

(2017) 06 KAR CK 0053
In the Karnataka High Court
Case No : 1801 of 2011

Leo Fernandes and others

APPELLANT

Vs

Jhon Fernandis and others

RESPONDENT

Date of Decision : 07-06-2017

Acts Referred:

Citation : (2017) 06 KAR CK 0053

Hon'ble Judges : L. Narayana Swamy

Bench : SINGLE BENCH

Advocate : Vyasa Rao K.S., Harikrishna S. Holla

Judgement

1. Plaintiff has filed a suit for partition and separate possession in O.S.No.83/1993 on the file of the Additional Civil Judge (Sr. Dn.). The suit came to be decreed on 17.09.2009, against which the appellants, who are the defendants preferred Regular Appeal in R.A.No.52/2009. The same also came to be dismissed on 16.06.2011, by confirming the order passed by the trial Court, against which this appeal is filed.

2. The plaintiff is the younger brother of the family. It is the case of the plaintiff that the members of the family namely, sisters and mother have executed a release deed dated 10.12.2007, in his favour. The plaintiff executed a General Power of Attorney in favour of his wife. On the service of notice, the defendants have entered appearance. Defendant No. 3 placed ex parte. Defendant Nos. 6 and 7 were absent and defendant Nos. 1, 2, 4, 5, 8, 9, 10, 11 were represented through their Advocates. The appellants are the defendant Nos. 2 to 4. They have filed written statement denying the fact of execution of the registered release deed dated 10.12.1979. In order to substantiate the case, Power of attorney holder of the plaintiff was examined as P.W.1 and she is a witness to the document marked at Ex.P3. Defendant No. 11 was examined as D.W.1 and documents were marked from Exs.P1 to P9, of which Power of Attorney and Conversion Order are at Exs.P1 and P2 and Exs.P4 to P9 are RTCs. Caveat, Lawyer notice and notice sent by Srinivas Achar, Advocate are at Exs.D1 to D4.

After hearing arguments of respective counsel, the trial Court has decreed the suit and the same has been confirmed by the Appellate Court.

3. Learned counsel for the appellant submitted that the document Ex.P3-Release Deed relied upon by the plaintiff was not proved. Though in the written statement the defendants have stated that Ex.P3 which has been executed is forgery, fraud, undue influence and coercion committed by the plaintiff, he has proved the case examining himself in support of his case. Further GPA Holder, who was examined as PW.1 who is none other than wife of plaintiff, is having knowledge of Ex.P3. If at all in order to prove the case, the plaintiff alone is the best person. In support of the case, the learned counsel has also referred to the judgment in the case of Man Kaur v. Hartar Singh Sangha, reported in (2010)10 SCC 512 : (2010 AIR SCW 6198); in which it has held in Head Note "C" as under: "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"

and further he has also referred to the judgment in the case of Vidyadhar v. Manikrao, reported in (1999)3 SCC 573 : AIR 1999 SC 1441, para 16); in which it is held in para 14 as under :

"where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct".

4. The appellants have also filed I.A.No.1/2016 for additional evidence. Learned counsel read-out para Nos. 4 and 5 of the affidavit. It is stated in the affidavit that the appellants have not instructed their counsel to file a memo and it is filed by the counsel on his own behalf. Since, the defendants have not instructed the counsel to file the said memo, they have to make oral evidence on their side.

5. Learned counsel for the respondents prays for dismissal of the appeal on the following grounds: Firstly, defendant Nos. 2 to 4 were not entered into the witness box. Except filing written statement, they have not examined the plaintiff. Defendant No. 11 was examined as D.W.1. Lateron, filed a memo on 30.06.2009 which was recorded in the Order sheet to the effect that it is available on record that " defendant Nos. 10 and 11 are present and filed a memo and they are giving up their claim and they have no objection to decree the same." Such memo was taken on record on behalf of defendant No. 11. Power of attorney holder of the plaintiff was examined as P.W.1 and witnessed the document which is marked at Ex.P3. Sisters and mother of the plaintiff, who appeared before the Sub-Registrar have signed the document, D.W.1, who is defendant No. 11 in the suit has identified her signature in Ex.P3. When the signature itself has been identified by D.W.1, the question of ignoring the same does not arise. The Courts below by referring to several decisions as well as the decisions of the Hon"ble Supreme Court, have dismissed the suit. Therefore, the learned counsel prays for dismissal of the appeal.

6. This Court formulated the substantial question of law on 25.09.2012, which is as follows: "Whether the Courts below are right in holding that the execution of release deed at Ex. P.3 has been proved in accordance with the law?"

7. Heard the learned counsel for both sides.

8. It is seen that Ex.P3 release deed was executed by the sisters and mother in the year 1979 and released the property in favour of the plaintiff. On the basis of the same, partition has taken place in respect of the property. In the written statement, defendant Nos. 2 and 4 contended that they have not examined and have not entered the witness box. It is specifically stated in written statement that Ex.P3 was a forged document and the same has been executed under fraud, undue influence and coercion. This is the specific allegation alleged against the plaintiffs. He should have proved his case by adducing evidence before the Courts below. The appellants alleged that Ex.P3 was a forged document, fraud has been committed and same has been executed under undue influence and coercion, but they have not made out their case before the Court. The trial Court has considered the case by referring to the decision in the case of T. N. Narayanachar and others v. V. S. Venkatanathan and others, reported in 1961 (39) Mys LJ 794; it is held as under: "The execution of the document cannot be held to be proved by the fact of the registration itself. What Section 60(2) Registration Act provides is that the registration certificate is proof that the document was duly registered and not that it was duly executed."

The trial Judge also referred to the decision reported in AIR 1963 Mysore 335; wherein it is held as under:

"According to the scheme of the Registration Act, the registration of a document shall be deemed to be complete under Section 61(2) of the act only when it is registered as provided by Sections 58 to 61(1) and not otherwise. The requirements of Sections 60 and 61(1) of the Act are essential requirement and cannot be recorded as merely ministerial act."

About the conduct of the appellants, who were not entered the witness box, the trial Court has referred to the decision in AIR 2006 MP 58; in which it is held as under:

"even otherwise party who had knowledge of material fact of case and has not entered in witness box without sufficient reasons warrants sufficient circumstances to draw adverse inference against him as per provisions of Section 114 of the Evidence Act."

9. The evidence of P.W.1 was relied upon by the appellants for the purpose that she was not having knowledge of execution of Ex.P3. The beneficiary of Ex.P3 has not entered the witness box. P.W.1 in her evidence has deposed that she does not know for what reason, under what circumstances and for what purpose the said Release Deed was executed. Her husband only knows about the said fact and it is stated that Ex.P3 has not at all been proved. When a specific allegation

alleged against the plaintiff, it is the duty of the plaintiff to prove the same by adducing evidence. I do not find any force in the submission made by the appellants.

10. The appellants also relied on affidavit evidence filed on behalf of defendant No. 11 which is marked as D.W.1. Defendant No. 11 deposed that she knows about case since, 1993 and she has denied the document of release in favour of the plaintiff and she signs in English and she identified her signature in Ex.P3(J) and stated that the plaintiff has cheated her. This is contrary to her own statement. Though she identifies her signature, she has deposed contrary to her statement. But in the subsequent paras, she has deposed that at the time of execution of Ex.P3 before the Registrar, all the sisters were present. Again at the end of the said para, they have denied the execution of Ex.P3 and the plaintiff has deceived us. This piece of evidence is relied upon by the appellants. This case discarded only for the reason that in the memo filed by D.W.1, who is defendant No. 11, she said that she has no objection to decree the suit. This evidence proves the case of the defendants that Ex.P3 is not proved. D.W.1 herself has stated that the sisters were present before the Registrar and Ex.P3 was executed in the year 1979. The judgment referred to by the appellants in respect of the evidence for the purpose of proving. The appellants referred to the decision in (2010) 10 SCC 512 : (2010 AIR SCW 6198), in which, the Hon''ble Supreme Court has referred to the decision in (1999) 3 SCC 573 : (AIR 1999 SC 1441); it is held that: "where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct".

11. This could be relevant for the present circumstance, where the plaintiff is totally unknown to the case and power of attorney holder is none other than wife of the plaintiff. The document Ex.P3 is executed in the year 1979. She has deposed that it was well within the knowledge of her husband. That cannot be taken for the purpose of inference. Consequently, PWs.1, 2 and D.W.1 are consistently deposed to the fact of the execution.

12. This Court in the case of Bhimappa and Ors. v. Allisab and Ors., reported in AIR 2006 Kar 231 has held in para 11 as under: "11. The proposition of law about the competence of a person to testify as a witness is governed by Section 118 of the Evidence Act. Giving evidence before a Court of law is an act within the meaning of the said provision. However, everyone is not entitled or competent to give evidence as witness before a Court unless one fulfils the requirements of the qualifications envisaged in Section 118 of the Evidence Act. There is no express bar made in the provisions of CPC to debar the Power of Attorney to be examined as a witness on behalf of the parties to the proceedings. Power of Attorney is a competent witness and is entitled to appear as such. His evidence cannot be refused to be taken into consideration on the ground that the parties to the suit i.e., plaintiff or defendant do not choose to appear as witness

in the witness box. The question, whether the General Power of Attorney Holder of a party can be competent witness on behalf of a party has to be answered in the light of Section 118 of the Evidence Act. The Power of Attorney Holder of a party, only on the ground that he holds the power of attorney, cannot be said to be in the category of persons who are incapable of being witness as provided by Section 118 of the Evidence Act. Whether such, Power of Attorney Holder has personal, knowledge about the matters in controversy, may be a question which can be thrashed out by cross-examining him and if it is found that the Power of Attorney Holder has no personal knowledge about the facts in controversy, the evidentiary value of his deposition may be determined, but that has nothing to do with the competence of such a Power of Attorney Holder to depose before a Court or a Judicial Tribunal as a competent witness."

13. From referring to the citation referred by both the learned counsel, what has to be mentioned is that the General Power of Attorney holder can be examined as a witness. It depends on the particular case and the GPA holder is not altogether a different person, who is none other than the wife of the plaintiff. It shows, she was within the knowledge of executing Ex.P3. This is not the case to be remanded back to the Court below. I do not find any substantial grounds raised by the appellants. Accordingly, I pass the following order: Appeal is dismissed. The substantial question of law raised in this appeal is answered in the affirmative.

I.A. No. 1/2016 filed for further evidence does not arise in the matter for the reason that these appellants No. 2 and 4 did not enter the witness box. They did not instruct their counsel to file such a memo for oral evidence. If that is the case, they have to proceed against the counsel, who had filed such memo without their consent. Under these circumstances, paras 4 and 5 of the affidavit filed in support of I.A. No. 1/2016 cannot be accepted. On this ground, I.A. No. 1/2016 is also rejected. Appeal dismissed.