

Kariyaiah Vs. Cheluvaiah and Others

Kariyaiah Vs. Cheluvaiah and Others

SooperKanoon Citation : sooperkanoon.com/373504

Court : Karnataka

Decided On : Jun-18-1997

Reported in : 1998(1)KarLJ522

Judge : Hari Nath Tilhari, J.

Acts : [Hindu Minority and Guardianship Act, 1956](#) - Sections 12; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100

Appeal No. : Regular Second Appeal No. 91 of 1991

Appellant : Kariyaiah

Respondent : Cheluvaiah and Others

Advocate for Def. : Sri. B.M. Chandrasekharaiah, Adv.

Advocate for Pet/Ap. : Sri T.N. Raghupathy, Adv.

Judgement :

1. This appeal under Section 100 of the Civil Procedure Code, has been preferred by defendant 2 in the suit, challenging the judgment and decree dated 23-10-1990, delivered by Sri K.M. Thammaiah, Civil Judge/J.M.F.C., Hunsur, in Regular Appeal No. 21 of 1989, whereby the First Appellate Court had in part allowed the appeal of defendant 2 after having held that to the extent of 1/4th share, defendant 1 could make a transfer as defendant 1's share in the property was 1/4th and held

the sale deed to that extent of 1/4th share to be valid, while setting aside that sale deed dated 7-2-1972, to the extent of 3/4th share and modified the Trial Court decree as mentioned above, which has been passed in Regular Suit No. 228 of 1984.

2. The facts of the case in brief are that plaintiffs and respondents filed the regular suit claiming the following reliefs:

(a) a declarative decree declaring that the transfer purporting to be a sale and executed by the registered sale deed dated 7-2-1972, was in the nature of mortgage deed and to further order the redemption of mortgage directing the delivery of possession of the property in suit in favour of the plaintiffs; or in the alternative it was prayed as Relief No. (b) that if the sale deed is taken on its face value as sale by plaintiffs father, i.e., defendant 1, in favour of defendant 2 that is the present appellant, the plaintiff-respondent prayed for the grant of decree for cancellation of that sale deed and for restoration of the possession of the plaintiffs. Plaintiffs also claimed cost of the suit.

3. Plaintiffs' case as per plaint allegations has been, that the suit property has been joint family property of the joint coparcenery consisting of defendant 1 and plaintiffs 1 to 3, in other words to be the joint ancestral property of present respondents 1 to 4. The plaintiffs further alleged that defendant 1 that is the present respondent 4 had transferred the property mentioned in the schedule in favour of defendant 2 namely the present appellant vide, sale deed dated 7-2-1972, without any legal necessity and during minority of plaintiffs 1 to 3 namely respondents 1 to 3. Plaintiffs averred that they learnt that the said sale was never intended and defendant 1 wanted to borrow loan on security of property and so he mortgaged it, but, defendant 2-appellant having practised fraud and misrepresentation got executed the sale deed instead of mortgage deed. The plaintiffs' case has been that the deed dated 7-2-1972, which on its face value appears to be sale deed has been illegal, null and void and had not been binding on the plaintiffs, as the said transaction had been entered into without any legal necessity. The plaintiffs averred that if the plaintiffs plea is accepted that it is a mortgage, a declaration may be given to that effect and order for redemption may

be issued, but if on the face value of it is taken to be the sale deed it may be declared to be illegal, as defendant 1 that is respondent 4 could not make the transfer of the property in dispute by the said document as there did not exist any legal necessity, nor there was any need to pay an antecedent debt. Defendant 2 in the suit, namely the present appellant filed the written statement denying and challenging the plaint allegations. It was denied that the property in dispute was joint family property having been inherited by defendant 1. The defendant further denied the case of mortgage set up by the plaintiffs in the plaint as well as denied the plea of fraud taken by the plaintiffs in the suit. The defendant's case has been that the deed had not been executed without any legal necessity. Defendant admitted that it is true that plaintiffs made repeated demands from the second defendant that is the present appellant to deliver the suit land and also issued notice, but the said notice had been properly replied. Defendant 2 asserted that he purchased the suit property for valuable consideration from respondent 4 that is defendant 1. It was asserted that the suit was filed for wrongful gains. In paragraph 2 it has been stated that it is further false to say that the first defendant sold the suit schedule property without necessity.

4. On the basis of the pleadings of the parties, the Trial Court framed 7 issues which read as under.-

1. Whether the suit schedule property is the joint family property of plaintiffs and defendant 1?
2. Whether the plaintiffs prove that the sale deed dated 7-2-1972, is a mortgage deed as contended in paras 3 and 4 of the plaint?
3. Whether the sale deed dated 7-2-1972 executed by the 1st defendant in favour of the 2nd defendant is not for legal necessity?
4. Whether the above said sale deed is not binding on the plaintiffs?
5. Whether the suit is not maintainable as brought?
6. Whether the plaintiffs are entitled to possession of the suit schedule property?

7. To what reliefs the plaintiffs are entitled to?

8. What decree or order?

5. After having examined the evidence on record the Trial Court held that the property in dispute had been the joint ancestral property of the plaintiffs-respondents as well as defendant 1-respondent 4. It further held that the transaction exhibited by the deed dated 7-2-1972, cannot be held to be a mortgage deed and plaintiffs failed to establish the said transaction to be a mortgage deed. It held that the transaction exhibited by deed dated 7-2-1972, to be an out and out sale as alleged by the defendant. The Trial Court further held on appreciation of evidence that defendant has failed to prove that sale deed dated 7-2-1972 has been executed by defendant 1 (respondent 4) in favour of defendant 2 (present appellant) for legal necessity. The Trial Court recorded the finding that there is no evidence on record to hold that the sale deed was executed for legal necessity. The Trial Court further held that as defendant 2 that is the present appellant failed to prove the legal necessity as well as he failed to establish that he made enquiries, the sale deed dated 7-2-1972, executed by defendant 1 (respondent 4) in favour of defendant 2 that is the present appellant has not been binding on the plaintiffs as contended by them. The Trial Court also answered Issue 5 in the negative and held the suit to be maintainable. The Trial Court further held that the plaintiffs have also been entitled to the possession of the suit property as prayed by them and so decreed the suit and granted the relief for cancellation of the sale deed dated 7-2-1972 and directed defendant 2 to deliver the possession of the suit property to the plaintiffs-respondents.

6. Having felt aggrieved from the judgment and decree of the Trial Court, defendant 2 that is the present appellant preferred first appeal namely Regular First Appeal No. 21 of 1989. The lower Appellate Court affirmed the findings, of the Trial Court that the property in dispute was and has been the joint ancestral property of respondents 1 to 4 that is plaintiffs 1 to 3 and defendant 1 in the appeal. It also affirmed the findings of the Trial Court that the transaction entered and exhibited by the deed dated 7-2-1972 was not a mortgage deed. It also affirmed the Trial Court's finding that the said transaction was out and out sale.

The lower Appellate Court further held on a consideration of the evidence that the transaction of sale exhibited by deed dated 7-2-1972 and entered into between the first and second defendant namely the present appellant and respondent 4 was not for legal necessity or to discharge any antecedent debt. It also held though plaintiff 3 was not born at the time of transaction, but he could challenge the alienation. The Appellate Court further found that the coparcenary consisted of 4 persons, the share of the vendor that is defendant 1 namely respondent 4 was 1/4th in the property in dispute. It further held that co-sharer can transfer his share no doubt in the joint family property. It held that transfer of 1/4th share by defendant 1 that is the respondent 4, which belonged to him, was binding on defendant 1 that is respondent 4. Having recorded these findings, the lower Appellate Court modified the Trial Court's decree and it held that the sale deed to the extent of 3/4th share belonging to the plaintiffs-respondents was illegal and was not binding on the plaintiffs-respondents, as defendant 1 even being the Kartha of the family could not make transfer when there was no legal necessity or when there was no question of there being any antecedent debt. It modified the Trial Court's decree and it provided that the sale deed stands set aside only to the extent of 3/4th share belonging to the plaintiffs, but to the extent of 1/4th share it will remain binding on the transferee that is respondent 4.

7. Having felt aggrieved from the judgment and decree of the lower Appellate Court, the vendee that is defendant 2 in the suit has come up in appeal.

8. I have heard Smt. Jayashree holding brief for Sri T.N. Raghupathy, learned Counsel for the appellant at great length. Learned Counsel for the appellant Smt. Jayashree contended that the finding as to legal necessity is the result of improper appreciation of the material, and on a consideration of recital in the sale deed along with the notice issued by the plaintiffs Counsel and the statement of P.W. 1, it could and ought to have held that the sale was for a legal necessity. Smt. Jaishree invited my attention to Ex. P-4 the notice and to paragraph 2, where a phrase is used, 'due to necessity it appears my client's father approached you to lend loan of Rs. 400-00 to him after taking mortgage from him on security of his land'. Learned Counsel emphasised on the expression 'necessity' used in the notice and challenged that it is an admission that there was necessity to execute the sale

deed and this admission should be taken note of. I am unable to accept this contention. It is well-settled principle of law that an admission if it has to be relied and has to be read as a whole and not in part. Therefore, if it has to be relied, the sole question would be whether money was taken as loan, necessity arising at the time, so it should not be accepted. Appellants' Counsel insisted that part of it should be accepted and part should not be, which runs against the principles of law. In this view of the matter this portion cannot be of any help. That no nature of necessity has been indicated which the Court could judge whether it was a legal necessity or not. Learned Counsel invited my attention to the statement of P.W. 1 and contended that P.W. 1 has stated in his statement that his father was injured by a pig and therefore, money was needed. When was plaintiffs father injured by the pig, what was the extent of injury, when was he admitted in the hospital, nothing is clear. Apart from that the necessity that has been shown in the sale deed was that of purchasing the bullocks, while there is no evidence that it was needed for purchasing bullocks. So all the pleas raised were different pleas. These things were not mentioned in the sale deed and self conflicting.

9. In my opinion, in these circumstances lower, i.e., Trial and Appellate Courts, if they found that there is no reliable evidence to prove the legal necessity, the Courts below did not commit any error of law much less substantial error of law. The appeal has been admitted on one sole question relating to legal necessity. Ordinarily finding as to existence of legal necessity is the finding of fact -- *Dodda Thimma Naika v Lakshmaiah and Others* . Here it is essentially finding of fact, because no necessity as per finding has been established. To show legal necessity, no doubt it may be said that whether the necessity as established, constitutes legal necessity, and that may be said to be a question of law. But here no necessity has been established, as has been found concurrently by two Courts below and in my opinion has rightly been found that no necessity has been established. When no necessity for executing the sale deed has been established, it can well be said that the decision of the Courts below is completely based on concurrent findings of facts. The appeal does not raise any substantial question of law. As such the appeal is devoid of merits. No cross-appeal having been filed, the judgment of the lower Appellate Court is hereby confirmed. No order as to costs.

