

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 30TH DAY OF MARCH, 2007

BEFORE

THE HON'BLE MR. JUSTICE JAWAD RAHIM

C.R.P. No. 70/2004

BETWEEN

1. DR HEROLD MASCARENHAS
MAJOR, AGE 48 YEARS
S/O.LATE BENEDICT
STANCY MASCARENHAS,
R/AT.2ND CROSS
LOWER BENDORE,
MANGALORE-2
2. MR. RICHARD MASCARENHAS
Age: 47 YEARS
MAJOR, S/O.LATE BENEDICT
STANCY MASCARENHAS
R/AT.2ND CROSS
LOWER BENDORE
MANGALORE-2
3. MRS. JOYCE
AGE: 47 YEARS
MAJOR, W/O MR.LAWRENCE
R/AT.2ND CROSS,
LOWER BENDORE, MANGALORE-2
4. MRS. MARGARET ROSEMARIA D'SOUZA
AGED.34 YEARS
R/AT.VOGGA, BANTWAL TQ, D.K.
REP BY GPA HOLDER

AB

MR RICHARD MASCARENHAS,
2ND CROSS
LOWER BENDORE, MANGALORE

... PETITIONERS

(BY SRI. T N RAGHUPATHY, SRI K.N. KRISHNA RAO & SRI
CHANDRASEKHAR L. ADVOCATE)

AND

1. MS. ODETE D'SOUZA
AGED ABOUT 57 YRS,
D/O FREDERICK D'SOUZA
2. MRS. OPHELIA SEQUIRA
AGED ABOUT 50 YRS,
D/O FREDERICK D'SOUZA
3. MRS. CISSIE @ CICILA D SOUZA
AGED ABOUT 75 YRS,
4. MRS. CAROL SALDHANA
AGED ABOUT 46 YRS,
D/O CHARLES D SOUZA
5. MRS. CORAL COUTINHO
AGED ABOUT 46 YRS,
D/O CHARES D SOUZA
6. MRS. CHARYL LEONARD
AGED ABOUT 41 YRS, D/O CHARES D SOUZA
7. MR. CYPRIAN D SOUZA
AGED ABOUT 77 YRS, S/O MARY MAGDALINE
8. MRS. AMY MASCARENHAS
AGED ABOUT 70 YRS ,



D/O MARY MAGDALINE

9. MRS. MATTIE PIMENTA
AGED ABOUT 67 YRS,
D/O MARY MAGDALINE
10. MRS. ELFRIDA RODRIQUES
AGED ABOUT 59 YRS,
D/O LATE LYDIA MATHIAS
11. MRS. ESMERALDA MATHIAS
AGED ABOUT 57 YRS,
D/O LATE LYDIA MATHIAS
12. MR. EDSEL MATHIAS
MAJOR 56 YEARS,
S/O LATE LYDIA MATHIAS
13. MR. LAWRENCE D'SOUZA
AGED ABOUT 83 YRS,
14. MRS. LOVINA GRACIAS
AGED ABOUT 56 YRS,
D/O BENEDICTA D SOUZA
15. MR. LESLIE D'SOUZA
AGED ABOUT 54 YRS,
S/O BENEDICTA D SOUZA
16. MS. LEETA D SOUZA
AGED ABOUT 47 YRS,
D/O BENEDICTA D SOUZA
17. MR. LESTER D SOUZA
AGED ABOUT 42 YRS,
D/O BENEDICTA D SOUZA

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18. MR. LANCY D SOUZA
AGED ABOUT 40 YRS,
S/O BENEDICTA D SOUZA

ALL ARE RESIDING AT
R/O 301, HELENA, III FLOOR,
57 MOUNT CARMEL ROAD,
BANDRA WEST,
MUMBAI-400 050.
AND REP BY THEIR GPA HOLDER
MR. NARAYAN SHETTY
AGED ABOUT 43 YRS,
S/O LATE SEKAPPA SHETTY
RESIDING AT TARIPADI,
KODIALBAIL,
MANGALORE - 3.

19. MRS. PREMILA
MAJOR, W/O IRWIN
R/O NO II CROSS ROAD
LOWER BENDORE
MANGALORE

20. MRS. VOLET
MAJOR, ABOUT 40 YEARS
D/O LATE BENEDICT STANY MASCARENH
R/O NO II CROSS ROAD
LOWER BENDORE
MANGALORE

21. MRS. APOLINE MASCARENHAS
MAJOR, D/O LATE BENEDICT STANY MASCARENH
R/O NO II CROSS ROAD
LOWER BENDORE
MANGALORE

22. MR. EDWIN JOSEPH D'SOUZA
MAJOR, ABOUT 40 YEARS
S/O JOHN D'SOUZA



R/O GUDDE THOTA
HILLWAY HOUSE
NAGORI, MANGALORE

23. SMT. STELLA D SOUZA
MAJOR, AGED ABOUT 38 YEARS,
D/O EDWIN JOSEPH D SOUZA
R/O GUDDE THOTA
HILLWAY HOUSE
NAGORI, MANGALORE

... RESPONDENTS

(BY SRI. S K V CHALAPATHY SR. ADVOCATE, SRI. B.S.
RAGHUPATHY FOR R1 - R18, ADVOCATE)

CRP FILED U/S.115 OF CPC AGAINST THE ORDER
DATED 12.12.2003 PASSED ON ISSUE NOS.9 & 10 IN
O.S.NO.126/1999 ON THE FILE OF THE PRL. CIVIL JUDGE
(JR.DN.), MANGALORE, D.K., ANSWERING ISSUE NOS.9 &
10 IN THE AFFIRMATIVE.

THIS PETITION COMING ON FOR ORDER THIS DAY,
THE COURT MADE THE FOLLOWING

ORDER

Defendants are in revision under Section 115, C.P.C.
assailing the order dated 12.12.2003 in O.S.126/99 before
the Principal Civil Judge (Junior Divn.), Mangalore,
answering issue nos.9 and 10 regarding court fee and
jurisdiction in favour of the respondents-plaintiffs and



declining to direct them to pay court fee as alleged by the petitioners.

2. Heard learned counsel for the petitioners and respondents. Perused records in supplementation thereto.

3. The contextual facts are:

a) Respondents-plaintiff filed suit in O.S.126/99 seeking a decree to declare that the judgment and decree in O.S.331/96 obtained by the revision petitioners-defendants and perpetual lease allegedly executed by the 1st defendant in the suit in favour of the 2nd defendant (revision petitioner) and subsequent deeds of sale executed by the 1st defendant in the suit in favour of the 2nd defendant dated 24.11.1997, is null and void.

b) In support of it, they averred they are owners of the property described in the schedule having succeeded to it from their mother-Mary Magdaline D'Souza. Mary Magdaline D'Souza had acquired the property by virtue of the sale deed dated 9.6.2004 and relied on documents in support thereof. After her demise, they have succeeded to



the property. They further averred, one Syprian D'Souza, one of the legal heirs of Mary Magdaline D'Souza for self and as power of attorney for the other co-sharers, had let out the schedule property to the 1st defendant (since deceased) on a monthly rent of Rs.50/-. Thus, the 1st defendant had only lease-hold right without any title or ownership. However, 1st defendant colluding with defendants 3 and 4, obtained a collusive decree in O.S.331/96 declaring he had perfected title by adverse possession and based on such decree, had created subsequent documents in favour of defendants 3 and 4.

c) Revision petitioners who are legal heirs of the 1st defendant namely, Benedict Stany Mascarenhas as also 2nd defendant-Marqaret Rosemari D'Souza filed their written statement contending that the suit filed by the respondents-plaintiff was not properly valued and the court fee paid valuing it under Section 24(d) of the Karnataka Court Fees and Suits Valuation Act, 1958, (hereinafter referred to as the Act, for brevity), was incorrect. They




also raised a plea that as the value of the subject matter of the dispute was more than the pecuniary jurisdiction of the Civil Judge (Junior Divn.), the court had no jurisdiction to try the suit.

d) The learned trial judge accepting the written statement raised two preliminary issues as issue nos.9 and 10 as follows:

Issue no.9: Whether valuation made and court fee paid is correct?

Issue no.10: Whether this court has got pecuniary jurisdiction to try this suit?

The basis ground to non-suit the plaint on the question of court fee was, the suit had to be valued under Section 38 of the Act and court fee had to be paid on the market value of the subject matter of the dispute at *ad valorem* rate. To support this plea, they contended the value of the subject matter of the suit was very high, but the plaintiffs have valued it under Section 24(d) of the Act and paid meager court fee.



e) Per contra, plaintiffs contended they are only seeking declaration that they are owners of the property in question and it is covered by Section 24(d) of the Act and not under Section 38. Learned trial judge has considered the contentions of both sides and also applied several decisions cited by both sides and ultimately reached the conclusion that court fee paid valuing the suit under Section 24(d) of the Act was correct and Section 38 was not attracted. Consequently it held the court had jurisdiction to entertain the suit.


4. In the revision, similar pleas are reiterated as before the trial court by the parties.

5. From the factual matrix averred in the plaint and the contentions of defendants in the written statement, it is discernable that plaintiffs assertively contended they are owners of the property in question having acquired it through their mother- Mary Magdaline D'Souza in which the 1st defendant-Benedict Stany Mascarenhas had no subsisting right, title and interest. He was merely tenant



inducted by one of the legal heirs of Mary Magdaline D'Souza, namely Syprian D'Souza and he had only the right of occupation as tenant. Despite such want of legal title of ownership, he fraudulently filed suit in O.S.331/96 and obtained *ex parte* decree declaring that he has perfected title by adverse possession. In pursuance of the judgment and decree dated 19.2.1997, he created further documents like sale deed dated 24.1.1997 in favour of the 2nd defendant- Mary Magdaline D'Souza and 3rd defendant- Edwin Joseph D'Souza. They thus contended the decree obtained in O.S.331/96 was fraudulent and a result of fraud played on the court by suppression of material facts. Basically they sought for a declaration that they are the owners having acquired it from their mother- Mary Magdaline D'Souza.

6. Per contra, the contention of the defendants was, as the decree in O.S.331/96 was declaring the ownership of the 1st defendant, the suit should have been valued under



the provision of Section 38 of the Act, and not under Section 24(d).

7. Necessarily the provisions of Sections 24(d) and 38 of the Act are examined.

"Sec. 24: Suits for declaration:

- (a) ...
- (b) ...
- (c) ...

(d): *in other cases, whether the subject-matter of the suit is capable of valuation or not, fee shall be computed on the amount at which the relief sought is valued in the plaint or on (rupees one thousand) whichever is higher.*

Sec. 38: Suits for cancellation of decrees, etc:

(1) *In a suit for cancellation of a decree for money or other property having a money value, or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property, fee shall be computed on the value of the subject matter of the suit, and such value shall be deemed to be-*

If the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or to her document was executed;

If a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property.

(2) *If the decree or other document is such that the liability under it cannot be split up and the relief claimed relates only to a particular*

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item of property belonging to the plaintiff or to the plaintiff's share in any such property, fee shall be computed on the value of such property or share or on the amount of the decree, whichever is less.

Explanation 1: *A suit to set aside an award shall be deemed to be a suit to set aside a decree within the meaning of this section.*

Explanation 2: *In a suit for cancellation of a decree and possession of any property, the fee shall be computed as in a suit for possession of such property.*

8. No doubt as urged by the petitioner's counsel, the provision of Section 38 of the Act will be attracted in a suit for cancellation of a decree for money or other property having a money value, or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property, and the plaintiff will be required to compute on the value of the subject matter of the suit, the court fee payable. But the exception to it, Section 24(d) of the Act deals with declaratory decrees but in a different situation.

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8. In the present case, it is not in dispute respondents-plaintiffs were not parties to the suit in O.S.331/96 nor their claim of title has been considered in the said decree. The judgment and decree in O.S.331/96 is not passed against them and as the main allegation is it is fraudulently obtained by the 1st defendant in collusion with defendants 2 and 3, the right course for the plaintiffs was to resort to seek declaration that such decree is not binding on them, being vitiated by fraud and is thus *non-est* in the eye of law. For such relief, the suit had to be valued only under Section 24(d) of the Act. This view is fortified from the decision of the this court in the case of **PRABHAKAR & OTHERS .vs. PARVATAMMA & OTHERS** reported in **1963 (1) Mys.L.J. 326** wherein it has been observed thus:

"The petitioners herein, are the plaintiffs on O.S. No. 87 of 1960 on the file of the Additional Civil Judge, Bangalore. In that suit, petitioners prayed for partition and possession of their 6th share in the plaint schedule property. One of the reliefs claimed in the suit is that they are entitled to their 6th share in the suit property, free of the decree in O.S.No. 27 of 1955. In other words, they have prayed for a declaration that the decree in O.S. No.27 of 1955 is not binding on them. They have valued that relief

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as a declaratory relief. They were not parties to the mortgage on the foot of which, the decree had been obtained. Therefore, there was no need for them to get the decree cancelled. In such a case, no Court fee need be paid on *advalorem* basis. All that they need have done and in fact they have done so, is to value the relief in question as a declaratory relief and pay Court fee accordingly. See *Kempe Gowda v. Kempe Gowda*(1)

The decision makes it abundantly clear that in a suit where the plaintiff seeks that the decree obtained in which they were not parties, is not binding upon them is different from seeking cancellation of the decree. Consequently, the provision of Section 24(d) was only applicable and the valuation of the suit done by the respondents-plaintiffs was certainly in order.

10. The second question is, whether the defendant could question determination of court fee by the trial court in revision to the High Court. This court, in the case of **VISVAVARMA HOTELS LTD. .vs. ANJUMAN-e-IMAMIA & OTHERS** reported in **(1984 (2) Kar.L.J. 185)** has held in paragraph 25 as under:

'So far as valuation of suit, the right of the defendant to contest the same is absolute.



When the defendant has a right to object to valuation, his right to challenge the same either in appeal or revision is not controlled by any other factor as in the case of determination of court fee where he is only given the right to bring insufficiency or otherwise to the notice of court and can do no more, if the determination on that question itself turns out to be wrong.'

This decision spells out that the defendant has no right to question the order passed by the trial court even if it has wrongly determined the question of court fee. A similar view has been expressed by this court in the case of **THE KARNATAKA THEOSOPHICAL FEDERATION ® .vs. BALAKRISHNA ASHRAM** reported in **ILR 1999 KAR 2930** to hold that revision does not lie on any finding recorded on the issue relating to court fee.

11. The apex court in the case of **RATHNAVARMARAJA .vs. SMT.VIMLA (AIR 1969 SC 1299)** has also held that *'the jurisdiction in revision exercised by the High Court under Section 115, C.P.C. is strictly conditioned by clauses(a) to (c) (repealed C.P.C.). The defendant who may believe and even honestly, that proper court fee has not been paid by the plaintiff, has still*

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no right to move the superior courts by appeal or revision against the order adjudging payment of court fee payable on the plaint.'

12. In this view, I find no merit in the revision. It is dismissed, confirming the order of the trial court on issue nos.9 and 10.

**Sd/-
JUDGE**

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