

Shanthamallappa Vs. Madavan

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Court : Karnataka

Decided On : Jan-16-1986

Reported in : ILR1986KAR1008

Judge : Nesargi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11, 97(2) and 97(3); Code of Civil Procedure (CPC) (Amendment), 1976;

Appeal No. : R.S.A. No. 1096 of 1976

Appellant : Shanthamallappa

Respondent : Madavan

Advocate for Def. : S.G. Bhagwan, Adv. for Respondent 1

Advocate for Pet/Ap. : M. Gopalakrishna Shetty, Adv.

Disposition : Appeal dismissed

Judgement :

Nesargi, J.

1. The plaintiffs who have failed in both the Courts below are the appellants in this appeal. They filed the suit O.S. No. 34 of 1971 in the Court of the Civil Judge, Coorg, Mercara, for declaration that the sale dated 25-4-1962 (evidenced by Ex.

D-1) made by one Maribasavegowda in favour of the defendants is not binding on them and for further declaration that they are the owners of the suit lands and for possession. They have also prayed for grant of past and future mesne profits.

2. The defendants contested the suit.

3. The undisputed and proved facts are that Maribasave gowda and the plaintiffs belong to the same family. Suit for partition in O.S. No. 2 of 1958 in regard to the joint family properties of this family was filed. Compromise decree as per Ex. D-2 dated 31-3-1958 was passed. Suit items were allotted to the share of Maribasavegowda. On 5-7-1960 Maribasavegowda entered into an agreement of said of these suit items in favour of the defendants by executing Exhibit P.3. The defendants filed O.S. No. 9 of 1961 against Maribasavegowda praying for a decree of specific performance of the agreement of sale and obtained a decree. They executed that decree. Sale deed Exhibit D-1 came to be passed in their favour. They obtained possession of the properties also.

4. According to the plaintiffs, on 14-8-1958 there was another partition amongst the members of the family as evidenced by Exhibit P-1 which is a registration copy of the said deed. In this partition, the suit items were allotted to their share and as Maribasavegowda had entered into an agreement of sale in regard to these three items on 5.7.1960 under Exhibit P-3, that agreement and the subsequent sale does not bind them.

5. The two Courts below have held that the plaintiffs have not established the partition that is alleged to have taken place in the family on 14-8-1958. Original partition deed has not been produced. Its copy is marked as Exhibit P-1. P.W. 4 has sworn that the original was with one Ramaiah. He has also sworn that Ramaiah is alive and is residing in Somwarpet and he has not been summoned to produce the original. The two Courts below have, on these facts, held that loss of the original having not been proved, secondary evidence by means of a copy would be inadmissible. They have also ruled out the contention that while admitting Exhibit P-1 in evidence no objection was raised, by reasoning that cross-examination of P.W. 4 clearly showed that it must be of the document and Exhibit P-1 was challenged. In my opinion, there is no answer to this reasoning.

6. In regard to the issue based on principles of res judicata, in view of the suit O.S. No. 76 of 1966, the two Courts below have held the same in favour of the plaintiffs.

7. O.S. No. 76 of 1966 was filed by the defendants against the plaintiffs for possession of the suit properties on securing the sale deed Exhibit D-1 by executing the decree for specific performance in O.S. No. 9 of 1961. The plaintiffs could have raised these contentions in their defence in O.S. No. 76 of 1966. That part of it falls under Explanation IV to Section 11 of the Code of Civil Procedure. The reasoning of the two Courts below in holding this issue in favour of the plaintiffs is based on the decisions of the Supreme Court in Gulabai v. Manpool Bai, : [1962]3SCR483 Jeevantha v. Hanumantha, : AIR 1954 SC9 and also a decision of this Court.

8. Explanation I to Section 11 which has been introduced by Act No. 104 of 1976 reads as follows:

'The expression 'former suit' shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.'

Perusal of Section 97(2) in Chapter V of the said Act shows that Section 11 as it stands has remained untouched.

9. Sub-Section (3) of the said Section 97 reads as follows :

'Save as otherwise provided in Sub-section (2) the provisions of the principal Act as amended by this Act, shall apply to every suit, proceeding, appeal or application pending at the commencement of this Act or instituted or filed after such commencement notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement.'

As Section 11 has remained untouched in Sub-section (2) and Sub-section (3) lays down that Section 11 as it now stands after amendment has to be applied to any suit, proceeding or application pending at the commencement of this Act, Explanation VIII would become applicable to this appeal also. When that is so, it is plain that in view of Explanation IV to Section 11 of the Code of Civil Procedure,

the plaintiffs' suit is barred by principles of res judicata.

10. I.A. No. 1 has been filed by the applicant therein requesting that she be impleaded in this appeal. She was not a party to the proceeding at any stage uptill now. I do not see any good ground to allow I.A. No. 1 and dismiss it.

11. In the result, this appeal fails and is dismissed with costs.

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