Gurulingappa Vs. Channappa

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Court : Karnataka

Decided On : Jan-12-2006

Reported in : AIR2006Kant220; 2006(2)KarLJ499

Judge : V.G. Sabhahit, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 10

Appeal No. : Regular Second Appeal Nos. 866 and 867 of 2003

Appellant : Gurulingappa

Respondent : Channappa

Advocate for Def. : Yoganarasimha, Sr. Counsel and ;Deepashree, Adv.

Advocate for Pet/Ap. : M. Sivappa, Adv.

Disposition : Appeal dismissed

Judgement :

V.G. Sabhahit, J.

1. Regular Second Appeal No. 867 of 2003 by the defendant is directed against the judgment and decree passed by the Court of the Civil Judge (Senior Division), Nanjangud, in R.A. No. 105 of 1999, dated 11-8-2003, dismissing the appeal and confirming the judgment and decree passed by the Court of the Civil Judge (Junior

Division), Nanjangud, in O.S. No. 70 of 1991, dated 31-7-1999, decreeing the suit of the plaintiff for declaration of title and permanent injunction. Regular Second Appeal No. 866 of 2003 by the plaintiff is directed against the judgment and decree passed by the Court of Civil Judge (Senior Division), Nanjangud, in R.A. No. 16 of 1998, dated 11-8-2003, confirming the judgment and decree passed by the Court of the Civil Judge (Junior Division), Nanjangud, in O.S. No. 525 of 1990, dated 21-1-1998 only in respect of declaration of title of the plaintiff in respect of southern 35 V2 guntas of land, out of the suit schedule property and dismissing the suit of the plaintiff for declaration of title in respect of the northern 35 V2 guntas of land out of the suit schedule property and for possession of 31 guntas of land which forms northern portion of the suit schedule land.

The essential facts of the case leading upto these appeals with reference to the rank of the parties before the Trial Court are as follows:

2. O.S. No. 525 of 1990 was filed by Gurulingappa, the plaintiff against his Uncle Channappa, the defendant seeking for declaration that the plaintiff is the owner of the suit schedule land and to direct the defendant to put the plaintiff in peaceful possession and enjoyment of the encroached portion in the suit schedule land and also for an order of award for costs. The suit schedule property is described as land bearing Sy. No. 325/2 of Hallare Village, Hullahalli hobli, Nanjangud Taluk, measuring 01 acre 31 guntas bounded as per the description given in the schedule to the plaint. It is averred in the plaint that the plaintiff is the owner of the suit schedule land bearing Sy. No. 325/2 of Hallare Village, being his ancestral property and all the revenue records are in his name. The defendant is a neighbouring landowner on the northern side of the plaint schedule land. It is averred that the land in the suit schedule was mortgaged with possession in favour of the brother of the defendant and the defendant and his brother were in possession of the properties mortgaged to them between 1966 and 1980, when the mortgage was redeemed by the plaintiff. Upon redemption, the plaintiff received back the possession of the suit land. The plaintiff got suspicious about the extent of the land handed over by the mortgagee and finally approached the Assistant Director of Land Records of Nanjangud, for measurement of the land to know the exact extent of encroachment by the defendants or in other words, the

exact area of which possession was not handed over by the defendant's brother to the plaintiff. On 11-8-1990, the Surveyor attached to the Assistant Director of Land Records Office measured the land and found that about 0.31 guntas of land in the suit schedule land had been encroached by the defendant on the northern side of the suit schedule land and wherefore, the suit for the above said reliefs.

3. The suit was resisted by the defendant by filing the written statement denying the material averment made in the plaint that the plaintiff is the absolute owner of the suit schedule property bearing Sy. No. 325/2 of Hallare Village. It is averred that the averments made in the plaint that the suit property was mortgaged in favour of the brother of the defendant and the defendant and his brother were in possession of the suit schedule property till redemption in 1980 and that after redemption, the plaintiff got suspicious about the extent of the land redeemed and got the land measured and found that the defendant has encroached upon the property are concocted and are not true and tenable. It is further averred that the suit schedule land and the other lands are the ancestral properties of the defendant and the plaintiff. One Channaiah, son of Maliyappa is the grandfather of the defendant and the plaintiff. Channaiah had three sons: Puttappa, Channabasappa and another son, who died without marriage. The plaintiff is the son of Channabasappa, son of Channaiah and the defendant is the son of Puttappa, son of Channaiah. It is further averred that there was a partition of the properties belonging to the family about 60 years next before filing of the written statement and all the properties were equally divided and the suit schedule land hearing Sy. No. 325/2, is also one of the items got divided equally between Puttappa and Channabasappa and as such the northern half of the suit land measuring about 35V2 guntas of land fell to the share of the defendant's father and the southern half of the suit land measuring 35V2 guntas of land fell to the share of the plaintiffs father and the plaintiff and the defendant have succeeded to the said portions of the land in Sy. No. 325/2 and have been in possession and enjoyment of the same and the question of encroaching upon the land belonging to the plaintiff does not arise and the defendant has filed original suit, O.S. No. 70 of 1991 against the plaintiff for declaration of his title and for permanent injunction with respect to the northern half share in the suit schedule property and wherefore, the suit is liable to be dismissed.

4. The Trial Court framed appropriate issues in O.S. No. 525 of 1990 having regard to the above said pleadings. On behalf of the plaintiff, the plaintiff got examined himself as P.W. 1 and he got marked Exs. P. 1 to P. 6. On behalf of the defendant, defendant 1 was examined as D.W. 1 and he also examined D.Ws. 2 to 4 and got marked Exs. D. 1 to D. 5. The Trial Court after considering the contentions of the parties and the material on record, answered the issues in favour of the plaintiff and decreed the suit, O.S. No. 525 of 1990, by declaring that the plaintiff is the owner of the suit schedule land and directing the defendant to deliver possession of the land measuring 0.31 guntas to the plaintiff, by its judgment dated 21-1-1998.

5. O.S. No. 70 of 1991 was filed by the Channappa, defendant in O.S. No. 525 of 1990 reiterating the averments made in the written statement filed in O.S. No. 525 of 1990 stating that there was partition of the properties and the father of the plaintiff, who is defendant in O.S. No. 525 of 1990 was allotted the suit schedule land i.e., 35V2 guntas of land in Sy. No. 325/2, bounded as per the description given in the schedule to the plaint, which is the northern half portion of the land in Sy. No. 325/2 which totally measures 01 acre 31 guntas and the southern half portion of the land in Sy. No. 325/2 was allotted to the father of the defendant, who is plaintiff in O.S. No. 525 of 1990.

6. O.S. No. 70 of 1991 was resisted by the defendant-Gurulingappa, the plaintiff in O.S. No. 525 of 1990, denying the material averments made in the plaint that the father of the plaintiff and the father of the defendant were allotted half share in the property comprised in Sy. No. 325/2 and averring that the defendant-Gurulingappa is in possession of the entire extent of 01 acre 31 guntas of land and the plaintiff-Channappa has encroached upon the suit schedule property belonging to him and he has filed suit, O.S. No. 525 of 1990 for declaration of title and injunction and wherefore, the suit is not maintainable.

7. The Trial Court framed issues in O.S. No. 70 of 1991 on the basis of the above said pleadings. On behalf of the plaintiff, the plaintiff-Channappa got examined himself as P.W. 1 and he also examined P.Ws. 2 to 4 and Exs. P. 1 to P. 5(c) were got marked. On behalf of the defendant, Gurulingappa, the defendant got

examined himself as D.W. 1 and no documentary evidence was adduced on behalf of the defendant. The Trial Court after considering the contentions of the parties and the material on record, by judgment dated 31-7-1999, answered the issues in favour of the plaintiff and decreed the said suit by declaring that the plaintiff-Channappa is the owner of the suit schedule property and by granting permanent injunction restraining the defendant-Gurulingappa from interfering with the plaintiffs peaceful possession and enjoyment of the suit schedule property.

8. That being aggrieved, by the judgment and decree passed by the Trial Court, dated 21-1-1998 decreeing the suit of the plaintiff in O.S. No. 525 of 1990, the defendant in the said suit - Channappa preferred R.A. No. 16 of 1998. Being aggrieved by the judgment and decree passed by the Trial Court in O.S. No. 70 of 1991, dated 31-7-1999, decreeing the suit of the plaintiff in the said suit, R.A. No. 105 of 1999 was filed by the defendant in the said suit-Gurulingappa. The first Appellate Court by judgment dated 11-8-2003, allowed the appeal, R.A. No. 16 of 1998, filed by Channappa, the defendant in O.S. No. 525 of 1990, in part, confirming the judgment and decree passed by the Trial Court insofar as it relates to decreeing the suit of the plaintiff for declaration of title in respect of the southern 35V2 guntas of land out of the suit schedule property and dismissing the suit of the plaintiff for declaration of title in respect of the northern 35V2 guntas of land out of the suit schedule property and for possession of 31 guntas of land which forms northern portion of the suit schedule land. The first Appellate Court by separate judgment dated 11-8-2003, dismissed the appeal, R.A. No. 105 of 1999 filed by Gurulingappa, the defendant in O.S. No. 70 of 1991 and confirmed the judgment and decree passed by the Trial Court in O.S. No. 70 of 1991, dated 31-7-1999 decreeing the suit of the plaintiff-Channappa for declaration of title in respect of the suit schedule property and for permanent injunction. Being aggrieved by the said judgment and decree passed by the first Appellate Court, in R.A. No. 16 of 1998 and R.A. No. 105 of 1999, these two appeals have been filed by Gurulingappa, the plaintiff in O.S. No. 525 of 1990 and the defendant in O.S. No. 70 of 1991. Both the appeals were admitted on 21-10-2003 for consideration of the following substantial question of law:

Whether the Appellate Court committed legal error in appreciating the facts and evidence in holding that the appellant has not proved his title and in dismissing the appeal, R.A. No. 105 of 1999 and as a corollary the Appellate Court committed error in upholding the title of the defendant in R.A. No. 16 of 1998 and that the interpretation of the evidence and the findings rendered by the Appellate Court thereon are perverse and contrary to the evidence on record?

9. I have heard the learned Counsel appearing for the parties on the above said substantial question of law.

10. Learned Counsel appearing for the appellant in both the appeals submitted that O.S. No. 525 of 1990 had been filed by the appellant seeking for declaration of his title in respect of 01 acre 31 guntas of land in Sy. No, 325/2 and seeking for possession of the encroached portion in the suit schedule land from the defendant. Learned Counsel submitted that the said suit, O.S. No. 525 of 1990 was decreed by the Trial Court and the Trial Court also decreed the suit filed by the defendant in O.S. No. 525 of 1990, i.e., O.S. No. 70 of 1991 by declaring that the plaintiff-Channappa the owner of the suit schedule property, i.e., northern half measuring 35V2 guntas of land in Sy. No. 325/2 and wherefore, the Trial Court was not justified in decreeing the suit, O.S. No. 70 of 1991 and the Trial Court ought to have clubbed both the suits and non-clubbing of the suits has led to inconsistent judgments. Learned Counsel further submitted that the first Appellate Court was not justified in relying upon the admission made by the appellant, who is defendant in O.S. No. 70 of 1991 and who is examined as D.W. 1. The said facts elicited in the cross-examination of D.W. 1-appellant herein in O.S. No. 70 of 1991 ought to have been considered with the other material on record including the evidence adduced by the appellant as the plaintiff in O.S. No. 525 of 1990 and the first Appellate Court has not referred to the judgment rendered in O.S. No. 70 of 1991 while considering the appeal filed against the judgment and decree passed in O.S. No. 525 of 1990. Learned Counsel submitted that the admission made by the appellant as D.W. 1 in O.S. No. 70 of 1991 is not clear and unambiguous as the same has not been considered in accordance with law and cannot be conclusive proof to decree the suit of the respondent-plaintiff in O.S. No. 70 of 1991 and dismissing the suit of the plaintiff in part in O.S. No. 525 of 1990. Learned Counsel

in support of his contention, has relied upon the decision of the Hon'ble Supreme Court in Prem Ex-Serviceman Co-operative Tenant Farming Society Limited v. State of Haryana and Ors. : AIR 1974 SC1121 wherein it is held that it is well-settled that the effect of an alleged admission depends upon the circumstances in which it was made. Learned Counsel has also relied upon the decision of this Court in Smt. Parameshwari Bai v. Muthojirao Scindia : AIR1981 Kant40 wherein it is held as under:

Stray sentences elicited in the cross-examination could hardly be construed as admission. Before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive. There should not be any doubt or ambiguity about the alleged admission and to examine whether there is ambiguity in the admission, it would be necessary for the Court to read the other parts of the evidence and the stand taken by him in the pleadings.

11. On the other hand, the learned Counsel appearing for the respondent-plaintiff in O.S. No. 70 of 1991 and the defendant in O.S. No. 525 of 1990 submitted that though the Trial Court had decreed both the suits, in the appeal, R.A. No. 16 of 1998, the first Appellate Court has rightly set aside the judgment and decree passed by the Trial Court in part in O.S. No. 525 of 1990 and in view of the clear and unambiguous admission elicited in the cross-examination of D.W. 1 in O.S. No. 70 of 1991 and also the evidence of the plaintiff in O.S. No. 525 of 1990, the first Appellate Court has rightly held that the property comprised in Sy. No. 325/2 was equally divided between the father of the plaintiff and father of the defendant and the northern portion measuring 35 V2 guntas was allotted to the share of the respondent-defendant in O.S. No. 525 of 1990 and the southern portion measuring 35V2 guntas was allotted to the share of the father of the plaintiff in O.S. No. 525 of 1990, which is clearly admitted by the appellant as D.W. 1 in O.S. No. 70 of 1991 and it is also elicited in the cross-examination of P.W. 1, the plaintiff in O.S. No. 525 of 1990 that all the properties of the family were equally divided and wherefore, the judgment and decree passed by the first Appellate Court in R.A. No. 105 of 1999 and R.A. No. 16 of 1998 is justified and cannot be said to be perverse or arbitrary.

12. I have considered the contentions of the learned Counsel appearing for the parties with reference to the material on record. I have been taken through the oral and documentary evidence on record in both the suits and the judgment and decree passed by the Trial Court and the first Appellate Court in both the suits and the appeals respectively. Having considered the contentions of the learned Counsel appearing for the parties, I answer the substantial question of law by holding that the judgment and decree passed by the first Appellate Court in R.A. No. 105 of 1999 and R.A. No. 16 of 1998 is justified and cannot be said to be perverse and contrary to the evidence on record for the following:

REASONS

13. It is clear from a perusal of the material on record that the dispute is regarding the land comprised in Sy. No. 325/2 measuring 01 acre 31 guntas. O.S. No. 525 of 1990 was filed by Gurulingappa averring that the entire extent of land was allotted to his father's share and he has become the absolute owner of the property and the defendant has encroached upon the property to an extent of 31 guntas. The said suit was resisted by the defendant-Channappa and Channappa also filed O.S. No. 70 of 1991 against the plaintiff in O.S. No. 525 of 1990 averring that in the partition, the land comprised in Sy. No. 325/2 was equally divided between the father of the plaintiff and the father of the defendant and the father of the plaintiff was allotted 35V2 guntas of land on the southern side and the father of the defendant was allotted 35V2 guntas of land on the northern side and that he has not encroached upon the property belonging to the plaintiff as averred in the plaint, O.S. No. 525 of 1990. It is true that the Trial Court decreed both the suits and thereby, rendered inconsistent judgments. However, it is also clear from a perusal of the material on record that even though the parties were the same, O.S. No. 70 of 1991 was filed subsequent to filing of the suit, O.S. No. 525 of 1990 by the appellant herein, no application was filed for stay of the further proceedings in O.S. No. 70 of 1991 and no application was also filed for clubbing of both the suits and for leading common evidence by the parties. On the other hand, the facts elicited in the cross-examination of P.W. 1 in O.S. No. 525 of 1990 shows that he has denied that the defendant has filed the suit against him for declaration of his title in respect of 35 V2 guntas of land in Sy. No. 325/2 and wherefore, it is clear that in

the absence of an application filed under Section 10 of CPC, or an application for clubbing of both the suits, the Trial Court has recorded the evidence independently in both the suits and decided the suits on merits on the basis of the material on record. However, the first Appellate Court having found that both the suits were in respect of the land comprised in Sy. No. 325/2, has heard both the appeals, R.A. Nos. 16 of 1998 and 105 of 1999 and disposed of both the appeals on the same day by separate judgment and it is clear from a perusal of the evidence adduced by the parties that the material on record clearly shows that the plaintiff in O.S. No. 525 of 1990, the appellant herein has failed to substantiate the contention that his father was allotted entire extent of 01 acre 31 guntas of land in Sy. No. 325/2 and the admission elicited in the cross-examination of P.W. 1 in O.S. No. 525 of 1990 and as D.W. 1 in O.S. No. 70 of 1991 is clear and unambiguous and when the same is considered in the light of the material on record, it is clear that the appellant as D.W. 1-defendant in O.S. No. 70 of 1991, has clearly admitted in his cross-examination that it is true that the property comprised in Sy. No. 325/2 was equally divided and the father of the plaintiff was allotted southern half portion and the father of the defendant was allotted northern half portion in the said survey number and it is true that the plaintiff and the defendant in O.S. No. 525 of 1990 are in possession of the said southern and northern portions of the land in Sy. No. 325/2 respectively, and the appellant even as the plaintiff in O.S. No. 525 of 1990, has admitted in his cross-examination that it is true that all the properties were divided equally. Therefore, the facts elicited in the cross-examination of appellant as D.W. 1 in O.S. No. 70 of 1991 even without considering the facts elicited in the cross-examination of the plaintiff in O.S. No. 525 of 1990 would clearly show that fact that there was partition of the property in Sy. No. 325/2 and same was divided equally has been admitted by the appellant herein and the said admission is clear and unambiguous and cannot be said to be a stray admission. Therefore, the first Appellate Court has rightly held that the plaintiff and the defendant are owners in possession of 35V2 guntas of land each in Sy. No. 325/2 and accordingly, decreed the suit of the plaintiff in O.S. No. 525 of 1990 to the extent of 35V2 guntas of land on the southern side and dismissed the suit in respect of the remaining extent for which the decree has been passed in favour of the plaintiff in O.S. No. 70 of 1991 and accordingly, the first Appellate Court has rightly confirmed the judgment and

decree passed in O.S. No. 70 of 1991 and the decisions relied upon by the learned Counsel appearing for the appellant are not helpful to him in the present case. The finding of the first Appellate Court in R.A. Nos. 16 of 1998 and 105 of 1999 is justified having regard to the evidence of the parties adduced before the Court and with reference to the admission elicited in the cross-examination of the appellant as P.W. 1 in O.S. No. 525 of 1990 and D.W. 1 in O.S. No. 70 of 1991 and the same cannot be said to be perverse or arbitrary so as to call for interference in these appeals and accordingly, I answer the substantial question of law and pass the following order.-

Both the appeals are dismissed. The judgment and decree passed by the Court of the Civil Judge (Senior Division), Nanjangud, in R.A. No. 105 of 1999 and R.A. No. 16 of 1998, dated 11-8-2003, confirming the judgment and decree passed by the Court of the Civil Judge (Junior Division), Nanjangud, in O.S. No. 70 of 1991, dated 31-7-1999 and modifying the judgment and decree passed by the Court of the Civil Judge (Junior Division), Nanjangud, in O.S. No. 525 of 1990, dated 21-1-1998 by decreeing the suit of the plaintiff in O.S. No. 525 of 1990 in part respectively, is confirmed. However, there shall be no order as to costs in this appeal.