

Nagaraj Vs. Kalluramma

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Court : Karnataka

Decided On : Mar-05-1995

Reported in : ILR1995KAR1114; 1995(4)KarLJ1

Judge : Bharuka, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 7, Rule 3

Appeal No. : R.S.A. No. 9 of 1993

Appellant : Nagaraj

Respondent : Kalluramma

Advocate for Def. : G. Vedavyasachar, Adv.

Advocate for Pet/Ap. : M.S. Gopal, Adv.

Disposition : Appeal dismissed

Judgement :

Bharuka, J.

1. This is a Second Appeal by the defendant who has lost in both the Courts below. The suit is one for redemption of usufructuary mortgage.

2. According to the plaintiff the land measuring 19 guntas in survey No. 134/2B as described in the schedule to the plaint was owned by Chikkajogishetty who had mortgaged the same in favour of the defendant with possession by borrowing Rs. 1500/- under a registered possessory Mortgage Deed dated 21.11.1980 - Exhibit P- 2 for a period of five years. He subsequently sold the suit property in favour of the plaintiff for Rs. 6000/- under a registered Sale Deed dated 7.2.1981 subject to mortgage with a right to redeem the same, which has been marked as Exhibit P-3. Accordingly the present suit for redemption was filed. The trial Court decreed the suit and the appeal preferred by the defendant has been dismissed by the lower appellate Court.

3. The present Appeal had been admitted for hearing on the following two Substantial Questions of Law :

'1. Whether the Courts below were justified in granting redemption of 19 guntas comprising in Sy.No. 134/2B though the property mortgaged was Sy.No. 134/2 ?

2. Whether the transaction of sale in favour of the plaintiff is hit by the provisions of the Karnataka Prevention of Fragmentation and Consolidation of Holdings Act, 1966, despite the enactment of Karnataka Prevention of Fragmentation and Consolidation of Holdings (Repeal) Act, 1990 ?'

2. In relation to the first question, Mr. M.S. Gopal appearing for the defendant-appellant has submitted that though as per Mortgage Deed Exhibit P-2 the mortgage was created over survey No. 134/2, plaintiff has claimed redemption of 19 guntas comprised in Survey No. 134/2B and the Courts below without framing any issue pertaining to the identity of the suit property have decreed the suit, and that therefore it is necessary that a finding on this issue should be called for from the trial Court, and, only thereafter the Appeal be disposed of finally.

3. On the other hand Sri Vedavyasachar appearing for the plaintiff has submitted that such an issue was not raised by the defendants for a decision by the trial Court, since there was no dispute with regard to the identity of the suit property, which the parties had well understood while going to the trial, and therefore, there is no occasion for calling for a finding in this regard. His further submission is that

even if it is necessary to decide this issue a finding in this regard can be validly recorded by this Court under Section 103 of the Code of Civil Procedure.

4. I have heard the learned Counsel appearing for the contesting parties at length with respect to the pleadings and oral and documentary evidence adduced in respect of the identity of the property. Mortgage Deed Exhibit P-1 clearly demonstrates that 19 guntas out of Survey No. 134/2 was mortgaged in favour of the defendant with boundaries disclosed therein. Sale Deed Exhibit P-2 unambiguously states that the extent of land mortgaged as above to the defendant had been sold to the plaintiff with a direction to redeem the same. The RTC extract Exhibit P-7 also supports these very facts wherein the plaintiff has been shown as the owner (by bracketing the name of his vendor) of 19 guntas of land out of Survey No. 134/2 marked as Hissa (Share) 'B '. Column No. 11 pertaining to the rights and liabilities also mentions that this land has been mortgaged in favour of the defendant. Against the mutation entries made in Exhibit P-7 the defendant had filed an appeal before the Assistant Commissioner under Section 136(2) of the Karnataka Land Revenue Act, 1966 which has been dismissed by an order dated 21.12.1987 (Exhibit P-17). In the said proceedings it was an admitted case of the defendant that he is in possession of the property referred to in the RTC (Exhibit P-7) as mortgagee which has been sold to the plaintiff.

5. Now, coming to the oral evidence, PW-1 in his examination in-chief has stated that the suit property was mortgaged by his vendor Chikkajogishetty to the defendant. Survey number of the property is '134/2E3'. In his cross examination he has clearly set out the boundaries of the said survey number. He has further stated in the cross examination that the survey No. 134/2 which in all measures 1 acre 18 guntas belongs to Siddashetty, Siddashetty and the vendor of the plaintiff Chikkajogishetty who are own brothers. He has also deposed that his purchase is out of the said 1 acre 18 guntas of Survey No. 134/2 and separate Khatas have been made in respect of three brothers as is evident from Exhibits P-6 and P-7. Despite these specific averments in respect of the suit property it was not suggested in the cross examination that Survey No. 134/2B is not the property mortgaged to the defendant and purchased by the plaintiff with the said encumbrance. Rather the defendant who has been examined as DW-1 has very

clearly admitted in his examination in-chief itself that: 'I know about the suit land and this is in my possession till date', and he has admitted therein to the following effect:

'The property had been mortgaged to me since Chikkajogishetty was in need of money. I have taken the property on mortgage by seeing all concerned papers related to Chikkajogishetty at the time of mortgage. On the date of mortgaging the property to me there was 19 guntas of land in the name of Chikkajogishetty as mentioned in the RTC.'

6. The RTC for the period from 1978-79 to 1980-81 is on record as Exhibit P-6 and that for the period of 1981-82 is at Exhibit P-7 which shows that out of Survey No. 134/2, 19 guntas of land had fallen to the share of the plaintiff's vendor - Chikkajogishetty which has been mortgaged to the defendant and the said share (Hissa) has been marked as 'B' in column No. 2 of the said RTC. From the said discussion it is quite clear that the draftsman of the plaint described the suit land as 134/2B by combining the descriptions in columns 1 and 2 of the RTC being survey number and hissa (share) of plaintiff's vendor. Taking benefit of this description, in the written statement an objection was raised that the property mortgaged was out of survey No. 134/2 and not 134/2B. The defendant knowing fully well the fallacy involved in this objection did not try to prove the alleged discrepancy pertaining to the identity of the property either by cross examining the plaintiff's witnesses or by leading any independent evidence in this regard. As is evident from the judgments of the Courts below, no issue was sought to be raised with regard to the discrepancy in the identity of the suit property.

7. Order VII Rule 3 of the Code of Civil Procedure provides thus:

'R-3.- Where the subject-matter of the suit is immovable property:- Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.'

8. While meeting the objections raised with reference to the aforesaid Rule, a Full Bench of the Allahabad High Court in the case of GANESH v. SRI RAM LALAJI MAHARAJ BIRAJMAN MANDIR AND ORS., AIR 1976 Allahabad 116, has held in paragraph 10 of its Judgment thus:

'It will thus be seen that what the law requires is that the description of the property in suit given in the plaint must be sufficient to identify the property. If independently of the boundaries' the property can be sufficiently identified, then any error or misdescription in the boundaries cannot affect either the suit or the decree passed in the suit....'

9. Similarly a Division Bench of the Patna High Court in the case of THE STATE OF BIHAR AND ANR. v. RANCHI GOSHALA SOCIETY AND ANR, AIR 1981 NUC 179 (Patna). has taken a view that if from the description of the property the parties understanding as to which property forms the subject matter of the suit go to the trial and fail to show any prejudice caused to them by vagueness of the description, the suit is not liable to be dismissed on the said ground.

10. In the above view of the matter, I am of the considered opinion that the parties had well identified and understood the description of the property which was the subject matter of the suit and had gone to the trial with that clear understanding. Therefore, no prejudice can be said to have been caused because of the description of the property as Survey No. 134/2B nor can it impede the execution of the decree. In my opinion, the Courts below have rightly decreed the suit in respect of the suit property.

11. So far as the second Question is concerned, Mr. M.S. Gopal has clearly admitted that keeping in view the findings of the Courts below, the suit property is not a fragmentation within the meaning of the Act and further that the Fragmentation Act having already been repealed in 1990 this question needs no further consideration by this Court.

12. For the reasons discussed in the foregoing paragraphs, I am of the opinion that the Appeal deserves to be dismissed with costs all through. Ordered accordingly. Lawyer's fee in this Court is assessed at Rs. 550/-.

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