A MAHABOOB

v.

MAKTUMSAB

(Civil Appeal No. 1869 of 2008)

MARCH 10, 2008

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[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

Code of Civil Procedure, 1908 – s.100:

Second appeal – Interference with question of fact – Suit C *for declaration of title in respect of property – Decreed by Trial Court– Order upheld by First Appellate Court – Second appeal – High Court modified the decree passed by Courts below – Justification of – Held: Not justified – High Court erred in interfering on a question of fact which was not permissible under* D *s.100 CPC.*

Appellant filed suit for declaration of title in respect of property, which according to him came to the share of his father pursuant to a partition in the year 1973. The E **defendant contended that the plaintiff-Appellant had wrongly described the property as 7 acres and 10 guntas, when in fact he owned and possessed only 7 acres of land. Trial Court decreed the suit. That order was upheld by the First Appellate Court. On second appeal, High Court modified the judgment and decree of the Courts** F **below holding that the Appellant was owner in possession only to an extent of 7 acres. Questioning the modified decree to the extent of 10 guntas, Appellant has filed the present appeal.**

G **The question which arose for consideration in the present appeal is whether the High Court was justified in interfering with the conclusion arrived at by both the Courts below.**

Allowing the appeal, the Court

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HELD:1.1. The High Court proceeded on the basis that it was during 1985 as per arrangement in Ex.D-11, RS. Nos. 98/2 and 98/3 were equally divided between two brothers i.e. grandfather of the plaintiff and father of the defendant and each got 7 acres to their share, the same was intimated to the village accountant and on that basis entry was made. In other words, the High Court based its reliance as per Ex.D-11. [Para 9] [633-E, F]

1.2. The discussion of the Trial Court on these issues clearly shows that the document Ex.D-11 does not contain the date and as to when the same was returned and intimated to the village accountant. On verification of Ex.D-11, the Trial Court came to the conclusion that it does not bear even the signature and seal of the office of the village accountant. When the plaintiff has totally denied the execution of Ex. D-11 and more particularly when DW.2 who was examined to prove Ex.D-11 has not identified the signature of the plaintiff, the High Court is not justified in relying on Ex.D-11. Hence, the consequent action taken on the basis of Ex.D-11 cannot be accepted. DW.1 is none else than son of the defendant. As rightly observed by the Trial Court, he is aged about 26 years as on February, 1994, whereas partition was taken place in the year 1973. This shows that he was just aged about 7 years in 1973. In such circumstances, it is difficult to believe that he was aware of the transaction that took place in 1973. Even if it is accepted that his statement is correct, he admitted that as per Ex.P-1 the plaintiff's father got 7 acres 10 guntas. The Trial Court has also raised a doubt that there is nothing on record to show that Ex.D-11 and D-13 were given to village accountant with the consent of the plaintiff. Like the Trial Court, the First Appellate Court too raised a doubt about the factum of 1985 partition. The Appellate Court also concluded that as per Ex.P1 the extent of RS No. 98/3 is 7 acres and 10 guntas. In light of the factual conclusion arrived by the Trial Court as well as the First Appellate

Court analyzing the oral and documentary evidence, the High Court committed an error in interfering on a question of fact which was not permissible under Section 100 CPC. [Para 10] [634-A-H]

1.3. It was impermissible for High Court to interfere on a question of fact particularly when both the Courts below rejected Ex.D-11 as not admissible since the same was not properly proved by the defendant. The conclusion arrived at by the High Court is not acceptable and the decision arrived by the Trial Court and the First Appellate Court declaring the plaintiff as the owner in possession of 7.10 acres is acceptable. [Para 10] [635-A, B, C]

P. Chandrasekharan and Ors. v. S. Kanakarajan and Ors. 2007 **(5) SCC 669 and** *Basayya I. Mathad v. Rudrayya S. Mathad,* **2008 (1) Current Tamil Nadu Cases 537 – relied on.**

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 1869 of 2008

From the final Judgment and Order dated 08.07.2005 of the High Court of Karnataka at Bangalore in Regular Second Appeal No. 242 of 2001

M. Khairati, Amit Rana, Zaki Ahmad Khan and Irshad Ahmad for the Appellant.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1) Leave granted.

2) This appeal is directed against the judgment and order dated 08.07.2005 passed by the High Court of Karnataka at Bangalore in Regular Second Appeal No. 242 of 2001 modifying the judgment and decree in part that the plaintiff is owner and in possession only to an extent of 7.00 acres of land.

3) **BRIEF FACTS:**

Mahaboobsab Modinsab Agasimani, plaintiff in O.S. No. 129 of 1990 on the file of the Principal Civil Judge, Hubli is the appellant in the above appeal. The appellant/plaintiff filed the said suit for declaration declaring him as the absolute owner of the suit property bearing RS. No. 93/3 measuring 7 acres and 10 guntas situate at Palikoppa in Hubli. According to the plaintiff, he is the owner and in possession of the suit property which came to the share of his father in the year 1973 in their family adjustment among the brothers. Subsequently, father of the plaintiff and others got their shares entered vide ME No. 480. The same has not been challenged by the defendant so far. The defendant is the owner and in possession of R.S. No. 98/2 measuring 6 acres 30 guntas since 1973. Both the lands are adjacent to one another. Though the suit property measuring 7 acres 10 guntas, there was an entry in the record of rights to the extent of 7 acres and 30 guntas. The plaintiff, by filing an application to the Revenue Authority, got it rectified as 7 acres 10 guntas. The defendant got the extent of his land entered as 7 acres instead 6 acres 30 guntas. This entry made by the Revenue Authority was illegal and without the knowledge of the plaintiff. No notice was issued to him. Right from the date of partition in the year 1973, defendant is cultivating the land measuring 6 acres 30 guntas and the plaintiff is cultivating the land measuring 7 acres and 10 guntas. Therefore, the order made by the ADLR in PH No. 192/87 was illegal and contrary to the provisions of the Karnataka Land Revenue Code. Therefore, certification of ME No. 781 was illegal and not binding on the plaintiff. Though variations were made in the record of rights, the plaintiff continued to enjoy 7 acres and 10 guntas, whereas the defendant is in actual possession of only 6 acres and 30 guntas. Since the defendant started denying the title of the plaintiff to the entire extent, the plaintiff constrained to file the suit for declaration of his title.

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4) Defendant resisted the suit, *inter alia*, contending in his written statement that the plaintiff has wrongly described the property as 7 acres and 10 guntas. RS.No. 98 originally belonged

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A to the father of the defendant, Hasansab and his brothers. During 1973, there was an oral partition of RS No. 98 and accordingly M.E. No. 480 came to be certified. As per the oral partition, RS No. 98/1 measuring 6 acres 30 guntas was given to Nabisab A Agasimani, RS No. 98/2 measuring 6 acres 30 guntas was B given to Dawalsab Agasimani and RS No. 98/3 measuring 7 acres 10 guntas was given to father of the defendant. It was further stated that subsequently Dawalsab Agasimani to whom RS No. 98/2 was allotted, given up his claim in respect of that land and thus the said RS No. 98/2 was allotted to the share of C defendant's father. Therefore, RS No. 98/2 also came to the share of defendant's father. Accordingly, M.E. No. 600 came to be made on 01.05.1980. In this way, defendant and his brothers became the joint owners of RS No. 98/2 and 98/3. Subsequently, all the five sons of Hasansab partitioned these properties in the year 1985. In that partition, RS No. 98/2 measuring 7 acres fallen D to the share of defendant and RS No. 98/3 measuring 7 acres fallen to the share of the plaintiff. In this way, M.E. No. 712 came to be certified on 20.01.1985. In short, according to the defendant, he has been the owner in possession of 7 acres in RS No. 98/2 and the plaintiff is the owner in possession of 7 E acres in RS No. 98/3.

5) On the above pleadings, plaintiff himself was examined as PW. 1 and one Lalsab as PW.2 apart from exhibiting documents, namely, Ex.P-1 to P-16. On the side of the defendant, F his son has been examined as DW.1 and one Dawalsab Agasimani as DW.2 apart from marking Ex.D-1 to D-16 in support of his defence. The trial Judge, after framing necessary issues and considering the relevant materials, decreed the suit declaring the plaintiff as the absolute owner of suit property G measuring 7 acres 10 guntas in RS No. 98/3 of Palikoppa village.

6) Aggrieved by the aforesaid judgment and decree of the trial Court, the defendant preferred Regular Appeal No. 66 of 1994 before the First Addl. District Judge, Dharwad. The First H Appellate Court, after framing necessary points for

consideration, accepted the findings rendered by the trial Court and dismissed the appeal on 06.02.2001. Not satisfied with the judgment and decree of both the Courts below, the unsuccessful defendant filed Regular Second Appeal No. 242 of 2001 before the High Court of Karnataka at Bangalore under Section 100 CPC. The High Court, by impugned judgment dated 08.07.2005, modified the judgment and decree of the Courts below and held that the plaintiff is owner in possession only to an extent of 7.00 acres. Questioning the modified decree to the extent of 10 guntas, the plaintiff, after obtaining special leave, has filed the present appeal.

7) Heard Mr. M. Khairati, learned counsel appearing for the appellant. None appeared for the respondent.

8) The only point for consideration in this appeal is whether the High Court is justified in interfering with the conclusion arrived at by both the Courts below?

9) In view of narration of the pleadings of both parties in earlier paragraphs, there is no need to advert to the same once again. The dispute relates to 0.10 acres or 10 guntas of land in Sy.No.98. The High Court proceeded on the basis that it was during 1985 as per arrangement in Ex.D-11, RS. Nos. 98/2 and 98/3 were equally divided between two brothers i.e. grandfather of the plaintiff and father of the defendant and each got 7 acres to their share, the same was intimated to the village accountant and on that basis entry was made. In other words, the High Court based its reliance as per Ex.D-11. Learned counsel appearing for the appellant has brought to our notice that the High Court failed to appreciate that there has been only one partition in the year 1973 among the brothers of the defendant and father of the plaintiff, based on the same the plaintiff remained in possession of the property which came in the share of his father in 1973. In other words, after partition in the year 1973, the plaintiff continued to be in possession of 7.10 acres. Both the trial Court as well as the First Appellate Court discussed the issue in detail and rightly came to the conclusion that the plaintiff

A is the absolute owner of 7.10 acres and not 7 acres as alleged and erroneously concluded by the High Court.

10) It is relevant to point out that issue Nos.1-3 framed by the trial Court relate to the main question. The discussion of the trial Court on these issues clearly shows that the document Ex.D-
B 11 does not contain the date and as to when the same was returned and intimated to the village accountant. On verification of Ex.D-11, the trial Court came to the conclusion that it does not bear even the signature and seal of the office of the village accountant of Palikoppa. DW.2, who was examined to prove
C Ex.D-11, has stated that the plaintiff has signed Ex.D-11, did not identify the signature of the plaintiff. When the plaintiff has totally denied the execution of Ex. D-11 and more particularly when DW.2 who was examined to prove Ex.D-11 has not identified the signature of the plaintiff, the High Court is not
D justified in relying on Ex.D-11. That being our conclusion, as rightly concluded by the trial Court, the consequent action taken on the basis of Ex.D-11 cannot be accepted. DW.1 is none else than son of the defendant. As rightly observed by the trial Court, he is aged about 26 years as on February, 1994, whereas
E partition was taken place in the year 1973. This shows that he was just aged about 7 years in 1973. In such circumstances, it is difficult to believe that he was aware of the transaction that took place in 1973. Even if we accept his statement is correct, he admitted that as per Ex.P-1 the plaintiff's father got 7 acres
F 10 guntas. The trial Court has also raised a doubt that there is nothing on record to show that Ex.D-11 and D-13 were given to village accountant with the consent of the plaintiff. Like that of the trial Court, the First Appellate Court raised a doubt about the factum of 1985 partition. The Appellate Court also concluded
G that as per Ex.P1 the extent of RS No. 98/3 is 7 acres and 10 guntas. In the light of the factual conclusion arrived by the trial Court as well as the First Appellate Court analyzing the oral and documentary evidence, we are of the view that the High Court has committed an error in interfering on a question of fact which
H was not permissible under Section 100 CPC vide ***P.***

Chandrasekharan and Others vs. ***S. Kanakarajan and Others***, 2007 (5) SCC 669 and ***Basayya I. Mathad*** vs. ***Rudrayya S. Mathad*** in Civil Appeal No. 1349 of 2001 dated 24.01.2008 [2008 (1) Current Tamil Nadu Cases 537]. It is settled law by this Court, that, it is impermissible for High Court to interfere on a question of fact particularly when both the Courts below rejected Ex.D-11 as not admissible since the same was not properly proved by the defendant. The conclusion arrived at by the High Court is not acceptable and the decision arrived by the trial Court and the First Appellate Court declaring the plaintiff as the owner in possession of 7.10 acres is acceptable.

11) In the light of the above discussion, the conclusion arrived at by the High Court cannot be sustained and the same is set aside. The civil appeal is allowed. No costs.

B.B.B. Appeal allowed.