

A

B. LEELAVATHI

v.

HONNAMMA AND ANR.

MAY 6, 2005

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[ASHOK BHAN AND D.M. DHARMADHIKARI, JJ.]

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Pleadings—Suit for declaration and permanent injunction—Plaintiff claiming to be in possession of suit property on the basis of possession certificate, filing suit for declaration that mortgagee fraudulently sold the property and Bangalore Development Authority illegally executed the sale deed in favour of the vendee—Suit dismissed by trial court—Appellate court decreeing the suit on the grounds of adverse possession and non-issuance of show cause notice by BDA to the plaintiff—Held, adverse possession is a question of fact which has to be specifically pleaded and proved—No categorical stand on the point of adverse possession taken in the plaint, nor issue framed in this regard—Plea of non-issuance of show cause notice before executing the sale deed neither pleaded nor raised before trial court—High Court erred in reversing the findings of trial court on these issues—Judgment and decree passed by High Court set aside and those passed by trial court restored—Adverse possession—Bangalore Development Authority Act—ss. 9 and 64.

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Respondent No. 1 filed a suit for declaration and permanent injunction. Her case was that she was issued a possession certificate and was delivered possession of the suit property in the year 1971. She mortgaged the said property and the mortgagee fraudulently sold the same. Later the property was sold to the appellant and the Bangalore Development Authority illegally regularized the sale in her favour. When respondent No. 1 came to know of this, she gave a notice to the Bangalore Development Authority u/s 64 of the Bangalore Development Authority Act and as no action thereon was taken by the BDA, she filed the suit. The BDA, in its written statement denied to have received any notice. The stand of the BDA was that the plaintiff sold the suit property by a registered sale deed and later the property was sold to the appellant and on an application by the latter, the suit property was transferred in her name through a properly executed sale deed. The appellant contested the

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suit on the similar line. The suit was dismissed by the trial court holding that by virtue of s.9 of the Act respondent No. 1 could not challenge the sale deed executed by the BDA and the suit was not maintainable for non-issuance of notice by plaintiff to BDA u/s 64 of the Act. The plaintiff filed an appeal before the High Court, which decreed the suit holding that since the BDA did not issue any show-cause notice to the plaintiff before executing the sale deed in favour of the appellant, the sale was bad in law and that the plaintiff had perfected her title by way of adverse possession. Aggrieved, the transferee filed the present appeal.

Allowing the appeal, the Court

HELD: 1. Plea of non-issuance of show cause notice by the BDA before executing the sale deed in favour of the appellant was neither pleaded nor raised before the trial court. It was raised for the first time before the High Court. No issue had been framed in this respect. The plaintiff did not lead any evidence on this point. On the contrary, the case of the appellant and the BDA was that respondent No. 1 was present at the time when the sale deed was executed in favour of the appellant by the BDA. This was primarily a question of fact and in the absence of any pleadings and evidence on this point, the High Court has erred in holding that the BDA did not issue a show cause notice to the plaintiff before executing the sale deed in favour of the appellant. [151-E, F, G]

2. Plea of adverse possession had been taken vaguely and no categorical stand on this point was taken in the plaint. No issue had been framed and seemingly the same was not insisted upon by the plaintiff-respondent. Adverse possession is a question of fact which has to be specifically pleaded and proved. No evidence was adduced by the plaintiff-respondent with regard to adverse possession. In the absence of any plea and evidence on the point High Court erred in holding that the plaintiff-respondent had perfected her title by way of adverse possession.

[151-H; 152-A, B]

3. The finding recorded by the High Court that the plaintiff-respondent had issued a valid notice under s.64 to the BDA before filing of the suit is contrary to the evidence on record. This finding is also set aside. [152-C]

4. Judgment and decree passed by the High Court are set aside and those of the trial court restored. [152-D]

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7034 of 2003.

From the Judgment and Order dated 13.2.2003 of the Karnataka High Court in R.F.A.No. 388 of 1996.

G.V. Chandrashekhar for P.P. Singh, for the Appellant.

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M. Gireesh Kumar for Kh. Nobin Singh, for the Respondent No.2.

The Judgment of the Court was delivered by

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BHAN, J. This appeal by grant of leave has been filed by defendant no.2, (hereinafter referred to "the Appellant") against the judgment and decree of the High Court of Karnataka at Bangalore dated 13.02.2003 in Regular First Appeal No.388 of 1996 whereby and whereunder the High Court while setting aside the judgment and decree of the trial Court decreed the suit filed by the plaintiff, 1st respondent herein for declaration of ownership of suit property as well as for setting aside the sale deed dated 21.05.1983 executed by the City Improvement Trust Board (CITB), now Bangalore Development Authority (BDA) respondent no.2 herein. The High Court held the action of the BDA in executing the sale deed in favour of the appellant as void and not binding on respondent no.1. Further, the BDA has been restrained from interfering with the peaceful possession and enjoyment of the property by respondent no.1.

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Plaintiff-respondent no.1 is proceeded *ex-parte* since she has chosen not to enter appearance despite service of notice.

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Plaintiff-respondent filed a suit seeking declaration that she is the owner of the site bearing No. 115, situated at Jabbar Block, Rajamahal Cuttahalli Bangalore 560 003, hereinafter referred to as "the suite property" and for setting aside the sale deed dated 21.05.1983 executed by the BDA in favour of the appellant being illegal, null and void and not binding on her. She also sought for an order of permanent injunction restraining the BDA from interfering with her possession. In the suit, plaintiff claims herself to be in possession of the suit property since 1940, same being allotted to her by erstwhile CITB, now BDA vide possession certificate dated 27.01.1971 and actual possession being delivered to her on 06.05.1971. It was averred that she had perfected her title to the suit property by virtue of adverse possession.

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That she created a charge on suit property and borrowed Rs.2,000/- from one

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Krishnappa, who in place of mortgage deed, by cheating, got executed a sale

deed. Later, Krishnappa fraudulently sold away the property to one Eramma who in turn sold the same to the appellant. That on an application filed by the appellant, the BDA regularised the sale and executed the sale deed dated 21.05.1983 in her favour. That soon after coming to know about the sale made in favour of the appellant, a notice under Section 64 of Bangalore Development Authority Act, ('the Act') was got issued on 04.06.1988 to BDA informing about the nature of wrong committed by it. It is her case that since the BDA failed to take any action on the notice issued, the present suit was filed.

BDA in its written statement denied the receipt of alleged notice dated 04.06.1988 issued under Section 64 of the Act. It was contended that the property was allotted to plaintiff and on payment of the full value thereof a lease-cum-sale deed was executed in her favour on 08.01.1971 along with possession certificate dated 27.01.1971. That plaintiff sold the suit property to one V. Krishnappa vide registered sale deed dated 13.01.1975 who in turn sold the same to one Eramma on 05.12.1979. Eramma, in turn, sold the suit property to the appellant on 17.05.1982. That on a representation made by the appellant, to grant a transfer of site from the name of original purchaser to her name, suit property was transferred in her name on 30.03.1983. Sale deed was executed in favour of the appellant on 21.05.1983.

Appellant in her separate written statement denied the plaint averments contending that she is the owner of suit property having purchased the same and in view of the sale deed dated 21.05.1983 executed in her favour. That one Bajappa and his supporters tried to interfere with her peaceful possession and enjoyment of the property against which she filed O.S. No.1522 of 1984 and obtained a decree of injunction. That in the said suit, plaintiff made an attempt to implead herself as a party but her application was rejected.

Trial Court on the basis of the pleadings framed the following issues/ additional issues:-

1. Whether plaintiff proves title to the suit property?
2. Whether plaintiff proves that the sale deed executed by the 1st defendant in favour of the 2nd defendant is null and void?
3. To what order and reliefs the parties are entitled to?

Additional Issues

1. Whether the suit is bad for want of notice under Section 64 of

- A** the Bangalore Development Authority Act?
2. Whether the court fee paid is sufficient?
 3. Whether the plaintiff is entitled to the declaration sought for?
 4. Whether the plaintiff proves she is in lawful possession of the suit schedule property?
- B**
5. Whether there is interference by the 2nd defendant as alleged?
 6. Whether the plaintiff is entitled to the perpetual injunction as sought for against 2nd defendant?
- C** Parties led their evidence oral as well as documentary. Trial Court on appraisal of the entire evidence dismissed the suit filed by the plaintiff-respondent. It was observed that sale deed executed by the plaintiff in favour of Krishnappa was not the outcome of fraud or misrepresentation. The said sale deed was executed with consensus-ad-idem amongst parties as the same was preceded by an agreement of sale dated 17.11.1974 executed by the plaintiff and her son in favour of Krishnappa. That by virtue of Section 9 of Bangalore Development Authority (3rd Amendment) Act, 1993 (Karnataka Act No.17/1994) plaintiff cannot challenge the sale deed dated 21.05.1983 executed by the BDA in favour of the appellant. It was held that the suit filed against the BDA was not maintainable as the plaintiff-respondent had failed
- D**
- E** to prove the issuance and service of the notice on BDA under Section 64 of the Act which was mandatory in nature. In the absence of such a notice the suit was not maintainable. It was also held that the plaintiff-respondent had failed to establish that the appellant was interfering with her lawful possession over the suit property.
- F** Being aggrieved by the dismissal of the suit, plaintiff filed R.F.A. No.388 of 1996. High Court by making out an altogether new case which had not been even pleaded and on which no evidence had been led by either of the parties set aside the judgment and decree passed by the trial Court and decreed the suit filed by the plaintiff-respondent with costs throughout. It was held
- G** that since the BDA had failed to issue a notice to the plaintiff-respondent before executing the sale deed on 21.05.1983 in favour of the appellant, the sale made in favour of the appellant was bad in law. Further, it was held that the plaintiff had perfected her title by adverse possession. It was held that the respondent no.1 did not acquire full ownership rights as only a lease-cum-sale deed had been executed in her favour. That BDA continued to be the
- H** owner of the suit property. As per Act, if the property is alienated within 10

years of the allotment, the BDA is entitled to resume possession of the property by issuance of show cause notice to the allottee calling upon him to explain as to why the lease-cum-sale deed and possession certificate be not cancelled. After issuance of such notice and cancellation of the lease-cum-sale deed, BDA can allot it to eligible persons. No action whatsoever was taken in this regard by BDA. That BDA had not assumed possession of the suit property from respondent no.1. There is nothing to show that BDA had put the appellant in possession of the suit property in pursuance of sale deed dated 21.05.1983. That the appellant had failed to prove that she was in possession of suit property. That respondent no.1 continued to be in uninterrupted possession of the property and therefore, had perfected her title by way of adverse possession. It was further held that notice under Section 64 of the Act had been duly issued by the respondent no.1 to BDA and the sale deed dated 21.05.1983 executed by BDA in favour of the appellant was null and void.

Counsels for the parties have been heard at length.

In our considered view, the High Court has erroneously set aside the judgment and decree passed by the trial Court on the ground of non-issuance of notice by the BDA to plaintiff-respondent before executing the sale deed dated 21.05.1983 in favour of the appellant and that the plaintiff-respondent had perfected her title by way of adverse possession. Plea of non-issuance of show cause notice by the BDA before executing the sale deed in favour of the appellant was neither pleaded nor raised before the trial Court. It was raised for the first time before the High Court. No issue had been framed in this respect. The plaintiff did not lead any evidence on this point. On the contrary, the case of the appellant and the BDA was that respondent no.1 was present at the time when the sale deed was executed in favour of the appellant by the BDA on 21.05.1983. DW1, husband of the appellant has specifically deposed that the respondent no.1 was a consenting party to all the transactions and had visited the office of the BDA along with the appellant at the time of the execution of the sale deed dated 21.05.1983. The High Court has not given any reasons to discard the testimony of DW1. This was primarily a question of fact and in the absence of any pleadings and evidence on this point, the High Court has erred in holding that the BDA did not issue a show cause notice to the plaintiff before executing the sale deed in favour of the appellant.

Plea of adverse possession had been taken vaguely in the plaint. No

- A** categorical stand on this point was taken in the plaint. No issue had been framed and seemingly the same was not insisted upon by the plaintiff-respondent. Adverse possession is a question of fact which has to be specifically pleaded and proved. No evidence was adduced by the plaintiff-respondent with regard to adverse possession. Honamma the plaintiff in her own statement did not say that she is in adverse possession of the suit property.
- B** We fail to understand as to how the High Court in the absence of any plea of adverse possession framing of an issue and evidence led on the point could hold that the plaintiff-respondent had perfected her title by way of adverse possession.
- C** The finding recorded by the High Court that the plaintiff-respondent had issued a valid notice under Section 64 to the BDA before filing of the suit is contrary to the evidence present on record. This finding is also set aside.

D This appeal is accepted, judgment and decree passed by the High Court is set aside and that of the trial Court is restored. The suit filed by the plaintiff-respondent is dismissed with costs throughout.

R.P.

Appeal allowed.