

Gavigowda Vs. Kalegowda and Others

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Court : Karnataka

Decided On : Jul-07-1995

Reported in : AIR1996Kant131; 1995(5)KarLJ478

Judge : Hari Nath Tilhari, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100 - Order 14, Rule 1

Appeal No. : R.S.A. No. 78 of 1987

Appellant : Gavigowda

Respondent : Kalegowda and Others

Advocate for Def. : M.S. Subbarayappa, Adv.

Advocate for Pet/Ap. : Smt. K. Sheela, Adv.

Judgement :

Acts/Rules/Orders:

Code of Civil Procedure, 1908 - Section 100 - Order 14, Rule 1

Cases Referred:

Nagu Bai v. B. Shama Rao, AIR 1956 SC 593;Nedunuri Kameswaramma v. Sampati Subba Rao, AIR 1963 884

JUDGEMENT

1. This is the plaintiff's second appeal under Section 100 of Code of Civil Procedure against the judgment and decree dated 11-9-1986 passed in Regular Appeal No. 29/83, Govigowda v. Kalegowda passed by the Civil Judge. Holenarasipura dismissing the plaintiff's appeal arising out of judgment and decree dated 20-10-1981 passed in O.S. No. 70/78, confirming the judgment and decree of the trial Court dismissing the plaintiff-appellant's suit for specific performance of contract to execute the sale-deed as well as for injunction.

2. The facts of the case in brief are that the property in suit did originally belong to Bettegowda and Byregoda. According to the plaintiff's case, as the Bettegowda and Byregowda were not keeping in good health, they entrusted the plaintiff with the suit schedule property to cultivate the same on wara basis. The plaintiff further alleged that Byregodwa sold his share to defendant No. 1 but possession of the suit property, after the death of Bettegodwa and Byregowda continued with the plaintiff-appellant. The plaintiff further alleged that, after the death of Bettegowda and Byregowda the first and second defendants agreed to sell the same in favour of the plaintiff-appellant for sale consideration of Rs. 6,000/- and an agreement to that effect was executed on the same day i.e. on 18-6-1975. The plaintiff's case is that towards sale consideration a sum of Rs.5.500/- had been paid on that day and the balance of Rs. 500/- was agreed to be paid before the Sub-Registrar at the time of the registration of the document. According to the plaintiff-appel-lant, he continues to be in possession of the property even after the agreement in question. The plaintiff's case is that, the reconveyance of the property was delayed for the reason that defendants 1 and 2 have to take recoveyance of certain items of the property which had been transferred and conveyed to the defendant No. 3. according to the plaintiff by nominal sale deed by way of security for the amounts advanced to defendants 1 and 2. The plaintiff's case is that, by issuing notices to the defendants 1 and 2, the plaintiff-appellant called upon them to receive the balance amount of Rs. 500/- and to execute the sale deed in compliance of the terms of agreement dated 18-6-1975. The plaintiff further alleged that, defendants failed to comply with the said notice, as such the suit has been filed for specific performance of contract to execute the sale deed in pursuance of the agreement

dated 18-6-1975 as well as for injunction restraining the defendant-respondent from interfering with their possession. In the plaint, in addition to defendants 1 and 2, defendants 3 and 4 have also been impleaded. The defendants filed the written statement separately and denied the plaint allegations altogether. In the written statement defendants 1 and 2, specifically, contended and stated that they did not execute the agreement dated 18-6-1975 and the allegation made in the plaint to the effect that defendants have executed the agreement dated 18-6-1975 is incorrect. The defendants further alleged, to the effect, that the sale-deed which had been executed in favour of defendant No. 3 was nominal one and it was executed as the security for the amount advanced has been totally false and incorrect. The defendants denied that the plaintiff was in possession or cultivation of the land in any manner. They denied that plaintiff was a wara tenant. The defendants 1 and 2 stated that they have sold the Survey Nos. 1/3, 47/4, 49; 1 and 61/2 to the fourth defendant and other properties by deed dated 12-9-1975 and have given possession of the same to the fourth defendant. The plea of limitation was also raised to the effect that the suit was barred by limitation. Defendants 3 and 4 denied the plaint allegations. According to defendant No. 3, Byregowda sold his share to defendant No. 1 they denied the plaintiff's possession as well. Defendant No. 3 further averred that, by registered sale deed dated 24-5-1974 an area of 17 guntas of item No. 1 of the plaint schedule was sold by defendants 1 and 2 so as to discharge the mortgage-debt of defendant No. 2 and Byregowda, and after discharging of the mortgage debt, the defendants 1 and 2 by registered sale deed dated 9-5-1975 sold rest 17 guntas of item No. 1 in favour of the defendants and as such, defendant No. 3 became the full owner for 34 guntas of land comprising item No. 1 and claimed to be in possession. The defendant No. 3 has stated, since after the written registered sale deed dated 24-5-1974 and 9-5-1975 defendants 1 and 2 lost their rights in the shares of Bettgowda and Byregowda. Defendant No. 3 denied the agreement of sale dated 18-6-1975 and it is further alleged that the sale deed of agreement itself was prima-facie a false and fraudulent document. He has stated that sale-deeds executed in his favour conveyed absolute title and interest in item No. 1 of schedule suit properties and there was no question of any reconveyance. Defendant No. 3 asserted that agreement dated 18-6-1975 if any, was a bogus and fraudulent one and it did not

confer any right on the plaintiff and as such, plaintiff is not in possession of the suit properties, there was no question of plaintiff's possession being disturbed. Therefore, plaintiff's suit is not maintainable.

3. Defendant No. 4 as per pleadings contained in written statement has stated that, Byregowda sold his share of the properties to defendant No. 1 and that defendant No. 1 after the death of Byregowda sold the share of Byregowda in Items Nos. 3 to 12 of the plaint schedule properties in favour of defendant No. 4 vide registered sale deed dated 12-9-1975 and the full consideration of the same has been paid. He claimed to be the owner of those properties except items Nos. 1 and 2, The fourth defendant has also denied the plaintiff's case that he was in possession of the disputed properties as wara tenant. The defendant No. 4 alleged that the agreement of sale dated 18-6-1975 was a concocted one and was a fraudulent document. The plea of bona fide purchaser for value without notice was also raised by defendant No. 4 and the allegation in the written statement was made that the plaintiff's suit was barred by limitation as well, it was not maintainable.

4. The trial Court framed the following issues:

(1) Plaintiff to prove the specific performance directing the defendants 1 and 2 to take the reconveyance deed from 3rd defendant and to direct the defendants 1 and 2 to execute a registered sale deed in favour of the plaintiff.

(2) Plaintiff to prove that he is entitled to permanent injunction restraining the defendants from obstructing the plaintiff's possession?

Additional Issues:

(1) Whether the suit against the 4th defendant is barred by limitation as contended by him in para 11 of the written statement ?

2. Whether the suit against the 4th defendant is not maintainable ?

3. Whether defendant No. 1 proves that he is a bona fide purchaser for value without notice of the agreement in favour of plaintiff or rights of any one

4A. The Munsiff tried the case and dismissed the plaintiffs suit. The learned Munsiff on the basis of appreciation of evidence on record held that the plaintiff has failed to prove Ex. P1 i.e. agreement to sell dated 18-6-1975. He further held that the plaintiff is not entitled to injunction as defendant No. 4 is found to be in possession of the land in dispute on the date of the suit. He further held that, as the plaintiff has failed to prove the alleged agreement, the plaintiff had no interest in the land and it cannot be said that defendants 3 and 4 are not bona fide purchasers. With these findings, the trial Court dismissed the plaintiff's claim,

5. Having felt aggrieved by the judgment and decree of the trial Court, the plaintiff preferred Regular Appeal No. 29/83. The learned lower appellate Court after having examined all the contentions raised by the parties and having examined the records, recorded the following conclusion :--

'After perusing the evidence placed by both the parties and the documents produced before this Court, I am convinced that the learned Munsiff has rightly come to the conclusion that the plaintiff has not proved the agreement Ex. P1 and has rightly answered the issues 1 and 2'.

6. Having felt aggrieved from the judgment and decree of the lower Appellate Court, the plaintiff-appellant has preferred this Second Appeal in this Hon'ble Court. I have heard Smt. K. Sheela learned Counsel for the appellant and Sri M. S. Subbarayappa, learned Counsel for the respondents. It has been contended on behalf of the appellant that learned Courts below have committed an error of law in recording the finding on the point on which no issue was framed by the Court nor was pressed. No issue had been framed whether plaintiff proves that defendant executed an agreement dt. 18-6-1975 in favour of plaintiff-appellant and when no issue was framed and decision bad to be taken that the plaintiff-appellant's case has been admitted and in particular when the thumb impression on the deed has not been specifically denied. Smt. Sheela, learned Counsel for the appellant further contended that there is an admission made by defendant No. 2 in the course of cross-examination which reads as under:

Defendant No. 2 (D.W. 5) stated to have deposed in her evidence that :

'I sold some of the suit lands to defendants 3 and 4 under Exs. D1 and D2 and D4. I told D3 and D4 at the time of Ex. D2 about the agreement in favour of the plaintiff'. On this basis it was contended by the Counsel Smt: K. Sheela that this admission clearly proves the existence of agreement Ex. P1 or to say entering of the agreement by the parties and the fact the defendants 3 and 4 did know about agreement to sell Ex. P1.'

7. The learned Counsel for the appellant contended that the finding has been arrived by Courts below ignoring this important piece of evidence. So finding on the question relating to execution deed of agreement to sell is bad in law. Smt, Sheela further contended that there are revenue record entries regarding possession of the plaintiff over the land in dispute and entries are to be presumed to be correct.

8. On behalf of the respondents, the contentions made on behalf of the appellant had been disputed. No doubt, the counsel for the respondents made an appreciation of the manner in which the case was placed by Smt. Sheela. But, he contended that the arguments are of with no substance. It has been contended by the learned counsel for the respondents that so far non-framing of issues on the point is concerned, no doubt the Courts below ought to have framed an issue specifically on the question, whether plaintiff proves the agreement? But, it does not matter much in this case because parties fully knew that the dispute between them particularly in view of the pleadings of the parties and evidence which has been led by both the parties in that regard. He submitted, the plaintiff examined himself and the witnesses, viz., the attesting witnesses and in this view of the matter, the plaintiff-appellant was not at all prejudiced in the course of trial of the case. So, for a moment, it can be taken as a technical error and an irregularity, but it had not resulted in causing the appellant any injury of substantial nature in the course of the trial of the suit.

9. The learned counsel for the respondents Sri Subbarayappa further submitted that, this appeal is concluded by findings concurrently arrived by courts below on the basis of appreciation of evidence on record and the finding is to the effect that the plaintiff has failed to prove the execution of the agreement dated 18-6-75 and so it is binding on parties and on Court as final. Sri Subbarayappa further

submitted that entries in appellant's favour might have made during the time of Bettegowda and Byregowda as the plaintiff was alleged to be cultivating the land as wara tenant in their time, but after the transfer in favour of defendants-respondents, the possession of the land came to the respondents and those entries have correctly not been relied upon. The presumption of the correctness of entries has been rebuttable and Sri Subbarayappa, the respondent's counsel, submitted that the finding on the question of possession is as well a finding of fact. I have applied my mind to the contentions made by the learned counsel for the parties as well as I have gone through the records. It is well settled that in a second appeal the findings of fact and particularly concurrent findings of facts recorded by the Courts below, howsoever grossly erroneous, the said findings may be binding on the second appeal viz., this Court except and unless and until it is shown that those findings are vitiated by error of law of substantial nature, such as finding is based on no evidence or finding has been arrived on the basis of conjectures or surmises or it has been arrived at after either ignoring the material or admissible evidence on record or by considering certain materials not relevant or admissible or like. Here, this has not been so nor any such contention has been advanced by the learned counsel for the appellant.

10. The contentions of the learned counsel for the appellant is that, no specific issues had been framed on the question of proof of execution of an agreement dated 18-6-75. I have been taken to the pleadings. In the written statement of defendants 1 and 2 it has been clearly stated that defendants did not execute any agreement dated 18-6-75 and they denied the allegations made in the plaint in respect of such an agreement. Defendants 3 and 4 also denied that agreement and said that if there is any agreement, it is, forged, concocted and fraudulent one. That being the position, no doubt it was the duty of the trial Court while trying the suit to draw proper issues after examining the pleadings of each point keeping in view the provisions of O. 14, R. 1, C.P.C. It is for the parties also under R. 5 thereof to move the application before the Court requesting to frame the issue which had not been framed. Anyway, it is the fact that no specific issues has been made though it may be said to be included in issue No. 1. But, issue No. 1 can be said to be vague. It would have been a case for interference on this ground in the second appeal, provided the plea or point in dispute would not have been clear to

the parties and party did not understand the case at the time of the trial and would not have led any evidence. It is well settled that mere failure to frame an issue will not entitle the reversal of decree unless and until it is shown that party did not know the point in dispute and so it was materially prejudiced in course of trial. Here, in the present case, the parties knew the point in dispute and plaintiff-appellant knew that it had to be proved whether the agreement in question had been entered and executed by defendants 1 and 2 in favour of the plaintiff for sale of property namely, agreement dated 18-6-75. The plaintiff led the evidence in order to prove the execution of the said agreement and in order to prove the same, the plaintiff examined the attesting witnesses of the deed. So, it cannot be said that the plaintiff suffered because of non-framing of the issues as he did not know the case. Here, the parties did know the real dispute between them. This being the position of law, in my opinion this is not a sufficient ground for interfering with the judgment and decree of the trial Court. When I so opine, I find support for my view from the decision of the Supreme Court in the case of Nagu Bai v. B. Shama Rao, reported in . The true scope of this rule is that, 'evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But, that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduce evidence relating thereto.'

11. Similar view has been expressed by the Supreme Court in the case of Nedunuri Kameswaramma v. Sampati Subba Rao, reported in .

12. In this view of the matter, in my opinion, there is no substance in this contention of the learned counsel for the appellant. As regards the alleged admission of defendant No. 2, DW 5 she has clearly stated that, she did not execute the document in respect of the land in dispute. No doubt, there is a statement during the course of the examination as under :

'I sold lands to defendants 3 and 4 at the time of execution of Exs.D2 and 4 about the agreement in favour of plaintiff and about the structure made by the plaintiff.

13. Exs. D2 and 4 are dated 24-5-74 and 9-5-75. It means, these deeds had already been executed at the time when Ex.P1 did not see even the light of the day. As Ex.P1 i.e. the agreement is dated 18-6-1975 was of a period' subsequent to the dates of the sale-deeds. Therefore, this statement itself is proved and shown to be mistaken and incorrect and admission of it is shown by the circumstances to be incorrect then, that is not binding as it stands. So, there is no substance in the contention of the learned counsel for the appellant as this statement has no material effect and stands proved to be mistaken and it lost all its efficacy and value.

14. As regards possession, the Courts below no doubt considered the entries and thereafter relied on the evidence of the defendants and recorded the finding of the possession. The findings on the question prove execution or entering into of agreement to sell dated 18-6-75 and that of possession are a pure and simple concurrent findings of fact and it is well settled that while exercising S. 100 of Code of Civil Procedure, this Court is not entitled to interfere with the findings of fact howsoever grossly erroneous it may be, except in cases where it may be said to be vitiated by substantial error of law. Here, it is not the case, nor it has been shown to be vitiated by any error of law. Thus considered, this second appeal has got no merit and so is liable to be dismissed.

Therefore, this second appeal is hereby dismissed with appreciation for counsel for appellant's Smt. Sheela's genuine effort. The appeal having been dismissed and decree of the Courts below are affirmed. The cost of the case are to be borne by the parties.

15. Appeal dismissed.