
(2013) 08 KAR CK 0153

In the Karnataka High Court

Case No : Regular First Appeal No. 676 of 2010

Abdul Basheer and Mohammed Rafeeq

APPELLANT

Vs

The State of Karnataka and Others

RESPONDENT

Date of Decision : 06-08-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 1, Order 3 Rule 2

Citation : (2013) 4 AKR 729 : (2013) ILR (Kar) 4435

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : M.S. Rejendra Prasad, for M/s. S. Keerthikar Associates, for the Appellant; I.G. Gachchinamath, Advocate for R-4, Sri. D.L. Jagadeesh, Advocate for R-5 and R-6 and Sri. Gopal Bilalmane, Government Pleader for R-1 to R-3, for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—This appeal is by the plaintiffs. The parties are referred to by their rank before the trial court for the sake of convenience.

The suit was filed for the relief of declaration and injunction.

The plaintiffs claimed to be the owners of the suit properties bearing No. 2, 3, 4 and 5 (Old no. 19, 20, 21 and 22), Mohd. Hayath Street, Narasimharaja Road Cross, Bangalore. The same was said to have been purchased from Mohammed Mazherulla, under a sale deed dated 5-12-1974. It was accompanied by a deed of agreement to reconvey the said property, also executed on the same day. It was agreed that the reconveyance was to be made within two years from the said date, subject to payment of the very sale price. However, Mazherulla had failed to abide by the condition, on the other hand, he is said to have enabled the plaintiffs to obtain change of khatha, in respect of the properties, in their favour—while giving his assent to the application made by the plaintiffs, to the competent authority. The plaintiffs claimed that they had thus become the absolute owners of the suit properties and the tenants in occupation of the same were also paying

rents to them.

It is the case of the plaintiffs that Mazherulla had died on 16-9-1980, and after his death, it was alleged by the plaintiffs, that his widow, Tajunnisa, the fifth defendant had, with the assistance of persons inimically disposed towards the plaintiffs had created a power of attorney in her favour, purportedly executed by the plaintiffs, by forging their signatures and on the strength of the same had executed a Reconveyance Deed in favour of her two sons, Mohammed Samiulla and Mohammed Barkathulla, as on 24-10-1998, with the active connivance of the Sub-registrar, the third defendant. It was also stated that on the basis of the said document, the khatha in respect of the property had also been transferred in favour of the said persons.

It is in this background that the plaintiffs had got issued legal notices and attempted to lodge criminal cases and since the same were not entertained, the present suit was filed.

2. Only defendants no. 5 and 6 had contested the suit. Barkathulla was said to have been murdered on 3-5-1999. He was not made a party to the suit.

The plaint allegations were denied by the above said defendants. It was contended that the suit properties belonged to the grand father of the sixth defendant and after him, the father of Defendant no. 6 had succeeded to the same, under whom the defendants 5 and 6 were claiming.

3. On the basis of the above pleadings, the following issues were framed:

1. Whether the plaintiffs prove that they are the absolute owners in lawful possession of the suit schedule property?
2. Whether the plaintiffs further prove that 5th defendant by playing fraud has forged the signatures of the plaintiffs and obtained Notarized General Power of Attorney in her favour, and executed reconveyance deed, and "Wapas Krayapatra" in the name of her two sons with the assistance of 3rd defendant?
3. Whether the defendants 4 and 5 prove that the suit is bad for misjoinder of parties?
4. Whether the defendants 4 and 5 prove that the suit is not properly valued and the claim of the plaintiffs is barred by Limitation?
5. Whether the plaintiffs are entitled to the relief as sought in prayer (a) and (b) of the plaint?
6. Whether the plaintiffs are entitled to the relief of permanent injunction as prayed in the plaint?
7. To what order and decree.

However, at the instance of the plaintiffs the said issues were reframed thus:

1. Whether the plaintiffs prove that they are the absolute owners in lawful possession of the suit schedule property?
2. Whether the plaintiffs further prove that 5th defendant by playing fraud has forged the signatures of the plaintiffs and obtained notarized General Power of Attorney in her favour and executed reconveyance deed and "Wapas Krayapatra" in the name of her two sons with the assistance of 3rd defendant?
3. Whether the defendants 5 and 6 prove that the suit is bad for misjoinder of parties?
4. Whether the defendants 5 and 6 prove that the suit is not properly valued and the claim of the plaintiffs is barred by limitation?
5. Whether the plaintiffs are entitled to the relief as sought in prayer (a) and (b) of the plaint?
6. Whether the plaintiffs are entitled to the relief of permanent injunction as prayed in the plaint?
7. To what order and decree?

The plaintiffs had tendered evidence through their Power of attorney holder, examined as PW-1. They did not choose to enter the witness box. On behalf of the defendants, defendant no. 6 had been examined as a witness.

The court below had answered all the issues in the negative and dismissed the suit. It is that which is in challenge in this appeal.

4. The learned Senior Advocate, Shri M.S. Rajendra Prasad, appearing for the counsel for the plaintiffs, contends that the trial court had failed to recast the issues properly. In that, since the plaintiffs had chosen to delete the relief of declaration of title to the property, Issue no. 1 had to be recast appropriately to restrict the issue to the question whether the plaintiffs were in possession of the suit property. The said issue being retained in its original form had misled the plaintiffs in not tendering appropriate evidence.

It is contended that the plaintiffs had been put in possession of the suit properties by virtue of a registered sale deed in their favour and the tenancy of the tenants in occupation of the suit properties was attorned in their favour and such symbolic possession through their tenants was possession of the owners in the eye of law and in the absence of any material to demonstrate that possession had been redelivered to Mazherulla during his life time or in favour of the defendants-the trial court ought to have held that the plaintiffs were in possession of the suit properties.

It is also contended that the theory of a transaction in the nature of a mortgage by way of conditional sale, sought to be canvassed was not tenable as any such transaction ought to incorporate such a term for reconveyance, in terms of Section 58C of the Transfer of Property Act, 1882 (Hereinafter referred to as the

"TP Act", for brevity) and therefore the registered sale deed, which is silent as to any reconveyance, could not be claimed to be supplemented by an unregistered deed of agreement to reconvey the subject property.

It is contended that the trial court could not have brushed aside the evidence of P.W. 1 on the ground that the said witness had no personal knowledge of the transaction, which was not an aspect disputed at all by the contesting defendants. It is urged that the trial court could not also draw an adverse inference against the plaintiffs for not stepping into the witness stand without assigning acceptable reasons.

5. On the, other hand, the learned counsel for the respondents would seek to point out that the plaintiffs had willfully chosen to delete the prayer for declaration of their title to the property, thereby narrowing the scope of enquiry.

Secondly, that the court below has arrived at a categorical finding on the admission of the witness for the plaintiffs that the sale consideration towards the sale deed under which the plaintiffs had claimed to have purchased the suit property was only partly paid, as a cheque issued for a substantial part of the price could not be encashed by the defendants and thereby had given scope for subsequent execution of documents, including a general power of attorney in favour of defendant no. 5, the widow of Mazherulla, enabling her to convey the property in favour of her sons.

Thirdly, that the serious allegations of fraud and forgery on the part of the defendants was required to be pleaded with the necessary particulars and was to be established with cogent evidence in support of the allegations, which was not forthcoming, as observed by the court below.

Further, it is contended that the plaintiffs were only claiming symbolic possession as the suit properties had continued to be in the occupation of tenants at all times prior to the suit and thereafter and hence the plea as regards the plaintiffs having obtained possession could not be denied the relief of retaining their possession was not tenable, in the absence of the plaintiffs having failed to establish their claim over the property.

In the light of the above and on an examination of the record, it is evident that the having regard to the Issues that were framed, the burden was heavy on the plaintiffs to establish the serious allegations against the defendants. Therefore, one important aspect that arises for consideration in the above appeal is whether the court below was justified in negating the case of the plaintiffs, among other grounds, on the ground that the general power of attorney who had tendered evidence for the plaintiffs was not competent to speak for the plaintiffs and that the plaintiffs not having taken the witness stand was fatal to their case.

Though the trial court has not referred to the legal basis on which it could be said that the evidence of the power of attorney holder of the plaintiffs by itself could not sustain the case of the plaintiffs, the law is well settled and we may therefore

usefully refer to the case law.

In Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others,

The apex court after considering the divergent views taken by the High courts on the question of Power of Attorney (See: Shambhu Dutt Shastri Vs. State of Rajasthan and Others, Ram Prasad Vs. Hari Narain and Others, Dr. Pradeep Mohanbay Vs. Minguel Carlos Dias, , and Shri Humberto Luis and another Vs. Shri Floriano Armando Luis and another, has held thus:

13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "act" done by the power-of attorney holder in exercise of power ""granted by the instrument. The term "acts" would not include deposing in place and instead of the principal In other words, if the power-of attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

In Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha, while relying on the decision in Janki Vasdeo Bhojwani, supra, the apex court has summarized for convenience, the position as to who should give evidence in regard to matters involving personal knowledge.

18 We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the

transaction. This frequently happens in case of principals carrying on business through authorised managers/attorney-holder or persons residing abroad managing their affairs through their attorney-holders.

(e) where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.

(f) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son-daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

The above decisions have been relied upon and followed in the case of S. Kesari Hanuman Goud Vs. Anjum Jehan and Others,

Hence given the circumstances of the case on hand, it was imperative for the plaintiffs have tendered evidence in support of their case as regards the several documents and transactions that were personally executed by them or alleged to have been executed by them and in support of the serious allegations of fraud and forgery with reference to particular documents and hence there was virtually no evidence available on behalf of the plaintiffs in support of their case. Hence the finding of the trial court on this aspect of the matter cannot be faulted. The suit would fail on that ground alone.

Hence the appeal is dismissed. No order as to costs.