

**Shivayya Vs. Praveena and anr.**

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**SooperKanoon Citation :** [sooperkanoon.com/388708](http://sooperkanoon.com/388708)

**Court :** Karnataka

**Decided On :** Nov-16-2007

**Reported in :** AIR2008Kant157; ILR2008KAR2747; 2008AIHC2793(Kar); 2008(4)AIRKarR142

**Judge :** V. Gopala Gowda, J.

**Acts :** Transfer for Property Act - Sections 52 and 53A

**Appeal No. :** R.S.A. No. 1056/2003

**Appellant :** Shivayya

**Respondent :** Praveena and anr.

**Advocate for Def. :** Sanket M. Yengai, Adv. for ;S.S. Patil Gugihal, Adv. for R1

**Advocate for Pet/Ap. :** T. Mohan Kumar, Adv. for ;R.B. Sadashivappa, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**V. Gopala Gowda, J.**

1. The appellant is the first defendant, second respondent was 2 defendant and first respondent was the plaintiff in the trial Court in O.S. No. 67/91. For the sake of convenience, the parties are referred to as per their rank in the trial Court.

2. The plaintiff, claiming to be the owner, has filed the suit against the defendants for possession and mesne profits in respect of the suit schedule property which is a car garage, alleging that defendants are trespassers. The defendants resisted the suit denying plaintiff's claim and have prayed for dismissal of the suit. After trial, the trial Court, by its judgment dated 30-6-2001 dismissed the suit. The plaintiff challenged the correctness of the same in R.A. No. 21/2001. The first appellate Court, by its judgment dated 29/8/2003 allowed the appeal, set aside the judgment and Decree of the trial Court and decreed the suit for recovery of possession and mesne profits. Aggrieved by the same, the first defendant filed this appeal questioning the correctness of the judgment and decree passed by the first appellate Court by framing the following three substantial questions of law for consideration of this Court:

a. Whether the finding of the 1 appellate court with regard to limitation is legally sustainable?

b. Whether the finding of the 1 appellate court with regard to Doctrine of part performance under Section 53-A of Transfer for Property Act is legally sustainable?

c. Whether the 1 appellate court is justified in reversing the finding recorded by the Trial Court in the given facts and circumstances of the case is legal and valid in law?

3. While the learned Counsel for the first defendant/appellant contended that the findings and reasons recorded by the first appellate Court are not only erroneous but error in law, learned Counsel for the plaintiff has justified the same and prayed for dismissal of the appeal contending that neither the substantial questions framed in this Appeal or any other question arises for consideration of this Court.

4. I have perused the judgments passed by the trial Court as well as the first appellate Court. It is not necessary for me to go in detail on the merits of the case because the appeal can be disposed of on a short ground.

5. The facts of the case reveals that the suit schedule property belonged to one Narayanarao Ramarao Bhave. DW-2 Aba Bapurao Jadhav was put in possession of the property in question by virtue of sale agreement in the year 1971. The first defendant's claim is that he purchased the suit schedule property from DW-2 on 16-1-1978 and since then he is in possession of the property. At this juncture, it is to be noted that the so-called agreement holder himself not acquired title as no sale deed was executed in his favour by the plaintiff. This is an undisputed fact. That apart, since the alleged agreement of sale was of the year 1971, it had lapsed after expiry of three years, as specific performance was not sought on the basis of agreement of sale in respect of the suite schedule property. That being the factual position, the agreement holder (DW-2) had no right, title and interest to sell the suit property in favour of first defendant. This is the crux of the case. Since the defendants had no right to enjoy the suit schedule property, the first appellate Court has rightly decreed the suit for recovery of possession and mesne profits.

6. Both the Courts below held that plaintiff is the owner of the suit schedule property. Since it was in possession of the defendants, the plaintiff filed suit for recovery of possession. Though the trial Court denied the relief, the first appellate Court rightly granted it, thereby the wrong committed by the trial Court has been set-right by allowing the Regular Appeal.

7. Regarding Issue No. 6 relating to limitation framed in the suit, the trial Court held that the suit is barred by limitation. The reasons assigned by the trial Court to arrive at such a conclusion are wholly untenable in law. However, the first appellate Court at para 16 of the impugned judgment while answering the contentious points No. 1 to 3 together in the affirmative referred to the decision Bhavnagar Municipality v. Union of India 1990 (2) Civil LJ 805 and another decision of the Apex Court in the case of Rajendra Singh and Ors. v. Santa Singh and Ors. AIR 1933 SC 2537 regarding pendency of earlier suit filed by defendants which was dismissed by the High Court, held that Doctrine of lis pendens Under Section 52 of T.P Act would not arrest the running period of limitation. The ratio of those decision are rightly applied to this case by the first appellate Court. It has also referred to another decision of the Apex Court reported in ILR 1988 KAR 1422, in support of the proposition that once title is established, unless defendant

proves adverse possession, the plaintiff cannot be non suited

8. Regarding part performance under Section 53A of T.P. Act claimed by the defendants the first appellate court rightly relied upon the judgments of the Apex Court and this Court in the case of Karabasappa v. Radhabi AIR 1996 SC 910 wherein this Court has held that an agreement holder can successfully resist the attempt of the owner of the property to get back possession by using the 'Part Performance' under the Agreement as a shield. It is further held that if there is delay in enforcing the contract benefit of Section 53-A is not available and the transferee who has obtained possession of property in part performance of the contract cannot resist suit for possession if his right to obtain specific performance is barred by limitation. No fault can be found with the judgment under appeal.

9. For the reasons stated supra, the judgment and decree of the first appellate Court is perfectly in order and no interference is warranted. No substantial questions of law, much less the questions framed in the appeal memorandum, arise for consideration. The appeal is devoid of merit and liable to be dismissed. Accordingly, the appeal is dismissed but there is no order as to costs.

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