

**Bommanayaka Vs. Bommanayaka and Others**

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**SooperKanoon Citation :** [sooperkanoon.com/934842](http://sooperkanoon.com/934842)

**Court :** Karnataka

**Decided On :** Jun-01-2012

**Reported in :** 2012(3)KCCR2175

**Judge :** A.N.Venugopala Gowda, J.

**Acts :** [Code of Civil Procedure,\(CPC\) 1908](#) - Section 100, Order 8 Rule 6A, 6B

**Appeal No. :** Regular Second Appeal No.1384 of 2009 C/W Regular Second Appeal No.1386 of 2009

**Appellant :** Bommanayaka

**Respondent :** Bommanayaka and Others

**Advocate for Def. :** Patel D. Karegowda, Adv.

**Advocate for Pet/Ap. :** S. Hanumanthaiah, Adv.

**Judgement :**

(Prayer: RSA No.1384/2009 is filed under S.100 of CPC against the Judgment and Decree dated 24.02.2009 passed in R.A.No.85/2007 on the file of the Civil Judge (Sr.Dn.) at Sira, dismissing the appeal and modifying the Judgment and Decree dated 6.11.2007 passed in O.S.No.45/2004 on the file of the Civil Judge (Jr.Dn.) and JMFC., Sira.)

1. Appellant was the plaintiff in O.S.No.45/2004 on the file of Civil Judge (Jr.Dn.) and JMFC at Sira. Suit was filed against the respondents – defendants for declaration of title and for perpetual injunction in respect of a site bearing Katha No.68/78 (Old No.105/73) measuring 4 x 20 yards (12 x 60 feet) situated at Seebi, Kallambella Hobli, Sira Taluk. For convenience, the parties would be referred to hereinafter with reference to their rank in Trial Court.

2. In brief, the case of the plaintiff is as follows:

The suit property, which was an ancestral and joint family property, fell to his share in a family partition and the katha of the same stands in his name and that he has paid the tax to the Village Panchayath and that, though defendants have no right, title and / or interest over the suit property, they tried to interfere with the possession and enjoyment of the same by him, by alleging that the plaintiff has executed a sale deed in favour of their mother Lingamma. It was stated that he had obtained loan from Ligamma of Umapathihalli and he repaid the same with interest and that he has not conveyed any right or interest over the suit property to Lingamma and the deed if any in her favour is not valid. It was stated that the defendants, about 15 days prior to the filing of the suit, entered into the suit property and canvassed that it belongs to them and thereby interfered with his possession and enjoyment, on account of which the suit was instituted seeking declaration of title and perpetual injunction.

3. The defendants 1 and 2 resisted the suit by filing written statement and also counter-claim under O 8 R 6A and 6B of CPC and prayed for declaration of title of the suit property in favour of them and other legal representatives of Lingamma W/o Eranayaka and for consequential perpetual injunction restraining the plaintiff from interfering with their peaceful possession and enjoyment over the written statement schedule property. It was contended that their mother had purchased the written statement schedule property for valid consideration of '100/- under a registered sale deed dated 25.02.1977 executed by the plaintiff and that she was put in possession of the property and from the date of purchase, Lingamma was in possession of it. After her death, they and their two brothers, Shivanna and Gurusiddappa, continue to be in possession and enjoyment of the suit property. It

was stated that due to illiteracy and lack of worldly knowledge, Lingamma had not made efforts to obtain change of katha of the schedule property to her name and that they approached the authority to change the katha of the schedule property to their name, which was opposed by the plaintiff by filing statement of objections and that the matter is pending adjudication. It was contended that, after filing of the suit, plaintiff tried to interfere with their peaceful possession and enjoyment of the suit property and hence, they sought for allowing the counter-claim and to dismiss the suit with costs.

4. Plaintiff filed written statement to the counter-claim, wherein, he denied the averments made in the written statement cum counter-claim and stated there is no cause of action to file the counter-claim. It was stated that, Lingamma W/o Earanayaka, is a close relative of the plaintiff and she had not obtained suit schedule property from him and that the defendants have taken advantage of an illegal deed and attempted to knock off the suit schedule property. He prayed for dismissal of the counter-claim with costs.

5. After filing of the written statement and written statement to the counter-claim, the two brothers of defendants 1 and 2 i.e., Shivanna and Gurusiddappa were impleaded as defendants 3 and 4. Defendant No.4 filed written statement, wherein, it was stated that the allegations made in para 2 of the plaint are true and correct i.e., about the ancestral joint family property and prayed for dismissal of the suit. One Lingamayaka, brother of the plaintiff was impleaded as 5th defendant, who filed written statement and admitted the allegations made in paras 2 and 4 of the plaint but denied the allegations made in para 3. He stated that suit schedule property belongs to the plaintiff and that the katha of the same stands in the name of the plaintiff and himself.

6. The Trial Court framed appropriate issues. Plaintiff got himself examined as PW-1 and examined two witnesses as PWs 2 and 3 and marked Exs.P1 to P50. Defendants 1 and 5 deposed as DWs 1 and 2 and three witnesses were examined as DWs 3 to 5. Exs.D1 to D4 were marked. After appreciating the oral and documentary evidence, Trial Court by a Judgment dated 06.11.2007 decreed the suit in part. The suit of the plaintiff for declaration of title was dismissed on account

of Ex.D1. However, the suit for the relief of permanent injunction was decreed, based on the tax demand and payment receipts. Defendants 1 and 2 were permanently restrained from interfering with plaintiff's physical possession and enjoyment over the suit property. The counter claim of the defendants was partly decreed and defendants 1 and 2 were declared as the absolute owners of the suit schedule property. The counter claim for the relief of perpetual injunction was dismissed. The suit as against defendants 3 to 5 was dismissed.

7. The Judgment and Decree passed by the Trial Court was challenged by the plaintiff by filing R.A.No.85/2007 in the Court of Civil Judge (Sr.Dn.) at Sira. The defendants 1 and 2 challenged the said Judgment and Decree by filing R.A.No.88/2007. Learned First Appellate Judge, by a common Judgment and Decree dated 24.02.2009, dismissed R.A.No.85/2007 filed by the plaintiff and allowed R.A.88/2007 filed by defendants 1 and 2 and as a result, modified the Judgment and Decree dated 06.11.2007 passed in O.S.No.45/2004. Decree of declaration of title of suit property of defendants 1 and 2 by Trial Court was affirmed. Defendants 1 to 4 were declared as the absolute owners of suit schedule property and as a consequential action, permanent injunction was granted restraining the plaintiff from interfering with the possession and enjoyment of the suit property by defendants 1 to 4. Suit filed by the plaintiff was dismissed in toto. Thus, the counter claim made by defendants stood allowed. Feeling aggrieved, the plaintiff has filed these second appeals.

8. Sri S.Hanumanthaiah, learned Advocate appearing for the appellant / plaintiff contended that the First Appellate Court has erred in granting the relief prayed in the counter-claim of the defendants and in dismissing the suit. He contended that, the Courts below have not given worthy and due consideration to the materials available on record in favour of the appellant. According to him, the documentary evidence would show that the plaintiff is in possession and enjoyment of the suit property by paying the tax and other charges to the authority concerned. Learned counsel submitted that despite Ex.D1, the plaintiff continues to be in possession and enjoyment of suit property, enjoying the same as the absolute owner and in view of its continuous holding and enjoyment for more than 12 years, he has perfected his right to the suit property by way of adverse possession and

enjoyment. Learned counsel submitted that in view of the said circumstances, the impugned Judgment has given rise to substantial questions of law as raised in the appeal memorandum and sought admission of the appeal for further consideration.

9. Sri Patel D. Karegowda, learned Advocate appearing for the respondents 1 to 4 on the other hand contended that, Ex.D2 is an undisputed document, under which the plaintiff has sold the property in favour of Smt. Lingamma, mother of respondents 1 to 4 and the suit property being a vacant site, the possession was delivered along with the execution of the said document and it is a case wherein the doctrine 'possession follows title' applies. He submitted that the appellant was the President of Grama Panchayath and was in good terms with the Secretary and that Smt. Lingamma was an uneducated person having no worldly knowledge, on account of which the katha of the property was not got changed and on the said court it is not open to the plaintiff to contend that he is in possession and enjoyment of the property as its owner. Learned counsel submitted that the First Appellate Court has correctly appreciated the oral and documentary evidence produced by the parties and the findings recorded by it, on material aspects of the case being pure finding of facts, no interference in the second appeal in exercise of jurisdiction under S.100 CPC is called for. He submitted that the impugned Judgment and Decree passed by the First Appellate Court allowing the counter-claim of defendants 1 and 2 has not given rise to any substantial question of law and hence, the second appeals being not maintainable may be rejected.

10. Keeping in view the rival contentions and the record of the case, which I have perused, the point for consideration is, whether the impugned Judgment passed by the First Appellate Court, allowing the counter-claim of defendants 1 and 2, has given rise to any substantial question of law?

11. Scope of interference with findings of fact while exercising jurisdiction under S.100 CPC is limited. Re-appreciation of evidence is not permissible, except where the Courts below misdirected themselves in appreciating the question of law or placed the onus on the wrong party. Where the facts required for a point of law have not been pleaded, a litigant cannot be allowed to raise that question as

substantial question of law in a second appeal. Appreciation of record of the case in a judicial manner is well within the jurisdiction of the Trial and the First Appellate Courts. Interference with the findings is permissible in cases where the Courts have, (i) ignored material evidence or acted on no evidence; (ii) drawn wrong inferences from proved facts by applying the law erroneously; or (iii) wrongly cast the burden of proof.

12. Ex.D1 is the sale deed of the suit property executed by the plaintiff in favour of Smt. Lingamma, mother of defendants 1 to 4. Said document has been marked in the cross-examination of the plaintiff – PW1. PW1 has admitted that Ex.D1 was executed by him in favour of the mother of defendants 1 to 4 in respect of the suit vacant site. He has identified the signatures of the scribe and the attestors to the said document. That apart, he has admitted that he gave the instructions to draft the said document. In view of Ex.D1, the sale deed of the suit property, executed by the appellant – plaintiff in favour of Smt. Lingamma, mother of defendants 1 to 4, the sale of suit property by the plaintiff has stood proved.

13. The plaint does not contain any plea relating to adverse possession. The contention that the plaintiff being in continuous possession and enjoyment of the suit property, even after the execution of Ex.D1, there is perfection of right by way of adverse possession is not well founded. Having sold the property under Ex.D1, the plaintiff, if had remained in the possession of the property, ought to have pleaded and proved, assertion of his independent hostile adverse possession to the knowledge of the purchaser or her successors in title or interest and they having acquiesced to his illegal possession during the entire period of 12 years. To establish a claim of title by prescription, the possession of the claimant must be actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding 12 years. Continuous possession by itself would not constitute adverse possession, if it was without animus possidendi. Unless the person possessing the property has the requisite animus to possess a property hostile to the true owner, the period for prescription will not commence, as has been held, in catena of decisions of the Apex Court. As already noticed, there is neither pleading nor any proof with regard to the claim of acquisition of title by prescription. Therefore, the contention of Sri Patel D. Karegowda, that plea of

adverse possession is not available to the plaintiff is well founded.

14. The defendants 1 and 2 have made out a clear and absolute title to the property in view of its sale by the plaintiff in favour of their mother. The suit property being a vacant site, in view of Ex.D1, the sale deed executed by the plaintiff in favour of Smt. Lingamma, the legal doctrine 'possession follows title' applies. The plaintiff has not been able to make out title by adverse possession for more than 12 years. Since the plaintiff has failed to plead and prove adverse possession, the First Appellate Court is justified in allowing the counter-claim of the defendants 1 and 2 and dismissing the suit filed by the plaintiff.

15. There is correct appreciation of record of the case by the First Appellate Court. The findings recorded by the First Appellate Court on the material aspects of the matter are neither perverse nor illegal. The material evidence has been appreciated in the correct perspective. The First Appellate Court has neither omitted from consideration any material evidence nor is there any misreading of the evidence, much less wrong placing of the burden of proof. The findings recorded are pure finding on facts, with which, there cannot be interference in exercise of the jurisdiction under S.100 CPC.

In the circumstances, the impugned Judgment has not given rise to any substantial question of law. Consequently, the second appeals being not maintainable, shall stand rejected with no order as to costs.

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