

**IN THE HIGH COURT OF KARNATAKA
CIRCUIT BENCH AT GULBARGA**

DATED THIS THE 21ST DAY OF AUGUST, 2009

BEFORE

THE HON'BLE MR.JUSTICE RAM MOHAN REDDY

REGULAR SECOND APPEAL No.1419/2008

BETWEEN:

1. Channappa
S/o Budeppa Kallamani
Age: about 37 years,
Occ: Govt. Employee,
R/o Kollwade, Yadgiri City,
Dist: Gulbarga 585 201.

(By Sri.Veeresh B.Patil, Advocate)

APPELLANT
.. {Petitioner}

*corrected vide Chamber
order dt 9/2/12*

AND

1. Peer Ahmed S/o Jalal Sab
Age: about 32 years,
Occ: Business,
R/o Kollwade Yadgiri City
Dist: Gulbarga 585 201

..Respondents

(By Sri.P.S.Malipatil, Advocate)

RSA FILED U/S 100 CPC PRAYING ALLOW THE
RSA AND TO SET ASIDE THE JUDGMENT AND
DECREE DATED 15.3.2008 PASSED BY THE CIVIL

[Signature]

JUDGE (SR.DN.) AT YADGIR IN R.A.No.18/2007 AND ALSO JUDGMENT AND DECREE DATED 3.7.2007 PASSED BY THE CIVIL JUDGE (JR.DN.) AT YADGIR IN O.S. No.199/2004 ETC.

THIS APPEAL COMING ON FOR ADMISSION THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

The plaintiff in O.S.No.199/2004 on the file of the Civil Judge (Jr.Dn) Yadgir, aggrieved by the judgment and decree dated 3rd July 2007 preferred R.A.No.18/2007 on the file of the Civil Judge (Sr.Dn.) Yadgir, which when dismissed by order dated 15th March 2008, having suffered concurrent findings of fact has filed this second appeal, under Section 100 of the Code of Civil Procedure.

2. Facts in brief are: The plaintiff instituted the suit to declare is title to the suit property and consequential relief of injunction to restrain the defendants from constructing any building on the open site bearing Municipal No.2-13-76, renumbered as 2-13-88,



measuring 45x49 feet, situated at Koliwada, Yadgir town, alleging that the suit property was purchased by his grandfather from one Gulam Maheboob S/o Haji Abdul Rasool Sab Badal in the year 1963 and since he did not put up a construction over the plot, the defendant took advantage and encroached upon the open plot. That suit was resisted by filing written statement denying that there existed a open plot bearing a municipal number and measurement as claimed in the plaint. In the premise of pleadings of the parties, the Trial Court framed issues, recorded the oral testimony of P.Ws.1 and 2, marked 15 documents Ex.P1 to P15 while the defendant was examined as DW1 and 7 documents marked as Ex.D1 to D7.

3. The Trial Court having regard to the material on record both oral and documentary, on an elaborate consideration, extracting relevant portions of the deposition of the parties, the plaintiff and their



witnesses, held that the plaintiff failed to prove that Yenkappa S/o Mallappa Saheb, the alleged vendor-in-title purchased the suit property under Ex.P1, sale deed, on the premise that the boundaries as disclosed in Ex.D1(d) and Ex.P5(a) being the copy of assessment and approved map, respectively, were at variance with the boundaries in Ex.P1, sale deed executed in favour of the plaintiff's alleged vendor-in-title by name Yankappa. The plaintiff in cross-examination stated that Yankappa, transferred the said property to his wife by name Neelamma during his lifetime who inturn transferred the property to the plaintiff as her adopted son. This claim of adoption was not a plaint averment, nevertheless, the plaintiff did not establish that fact. Yet another admission in the testimony of the alleged adoptive father of the plaintiff examined as PW.2 that the defendant was the owner in possession of the house bearing No.2-13-90/1 surrounded by a compound wall existing on the northern side of the suit property, led



the Trial Court to disbelieve the claim of the plaintiff and accordingly dismissed the suit.

4. The Appellate Court having regard to the material on record observed that in the plaint averments the suit property is described as an open site while the schedule house property and therefore a contradiction. The boundaries of the suit property both in the plaint and in the oral testimony of the plaintiff being at variance; in the absence of relevant material to establish the fact that the plaintiff's grandfather had purchased the plot in question muchless that the grandfather was one Yankappa S/o Mallappa Saheb, purchaser of the property under Ex.D1, sale deed; the admission in the cross examination of the plaintiff, PW-1, that his grandfather's name was Narasappa having two brothers by name Khandappa and Yenkappa and is not aware of the partition between them; the revenue records of the suit property, more appropriately Ex.P3 & P4 said to be



the assessment extract disclosing the name of one Chennappa S/o Boodeppa, though the name of the father of the plaintiff is one Sugappa as entered in the petitioner's service record in the State Government; the absence of specific pleadings in the plaint that the plaintiff was the son of Chennappa S/o Boodappa or adopted by Neelamma W/o Yenkappa; the Appellate Court was justified in recording a finding of variance between pleadings and proof.

5. The appellate court held as perverse the finding on issue No.3 that the defendant was the owner of the suit property, on the basis of municipal records and accordingly negated the said issue.

6. Although the learned counsel for the appellant contends that despite the concurrent findings of fact, there is non consideration of the evidence on record by the Court below, I am not impressed by that submission.



7. It is well settled that this Court in second appeal is entitled to interfere with the concurrent findings on fact if the said finding of fact are based on non-consideration of important piece of evidence in the nature of admission of one of the parties to the suit, overlooked by the Courts below. It is equally well settled that under Section 100 of the Code of Civil Procedure, the Trial Court cannot interfere with the concurrent findings of the fact of the Courts below without sufficient and just reasons. As observed by the Apex Court in the case of Sayeda Akthar Vs. Abdul Ahad reported in 2003 (7) SCC 52. So also this Court is not entitled to set aside the concurrent finding of fact by substituting its own finding contrary to the evidence on record as observed by the Apex Court in Saraswathi Vs. S.Ganapati, reported in 2001 (4) SCC 694.

8. In my considered opinion, the orders of the Courts below are not shown to suffer from findings which are



perverse or not based on evidence or sound reasons so as to call for interference in a second appeal. No substantial question of law arises for decision making. The appeal is accordingly dismissed.

Sd/-
JUDGE

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