

**Basamma and Others Vs. Devamma and Another**

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**Court :** Karnataka Dharwad

**Decided On :** Apr-13-2011

**Judge :** D.V. Shylendra Kumar

**Appeal No. :** Regular Second Appeal No.2866 of 2006 (SP)

**Appellant :** Basamma and Others

**Respondent :** Devamma and Another

**Advocate for Pet/Ap. :** For the Appellants: V. Vidya for K. Raghavendra Rao. For the Respondent: R1 and R2 - : Gode Nagaraj, Advocate.

**Judgement :**

**D.V. SHYLENDRA KUMAR, J.:**

1. This appeal is by the plaintiff in OS No.397 of 1997-a suit on the file of the Court of the II Addl. Civil Judge (Jr.Dn.,] at Bellary, for specific performance of agreement dated 3.4.1991 said to have been executed by the original defendants, one by name Siddappa-first defendant and his wife Siddamma-second defendant in favour of original plaintiff by name B. Chennanagouda, son of Karibasavanagouda. As the original plaintiff and original defendants are all dead and gone, the case has remained either by coming on record of the legal heirs of the plaintiff or bringing on record the legal heirs of the original defendants.

2. Plaintiff's case was that defendants 1 and 2-Siddappa and Siddamma respectively had during their lifetime executed an agreement dated 3.4.1991 agreeing to sell their property, rickyard measuring East to West-12 yards and North to South-24 yards, identified as Sy.No.546B or 546A/2 in the Village of Somasamudara, Bellary District, bounded on the East by: Open space of Sarvamangalamma, West by: Open space of Virupanna and Gadeppa, North by: Open space of Chidanandagouda, South by: Rastha.

3. It is also the case of the plaintiff that the sale consideration was a sum of `29,000/- and the entire amount is said to have been paid by the plaintiff to the defendants at the time of execution of the agreement and the plaintiff was also put in possession of the particular suit property.

4. It is also the case of the plaintiff that the property in question originally belonged to one Lingappa who had purchased the same on 16.8.1941 as per Exhibit. P6 a being part of 25 cents of land in Sy.No.546A/2 and had in turn been inherited by Siddamma through her father who is brother of said Lingappa and brothers though constituted a joint family, father of Siddamma being the only surviving legal heir and there being no other issues except Siddamma, Siddamma had inherited the property and Siddamma along with her husband Siddappa had executed the agreement in the year 1991 and the plaintiff having made some efforts and demand to get sale deed executed by the defendants, but not being successful in view of lukewarm approach of the defendants had got issued a legal notice dated 3.10.1997-Exhibit.P2 but resulting in reply notice dated 9.10.1997-Exhibit.P5 and reply being false and vexatious, the plaintiff was constrained to file the suit for specific performance of the agreement and therefore prayed for decreeing the suit.

5. Suit summons it appears was served only on the first Defendant-Siddappa, but not on the second Defendant-Siddamma even as per the endorsement made by the process server as also the subsequent endorsement made by the postal authorities as it appears that the second defendant-Siddamma had expired as is mentioned in the order sheet of the proceedings of the Trial Court relating to OS No.397 of 1997 as per record dated 4.3.1998 where it was noticed that summons issued in the name of the second defendant-Siddamma had been returned with

the postal shara 'person reported to be dead'. Very strangely, suit had come to be decreed ex parte on 19.8.1998 notwithstanding the order sheet of the Trial Court indicating as per order sheet dated 4.3.1998.

"SS to defendant No.1 served.

SS to defendant No.2 is reported dead.

Defendant No.1 is called out-absent

Placed exparte

For orders 12.03.98."

6. Submission of Smt. Vidya, learned Counsel for the appellants is that when the plaintiff had sought to execute the decree in execution proceedings, there was some resistance and later the first defendant appears to have filed Misc. Case No.5 of 1999 for setting aside the ex parte decree on the premise that the party had engaged a Counsel by name Rudragowda for defending interest of the defendants, but he having fallen sick and not having attended the case, the suit had been decreed ex parte and therefore sought for setting aside the ex parte decree.

7. Ultimately, Misc. Case No.5 of 1999 came to be allowed and the ex parte decree was set aside as per order dated 10.4.2002 and it is not very clear as to by this time which of the defendant had survived or whether both original defendants had died etc., but recording in the order sheet as on 12.3.1998 while does indicate that on the intimation of the death of second defendant steps have to be taken and on the other hand Mr. JSB, Advocate for the plaintiff appears to have filed a memo stating that the second defendant has no legal heirs and that is recorded and the order sheet dated 1.4.1998 does indicate that on that day plaintiff was represented by JSB, first defendant had remained ex parte, second defendant is dead and in this state of affairs suit is nevertheless listed for recording of evidence as part the order sheet dated 21.9.1998 on which day the Trial Court has also allowed IA No.1 under Order VI Rule 17 of CPC and has recorded that the amendment permitted as under this order is carried out, but again indicates that it is listed for filing of

amended plaint and for evidence as on 17.10.1998. On 17.10.1998, PW.1 is examined, Exhibit-P series documentary evidence are marked. After heading arguments, suit is set down for Judgment and Judgment is pronounced on 26.10.1998, decreed ex parte and it is thereafter suit was restored to file as noticed in the order sheet and it was directed to be listed for steps on 10.4.2002 and as per order on 17.4.2002, the Trial Court noticed that while steps were required to be taken in respect of deceased second defendant, first defendant also was dead by then and therefore steps were required to be taken in respect of both defendants. However the Trial Court noticed that KKR has already filed vakalath for the plaintiff. The order sheet dated 29.5.2002 does indicate that while plaintiff was represented by Advocate-KKR, first defendant was represented by Advocate-KV and suit abated as against second defendant. On IA No.2 filed under Order XXII Rules 1 and 4 of CPC to bring the legal heirs of the deceased defendants, notice was issued to legal representatives of defendants 1 and 2 returnable by 29.6.2002 and thereafter though no legal heirs came on record, the Trial Court has passed orders allowing IA No.2 as per order dated 14.8.2002 as the application was not resisted and permitted the amendment to be made to the plaint was filed on 17.9.2002 and copy served (on whom it is not known written statement was required to be filed by 9.10.2002. On 9.10.2002, position was that the Presiding Officer had been transferred and therefore the case got adjourned to 12.11.2002.

8. Strange are the ways of our legal system and the procedures. The order sheet records that the lawyer for the first defendant prays time and perused the order sheet. First defendant has appeared in the month of June 2002, hence written statements is taken as not filed, call on 22.11.2002 and the matter was adjourned at the request of Counsel for the plaintiff on 22.11.2002 and 9.12.2002 and on that day before the Court was placed a memo stating that the plaintiff is no more this time having died on 11.12.2002 and case was directed to be called on 11.1.2003 for steps, if any. Very strangely, thereafter the order sheet has begun to show that the second defendant who had already died in respect of whom steps were required to be taken, but not taken, was shown as absent on and after 19.8.2002 though order sheet had indicated that suit had abated as against the second defendant as per noting on the order sheet dated 14.8.2002.

9. It is in this state of confusion of procedures and the learned Presiding Officer being blissfully ignorant of facts and law had continued to dabble with the suit and in between it appears there was a change of Counsel for the first defendant, though even the first defendant was no more by then and obviously non appearing for the second defendant who was dead and gone and no steps having been taken.

10. Very strangely, the order sheet also indicates that Counsel who had been changed by then for defendant from original KV to ACS has cross examined plaintiff witness PW.1 on 25.11.2003 and PW.2 on 27.11.2003 and it appears said Advocate ACS has filed power of attorney of the defendant on 11.12.2003.

11. Things appear to have gone on in this state of mess and ultimately resulted in dismissal of the suit as per Judgment dated 13.7.2004. The written statement only one available on the file of the original records said to be containing the left thumb mark of Smt. Devamma wife of Kumaraswamy, presumably daughter of Smt. Siddamma while denied all plaint averments, material part of their version reading as under:

“These defendants nor the original defendants in the suit, nor their predecessors in title are the owners of the suit schedule property, which according to the plaintiff, is rickyard. The original defendants Sidhappa and Sidhamma were never in possession of the suit schedule property, nor they inherited from one Lingappa. Further, the original defendants have not executed the alleged agreement of sale in favour of the plaintiff. To the best of the knowledge of this defendant the suit schedule property was in possession of one Sarvamangalamma and her husband Mahalingaiah along with other properties, since long time Sarvamangalamma was in possession of the suit schedule property and she was the owner. This defendant’s father and mother Sidhappa and Sidhamma were not the owners, nor they were in possession of the said property. The alleged agreement of sale is a concocted one. It is also made known to this defendant that about 5 years ago Smt. Sarvamangalamma had sold the suit schedule property to one Maremma son of Gadeppa and handed over the possession of the schedule property. Said Maremma is in possession of the schedule property. There are differences between

the plaintiff and Mareenna. To defeat the rights of Mareenna, the plaintiff has filed this unholy suit. Even otherwise the suit is barred by limitation. There is no cause of action for the suit. Hence, it is liable to be dismissed.”

Only indicates that their prayer in the suit was for dismissal of the suit with exemplary costs, as they are unnecessarily dragged into the suit; that their parents never owned or possessed the suit property; that the property was in possession of one Sarvamangalamma and her husband Mahalingaiah along with other properties; that the suit agreement is a concocted one and to the knowledge of the defendants the said Sarvamangalamma had sold the suit schedule property to one Maranna and had handed over possession of the suit schedule property to him and - actually it is the said Maranna who was in possession of the suit schedule property and it was only to defeat rights of Maranna that the plaintiff had filed this unholy suit; that the suit is even otherwise barred by limitation and therefore prayed for dismissing the suit with exemplary costs etc.,

12. When the statement of the defendants was no contest to a suit for decree of specific performance as against them as defendants disowned everything including their right, title and interest to the property as successors nor admitted their capacity or authority to execute a sale deed in favour of the plaintiff in respect of the suit schedule property, the learned Judge of the Trial Court has proceeded to frame the following issues as indicated in the order sheet dated 26.3.2003.

1. Whether the plaintiff proves that, deceased defendant No.1 Siddappa and defendant No.2 Siddamma has saleable interest over the suit property?
2. Whether plaintiff proves that, on 3.4.1991 deceased defendant No.1 and 2 have agreed to sell away the suit property in his favour for consideration a sum of `29,000/-?
3. Whether plaintiff proves that, deceased defendant Nos.1 and 2 have received entire sale-consideration amount and executed an agreement dated 3.4.1991?
4. Whether plaintiff proves that, he is in possession and enjoyment of the suit property from the date of sale agreement?

5. Whether plaintiff proves that, he is ready and willing to perform his part of contract?
6. Whether plaintiff proves that, defendants have failed to execute the registered sale deed in his favour?
7. Whether defendants prove that, one Sarvamangalamma and her husband M.Lingaiah were owner and possessor of the suit property?
8. Whether defendants prove that, 5 years ago as on the date of written statement suit property was sold in favour of one Maranna by Sarvamangalamma?
9. Whether defendants prove that, said Maranna is in possession and enjoyment of the suit property?
10. Whether plaintiff is entitled to the relief sought for?
11. What order and decree?
13. While one legal heir of the deceased plaintiff by name B.Eshwaragowda deposed as PW.1, another witness by name Harijan Thimmappa deposed as PW.2 and on behalf of the defendants one Devendra @ Devendrappa - special power of attorney holder of the defendants deposed as DW.1 and another G. Lingappa deposed as DW.2 supporting the contents of written statement and it appears witness is brother of Maranna against whom the plaintiff had filed OS No.361 of 1997-a suit for injunction which came to be decreed in RA No.64 of 2001 and the Judgments and decrees which were made use of by the plaintiff in the present suit to seek relief sought for in the plaint.
14. However, deposition, of these witnesses does indicate that the plaintiff and even said Maranna while had a common vendor Sarvamangalamma either directly or through other persons, it is also the fact that plaintiff and said Maranna are owners of neighbouring land tracing their title to Sarvamangalamma and have been at loggerheads for quite some time.
15. Ways of our legal system are rather strange. We have become slaves to procedure forgetting substance of the matter, particularly, the provisions of the

Civil Procedure Code, 1908 weighing heavily upon Courts and Judges and what with knee jerk amendments carried out to those provisions resulting in accidents and disasters, rather than paving way for a satisfactory resolution of disputes before the Court.

16. By way of amendment to the provisions of Order XVIII, Rule 4 of Civil Procedure Code, 1908, a party is enabled to place evidence before the Court through an affidavit and not necessarily by appearing and deposing on oath before the Court.

17. The written affidavit is one prepared by the lawyer, sitting in his/her chambers and not necessarily a statement of the witness, though an affidavit is a sworn statement. As we noticed in the present case, chief examination of the witnesses for the plaintiffs as well as defendants are all in the written affidavit form and prepared in English placed before the Court. The witness for the plaintiff, particularly, PW.2 by name Harijan Thimmappa is an illiterate, he has affixed his left thumb mark to what is supposed to be his deposition prepared in English. He is cross-examined and his deposition during cross-examination is recorded in Kannada and to this also he has affixed his left thumb mark. In this state of affairs, it is rather difficult to accept that what is contained in chief-examination and what is recorded in the cross-examination is necessarily a truthful statement of the witnesses and not as is sought to be projected either by the lawyer or as is recorded by the trial Judge. The entire case is decided on the basis of such evidence of parties.

18. The efficacy of the witness deposing in the witness box in the Court hall atmosphere, in the presence of the Judge recording the evidence who can observe the demeanour of the witnesses, have all been lost because of short sighted amendment carried out to the Code of Civil Procedure, 1908 and it can no more be said that deposition of witness in chief examination is trustworthy or acceptable.

19. Though there is the safeguard of cross-examination, it falls too short of the required standards and expectations as no witness is cross examined immediately after his examination-in-chief and he is thoroughly prepared by a lawyer to face

situation in cross-examination and may not be stating the whole truth at all!

20. Our legal system, particularly, in the domain of adversary litigation, calls for a thorough overhauling and the Code of Civil Procedure, 1908 also calls for a crying attention and the need for setting right the procedural methods to be followed and adopted by the Courts.

21. Be that as it may, learned trial Judge, on appreciation of the documentary evidence on behalf of the plaintiff being. Exhibits P1 to P21, though answered issues 2 to 9 in the affirmative and answered issue Nos.1 and 10 in the negative, in view of the answers to issue Nos.7, 8 and 9 holding that the property in question is property of Sarvamangalamma as was contended in the written statement, declined to grant decree for specific performance and therefore dismissed the suit.

22. It is as against this Judgment and decree, the plaintiff appealed before the lower appellate Court, but without much success as learned Judge in the lower appellate Court who had formulated the following two points for consideration:

1. Whether the Trial Court is erred in holding that, the respondents/defendants are not having alienable right and title to the suit schedule property so as to make specific performance of contract?

2. Whether the impugned Judgment and decree needs to be interfered with?

Having answered both points against the appellants, dismissed the appeal without costs.

23. It is against such concurrent failures, the present second appeal.

24. Appearing on behalf of the appellants, Smt. Vidya, learned Counsel has apart from urging the substantial questions of law as contained in the memorandum of appeal has also raised additional substantial questions of law which read as under:

1. Whether the Courts below committed error of law in holding Issue Nos.1, 7 to 9 against the appellants in spite of issues regarding title and possession of Sarvamangalamma and Maranna having been concluded in O.S. 361/1997 and

R.A.64/2001?

2. Whether the defendants were estopped from setting up title to Sarvamangalamma and Maranna, having regard to the judgment and decree, produced as per Ex.P.18 to P.21?

3. Whether the Courts below committed error of law in not looking to the documents produced by the appellants, particularly the original title deeds record of rights and encumbrance certificates?

4. Whether the Courts below committed an error of law in holding that Sarvamangalamma was the owner of the suit property based only on revenue records which are not documents of title to immovable property?

5. Having held issue 2 to 6 in favour of the appellants, whether the Courts below committed error of law in not decreeing the suit for specific performance, as prayed for?

Additional Substantial questions of law:

6. Whether the Courts below erred in law in framing and holding issues 7 to 9 against the Appellants in view of the Judgment and decree passed in O.S.361/1997 as affirmed in RA 64/01, as per Ex.P.18 to P.21?

7. Whether the Courts below erred in law in not noticing that a finding given even in a suit for injunction operates as Res-Judicata?

25. I have also heard the learned Counsel for appellant on the substantial questions in great detail on the merits of the appeal and as the record had been called for and respondents had been put on notice and are represented by Counsel Sri. Gode Nagaraj.

26. To say the least, this is one of the strangest appeals that I have ever come across and the manner in which the trial has gone about leaves much to be desired, not only about the manner of functioning of our Judges in the Trial Court but also kind of procedures that we adopt as part of the proceedings. Even as per the pleadings in the plaint, plaintiff's case is that second defendant Siddamma

being the heir of one Lingappa who had purchased the land measuring about 25 cents in Sy.No.546/A2 way back on 16.8.1941 was the owner and through whom said Siddamma has inherited the property and also subject suit land measuring East to West-12 yards and North to South-24 yards and therefore it is Siddamma who is the owner and who is required to execute the sale deed if at all agreement is binding.

27. Though her husband-first defendant-Siddappa has joined to sign the agreement even as per the plaint pleadings, Siddappa has no saleable interest in the land, he cannot convey any title in respect of the subject land. The order sheet at the earliest point of time indicated that Siddamma was no more as per the recording in the order sheet dated 4.3.1998. If Siddamma is no more and the order sheet not indicating any steps having been taken by the plaintiff to bring on record the legal heirs of said deceased Siddamma, inevitably suit abates as against Siddamma as per the statutory period in terms of the provisions of Civil Procedure Code, 1908, but it is not clear as to whether even today steps have been taken to implead the legal heirs of said Siddamma.

28. In this regard, submission of learned Counsel for the appellants is that it is a non issue which cannot be looked into in this appeal under Section 100 of CPC; that it is nobody's case as to what could have happened even assuming that no steps had been taken in respect of second defendant-Siddamma, but the Courts below having proceeded on the premise that the defendants' interest is represented by present legal heirs of the defendants, that cannot have any significance in law else.

29. I find this submission not very tenable in terms of the statutory provisions. If the suit as against the second defendant abated after the statutory period due to the plaintiffs not taking steps to bring on record the legal heirs of deceased second defendant, that is a happening in law on the efflux of time and not because of any positive order or recording by a Judge conducting the proceedings in a Court.

30. When once suit abates, unless that abatement is set aside in accordance with law, there is no suit in the eye of law.

31. In the present case, the only person who had a title or saleable interest in respect of suit property even as per plaintiff's case was only second defendant-Siddamma and if suit had abated as against Siddamma the entire suit abates as no cause of action survives. Thereafter, as against the first defendant alone who in fact had no saleable interest though was a party to the agreement and a decree against first defendant would not and could not convey any right, title and interest in favour of the plaintiff in respect of the subject property of which as per plaintiff pleadings it was only the second defendant who could have acquired valid title as a legal heir of Lingappa. It is rather strange such a suit which had abated is decreed ex parte once and on filing of Miscellaneous case, ex parte decree is set aside, contested further by other legal heirs, but nowhere it is indicated that abatement had been set aside and has reached this Court in the form of second appeal and what with so many substantial questions of law being posed for examination in this second appeal.

32. I find even substantial questions of law said to be raised in the second appeal, particularly, for proving, that surviving, existing legal heirs of the original defendant had right, title and interest to the suit property to convey valid title to the agreement holder-plaintiff is a fantastic argument and to say the least is most illogical.

33. In the wake of the admitted case of the plaintiff that the real fight in respect of subject land was not with the so called defendants in the suit but with one Maranna and it is precisely for that reason, the Judgment and decree obtained in OS No.361 of 1997-a suit for bare injunction against Maranna being used as a trump card for foisting present decree on the present defendants daughter of Siddamma, but without joining said Maranna as party to the present suit is nothing short of a preemptive manner of achieving success or relief against Maranna without actually impleading Maranna as party to the present proceedings.

34. Be that as it may, submission of learned Counsel for the appellants that in the wake of the earlier Judgment and decree in OS No.361 of 1997 acts as res judicata in view of Section 11 of CPC as against the present defendants for putting up plea of the nature that they are not owners of the subject property, if accepted

can only lead to absurd result of thrusting title on an unwilling person and attributing ownership to a person who had disowned ownership, does not claim right, titled and interest to the property and if the statement of the defendants are to be seen, they have pleaded that subject property was never owned by their mother Siddamma nor father Siddappa and was never possessed by them and on the other hand, it is precisely the case of the plaintiffs that the agreement was executed by Siddappa and Siddamma original defendants as owners and they had put person in possession.

35. It is also rather strange that the plaintiffs if should have had agreement of this nature and had paid full sale consideration at the very beginning and had remained in possession and had not taken steps to enforce agreement to get decree for specific performance, but chooses to file a suit after filing of suit against Maranna for bare injunction, in fact, claim of the plaintiff in the other suit against Maranna in OS No.361 of 1997 is that he had already become owner of the property by sale transaction with said Siddamma etc. While it was not so. Though certified copy of the document is marked in the said suit as Exhibit P14, the whole effort appear to be one of creating evidence for this case or other case as in the present suit, the decree obtained in OS No.361 of 1997 is also exhibited as document in favour of the plaintiff for claiming the relief of specific performance.

36. What can constitute evidence in the normal course in any suit is what transpired before the institution of the suit and if any material subsequent to the institution of the suit is also sought to be relied upon as a supporting material in favour of the party for claiming relief in the suit, it will have to be examined with caution and with the kind of importance that it deserves as it is a document that has come into existence subsequent to the proceedings in the suit subsequent to the disputes having arisen and therefore will have to be viewed with circumspection.

37. Therefore, I am of the clear view that issues relating to the plaintiffs making good the answers to issues 7 to 9 in favour of the plaintiffs by administering fallacy of the Judgment and decree of the Courts below does not arise. In fact, the suit for specific performance cannot be made dependent on such issues, but to the extent

that a decree for specific performance cannot be granted if the person against whom the decree is to be granted himself or herself does not have a saleable interest in the subject property and therefore the suit does not come within the discretion to be exercised under Section 20 is a well accepted principle, but unfortunately, the learned Judges of the Trial Court and lower appellate Court have lost sight of this aspect. The conduct of the plaintiffs leaves much to be desired even as was found out on perusal of the order sheet of the trial Court and the manner in which the suit was prolonged even when there was virtually no contest over the suit and ultimately the present defendants are dragged to the suit only to enable the plaintiffs to foist a decree which if at all could be to the discomfort and detriment of Maranna-defendant in OS No.361 of 1997 as the present defendants did not claim any interest for themselves but conceded that even their parents did not have any right, title and interest in the subject land. In this strange situation, what can really be inferred is only the lack of bonafides on the part of the plaintiff in having not taken timely steps to seek for decree for specific performance promptly but allowing agreement to linger on for not less than a period of six years and that too instituted a suit only after instituting suit against such Maranna for bare injunction. Even assuming for argument sake, time was not essence of contract, it is not a factor which can confer bona fides on the plaintiff in seeking relief of specific performance. Relief of specific performance being a discretionary relief and plaintiff even assuming for argument sake had made good agreement, execution etc., relief is not automatic or matter of right and in my considered view, the Courts below have rightly declined to grant decree for specific performance and I do not find need for interference irrespective of the questions that is sought to be put forth in the manner extracted above.

38. The Judgment and decree in OS No.361 of 1997 can never constitute res judicata against defendants, particularly, issue being not one and the same and the earlier suit being merely a suit for injunction, no question of title having gone into in the present suit and if the defendants concede that they do not have right, there is no way of passing of any titled. Therefore, the only result in the suit is of dismissal and there is no need for interfering or setting aside the Judgment and decree passed by the Courts below.

39. This appeal is dismissed.

40. The defendants being dragged to the Court unnecessarily and having been harassed for last several years, plaintiff has to pay compensatory cost quantified at a sum of `10,000/-, `5,000/- in favour of each the defendants. Cost to be deposited within four weeks failing which registry shall issue a certificate in favour of the defendants with liberty reserved to execute the same as though it is a decree of the civil Court.

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