(2013) 12 KAR CK 0125

In the Karnataka High Court

Case No : Regular First Appeal No. 1106 of 2009

M/s. Raja Builders and Investments — APPELLANT

Vs

K.C. Shivashankar since deceased by L.Rs. Mrs. Gayathri, Ms. Monika and Ms. Bindhia — RESPONDENT

Date of Decision : 04-12-2013

Acts Referred:

Citation : (2013) 12 KAR CK 0125

Hon'ble Judges : K.L. Manjunath, J;A.V. Chandrashekara, J

Bench : Division Bench

Advocate : Padmanabha Mahale, for Sri C.R. Subramanya, for the Appellant; G. Papi Reddy, for C/R1(A), R1(B) is served, for the Respondent

Final Decision : Dismissed

Judgement

K.L. Manjunath, J.—The legality and correctness of the judgment and decree passed by the 39th Addl. City Civil and Sessions Judge, Bangalore, in O.S. No. 482/2002 dated 29th August 2009, is called in question in this appeal. The appellants were the plaintiffs before the trial Court. The suit was instituted by the plaintiffs to declare that the Joint Development Agreement dated 31-10-1994, Supplementary Agreement dated 15-12-1994 and the General Power of Attorney dated 31-10-1994 executed by one K.C. Shivakumar are valid and subsisting and to direct defendant K.C. Shivashankar to take all necessary steps to facilitate implementation of the Joint Development Agreement dated 31-10-1994 and Supplementary Agreement dated 15-12-1994 and also take steps to settle dispute the dispute in relation to 5 ft. of land forming part of the suit schedule property and to perform all other obligations cast upon the defendant under the said agreements.

2. During the pendency of the suit, defendant-K.C. Shivashankar died and his legal representatives were brought on record.

3. It is the case of the plaintiffs that the defendant is the absolute owner of the

suit property and in terms of the agreements referred to above, the plaintiffs agreed to develop and construct residential apartment as per the sanctioned plan and out of the constructed area, 42% has to be given to the defendant and remaining 59% built-up area shall be utilized by the plaintiff. It is also the case of the plaintiffs that on the date of agreement the plaintiffs paid a sum of Rs. 8,00,000/-, by cheque, which is a refundable deposit and an irrevocable General Power of Attorney was executed in favour of plaintiffs authorising and empowering the third plaintiff to apply to concerned authorities like KEB, Bangalore City Corporation, Fire Force; revenue authorities for obtaining necessary sanction plan and other permission required to complete the project. It is also the case of the plaintiffs that pursuant to the agreement, development charges was also paid, an attempt was made to secure the licence and plan from the concerned department. All of a sudden, a suit was filed by one of the brothers of the defendant in O.S. No. 1715/1997 against the plaintiffs and the defendant for grant of perpetual injunction. An order of injunction was granted in favour of plaintiff therein. Thereafter, the defendant filed Miscellaneous First Appeal in M.F.A. No. 1784/1996 which was disposed of by this Court. By the time, the appeal came to be disposed of by this Court, the area which was earlier within the jurisdiction of Jakkasandra Sanitary Board was merged with the Bangalore Mahanagara Palike and fresh licence was required to be obtained. On the ground that there was no co-operation, inspite of the plaintiffs were ready and willing to complete the project, the suit came to be filed.

4. The defendant raised several contentions in the written statement. One of the contention was that the suit was not maintainable since plaintiff firm is an unregistered firm.

5. The trial Court framed following the issues:

1. Whether the plaintiff proves that the plaintiff was put in possession of the schedule property in part performance of the contract?

2. Whether the plaintiff proves that plaintiff has been always ready and willing to perform his part of the contract?

3. Whether the defendant proves that the plaintiff has obtained the suit document by misrepresentation and committing fraud on him?

4. Whether the defendant proves that the plaintiff has committed a breach of the terms of the agreement as such, he has cancelled the contract by issuing the letter dated 1.5.12.94?

5. Whether the suit is barred by limitation?

6. Whether the suit is not maintainable for the reasons stated in para 3 of written statement?

7. Whether the plaintiff is entitled for the relief of declaration sought for?

8. Whether the plaintiff is entitled to the relief of permanent injunction?

9. What order or decree?

Issue No. 6 in regard to maintainability of the suit was tried as a. preliminary issue.

6. The trial Court considering the arguments advanced by both the parties came to the conclusion that the first plaintiff is an unregistered firm and that an unregistered firm cannot maintain a suit for the reliefs sought for. Accordingly, suit came to be dismissed as not maintainable.

7. Challenging the judgment and decree of the trial Court in dismissing the suit of the plaintiff, the present appeal is filed.

8. We have heard the learned counsel appearing for the parties.

9. The arguments of Sri Padmanabha Mahale, learned Senior Counsel appearing for the appellants are two fold. According to him, even though the first plaintiff was not a registered firm on the date of the suit, in view of the registration of the plaintiff-firm subsequent to the suit, the defect is cared. Therefore, the suit was maintainable. The other argument is that even if the first plaintiff was an unregistered firm since plaintiffs-2 to 4 are partners of the firm, all the partners can maintain the suit against the defendant.

10. Per Contra, Sri G. Papi Reddy, learned counsel for the respondents submits that both the grounds are not tenable because the relief is in respect of immovable property and as on the date of filing of the suit, plaintiff was an unregistered firm. On the date of the suit when the firm was not registered the question of curing such defect later would not arise at all. Even if the firm is registered later, it cannot cure the defect as the suit filed by the plaintiff was not maintainable. He further submits that even if other partners are made as a party the same cannot be ground to hold that suit is maintainable.

11. The Hon''ble Supreme Court in M.A. Hussain and Another Vs. Panchamal Vasudev Ganapath Kamath and Brothers and Another, has held as hereunder:

This provision specifically bars the institution by or on behalf of a firm to enforce a right arising from a contract makes (unless) the conditions specified in S. 69(2) are satisfied. The use of the expression "no suit.... shall be instituted in any court" clearly indicates the intention of the Legislature to make this provision mandatory. The two requirements which must be fulfilled before a suit can be instituted to enforce a contractual right by the firm or on behalf of the firm are: (1) that the firm is a registered one, and (2) that the persons suing are or have been shown in the register of firms as partners of the firm. As these are the conditions for the institution of the suit, the relevant date with respect to which these conditions must be satisfied is the date of the institution of the suit. On the date of institution of the suit, the firm must be registered one and the persons suing must either be partners or persons whose names are shown in the register of firms as partners. Both the conditions are mandatory and must be fulfilled. The suit would be wholly incompetent if either of these conditions is not fulfilled.

In the judgment referred to supra, the Hon''ble Supreme Court has clearly held that the suit is not maintainable if the firm is not registered on the date of the suit and persons suing are or persons who have filed the suit shall be shown in register of firm as partners of the firm and unless and until these two conditions are fulfilled, the suit is not maintainable.

12. The learned trial Judge has also relied upon several other judgments on the same question. Therefore it is clear that when the firm is not registered it cannot maintain the suit. Sri Mahale, learned Senior Counsel appearing for the appellants is unable to substantiate his argument how the partners of an unregistered firm can maintain the suit. In the circumstances, we do not see any merits in this appeal. Accordingly, the appeal is dismissed.

