

(2015) 03 KAR CK 0242

In the Karnataka High Court

Case No : Regular First Appeal No. 2064 of 2010

Fathima Bi and Others

APPELLANT

Vs

Maimunnissa and Others

RESPONDENT

Date of Decision : 18-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25

Citation : (2015) 03 KAR CK 0242

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : Mohammed Althaff, for the Appellant; C.N. Kamath, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Anand Byrareddy, J.—Heard learned counsel for the appellant and the respondents.

2. The appellant was the first defendant before the Trial Court.

3. It was the plaintiffs case that she was the daughter of Mariyambi. Mariyambi was initially married to one Sulaiman Sahab and they had a daughter Ameerbi. Ameerbi died in 1959. She predeceased her mother. However, she was married and had five children namely defendant Nos. 1 to 5.

4. It transpires that Sulaiman, the first husband of Manyambi died. Manyambi thereafter married Gousesab and they had a daughter Maimunisa who is the plaintiff Manyambi is said to have died on 05.02.1963.

5. It is the plaintiffs case that the property described in the suit schedule, namely property bearing No. 30 (old No. 109), 4th cross, Valmiki Nagar Range, 45th division, Bangalore belonged to the mother of the plaintiff Manyambi; she is said to have acquired the same under a registered sale deed dated 17.04.1930 and on purchase of the suit property the khata and revenue records were transferred

in her name and the plaintiff and her mother continued in possession of the property without any disturbance. The mother of the defendants died during the year 1959 and they did not lay any claim over the suit property and the defendants were not even residing in Bangalore. However, on subsequent requests made by them, the plaintiff had permitted them to reside in the schedule property and while other portions were let out to one Sabirabi. Subsequent to the death of the plaintiffs mother, the plaintiff had approached Bangalore City Corporation seeking change of khata in her name. It is then that she is said to have found that the khata in respect of property was changed in the name of the plaintiff as on 06.03.2000. Subsequent to the change of khata in the name of the plaintiff, the first defendant was said to be residing in the schedule premises along with her brothers namely defendant Nos. 2 to 5, she had hence raised an objection before the Palike for change of khata and on the basis of the said objections statement, officials of the Corporation are said to have issued notices dated 11.01.2001 and 29.01.2001 as regards an enquiry and by an order dated 22.03.2001, after conducting the enquiry, directed the plaintiff and defendants to approach the Civil Court insofar as the dispute as to the khata of the property was concerned and ordered that till then the khata of the schedule property be continued as "Holder Khata" and an endorsement was issued in this regard and the khata issued earlier was said to have been revoked.

6. It also transpires that insofar as the tenant on the premises was concerned defendant No. 1 had, with an ulterior motive to a create right over the property, instituted eviction proceedings before the Court of Small Causes, Bangalore, in HRC No. 710/1984 against Sabirabi. The same was said to have been dismissed for non prosecution. Similarly, a suit for recovery of money was filed claiming arrears of rent against the very tenant, which was also dismissed holding that defendant No. 1 had failed to prove that she was the land lord of the premises. It transpires that yet another eviction petition was filed in HRC No. 1813/1997 against the very tenant and which was pending as on the date of suit and was subsequently decreed and the tenant was evicted from the premises.

7. The plaintiff contended that the suit property was the self acquired property of late Mariyambi, the mother of the plaintiff and since the mother of defendant No. 1 had predeceased her mother Manyambi, the plaintiff would be the only legal heir in accordance with Mohammedan Law and even though the defendants were residing in the schedule property, on permission given by the plaintiff, it would not confer any right on the defendants and defendant No. 1 making hectic efforts to assert claim over the suit property was mala fide. Hence, it was contended that defendant No. 1 and others had no right over the suit property and that the plaintiff was the only legal heir to her mother and that she had succeeded to her estate and hence the suit was filed with the prayer to declare the plaintiff as the only legal heir and successor of the vacant suit property.

8. On suit summons being served on the respondents, defendant No. 1 had filed her written statement denying the plaint averments and contended that

Mariyambi had three properties at Doddamavalli and out of which one property was given to the plaintiff under a Hiba and another was sold to the plaintiff and the third property was leased out to a third party which was under the control of the plaintiff. That the defendants had collected the details of the said properties and would produce the same. But the plaintiff who was in possession and enjoyment of the three properties had set her sight on the suit schedule property which was the sole property given by Manyambi under a Hiba which was granted in January 1962 and simultaneously had delivered possession of the suit schedule property to the first defendant herein who was her grand daughter, born to Ameerbi. It was her claim that the Hiba executed was not challenged over several decades and that the defendant had continued in possession of the suit schedule property until her death and thereafter her legal heirs had come on record. It was also claimed that the khata and other revenue entries were standing in the name of the first defendant which was in the lawful possession of the defendant and that she had been paying the property taxes over 30 years and copies of the same were produced. The first defendant had also produced a copy of the khata extract standing in her name in support of her claim and it was also stated that there were tenants in occupation of portions of the property, namely, Tippu and Wazir against whom the first defendant had instituted eviction proceedings under the Karnataka Rent Control Act, 1961 and those petitions were allowed and an order passed in one of the petitions in HRC No. 3433/1980 by the Court of Small Causes, Bangalore. In this manner it was denied that the plaintiff had any right over the property and the contention that the first defendant's case instituted against one Sabirabi had been dismissed on the ground of the petition not being maintainable was incorrect. And that the said petition had been dismissed for non-prosecution. The first defendant thereafter filed yet another eviction petition which was decreed, in HRC No. 1813/1997 and Sabirabi was also evicted from the premises. These documents would without any doubt prove that she had continued in possession as the owner claiming under the Hiba granted by her grand mother in the year 1962 and it had been unquestioned till the suit was filed.

9. Incidentally the eviction petitions which were allowed at the instance of the first defendant has been challenged in revision petitions which were again dismissed before this Court in it's revisional jurisdiction, in HRRP No. 109/2005, dated 14.06.2006 and those matters had attained finality. It is also stated that the plaintiff had filed a civil suit in O.S. No. 5159/1986 for permanent injunction against the first defendant in respect of the very property and that suit was dismissed for non prosecution. In any event the relief of injunction having been negated by default the plaintiff is precluded from seeking the relief as a landlord in the present suit. In this manner the suit of the plaintiff was sought to be negated. Defendant No. 3 who is the bother of the first defendant had filed written statement to contend that he would be entitled to a share of the property, by succession.

10. On the basis of the above pleadings the Court below had framed the

following issues:

- "1. Whether the plaintiff proves that she is the only legal heir and successor of her mother late Mariyambi to succeed the suit schedule property?
2. Whether the 1st defendant proves that she is the absolute owner of the suit schedule property?
3. Whether plaintiff proves that the defendants are residing in the suit schedule property with permission of the plaintiff as contended in para 11 of the plaint?
4. Whether plaintiff is entitled for the reliefs sought?
5. What order or decree?"

11. It is to be noticed from the above issues framed, that a significant area of dispute, as to whether the plaintiff could claim the suit property by succession in the face of contentions that the suit property had been granted by way of Hiba in favour of the first defendant as early as in the year 1962 whether would enable the plaintiff to claim by way of succession, if the property stood vested in the first defendant as early as in the year 1962 is a moot question. No such issue has been framed in the face of categorical pleadings by the first defendant and the material evidence produced to demonstrate that she had continued in possession and exercised rights of ownership in filing eviction petitions against tenants in occupation of the premises and having got them vacated and having also established that she was paying taxes in respect of the properties in question and that the khata stood in her name and it was undisputed till the plaintiff raised a controversy before the local authorities seeking that the khata had to be transferred in her favour in view of her having succeeded to the property in question.

12. In Mohammedan Law there are three essentials of an oral gift known as Hiba.

"i) That there should be a declaration of gift by the donor

ii) The acceptance of the gift by the donee to the donor

iii) Delivery of possession of the subject property by the donor to the donee."

13. Insofar as the burden of proof of such a gift is concerned, in the instant case, it is the claim of the first defendant that there was a Hiba or a gift made by her grand mother in January 1962 in the presence of two witnesses. However, when the matter went to trial the evidence that could be produced by the defendant was apparently her own evidence along with other incidental documents to show that she had continued in possession over the years and continued to be in possession even as on the date of suit which is not denied by the plaintiff But it was asserted by her to be permissive possession.

14. Therefore, this was a serious controversy as to whether the material evidence on record was sufficient to demonstrate that the continued possession over the years and the exercise of ownership by the first defendant with

reference to the documents on record was sufficient to dislodge the claim of the plaintiff or whether the plaintiff could yet claim that she was the sole successor by virtue of operation of law. The Court below has not framed an issue as to the scope and effect of the Hiba set up by the plaintiff. Without arriving at such a finding, the Court having considered the case from the point of view of the plaintiff has certainly resulted in a miscarriage of justice. Therefore, on the face of it, and in the light of the pleadings that were categorically urged by the defendant and the supporting evidence that was tendered has been overlooked by the Trial Court. It is hence necessary to frame an issue in terms of Order XLI Rule 25 of the Code of Civil Procedure, 1908, as follows:

"Whether the defendant No. 1 proves that the suit property was granted to her under a HIBA in January 1962 by Mariyambi and whether by virtue of the same she had become the absolute owner of the property" 15. In view of the death of the first defendant who is now represented by her legal heirs, it would be for the legal heirs to tender any additional evidence if necessary and for the plaintiff to meet those contentions by leading additional evidence if so warranted. The Trial Court shall try such an issue and return the evidence to this Court together with its findings thereon and the reasons there for, within a period of six months from the date of receipt of the record. The appeal is disposed of awaiting such further findings by the Trial Court. The Trial Court shall proceed in accordance with the above directions and resubmit the record thereafter. The Registry is directed to remit the record to the Trial Court forthwith.