of the case, whether the grievance regarding non-framing of an issue as to fraud and misrepresentation pleaded by the defendant appellant can be entertained?

POINT NO. 1

6.1. The lower appellate court has recorded a finding that the plaintiff became aware of the mistake as to the survey number mentioned in the sale deed only in April or May 1980 when he approached the State Bank of India to obtain a loan on the security of the suit property. It was the bank which pointed out that the sale deed did not relate to the survey number on the security of which the loan was sought. Thereafter the suit was filed on 30th June 1981. This finding is a finding of fact. As such it is not liable to be disturbed in second appeal. It is on the basis of this finding and on applying Article 58 of the Limitation Act, 1963, (hereinafter referred to as the "Act"), the lower appellate court has held that the suit is well within time.

6.2. It is however contended by Sri Rama Bhat learned counsel for the appellant that as per Article 58 of the Act, the period of limitation commences when the right to sue first accrues. The learned counsel further submits that the right to sue first accrued to the plaintiff on the date when the sale deed was executed and as the suit is filed 14 years after the execution of the sale deed, it is beyond time.

6.3. It appears to me that this contention cannot be accepted. No doubt the courts below are not right in applying Article 58 of the Act. Article 58 is a residuary article applicable to the suits relating to declarations. In fact it occurs in Part III of the Schedule to the Act under the heading "Suits relating to Declarations." It reads thus:

Article No. Description of suit Period of limitation Time for which period begins to run

54. To obtain any other declaration Three Years When the right to sue first accrues.

In the suit in question, the plaintiff has not sought for any declaratory relief. He has sought for rectification of survey number of the land mentioned in the sale deed Ex.P.1 dated 3-7-1967. The case of the plaintiff is that under the sale deed what is sold is S. No. 352/1B/1 whereas it is wrongly mentioned as S. No. 252/1B/1. Therefore, he has sought for rectification of this mistake. Further case of the plaintiff is that this has happened due to mutual mistake of the parties. The relief sought for by the plaintiff falls under Section 26(1)(a) of the Specific Relief Act, 1963 which provides that when, through fraud or mutual mistake of the parties, a contract or other instrument in writing, not being the Articles of Association of a Company to which the Companies Act, 1956 applies, does not express their real intention, then either party or his representative in interest may institute a suit to have the instrument rectified. To such a suit when the main relief sought is rectification of the contract or instrument on the ground of fraud or mutual mistake and such relief is not dependent on any other relief. Article 113 of the Act applies and the time would commence to run from the date of discovery of mistake or fraud.

Article 113 which occurs in Part X of the Schedule which relates to "suits for which there is no prescribed period." It reads thus:

Art. No. Description of suit Period of limitation Time for which period begins to run

113. Any suit for which no period of limitation is provided elsewhere in this schedule. Three Years When the right to sue first accrues.

6.4. The Limitation Act, 1908 provided a specific Article in this regard viz., Article 96 which provided a period of limitation of three years for relief on the ground of mistake when the mistake became known to the plaintiff. Of course, under the Act, no specific article is provided. However, it is Article 113 which applies to the suit of the type in question. The right to sue accrues only when the cause of action arises. In a suit for rectification of the contract or other instrument in writing-in the instant case the sale deed-based on mutual mistake falling under Section 26(1)(a) of the Specific Relief Act, the cause of action arises only on coming to know, the mutual mistake in the contract or instrument as a result thereof the contract or instrument does not express the real intention of the parties. Thus the interpretation to be placed on the words "when the right to sue accrues" occurring in the third column of Art. 113 of the Act, to a large extent, depends on the particular facts of the case and the reliefs sought therein, to which the Article is to be applied.

6.5. The Privy Council in *Bolo v. Kuluan* (AIR 1930 PC 270) while interpreting similar words occurring in Column 3 of Article 120 of the Limitation Act, 1908 has

held thus:

"There can be no "right to sue" until there is accrual of the right asserted in the suit and its infringement, or atleast a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted."

6.6. In the instant case, as it is already pointed out, until the mistake in the sale deed was noticed, there was no accrual of the right asserted in the suit. The right that is asserted in the suit in question is that according to the real intention of the parties and the other recitals contained in the sale deed, what was sold was the land bearing S. No. 352/1B/1 and not S. No. 252/1B/1. Therefore, having regard to the finding recorded by the lower appellate court that the mistake came to the knowledge of the plaintiff only in April or May 1980 when the State Bank of India officials pointed it out, the suit filed on 30th June 1981 was well within the period of three years. As such the suit was in time. Even though the lower appellate court on applying Article 58 of the Act has held that the suit is in time, but the correct Article to be applied, is Article 113 of the Act. Having regard to the finding of fact as to the knowledge of mistake in the sale deed recorded by the lower appellate court, the application of Art. 113 of the Act at the stage of the Second Appeal does not cause any prejudice to the appellant because the facts remain the same, and Article 113 is applied only on the finding of fact recorded by the lower appellate court. Hence point No. 1 is answered in the affirmative.

Point No 2:

7. This point is covered by the trial court under Issue No. 1 which is reproduced in para 3 of this judgment. No doubt the trial court has held against the plaintiff on issue No. 1; but the lower appellate court which is the final factfinding court, has recorded a positive finding on issue No. 1 that wrong survey number was shown in the sale deed due to mutual mistake of the plaintiff and the defendant. This finding is a finding of fact. As such it is not liable to be disturbed in second appeal. It is also not shown that the said finding is arrived at on ignoring the material evidence on record. Therefore, such a finding is not liable to be disturbed in second appeal. Point No. 2 is accordingly answered in the negative.

Point No. 3:

8. No doubt the defendant pleaded that the sale deed Ex. P. 1 was obtained by fraud and misrepresentation. But he did not press for an issue being raised. As a result thereof, parties went to the trial without an issue being raised on the plea of fraud and misrepresentation raised by the defendant-appellant. In spite of this, the trial court adverted to this aspect of the matter in the course of its judgment and held in favour of the defendant. In this regard, it is pertinent to notice that it was not the case of the defendant-appellant that the sale deed was not executed. It was also not his case that he came to know of the fraud only on receipt of the suit notice or from a particular date. The suit was only for rectification of the mistake as to mentioning of the survey number in the sale

deed which had occurred due to mutual mistake of the parties. The sale deed was executed on 3-7-1967 and from that time, the plaintiff has been in possession and enjoyment of the land bearing S. No. 352/1B/1. Thus for a period of 14 years, the defendant kept quiet and did not approach the court to have the sale transaction declared as null and void on the ground that it was obtained by fraud and misrepresentation. Thus under the facts and circumstances of the case, it is not possible to hold that the non-framing of an issue has caused prejudice to the defendant-appellant when it was not his case that the fraud or misrepresentation was discovered only after he was served with the suit summons. Ordinarily when a party to the proceeding raises a particular plea and does not press for an issue being raised on that plea and goes through the trial without any objection, such a party must be deemed to have abandoned that plea. In the absence of any prejudice being caused, no such grievance can be entertained at the stage of Second Appeal. Thus having regard to the facts and circumstances of the case, the grievance as to non-framing of the issue cannot be entertained in Second Appeal. Accordingly, point No. 3 is answered in the negative.

9. For the reasons stated above, no substantial question of law arises in this appeal. It is accordingly rejected at the stage of admission.

Appeal dismissed.