

(2017) 04 KAR CK 0119
In the Karnataka High Court
Case No : 1280 of 2005

Lt. Col. R.J. Shanthraj (Retd.)

APPELLANT

Vs

Defence Colony Co-operative Housing Society Ltd.

RESPONDENT

Date of Decision : 27-04-2017

Acts Referred:

Citation : (2017) 04 KAR CK 0119

Hon'ble Judges : L. Narayana Swamy

Bench : SINGLE BENCH

Advocate : Udaya Holla, M.L. Dayananda Kumar, M.A. Sebastian, Shanmukha

Judgement

1. Respondent-plaintiff filed suit for declaration declaring that the sale deed executed for appellant-defendant is null, void and illegal; and the ground urged by the respondent-plaintiff is that the sale executed by the officer on behalf of the plaintiff-Society has no authority to execute the sale deed and what was executed in favour of the appellant-defendant is not a sale deed. Accordingly, he had filed a suit with a prayer to cancel the sale deed executed in favour of the defendant. The Court below, by its order dated 14th June 2005 decreed the suit, against which this appeal is filed by the defendant.

2. The learned Senior Counsel appearing for the counsel for the appellant-defendant submits that the Society itself has executed the sale deed on 2nd January 1976 and thereafter he has put up construction and is residing therein. Under this circumstance, the question of cancellation of sale deed does not arise. Secondly, he submits that under the bye-laws of the Society which was relied upon by the plaintiff as Exhibit P2 and recorded by the defendant-appellant, the Secretary of the Society who was competent and the sale deed executed is also by the Secretary of the Society. Under the circumstance, there is no illegality in the execution of sale deed and on this ground he submits to dismiss the suit. In support of his case, he submits that the Vice President of the Society himself has been examined as PW1 and marked documents as Exhibits P1 to P5, viz. Resolution dated 22nd September 2003, copy of by-law of the Society, certified

copy of the sale deed, office copy of the proceedings of Board of Directors of the Plaintiff-Society; and the office copy of the appointment order, respectively. The defendant was examined as DW1 and got marked documents as per exhibits D1 to D8. D1 is the order of Registrar and allotment letter, office copy of the letter of acceptance, office copy of the covering letter dated 10th January 1976, Katha, tax paid receipts and the approved plan. The Trial Court, after hearing both sides and after having examined the documents produced on behalf of the respective parties, held that the sale deed executed in favour of the defendant-appellant by the Secretary is not a competent person of the Society and hence decreed the suit by its order dated 14th June 2005 and declared that the Sale deed executed by the Society in favour of the defendant-appellant on 2nd January 1976 and Registered in the Office of the Sub-Registrar, Shivajinagar, Bangalore is void and not binding on the plaintiff; and further, the defendant-appellant was directed to vacate and hand over the schedule premises within a period of ninety days from the said date. Against the same, this appeal is preferred and while issuance of Notice, this Court granted stay.

3. The learned Senior Counsel further submits though the appellant-defendant is not a Member of the Society, but it is an undisputed fact that the he was serving in the Army and considering the services of the appellant-defendant in the Army, the plaintiff-society executed the sale-deed in favour of the appellant-defendant. The sale deed has been executed by the Secretary then who represented the Society, and it is submitted that the bye-law is silent as to specifying the person who has to execute the sale deed and under these circumstances, the Secretary who is competent to execute the sale deed has executed the same and accordingly, there is no error or illegality. In order to substantiate his claim, the learned senior counsel referred the bye-law of the Society and submits that as per Clause 2(c) of the bye-law, sites have been formed by the Defence Colony House Building Co-operative Society and sites would be allotted exclusively for the Members who served the Indian Army. As per the said Clause, since the appellant was also serving in the Indian Army, site has been allotted to him. As per bye-law 34, the Secretary of the Co-operative Society, in consultation with the President of the Society, shall appoint a paid Secretary who shall be an officer of the Co-operative department. As per the said clause, the plaintiff, who claims to be the Secretary of the Society and who only executed the sale deed in favour of the defendant and under this circumstance, no illegality could be found from it since Clause 34 of the bye-law provides for executing of sale deed. Clause 43 of the bye-law further provides for allotment of house-sites to its members. In this regard, the learned Senior Counsel submits that except the appellant has not become the member of the Society, he was eligible to get the member-ship, since the very Society was registered only for the benefit of the persons who serve the Indian Army and who had retired from their Service serving Indian Army and under the circumstance, there is absolutely no illegality in the execution of Sale deed by the Secretary who is competent to execute the sale deed under the bye-law for execution of sale deed.

4. In support of his claim, the learned Senior Counsel relied upon the judgment of Hon"ble Supreme Court in the case of BINNY MILL LABOUR WELFARE HOUSE BUILDING COOPERATIVE SOCIETY LIJMITED v. D.R. MRUTHYUNJAYA ARADHYA reported in ILR 2008 KAR 2245 and placing reliance upon paragraph 32 of the judgment he submits that the sale was for a valid consideration; there is no prohibition to sell a site in favour of non-members; and therefore, the sale deed executed by the Society in favour of the non-members cannot be said to be void. In the instant case also, the Society was constituted for the benefit of the persons of Indian Army and the appellant is entitled to get membership in the Society.

5. Secondly, the learned senior counsel submits that the sale deed was executed by the Secretary who is competent under Clause 34 of the bye-law of the society. He also referred to the judgment of the Hon"ble Supreme Court in the case of MRF LIMITED v. MANOHAR PARRIKAR AND OTHERS and other cases reported in (2010)11 SCC 374 and placing reliance on paragraph 111 of the judgment he submits that as per the doctrine of the indoor management, persons dealing with the Company are entitled to be presumed that internal requirements prescribed in the memorandum of articles have been properly observed. With reference to the same, the learned senior counsel submits that under clause 34 of the bye-law, it is the Secretary who is competent to execute the sale deed and it is the internal arrangement made as per the bye-law that approval from the President of the Society is to be obtained. Whether the Secretary has taken the consent of the President or not is not forthcoming. However, consenting is not mandatory for the purpose of executing the sale deed. Once the sale deed is executed and is registered as per the provisions of Registration Act, it will not permit the Society to take "U" turn on the ground that the Secretary has not taken the consent of the President and under the circumstance, the doctrine of indoor management is applicable to the instant case.

6. The learned Senior Counsel further placed reliance on the judgment of the Hon"ble Supreme Court in the case of GOPAL KRISHNAJI KETKAR V. MOHAMED HAJI LATIF AND OTHERS reported in AIR 1968 SC 1413 and by referring to paragraph 5 of the judgment he submits that the Society is in possession of best evidence, viz. the proceedings ledger or a book, but the same has not been produced before the Court in order to take a ground that the Secretary has not taken consent from the President for the purpose of registration. He submits that this is an internal arrangement made within the Society and whether obtaining consent from the President or not is not for the appellant to take the ground. It is further submitted that non-production of ledger or proceedings book to fortify the case for having obtained the consent of President, is bad in law. On the same ground, the learned senior counsel relied upon the judgment of the Hon"ble Supreme Court in the case of B.H. INAMDAR v. B.F. SWAMY reported in ILR 1991 KAR 1654 and referred to paragraph 10 of the judgment and submitted that unless a Board, by a Resolution, authorizes filing of Suit, the Secretary on his own cannot institute a Suit; and it is not forthcoming whether Resolution has

been passed by the Society to institute a Suit challenging the sale deed and under these circumstances, the learned judge should have dismissed the suit.

7. On the other hand, the learned counsel appearing for the respondent-plaintiff submits to dismiss the appeal. He submits that it is the Secretary, who is the paid Secretary has executed the sale deed as per Clause 34 of the bye-law, but it is the elected Secretary or the Office bearer of the Society should have executed the sale deed, under the circumstance, what has been executed is bad in law. Secondly, it submitted that admittedly, the appellant is not the member of the Society and as per the bye-law, the sites could only be allotted to its members and contrary to the said bye-law, the Secretary, who is basically not competent, has executed the sale deed. Under this circumstance, the sale deed is to be cancelled and is not binding on the appellant and accordingly he justified the order passed by the court below. He also refers to bye-law 2(c) of the bye-laws of the Society, which provides for allotment of sites to its members only and the appellant is not a member of the Society. Hence, there is no infirmity in the order of the court below.

8. Heard the learned counsel for the parties. The points that arise for consideration in this appeal are: 1. Whether the Court below committed an error in decreeing the suit? and

2. Whether the plaintiff has proved the fact that the Society has passed resolution resolving to file a suit?

9. My answer would be as follows: The undisputed fact is that the appellant is not a member of the Society, however, the Society has been constituted only for the benefit of the persons who is serving in the Indian Army or retired after serving the Indian Army. Admittedly, the appellant had served the Indian Army since 1963 and retired. While he was serving in the Army, he made an application and pursuant to the application made by him, he has been allotted a site and at the time of allotment, if at all it was the condition that only members would be allotted the sites, the Society should have rejected the application of the appellant. Further, having considered the application and ascertaining the fact that the appellant was serving in the Indian Army and having allotted the site, permitting him to put up a construction and thereafter, when he is in possession of the same and when he is residing in the premises for decades now, at this juncture, the plaintiff even without producing the resolution resolving to file a suit, the Secretary preferring a suit is bad in law. The principle of estoppel very much applies in this case when the plaintiff allotted the site and that too after examining his application and satisfying itself that the beneficiary of the site is serving in the Indian Army and that too on the said ground it has allotted the site, thereafter, it is impermissible for the Society to take a "U" turn for the reason that in order to prefer a suit on behalf of the Society there should have been an authorization authorizing the Secretary to prefer a suit. Under the circumstance, filing of suit without there being any authorization or without producing any resolution, it is contrary to law and fact.

10. The Hon"ble Supreme Court in the case of GOPAL KRISHNAJI KETKAR (supra), in the course of judgment has observed thus: "On behalf of the appellant reference was made to the Area Book, Ex. 66 of the year 1890. The entry shows the name of Laxmibai widow of Govind Gopal Ketkar under the heading (name of the person). Exhibit 67 is the entry from the Phalani Book for the year 1897 and shows the land as "Kilyacha Dongar" and under the column is shown the name of Laxmibai widow of Govind Gopal. Exhibit 68 is of the same year from the revision Phalani containing Similar entry with the map attached. In Exhibit 70 the name of Laxmibai is shown as "Khatedar" for the year 1906. In the remarks column there is an entry "one built well, one pakka built masjid, one Dargah, one tomb". Exhibit 71 is an entry for the year 1915 from Akar Phod Patrak and in the column of "Kabjedat" the name of Rukminibai Hari appears with regard to plot 134. Thereafter, in the record of rights for the year 1913, Ex. 76, the name of the predecessor of the appellant is shown. On the basis of these entries it was submitted by Mr. Gokhale that the ownership of the plot was with the appellant and not with the Dargah. But there are important circumstances in this case which indicate that the appellant is not the owner of Survey plot No. 134. Exhibits 64 and 65 are significant in this connection. Exhibit 64 is an entry from the "Sud" in Marathi for the year 1858 in connection with Survey plot No. 134 (Revisional Survey Number). The original Survey number of this plot was 24 and it was known as "Kilyacha Dongar". The total area is shown to be 249 acres and 24 Gunthas. It is shown as "Khalsa" land. Kharaba is shown as 89 acres 24 Gunthas and the balance of the area is shown as 160 acres. In the last column the name of the cultivator is not mentioned but it is shown as "Khapachi". It is significant that the name of the Ketkar family is absent from this record. No convincing reason was furnished on behalf of the appellant to show why his name was not entered in the "Sud". It is also important to notice that the appellant has furnished no documentary evidence to show how his family acquired title to the land from the earliest time; there is no sanad or grant produced by the appellant to show that he had acquired title to the land. It further appears that the appellant's family did not assert any title to the land at the time of the survey made in 1858; otherwise there is no reason why its name was not entered in the "Sud" of the year 1858. It is true that there are a number of entries subsequent to the year 1890 and 1897 in which the Ketkar family is shown as the "Khatedar" or the occupant but these entries are not of much significance since the Ketkar family was in the fiduciary position of a Manager of the Dargah and was lawfully in possession of Survey plot 134 in that capacity. There is also another important circumstance that the appellant has no lands of his own near plot No. 134 and the nearest lands he owns are in Bandhanwadi which are admittedly 3-1/2 to 4 miles away from the top of the hill. There is also the important admission made by the appellant in the course of his evidence that there are 2 or 3 tombs behind the Musaferkhana. He stated further that "there is no cemetery or burial ground in Survey No. 134". But this evidence is in direct conflict with the statement of the appellant in the previous case that "Round about the Dargah many people die every year.... Anyone that died there,

whether Hindu, Muslim or Parsee if he has no heirs is buried there". He also conceded that there is one public tank known as "Chasmyachi Vihir" near the Dargah and there are 5 wells near the Dargah and five boundary "Aranas" about one mile from the Dargah. Lastly, reference should be made to the important circumstance that the appellant has not produced the account of the Dargah income. In the course of his evidence the appellant admitted that he was enjoying the income of plot No. 134 but he did not produce any accounts to substantiate his contention. He also admitted that "he had got record of the Dargah income and that account was kept separately." But the appellant has not produced either his own accounts or the account of the Dargah to show as to how the income from plot No. 134 was dealt with. Mr. Gokhale, however, argued that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of plot No. 134. We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In *Murugesam Pillai v. Manichavasaka Pandara*(1) Lord Shaw observed as follows:

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to, the, Courts the best material for its decision. With regard to third parties, this may be right enough-they have no responsibility for the conduct of the suit but with regard to the parties to the suit it is, in their Lordships' opinion an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.""

11. In the instant case, the Vice President of the Society has got himself examined as PW1 and in his evidence he has stated that the second defendant before the Trial Court who was the Ex-officio Member President of the plaintiff-Society, despite having no power to deal with the property of the plaintiff society and without the approval of the Board of Directors, executed the sale deed in favour of the appellant herein. The defendant No.1 who got himself examined as DW1, both in his written statement as well as in his examination-in-chief in his evidence as stated that he was not a member of the plaintiff-Society. He has also stated that with a desire to obtain a site in the layout formed by the plaintiff-Society, he registered his name in the waiting list and when his option was sought for he gave his acceptance for allotment and site was registered in his name on 2nd January 1976.

12. In the case of *B.H. INAMDAR* (supra) the Hon''ble Supreme Court has

observed that the authority to file a suit is quite different from the authority to represent the Society in a suit which has been validly instituted. In the instant case, the plaintiff, who is the custodian and who in possession of the resolution ledger or book, having not produced the same, it is impermissible to file a suit. It is useful to extract paragraph 10 of the judgment which reads thus: "10. Article 17 of the Memorandum of Association provides that the Secretary of the Association for the time being or any other person authorised by the Board in that behalf shall represent the Association in any legal proceeding that may be instituted by or against the Association. Article 17 therefore deals with a situation where a decision has already been taken to file or defend a suit. Once the suit is properly instituted, Article 17 authorises the Secretary to represent the Society in that suit. The authority to file a suit is quite different from the authority to represent the Society in a suit which has been validly instituted. In my view, Articles 10 and 17 read together do not substantiate the plea that the Secretary has been authorised to institute suits on behalf of the Society. The decision to file or defend suits must be taken by the Board itself since the power to administer the affairs and conduct the activities of the association vests in the Board. It is important that power to institute or defend suits must vest in the Board, it is open to the Secretary or President or Principal Secretary to file or not to file a suit resulting in abuse of power. Where the Society has a just claim, the Secretary may not file a suit. Conversely, where the Society has a sound defence, the Secretary may concede the claim in Court. With a view to avoid such eventualities Article 10 of the Memorandum of Association vests power in the Board itself to file or defend suits. In my view, therefore, unless the Board by a resolution authorises the filing of a suit, the Secretary on his own cannot institute a suit against any person."

13. The plaintiff relied on Clause 2(c) of the bye-law of the Society, and throughout it is its case that basically, the appellant-defendant is not a member of the Society, and as per the bye-law, the plaintiff which is the Housing Co-operative Society, has to allot the sites only to its Members and the allotment of sites to the appellant-defendant without getting a membership is contrary to the bye-laws. Hence, rightly, the Secretary need not get consent from the President so as to file a suit and has rightly filed a suit. Though the said submission makes out a case for consideration, but in the instant case, it cannot be considered for the reason that when the application initially made by the appellant-defendant for allotment of site, the society should have verified or examined as to the fact whether the appellant is the member of the society or not. In that view of the matter, it is to be presumed that the Society itself is negligent. The Secretary, Office bearers of the Society, the President including the office of the Registrar of Co-operative Societies must have examined before allotment of site. Since, they have not been examined nor raised any objection at the appellant's application for allotment of site, it is not appropriate to file a suit that too after allotting a site and after permitting the appellant to put up a construction. Hence, the said submission of the plaintiff is to be rejected and is accordingly rejected. Before

filing a suit of this nature, the plaintiff should have examined the fact and should have taken much care as to against whom the suit is being filed the reason being that persons who serve the nation should be given relaxation. After suffering an injury or for loss of life while defending the country, just paying respect itself would not suffice and what is required is, a person who successfully fights for nation, should be given all facilities including the principle of relaxation.

14. While disposing of this matter the Court has not examined the fact of the Society not passing any resolution; and secondly, in view of non-examination of Clause 34 of the byelaws of the Society, I find that there is infirmity in the order passed. Accordingly, I pass the following: O R D E R

1. Appeal is allowed.

2. Order dated 14th June 2005 passed in OS No.751 of 1987 by the learned XV Additional City Civil and Sessions Judge, Bangalore is set aside and the suit stands dismissed.

3. Points formulated for consideration, are answered accordingly.

In view of the allowing of the appeal, the Interlocutory applications do not survive for consideration and are accordingly dismissed.