

Poovanigowda Vs. Vasantha Alias Subba Rao and Others

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Court : Karnataka

Decided On : Mar-22-1991

Reported in : AIR1992Kant254; 1991(2)KarLJ567

Judge : M.P. Chandrakantaraj Urs, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 11; [Limitation Act, 1963](#) - Schedule - Articles 58, 64, 65; [Evidence Act, 1872](#) - Sections 101- 104; [Specific Relief Act, 1963](#) - Sections 37

Appeal No. : Regular Second Appeal 893 of 1990

Appellant : Poovanigowda

Respondent : Vasantha Alias Subba Rao and Others

Advocate for Def. : U.L. Narayana Rao, Adv.

Advocate for Pet/Ap. : G.S. Visweswara, Adv.

Judgement :

ORDER

1. This Second Appeal is directed against the judgment of the lower appellate court in R.A. 18/1987 on the file of the Civil Judge at Puttur. Lower appellate court, by the said judgment and decree, reversed the finding of the trial-court in O.S. No. 236 of 1978 on the file of the Principal Munsiff at Puttur.

2. Bare facts necessary for disposing of this Second Appeal that are required to be stated are as follows:--

Plaintiffs filed a suit for declaration of their right, title and interest in the suit schedule properties on 2-12-1978. Having failed to secure a permanent injunction restraining the defendants from interfering with their peaceful possession of the suit schedule properties in earlier suit filed in the same Court on the ground that they had not proved their possession on date of suit to obtain the permanent injunction for which they had prayed for. In the second suit, they pleaded the manner in which they had acquired title and why they wanted declaration of title in having been found to have lost possession on account of the judgment of the Court in the earlier suit. Consequently, prayer for possession was added.

3. Defendants resisted the suit inter alia on the ground that the suit was barred by res judicata in as much as in the earlier suit, the first issue decided was whether the plaintiffs were the owners or not and that had been held against the plaintiffs; that the defendants had perfected their title by adverse possession of property for over 50 years, hostile and adverse to the plaintiffs. Therefore, suit was barred by limitation.

4. On such pleadings, as many as six issues were framed by the trial court and they are as follows:

1. Whether the plaintiff is the owner of plaint 'A' schedule property?
2. Whether plaintiff proves that his family was in possession and enjoyment of 'A' schedule properties?
3. Whether the plaintiff proves that the defendants trespassed into S. No. 50/32 as alleged?
4. Whether the defendants prove that S. No. 50/30, 31, 32 and 34 were purchased in 1949 as alleged?
5. Whether defendants prove that suit is barred by res judicata?

6. Whether the defendants prove that they have perfected their title by adverse possession?

If so, whether the suit is barred by limitation?

The trial-court came to the conclusion on the evidence led that the plaintiffs are the owners of the property. That on Issue No. 2, it did not record a finding because issue No. 5 was found in favour of the defendants. As also on issue No. 6, the defendants failed to establish their title by adverse possession. While deciding issue No. 6, the trial-court also dealt with plea of limitation pleaded by the defendants. The defendants had pleaded the suit was not brought within 12 years from the date of dispossession and therefore, it was barred by limitation. In issue No. 6, the lower-court, while deciding that issue at para 20 of the judgment has stated as follows :--

'That the suit was filed on 29-11-1978 and the earlier suit had been filed on 31-12-1966. As the court has already given a finding on issue-2 in O.S. 5/67 to the effect that plaintiff in that suit were not in possession of the schedule properties not only on the date of suit but also prior to it, the present suit is clearly barred by time.....'

It further noticed that the plaintiffs had not deliberately pleaded the exact date of dispossession as the defendants had advanced a case that they had been in possession of the suit schedule properties for the last over 50 years and that they had perfected their title by adverse possession. It was incumbent on the plaintiffs to prove their possession. Plaintiffs were dispossessed from a date even before the filing of the suit. The trial-court also came to the conclusion that there was no material produced by the plaintiffs that between 29-11-1966 and the disposal of the earlier suit, they were in possession. In that circumstance, regard being had to the plea of adverse possession by the defendants despite holding that they had not produced only (any) material, trial-court came to the conclusion that suit was barred by limitation. Therefore, the suit came to be dismissed.

5. The lower appellate court, after hearing the parties and perusing the evidence on record, formulated the following three points for consideration:

(1) Whether the lower-court was not justified in expressing that it was precluded from giving a finding on issue -- 2? If so, what is the finding on issue-2 on the basis of oral and documentary evidence placed on record by both the sides?

(2) Whether the lower-court has committed any error in holding that the plaintiff's suit is barred by the principles of res judicata?

(3) Whether the lower Court has committed any error in holding that plaintiff's suit is barred by limitation?

I need not concern myself with the first question formulated for consideration because Mr. Visweswara has not pressed that question. He has pressed only the questions of res judicata and limitation.

6. Mr. Visweswara solely relies on the issue framed in the earlier suit viz., O.S. 236 of 1978 in regard to the title of the plaintiff. What the trial Court over-looked was that in the earlier suit, the title was not substantially in issue as none had denied title except by a bald assertion in the written statement filed in that suit. The issue was raised incidently to determine whether possession was with the plaintiff, on the basis of which permanent injunction was sought for. That was on the principle that possession followed title and no more. It was in that context that a finding was recorded that the plaintiff had not proved ownership of the properties. That should not be binding as the rule of res judicata is not attracted to a case where the issue was not directly and substantially in issue. It could not have been directly a substantial issue in the earlier case as there was no pleading by the plaintiff that anybody had questioned the title. Therefore, the lower appellate Court correctly came to the conclusion that the second suit was not barred by the principle of res judicata having regard to the plain language of S. 11 of the Civil P.C.

7. In regard to limitation, it is only in this Court that Mr. Visweswara argued that the Article that should have applied is An. 58 of the Limitation Act, that is, in regard to suit for any other type of declaration. The argument and the pleadings and the pleadings and the evidence led in the trial Court was that the suit was not instituted within 12 years from the date of dispossession. As I have already

discussed, the trial Court proceeded on the wrong assumption that the burden was on the plaintiff to prove on what date he was dispossessed. On the other hand, the burden should have been on the defendants who had raised the plea of limitation in a particular manner, that is, beyond the period of 12 years from the date of dispossession, the suit had been filed. After having reached the conclusion that the defendants had not perfected their title by adverse possession, the issue coupled with it in regard to the limitation should have been in favour of the plaintiff and in that possession of the defendants impliedly was not hostile and continuous and adverse for 12 years prior to the presentation of the second suit. That would be sufficient to dispose of the plea advanced in this Court.

8. Lower appellate Court approached the case in a different fashion. It has taken into account the fact of the defendants having pleaded adverse possession on the question of limitation, should have discharged their onus of pointing out at what point of time plaintiff was dispossessed in order to non-suit him on the ground of limitation. He has also taken notice of the fact that in the earlier suit, a temporary injunction was granted which tantamounted to admitting possession of the plaintiffs till disposal of the suit from the date of grant of injunction. The cumulative effect, therefore, was that the suit could not have been held to be barred by limitation on the pleadings and evidence led by the present appellants.

9. In that view of the matter, really no substantial question of law arises for consideration in this second Appeal and therefore it is rejected.

10. Appeal dismissed.