

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 8th DAY OF AUGUST, 2006

P R E S E N T

THE HON'BLE MR. JUSTICE S.R.BANNURMATH

AND

THE HON'BLE MR. JUSTICE SUBHASH B ADI

Regular First Appeal No. 790 OF 2006

BETWEEN :

Sri P.H. Dayanand,
S/o P.K. Hutchanna,
Aged about 38 years,
Residing at No.7,
Carved out of Sy.No.17/136 of
Kattariguppa Village, B.S.K. III Stage,
Bangalore.

... APPELLANT

(By Sriyuths D.R. Ravishankar, Nandana M Swamy,
for M/s Lex Nexus, Advs.)

A N D :

1. Sri S. Venugopal Naidu,
S/o Nagama Naidu,
Age: major, residing at No.8,
1st 'C' Cross, II Main, 5th Block,
B.S.K. III Stage, Bangalore 560 005.

Sri G. Srinivas, S/o G. Gangappa,
Since deceased by L.Rs

S. S. S.

2. Hemavathi,
w/o late G. Srinivas,
age: major,
3. Master Rakshit,
S/o late G. Srinivas,
Aged about 5 years,
Rep. By the natural Guardian
Smt. Hemavathi,
4. Smt. Rajalakshmi
W/o late G. Srinivas,
Age: major.
5. Ku. Sindhu,
D/o late G. Srinivas
Aged about 2 years,
Rep. By natural guardian
Smt. Rajalakshmi

All are residing at
No.18, 4th Main,
Sarakki, J.P. Nagar,
Bangalore 560 078.

.. RESPONDENTS

(By Sri Shekar Shetty for
Sri D.L. Jagadeesh, Omkaresh, Adv. for C/R 1)

RFA FILED UNDER SECTION 96 OF THE CODE OF CIVIL PROCEDURE AGAINST THE JUDGMENT AND DECREE DATED 1.3.2006 PASSED IN O.S.NO. 5806/1999 BY THE 1 ADDL. CIVIL JUDGE AND SESSIONS JUDGE, BANGALORE CITY, DECREETING THE SUIT FOR RECOVERY OF POSSESSION, PERMANENT INJUNCTION AND DAMAGES.

THIS APPEAL COMING ON FOR FINAL DISPOSAL, THIS DAY,
SUBHASH B ADL.J., DELIVERED THE FOLLOWING:

Sgtl
12/11/11

J U D G M E N T

This is second defendant's appeal assailing the judgment and decree dated 1.3.2006 passed in O.S. No.5806 of 1999 by the I Additional Civil Judge and Sessions Judge, Bangalore City.

2. The suit is one for delivery of vacant possession of the suit schedule property and for damages at the rate of Rs.3,000/- per month. The case of the plaintiff is that he purchased the suit schedule property under a registered sale deed dated 7.3.1994 executed by Sri T. Byrappa and pursuant to the sale deed, khatha was changed in to his name. In the year 1992 the B.D.A. attempted to demolish the building and he approached this Court. It is the case of the plaintiff that the 2nd defendant has been permitted to occupy the suit schedule property as a licensee (permissive possession). However second defendant in collusion with the 1st defendant has fabricated and got up false documents by forging the signature plaintiff's vendor, one Krishna



Murthy who is dead, to create an agreement of sale. It is also alleged by the plaintiff that the suit schedule property was sold to him by T.Byrappa in 1994 and he was fighting the litigation from 1991 against the B.D.A and further alleged that the 1st defendant has filed a suit in O.S.8141/1998 for specific performance. On this allegation the plaintiff sought for possession of the schedule property from the defendants.

3. Initially defendants 1 and 2 together filed a joint written statement inter alia alleging that T. Byrappa himself had no title to execute any agreement of sale with the plaintiff except defendant no.1. It is also alleged that T. Byrappa had executed the agreement of sale in favour one Krishnamurthy on 10.7.1991 and the said Krishnamurthy in turn had entered into an agreement of sale with the 1st defendant. The 1st defendant has filed suit O.S.8141/1998 claiming specific performance against the plaintiff. The said Krishnamurthy died on 10.5.1997. The assignee of the 1st defendant, Krishna Murthy is actually in possession of the



suit schedule property and he enjoyed physical possession upto 28th June 1992. It is also alleged that defendant no.1 has put up a structure on the suit land by investing huge amount and has let out three portions of the same and also constructed a cow shed in the suit schedule property and has availed electricity. The 1st defendant claims he is in lawful possession of the suit schedule property. It is also alleged by the defendants that the plaintiff was never in possession of the suit schedule property. On these allegations initially both the defendants resisted the suit by filing joint written statement.

4. Later on the 2nd defendant filed additional written statement inter alia alleging that defendant no1 has entered into an agreement of sale with the 2nd defendant for consideration of Rs.9.60,000/- and also alleged that the 1st defendant now colluding with the plaintiff has filed a memo in collusion with the plaintiff has withdrawn the suit filed by him in O.S.8141/1998. On this allegation defendant no.2 filed an additional written statement and contested the suit.



The trial Court framed the following issues and additional issues:

2. Whether the plaintiff proves that he is entitled for Rs.3,000/- per month by way of damages from the date of suit till the date of delivery of vacant possession of suit premises?
3. Whether the defendants prove that suit is not maintainable as contended in written statement?
4. Whether plaintiff proves that defendants are trying to alter the existing structure by demolition and reconstruction?
5. Whether plaintiff is entitled for an order of permanent injunction as sought for?
6. To what order or decree?

Additional issues framed on 10.8.2004

1. Whether the plaintiff proves that, 2nd defendant is in permissive possession under the plaintiff?
2. Whether the plaintiff further proves that permission granted in favour of 2nd defendant was withdrawn in the month of August 1998 and thus, the defendant's possession over the suit property is unauthorised?

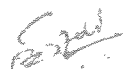
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3. Whether the suit is barred by limitation as contended in the written statement?
4. Whether Court fee paid is insufficient?
5. Whether suit is bad for non-joinder of necessary parties, as contended by the defendant No.2?
6. Whether the defendants prove that, they are in active possession of the suit property since 20.6.1992 in view of sale dated 10.5.1992?
7. Whether the defendant proves that, Byrappa entered into agreement to sell on 10.7.1991 in favour of one Krishna Murthy?

3. Before the trial Court plaintiff got examined himself as PW 1 and also examined his vendor T. Byrappa as PW 2 and one S. Gangadhara as PW 3 and got marked the documents as Ex P 1 to 21. Defendant no.2 got himself examined as DW 1, however no documents were marked. The trial Court on appreciation of evidence on record held that the 1st defendant is in permissive possession of the suit schedule property. It has also held that possession of defendant no.2 is unauthorised and negated the case of the 2nd defendant.

C. J. S.
12/2/92

5. Sri D.R. Ravi Shankar, learned counsel for the appellant who is defendant no.2 in the trial Court submitted that T. Byrappa, original owner of the suit schedule property had entered into an agreement of sale dated 10.7.1991 with Sri Krishna Murthy and the said Krishnamurthy assigned his right under the agreement in favour of defendant no.1 under assignment of rights dated 10.5.1992 and from defendant no.1 defendant no.2 got the assignment of right and defendant no.2 is in possession and enjoyment of the suit schedule property under his own independent right as assignee from defendant no.1. He further submitted that by virtue of assignment of right in favour of defendant no.2, he is protected under Section 53 A of the Transfer of Property Act as an assignee. It is his case that when once possession of defendant no.2 is protected under Section 53 A of the T.P. Act the suit for possession by the plaintiff is not maintainable on the ground of the alleged permissive possession. He also contended that defendant no.1 has no title to transfer the suit schedule property in favour of the plaintiff in 1994 as at that time he had already assigned his



right in favour of Krishnamurthy and Krishnamurthy has assigned his rights in favour of defendant no.1 and defendant no.1 in turn has assigned his right in favour of defendant no.2. He further submitted that the 1st defendant, though filed a joint written statement along with defendant no.2 and contested the suit, however in collusion with plaintiff has filed a memo supporting the plaintiff and has withdrawn the suit filed in O.S.8141/1998 which was filed for grant of decree for specific performance against T. Byrappa and two others.

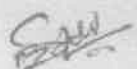
6. He also submitted that he was not given adequate opportunity before the trial Court to adduce evidence and as such he was not able to produce necessary documents in proof of his possession and also in proof of his right as an assignee from defendant no.1. He also submitted that even if defendant no.1 withdrew from the case or support the plaintiff it will not in any way effect his right already accrued to him in the agreement entered into between defendant no.2 and defendant no.1. In support of his



submission he relied on Section 53 A of the T. P. Act and submitted that defendant no.2 was put in possession as a holder of assignee. He further stated that the trial Court in a hurried manner has disposed of the suit even without giving adequate opportunity after the additional written statement was filed by defendant no.2. It is his submission that after defendant no.1 withdrew the suit OS.8141/1998 and after a memo was filed before the trial Court, he came to know the collusion between defendant no.1 and plaintiff and it is thereafter he was forced to file additional written statement and further submitted that after the additional written statement was filed he requested the court to frame additional issues in terms of the additional written statement. He further submitted the trial Court did not give him opportunity and on account of this he could not produce necessary evidence and also submitted that if defendant no2 is given an opportunity he could produce necessary evidence. In support of his contention, learned counsel for the appellant relied on the judgment reported in AIR 1958 SC page 394 inter alia contending that under

Section 146 of CPC he has every right to come on record in the place of his assignor whose rights are being assigned in his favour. It is his submission that even if defendant no.1 abandoned his claim, that will not in any way affects the right of defendant no.2 to contest the suit stating that he being an assignee of defendant no.1. In the same line he also relied on the decision reported in AIR 1913 AP page 46 and further submitted that defendant no.2 has every right to resist the claim of the plaintiff by coming on record as a legal heir of defendant no.1 under Order 22 Rule 10 of CPC.

7. Sri Shekar Shetty, learned counsel appearing for the plaintiff/defendant no.2 submitted that defendant no.2 is in permissive possession of the suit schedule property. The alleged claim of defendant no.2 in the additional written statement that there is an agreement between himself and defenantno.2 is not fortified by any evidence and further submitted that in the light of the memo filed by defendant no.1, defenantno.2 has no independent right. He also submitted that defendant no.1 who had filed his suit in



O/S.8141/1998 claiming decree for specific performance against the plaintiff's vendor i.e., PW 2 T. Byrappa has been withdrawn without reserving any liberty. He also submitted that in view of dismissal of the suit filed by defendant no.1 and also in view of defendant no.1 filed a memo that he has no right in the suit schedule property. Defendant no.2 admittedly claiming that he is the assignee of defendant no.1 cannot have any better right than defendant no.1. He submitted that before the trial Court though defendant nos.1 and 2 together have filed their written statement no whisper is made as regards to an agreement executed by defendant no.1 in favour of defendant no.2 nor such statement is made by defendant no.1 in his suit O.S.No.8141/1998. This clearly shows that the alleged claim of defendant no.2 is only an after thought after defendant no.1 filed the memo. He also submitted that nothing prevented defendant no.2 to produce the alleged agreement of sale if it is in his favour before the trial Court when the matter was posted for evidence on 30th July, 2004 or even before that no attempt was made by defendant no.2 to produce any document in



respect of the alleged claim. He further submitted that defendant no.2 had not even filed any application inter alia for summing documents if any alleged to have been produced in OS.8141/1998 as alleged by defendant no.2. He submitted that in the absence of any document assigning right of defendant no.1 and in the light of the registered sale deed in favour of the plaintiff, defendant no.2 has no right to allege that he has an independent right assigned by defendant no.1. He also pointed out from the order sheet that on several occasions defendant no.2 has filed several applications except an application for summoning the alleged documents nor has produced necessary document and this conduct of defendant no.2 shows that he has no such claim it is only after defendant no.1 withdrew the suit he tried to make a strange claim against the plaintiff to sustain his possession. On the other hand he submitted that the trial Court after considering the evidence on record and documents has rightly decreed the suit.

S. M.
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8. In the light of the submissions made by both the parties the only question that arises for consideration is as to whether defendant no.2, appellant herein is entitle for protection under Section 53 A of the T.P. Act.

9. There is no dispute that T. Byrappa is the owner of the suit schedule property. The plaintiff claimed his title based on the registered sale deed executed by T. Byrappa, who is examined as PW 2. PW 2 in his evidence has stated that he has not transferred the property under a registered sale deed in favour of the plaintiff. As far as the alleged agreement entered into between T. Byrappa with Krishnamurthy is concerned it is the evidence of PW 2 that he had not executed any document in favour of Krishnamurthy, there is no documents produced to evidence the alleged agreement in favour of Krishnamurthy by T. Byrappa as alleged by defendant nos.1 and 2 at the initial stage.

10. It is also clear from the evidence of DW 1 that except oral statement he has not produced any document of



assignment of rights either by T. Byrappa in favour of Kishnamurthy or from Krishnamurthy in favour of defendant no.1 or by defendant no.1 in favour of defendant no.2. In the absence of any evidence of assignment of rights in favour of defendant no.2 it is not possible to know whether defendant no.2 is assigned of such right invoking Section 53A of the T. P. Act. Under Section 53A of the T.P. Act it is required to show that under the contract of transfer for consideration of any movable property in writing and the transferee in proof of the contract must have been taken possession of the property. Except the oral statement of PW 1 there is nothing on record to show that there has been transfer of property in favour of defendant no.2 and he has been put in possession of the suit schedule property. No doubt in this case defendant no2 is in possession of the property, but it is not possible to trace out that possession under an agreement. In the absence of any document it is not possible to hold the possession of defendant no 2 as that of agreement holder in possession.



11. The next contention of the appellant's counsel is that the appellant had not given an opportunity to produce the relevant documents and as such he could not produce the necessary documents in the trial Court. In this case initially a joint written statement was filed by defendants 1 and 2 and it is not in dispute that in the entire written statement there is no whisper as to the assignment of right by defendant no.1 in favour of defendant no.2. Further defendant no.1 himself had filed a suit claiming decree for specific performance against the vendor, that presupposes that there was no agreement by defendant no.1 in favour of defendant no.2. Defendant no.1 has not made any whisper about the alleged right of defendant no.2 which clearly shows that the assignment of right by defendant no.1 in favour of defendant no.2 is an after thought and it was only after defendant no.1 withdrew from the suit in O.S. No.8141/1998. Apart from this nothing prevented defendant no.2 to produce the agreement before the trial court to show that he has been assigned rights by defendant no.1. Defendant no.2 has not produced the alleged assignment of



rights, nor has even attempted to get the alleged assignment of rights said to have been assigned by Krishnamurthy to defendant no.1 or the alleged agreement alleged to have been executed by T Byrapa in favour of Krishnamurthy. Therefore, it cannot be said that defendant no.2 had no opportunity at all. The suit is filed in 1999. At the first instance the matter was set down for evidence on 30th July 004. It is alleged that defendant no.2 was not able to file additional written statement to claim his right on the alleged documents at the initial stage but even subsequently also he has not made an attempt to produce such documents. However no such attempt has been made at any time by defendant no2. Apart from this it is clear from the order sheet that, defendant no.2 has filed several applications even after the dismissal of the applications defendant no.2 has filed review application. From this and order sheet it can be inferred that defendant no. no.2 being admittedly in possession of the suit schedule property was only interested in prolonging the suit to protect his possession and when defendant no.1 did not support him he had set up additional

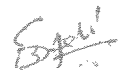


story of the assignment of rights by defendant no.1 in his favour. In view of sufficient time having been elapsed before the trial Court and in the absence of documentary evidence or proof of assignment of alleged rights in favour of defendant no.2. The trial Court cannot by its wat reasoned order has passed the decree. In the absence of any other independent right claimed by defendant no.2 and his possession as alleged by the plaintiff being permissive possession he has no right to continue in possession. Hence the trial Court found that the suit for possession filed by the plaintiff who is a registered owner of the property is entitled for possession. Therefore we find no reason to interfere with the judgment and decree of the trial Court.

12. At this stage learned counsel for the appellant submitted that the trial court was not justified in awarding mesne profit on the ground that the trial Court ought to have order for an enquiry as regards to the mesne profit instead of awarding mesne profit. The trial Court has framed issues as regards to the mesne profit and based on



the evidence the trial Court found that the plaintiff is entitled for mesne profit and it is clear from Order 20 Rule 12(b)(a) that the mesne profit can be ordered by the trial Court while decreeing the suit. Apart from this the appellant has not raised any such ground in the memorandum of first appeal. It is only at this stage he raised objection as regard to the mesne profit. We do not propose to go into the question whether Order 20 Rule 12 (b)(a) requires an enquiry or the mesne profit can be granted as specific ground is raised by the appellant and the trial Court has granted mesne profit on the basis of evidence. In the light of the findings of the trial Court on the issue on mesne profit we do not propose to interfere with the same as the trial Court by framing a specific issue and based on evidence has determined the mesne profit. Accordingly we do not see any ground to reverse or modify the decree as regards to the mesne profit. Accordingly the appeal fails and the same is dismissed. However no order as to costs.



13. As defendant no.2 is in permissive possession and submits that he requires some time to vacate and hand over possession. We feel, it is just and proper to grant six months time to the appellant/defendant no.2 to vacate and hand over possession of the suit schedule property to the plaintiff.

Sd/-
JUDGE

Sd/-
JUDGE

Vb/-