



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 27TH DAY OF AUGUST, 2024

BEFORE

THE HON'BLE MR JUSTICE V SRISHANANDA

MISCELLANEOUS SECOND APPEAL No.24 OF 2019 (RO)

BETWEEN:

1. H MAHADEV
S/O G HANUMANTHEGOWDA
MAJOR
R/O HANUMANTHAPURA
TUMKUR ROAD,
KORATAGERE TOWN
TUMKUR DISTRICT

...APPELLANT

(BY SRI G S VENKAT SUBBARAO, ADVOCATE)

AND:

SMT. K N RAJAMMA
W/O LATE I RANGASWAMY
SINCE DEAD BY HER LRS

1. SMT B R MANJULA DEVI
D/O LATE I RANGASWAY
AGED ABOUT 48 YEARS,
R/O HANUMANTHAPURA
KASABA HOBLI,
KORATAGERE TALUK-572 129
TUMKUR DISTRICT

SRI HANUMANTHARAYAPPA
S/O EARANADAIAH
SINCE DEAD BY LRS

2. SMT GANGAMMA
W/O NAGARAJU
AGED ABOUT 35 YEARS,

Digitally
signed by
MALATESH
K C

Location:
HIGH
COURT OF
KARNATAKA



3. SMT ERAKKA
W/O LATE HANUMANTHARAYAPPA
AGED ABOUT 33 YEARS,
4. SMT NAGAMMA
W/O MANJUNATH
AGED ABOUT 31 YEARS,
5. SMT PUTTALINGAMMA
W/O LATE HANUMANTHARAYAPPA
AGED ABOUT 53 YEARS,
6. SRI RAJU
S/O LATE HANUMANTHARAYAPPA
AGED ABOUT 25 YEARS,

(2) TO (6) ARE ALL RESIDENT
NEAR MARAMMA TEMPLE
KORATAGERE TOWN -572 129
TUMKUR DISTRICT

7. SMT SHIVAMMA
W/O NARAYANA
AGED ABOUT 20 YEARS,
R/O RAMAPURA, HOSUR HOBLI
GOWRIBIDANUR TALUK
CHIKKABALLAPURA DISTRICT-562 101

...RESPONDENTS

(SRI HARISH H.V, ADVOCATE FOR R1;

R2, R4, R5 AND R7 ARE SERVED AND UNREPRESENTED;

VIDE ORDER DATED 16.03.2021 APPEAL STANDS DISMISSED
IN SO FAR AS DECEASED R3; VIDE ORDER DATED 10.12.2021
NOTICE TO R6 IS HELD SUFFICIENT)

THIS MSA IS FILED UNDER ORDER 43 RULE 1 OF CPC
AGAINST THE JUDGMENT AND DECREE DATED 08.02.2019
PASSED IN RA.NO.03/2009 ON THE FILE OF THE PRL.SENIOR
CIVIL JUDGE AND JMFC, MADHUGIRI ALLOWING THE APPEAL
AND SETTING ASIDE THE JUDGMENT AND DECREE DATED
22.11.2018 PASSED IN O.S.NO.96/2000 ON THE FILE OF THE
CIVIL JUDGE (J.D) AND JMFC, KORATAGERE.



THIS APPEAL, COMING ON FOR HEARING, THIS DAY,
JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE V SRISHANANDA

ORAL JUDGMENT

Heard Sri G.S.Venkat Subbarao, learned counsel for the appellant and Sri Harish H.V., learned counsel for respondent No.1.

2. Defendant No.1 is in appeal challenging the Judgment passed in R.A.No.3/2009 dated 08th February 2019 on the file of the Prl. Senior Civil Judge and JMFC, Madhugiri, setting aside the judgment and decree dismissing the suit in O.S.No.96/2000 dated 22nd November 2008 on the file of the Civil Judge (Jr.Dn.) and JMFC, Koratagere, filed by the respondent No.1 herein.

3. Facts in brief which are utmost necessary for disposal of the appeal are as under:

Plaintiff filed a suit in O.S.No.96/2000 for the relief of declaration declaring that she is the owner of the immovable property which is a site situated in Kumbara Street, Koratagere Town, bearing Koratagere Pattana Panchayath Khatha



No.1623/1465, measuring 30 ft. x 40 ft. bounded on the East by Road, West by Site of G.S.Lingappa, North by House of Chandrahasa and South by road.

4. Plaintiff further claimed that Appaiahanna is the grandfather of the plaintiff and he had only daughter by name Gangamma who is the mother of the plaintiff. According to plaintiff, suit property belonged to Appaiahanna and after his death, same was succeeded by Gangamma being his only daughter and said Gangamma was in enjoyment of the same.

5. It is further case of the plaintiff that after the death of Gangamma, plaintiff being the only daughter of Gangamma, succeeded to the suit property and also other properties of Gangamma and she is in possession and enjoyment of the same.

6. It is further case of the plaintiff that when the matter stood thus, in the month of July 2003, suit house collapsed on account of heavy rain. Thereafter, property has become a vacant site. It is also contended by plaintiff that she is the owner of 04 feet space towards eastern side of the suit property, in addition to the suit schedule dimension.



7. Plaintiff further contended that defendants being utter strangers to the suit property, took advantage of helplessness of the plaintiff, attempted to interfere with the possession of the suit property. Therefore, suit for declaration and injunction came to be filed.

8. Pursuant to the suit summons, defendants entered appearance and defendant No.2 filed the written statement denying the plaint averments except admitting that the suit property belonged to Appaiahanna and he having only daughter.

9. It is the specific case of defendant No.2 that after the death of Appaiahanna, Gangamma bequeathed the suit property along with land in Sy.No.25 of Hanumanthapura village to the second defendant under registered gift deed dated 26.02.1964 and from the date of gift, it is the second defendant who is the owner of the property.

10. It is also contended by second defendant that second defendant enjoyed the suit property till it was alienated in favour of first defendant on 14.02.1996 through registered sale



deed and therefore, it is defendant No.1 who is in possession and enjoyment of the suit property as on the date of filing of the written statement and therefore, there is no question of any interference nor there was any cause of action.

11. Based on the rival contentions of the parties, four issues were framed initially by the Trial Court and two more additional issues.

12. Parties joined the issues and placed both oral and documentary evidence on record.

13. The Trial Court, after considering the oral and documentary evidence on record, dismissed the suit of the plaintiff holding that the gift deed is valid and therefore, plaintiff has no right, title and interest over the suit property as her mother Gangamma has already executed the registered gift deed in favour of second defendant who in turn sold the property in favour of first defendant.

14. Being aggrieved by the dismissal of the suit, plaintiff filed an appeal before the Appellate Court in R.A. No.3/2009.



15. Learned Judge in the First Appellate Court, after considering the rival contentions of the parties, and after securing the records, allowed the appeal and remitted the matter for fresh disposal, in accordance with law, *inter alia*, holding that the presumption raised by the Trial Court in favour of the defendants in respect of Exs.D.1 and 2 viz., certified copies of sale deed and gift deed respectively, by invoking Section 90 of the Indian Evidence Act is incorrect, inasmuch as Exs.D.1 and 2 were the certified copies and not the original documents.

16. The first appellate Court also observed that the defendant being the beneficiary under the gift deed said to have been executed by Gangamma excluding the daughter who is the plaintiff, should not have been accepted only on the say of D.W.1, without demanding the proof of gift deed by examining the attesor or the scribe. The said order is in question by the first defendant in this appeal.

17. Sri G.S.Venkat Subbarao, learned counsel for the appellant, reiterating the grounds urged in the appeal memorandum, vehemently contended that admittedly the gift



deed is of the year 1964. Therefore, the Trial Court was justified in raising a presumption as is found in Section 90 of the Indian Evidence Act which has been faulted with by the learned Judge in the First Appellate Court resulting in miscarriage of justice and sought for allowing the appeal.

18. He also pointed out that when the matter is pending before this Court, beneficiary under the gift deed is no more and therefore, expecting the proof of gift deed at this distance of time is highly improbable and impermissible. Therefore, sought for allowing the appeal.

19. Per contra, Sri Harish H.V. learned counsel for respondent No.1/plaintiff supports the impugned Judgment.

20. He also contends that admittedly the secondary evidence were placed on record in the form of certified copy and there was no foundation laid by the defendant to accept the secondary evidence especially when the very gift deed is in question and nothing prevented the defendants to produce the original gift deed so as to enable the plaintiff to challenge the validity of the gift deed in proper manner. Therefore, learned Judge has afforded an opportunity for the parties to re-agitate



the issues by remitting the matter to the Trial Court and therefore, the appeal is to be dismissed.

21. Having heard the parties in detail, this Court perused the material on record, meticulously.

22. On such perusal of the material on record, it is crystal clear that there is no dispute that the property earlier belonged to Appaiahanna. It is the case of the plaintiff that she is the grand-daughter of Appaiahanna and she became owner of the suit property being the sole daughter of Gangamma who is the sole daughter of Appaiahanna. Defendant No.2 in his written statement, did not dispute said aspect of the matter.

23. However, what is disputed in the written statement is that Gangamma during her lifetime, gifted the suit property in favour of second defendant by registered gift deed in the year 1964 and thereby second defendant enjoyed the property as his absolute property till he alienated the same by virtue of registered sale deed dated 14.02.1996 in favour of first defendant. Therefore, the contention urged on behalf of the plaintiff that defendants are strangers, is incorrect.



24. Learned Trial Judge has appreciated this aspect of the matter and has taken shelter insofar as proof of gift deed under Section 90 of the Indian Evidence Act and then dismissed the suit.

25. Learned Judge in the First Appellate Court has taken note of the fact that Exs.D.1 and D2 are the certified copies and not the original documents and therefore, proof of the gift deed was not in accordance with law and presumption could not have been invoked as is found in Section 90 of the Indian Evidence Act and has set-aside the judgment and remitted the matter to the Trial Court for fresh disposal in accordance with law.

26. Learned Judge in the First Appellate Court also took into consideration that appropriate issue should have been framed with regard to the sale deed and the gift deed marked at Exs.D.1 and D2 and permitted the parties to place additional evidence on record.

27. In the considered opinion of this Court, taking note of the fact that the title in favour of Appiahanna was not disputed by the parties to the suit and so also relationship of the plaintiff with Gangamma having not been disputed, the only point that



should have been taken note of by both the Courts was whether natural succession has been interfered by alleged gift deed.

28. Admittedly, defendant did not choose to examine any of the attestors to the gift deed nor its scribe. Plaintiff had no chance of questioning the veracity of the gift deed in the absence of original gift deed being produced and marked before the Trial Court.

29. While considering Section 90 of the Indian Evidence Act, the Trial Court failed to note that presumption is with regard to proper execution of the document which is 30 years old and not the proof of execution thereof.

30. More so, the requirement to invoke Section 90 of the Indian Evidence Act is that, the document is in the hand writing of the executant. In the case on hand, since the original gift deed is not produced before the Court, plaintiff lost his chance to question the genuineness and veracity of the gift deed as the Trial Court and the parties did not know whether the gift deed was in the hand writing of Gangamma.



31. Further, on close reading of the gift deed which is the certified copy, it is crystal clear that Gangamma has subscribed her left hand thumb impression on the gift deed. Therefore, presumption as is available under Section 90 of the Indian Evidence Act could not have been *per se* made applicable so as to deny the demand for the proof of Ex.D.2/ gift deed.

32. Said aspect of the matter is not noticed by the learned Trial Judge and therefore, remitting the suit for demanding the proof of Ex.D.2-registered gift deed is just and proper and does not call for interference from this Court that too while exercising power under Order XLIII of the Code of Civil Procedure.

33. Accordingly, appeal needs to be dismissed. Hence, the following:

ORDER

- (i) Appeal stands ***dismissed***.
- (ii) However, it is made clear that subsequent events having been occurred especially, beneficiary under the gift deed is no more, parties are at liberty to place additional



pleadings and additional evidence, if any, on record, insofar as the proof of gift deed is concerned and thereafter, Trial Court shall dispose of the suit, in accordance with law.

- (iii) Taking note of the fact that suit is of the year 2000, learned Trial Judge shall expedite the hearing of the suit as early as possible, not later than 31st March 2025.
- (iv) Needless to observe that the parties shall cooperate for the same.
- (v) Parties shall appear before the Trial Court without further notice on 13th September 2024.
- (vi) Office is directed to return the Trial Court Records forthwith, along with copy of this judgment.

Sd/-
(V SRISHANANDA)
JUDGE