

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10<sup>TH</sup> DAY OF JULY 2019

BEFORE

THE HON'BLE MRS. JUSTICE K.S.MUDAGAL

**REGULAR SECOND APPEAL NO.85/2015**

**BETWEEN:**

V SUDARSHAN  
S/O LATE VENKATAKRISHNAIAH,  
AGED ABOUT 54 YEARS,  
R/AT NO.143, 5<sup>TH</sup> BLOCK,  
DODDABOMMASANDRA,  
BANGALORE-560 097. ... APPELLANT

(BY SRI. RAGHAVENDRA RAO K, ADVOCATE)

**AND**

1. V MOHAN  
S/O LATE VENKATAKRISHNAIAH,  
AGED ABOUT 49 YEARS,  
R/AT NO.526/C, 1<sup>ST</sup> FLOOR,  
1<sup>ST</sup> MAIN, 'A' BLOCK,  
NEXT TO 'E' ZONE,  
DR. RAJKUMAR ROAD,  
RAJAJINAGAR,  
BANGALORE-560 010.
2. SRINIVASA MURTHY,  
S/O LATE VENKATAKRISHNAIAH,  
AGED ABOUT 52 YEARS,  
R/AT NO.14, 1<sup>ST</sup> 'B' CROSS,  
1<sup>ST</sup> MAIN ROAD, DEFENCE COLONY,  
HESARAGHATTE MAIN ROAD,  
BANGALORE-560 073.
3. JAGADISH,  
S/O LATE VENKATAKRISHNAIAH,  
AGED ABOUT 47 YEARS,

R/AT NO.496, 12<sup>TH</sup> 'C' CROSS,  
VYALIKAVALL, MALLESHWARAM,  
BANGALORE-560 003.

4. SMT. SUSHEELAMMA,  
S/O LATE VENKATAKRISHNAIAH,  
R/AT NO.2607, 12<sup>TH</sup> CROSS,  
6<sup>TH</sup> MAIN, R.P.C. LAYOUT,  
VIJAYANAGAR,  
BANGALORE-560 040.
5. HAMSA KUMARI,  
W/O B CHANDRA,  
AGED ABOUT 42 YEARS,  
R/AT NEAR GANESHA TEMPLE,  
4<sup>TH</sup> CROSS, 5<sup>TH</sup> MAIN,  
C.H.V. BLOCK, GANGANAGAR,  
BANGALORE-560 032.
6. SRI NANDA GOPALA REDDY,  
S/O LATE KODANDARAMA REDDY,  
MAJOR, R/AT 188/32/1,  
BHASHYAM CIRCLE,  
SADASHIVANAGAR,  
BANGALORE-560 080.
7. SMT. AMBIKA,  
W/O B N VENUGOPAL,  
AGED ABOUT 46 YEARS,  
R/AT KODIGANHALLI,  
BETTAHALASUR POST,  
JALA HOBBI,  
BANGALORE NORTH TALUK-562 157
8. SRI GANESH RAO,  
S/O LATE ANAND RAO,  
AGED ABOUT 51 YEARS,  
R/AT C/O SRINIVASACHAR,  
VIDYANAGAR CROSS,  
BETTAHALASUR POST,  
JALA HOBBI,  
BANGALORE NORTH TALUK-562 157.
9. SRI KANNAIAH,  
S/O RAMACHANDRA,

SRI HIRALAL,  
S/O RAMACHANDRA,  
AGED ABOUT 32 YEARS,

RESPONDENT NO.9 & 10 ARE  
R/AT SONNAPPANAHALLI,  
JALA HOBLI,  
BANGALORE NORTH TALUK.

10. SMT. PREMA,  
W/O KRISHNAPPA,  
AGED ABOUT 39 YEARS,  
R/AT SONNAPPANAHALLI,  
JALA HOBLI,  
BANGALORE NORTH TALUK. ... RESPONDENTS

(BY SRI. VIJAYA SHEKARA GOWDA V, ADVOCATE  
FOR C/R1 & R5 – R11  
R2 TO R4 SERVED UNREPRESENTED)

THIS R.S.A. IS FILED UNDER SECTION 100 OF CPC AGAINST THE JUDGMENT AND DECREE DATED 11.11.2014 PASSED IN R.A.NO.15022/2014 ON THE FILE OF THE V ADDL. DISTRICT & SESSIONS JUDGE, DEVANAHALLI, BENGALURU RURAL DISTRICT DISMISSING THE APPEAL AND CONFIRMING THE JUDGMENT AND DECREE DATED 22.02.2014 PASSED IN O.S.NO.111/2006 ON THE FILE OF THE SENIOR CIVIL JUDGE & JMFC, DEVANAHALLI.

THIS R.S.A. COMING ON FOR HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING:

### **J U D G M E N T**

This second appeal of plaintiff No.1 arises out of judgment and decree dated 11.11.2014 passed by V Additional District & Sessions Judge, Devanahalli in R.A.No.15022/2014.

2. By the impugned judgment and decree, First Appellate Court dismissed the appeal of the appellant and confirmed the judgment and decree dated 22.02.2014 in O.S.No.111/2006 passed by the Senior Civil Judge & JMFC, Devanahalli and also rejected the application filed by the appellant under Order 41 Rule 27 of CPC to adduce additional evidence.

3. By the judgment in O.S.No.111/2006, trial Court had dismissed the suit of plaintiffs for partition and separate possession of their 3/6<sup>th</sup> share in the suit schedule property.

4. Appellant was plaintiff No.1. Respondents No.3 and 4 were plaintiffs No.2 and 4 and their mother Smt. Rajamma was plaintiff No.3, Respondent No.1 was defendant No.1 and respondents No.4 to 11 were defendants No.2 to 9 before the trial Court. For the purpose of convenience, parties will be referred to henceforth by their ranks before the trial Court.

5. Subject matter of the suit was the land bearing Sy.No.11/1 of Kadiganahalli Village, Jala Hobli, Bengaluru North Taluk in all measuring 1 acre 24 guntas. Plaintiffs No.1, 2, 4 and defendant No.1 were children of plaintiff No.3 Smt.Rajamma and her husband Venkatakrishnaiah. The subject matter of the suit was purchased on 06.12.1989 from one Gopal Bhatia for a consideration of Rs.90,000/-. The sale deed stood in the name of defendant No.1.

6. Plaintiff's case in brief was as follows:

Venkatakrishnaiah and his friend Chhunchu Reddy negotiated for the purchase of the said property from Gopal Bhatia. On request of Venkatakrishnaiah, later Chhunchu Reddy withdrew receiving the advance amount paid by him. Venkatakrishnaiah paid entire sale consideration and got executed sale deed in the name of defendant No.1. Defendant No.1 was only an ostensible owner and Venkatakrishnaiah was the absolute and true owner of the property. Venkatakrishnaiah died on 02.09.1993. On death of

Venkatakrishnaiah, plaintiffs are entitled to equal share with defendant No.1 in the suit schedule property.

7. Defendant No.1 sold the property to defendant Nos.2 to 4 during the year 1997 and 1999. Initially defendant Nos.1 and 2 alone were impleaded in the case. In view of alienations effected in favour of defendant Nos.3 to 9, subsequently defendant Nos.3 to 9 were impleaded in the suit.

8. Defence of defendant No.1 was as follows:

Initiation of sale transaction by Venkatakrishnaiah and Chhunchu Reddy, payment of sale consideration by Venkatakrishnaiah was denied. It was denied that Venkatakrishnaiah was the absolute owner of the property. It was denied that defendant No.1 was the only name lending purchaser in the sale deed. Rs.30,000/- from his father was received as loan and he discharged that loan. He was the absolute owner of the suit schedule property and plaintiffs have no share in the said property.

9. The purchasers contested the suit claiming that they are the bonafide purchasers for value.

10. On the basis of such pleadings, the trial Court framed the following issues:

- 1) Whether the plaintiffs prove that the suit schedule properties are the properties acquired by Venkatakrishnaiah in the name of 1<sup>st</sup> defendant Mohana under the circumstances stated in paras.4 and 6 of the plaint ?
- 2) Whether the plaintiffs further prove that consideration amount in fact paid by Venkatakrishnaiah from his account No.1557 of Bank of India, to account No.2306 of 1<sup>st</sup> defendant in the same bank ?
- 3) Whether the plaintiffs further prove that the suit schedule properties are the property acquired by their father late. Venkatakrishnaiah and they are entitled 3/6<sup>th</sup> share in the suit schedule property ?
- 4) Whether the defendant No.1 proves that the suit schedule property is his self acquired property having purchased the same under the registered sale deed in the year 1990 and plaintiffs have no right over the suit schedule property ?
- 5) What order or decree ?

**ADDITIONAL ISSUES:**

1) Whether the defendant No.4 proves that, he is the bonafide purchaser in possession of written statement schedule property on the basis of the sale deed dated 30.06.1997 as contended in para No.3 to 7 of the written statement ?

2) Whether the defendant No.3 proves that, he is a bonafide purchaser of 3 guntas out of converted land measuring 8 guntas in Sy.No.11/1 under registered sale deed dated 20-06-2003 from the 1<sup>st</sup> defendant ?

11. Plaintiff No.1 was examined as PW.1 and on his behalf Ex.P1 to Ex.P20 were marked. The first defendant was examined as DW.1 and on behalf of the defendant, Ex.D1 to Ex.D18 were marked. Other defendants did not adduce evidence.

12. The trial Court after hearing the parties dismissed the suit on the following grounds:-

(i) Defendant No.1 borrowed Rs.30,000/- from Venkatakrishnaiah as loan and he repaid that under receipt Ex.D5.

(ii) Plaintiffs failed to prove the payment of the other sum as alleged by them.



(iii) Plaintiffs failed to prove that Venkatakrishnaiah purchased the property and the first defendant was only the name lending purchaser.

(iv) Plaintiffs failed to prove that Ex.D5 is not a genuine document.

13. During the pendency of suit, plaintiff No.3 died. Plaintiffs No.2 and 4 did not challenge the judgment and decree of the trial Court. Only the first plaintiff challenged the said judgment and decree before V Additional District & Sessions Judge, Devanahalli in R.A. No.15022/2014.

14. Before the First Appellate Court, the first plaintiff filed I.A.No.4 under Order 41 Rule 27 of CPC to produce Bank Passbook of Bank of India, Bettahalasur Branch as additional evidence. The First Appellate Court on hearing the parties, by the impugned judgment and decree dismissed the appeal and the application concurring with the findings of the trial Court.

15. The First Appellate Court further held that plaintiffs did not adduce any evidence in proof of Venkatakrishnaiah and Chhunchu Reddy initiating the purchase of the property and Chhunchu Reddy paying some amount and repayment of that by Venkatakrishnaiah, etc. The First Appellate Court did not accept the reasons given by the plaintiffs for non production of the Bank Passbook at the trial stage and dismissed the appeal.

16. This Court admitted the appeal to consider the following substantial questions of law:

(i) Were the Courts below justified in dismissing the suit of the plaintiff on the basis of Ex.D.5, when Ex.D.5 has not complied the requirement as contemplated under Section 67 of the Indian Evidence Act ?

(ii) Were the Courts below justified in dismissing the suit of the plaintiff, in the facts and circumstances of the present case ?

17. Sri Raghavendra Rao K, learned Counsel appearing for appellant seeks to assail the impugned

judgments and decrees of the Courts below on the following grounds:

a) Defendant No.1 admitted receipt of Rs.30,000/- and claimed discharge of the same under Ex.D5 cash receipt. But he did not chose to examine any body to prove the alleged transaction under Ex.D5 and the handwriting and signature of Venakatakrisnaiah, though the plaintiffs disputed those facts. The Courts below overlooked Section 67 of the Indian Evidence Act, 1872 ('the Evidence Act' for short).

b) The Bank Passbook of Venkatakrisnaiah produced at Ex.P2 showed that proximate to the date of sale under Ex.P3 Venkatakrisnaiah paid Rs.22,500/- and Rs.8,000/- which makes good the balance consideration in the sale transaction.

c) The 1<sup>st</sup> defendant himself did not contend that suit was bad for non inclusion of the other family properties. The First Appellate Court itself made out a case for defendant No.1 in that regard.

d) The Courts below overlooked the admissions of the defendant.

18. In support of his contention he seeks to rely upon the following judgments:-

1. Nagindas Ramdas v. Dalpatram locharam alias Brijramand Others (AIR 1974 SC 471).
2. Ratanlal v. Sundarabai Govardhandas Samsuka [(2018) 11 SCC 119].
3. LIC of India v. Ram Pal Singh Bisen [(2010) 4 SCC 491].
4. Neelawwa v. Shivawwa (ILR 1988 Karnataka 2761).

19. Per contra, Sri Vijaya Shekara Gowda V, learned Counsel for the respondents seeks to support the impugned judgments and decrees of the Courts below on the following grounds:

a) Sale deed dated 06.12.1989 nowhere states that the purchaser was Venkatakrishnaiah or sale consideration was paid by him. The case set up by the plaintiffs was contrary to the terms of the document relied upon by them only.

b) They did not examine Chhunchu Reddy or Gopal Bhatia to prove that Venkatakrishnaiah or Chhunchu Reddy paid the sale consideration and initiated the sale negotiation nor they proved that the real purchaser was Venkatakrishnaiah. The evidence of PW.1 was full of ignorance and inconsistencies.

c) After purchasing the property, revenue entries were effected in favour of defendant No.1. He mortgaged the property and borrowed the loan and enjoyed the property as absolute owner of the property all along.

d) Venkatakrishnaiah till his death never claimed ownership of the property nor challenged revenue entries or loan transactions made by defendant No.1.

e) Considering all the aforesaid facts and circumstances, the Courts below rightly rejected the claim of the plaintiffs.

f) Since plaintiff Nos.2 and 4 did not challenge the decree, the decree attained finality and that cannot be split and reversed on the appeal by the first plaintiff.

20. This being a second appeal under Section 100 of CPC, this Court cannot substitute its opinion to the findings of the Courts below unless it is shown that the judgments and decrees of the Courts below suffer perversity. It is settled principle of law that under the question of fact the First Appellate Court is the last Court.

21. The Hon'ble Supreme Court in **Gurnam Singh v. Lehna Singh** (2019 SCC Online SC 374) relying upon the earlier judgment of the Supreme Court in *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar* [(1999) 3 SCC 722] in para 26 of the judgment held that invoking Section 100 of C.P.C, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being:

(i) Contrary to the mandatory provisions of the applicable law; or

- (ii) Contrary to the law as pronounced by the Apex Court; or
- (iii) Based on in-admissible evidence or no evidence.

22. In light of the aforesaid ratio, now this Court has to see whether the judgments and decrees of the Courts below are contrary to the mandatory provisions of applicable law or the law pronounced by the Apex Court or based on in-admissible evidence or no evidence.

23. There is no dispute that the sale deed in respect of plaint schedule property stands in the name of defendant No.1 Mohan. There is also no dispute that plaintiffs and defendant Nos.1 and 2 are the children of Venkatakrishnaiah.

24. According to the plaintiffs the sale negotiations were initiated by Venkatakrishnaiah and after paying advance consideration of Rs.30,000/-, he could not pool the rest of funds i.e., remaining Rs.60,000/-. Therefore, he sought help of his friend Chhunchu Reddy. They further claimed that Chhunchu

Reddy and Venkatakrishnaiah later together paid Rs.50,000/- on 13.11.1989 and Venkatakrishnaiah reimbursed the amount paid by Chhunchu Reddy and his persuasion Chhunchu Reddy withdrew from the sale transaction and Venkatakrishnaiah paid the balance consideration of Rs.10,000/-, got executed the sale deed in the name of defendant No.1. Defendant No.1 denied all such contentions. He claimed that he received only Rs.30,000/- from his father as loan for purchasing the property and repaid the same under the receipt Ex.D5.

25. Sections 101 to 103 of the Evidence Act which deal with burden of proof state that burden of proving a fact lies on the person who wishes the Court to believe the existence of such fact and who fails if no evidence at all is given on either side in proof of such assertion.

26. Therefore, in view of Sections 101 to 103 of the Evidence Act, the initial burden of proving the fact that Venkatakrishnaiah intended to purchase the



property for himself, he negotiated with the vendors, paid advance consideration of Rs.30,000/- to the vendors lie upon the plaintiffs. Similarly, the burden of proving the fact that Venkatakrishnaiah sought help of his friend Chhunchu Reddy and Chhunchu Reddy had also intended to join as purchaser and paid part of the sale consideration, later he withdrew at the request of Venkatakrishnaiah was also on the plaintiffs. Further, the initial burden of proving the fact that after purchase of the property under Ex.P3 the sale deed, Venkatakrishnaiah enjoyed the property as exclusive owner thereof lies on the plaintiffs. Only on discharging such burden, the question whether defendant No.1 proved execution of Ex.D5 by Venkatakrishnaiah towards receipt of Rs.30,000/- arises.

27. To substantiate their contentions plaintiffs did not examine the vendor, his power of attorney holder who executed the document, Chhunchu Reddy, or the attester to the sale deed in question. It was not their case that those witnesses were not available.

Further after property was purchased, in the revenue records name of defendant No.1 was mutated. Evidence on record shows that defendant No.1 availed loan from P.L.D. Bank creating charge on the suit property.

28. After purchasing the property, Venkatakrishnaiah lived for three years. Up to his death on 02.09.1993, he never objected mutation entries in favour of defendant No.1 or defendant No.1 availing loan and creating charge on the suit property. These facts showed that Venkatakrishnaiah never exercised power of ownership over suit schedule property.

29. Except payment of Rs.30,000/- by Venkatakrishnaiah, defendant No.1 denied all other contentions. According to defendant No.1, Rs.30,000/- was availed by him as loan and repaid it at Ex.D5. Plaintiffs contend that defendant No.1 failed to prove the Ex.D5 alleged discharge receipt dated 20.06.1992 though that was disputed. It is true that though defendant No.1 did not examine anybody to prove Ex.D5, the trial Court accepted the said document on

the ground that plaintiffs did not prove that the signature and handwriting in Ex.D5 was not that of Venkatakrishnaiah. The First Appellate Court exercising the powers under Section 73 of the Evidence Act compared the alleged signature of Venkatakrishnaiah on Ex.D5 with the signature on Ex.P10 and concurred with the finding of the trial Court with reference to Ex.D5.

30. Of-course, the burden of proving Ex.D5 by examining the author or anybody acquainted with the handwriting of author of Ex.D5 as required under Section 67 of the Evidence Act was on the defendants and that was not discharged. However, initially plaintiffs were required to prove the intention of Venkatakrishnaiah to purchase and enjoy the property as his absolute property. He was not alive to speak to that fact. He died in 1993. After seven years of the death of Venkatakrishnaiah, plaintiffs came before the Court claiming that Venkatakrishnaiah purchased the property. Even assuming that Rs.30,000/- was paid to defendant No.1 by Venkatakrishnaiah or any

subsequent payment were made to him, that itself does not confer title on Venkatakrishnaiah. At the most, he had the right to recover the amount paid by him to defendant No.1 which he did not do during his life time.

31. In view of the discussions made above regarding the failure of the plaintiffs to discharge their burden of proof, failure of defendant No.1 in proving Ex.D5 was inconsequential and that did not vitiate judgments and decrees of the Courts below.

Substantial questions of law are answered accordingly. The appeal is dismissed with costs.

**Sd/-  
JUDGE**

PYR/KG/KSR