

(2015) 07 KAR CK 0134

In the Karnataka High Court

Case No : Writ Petition Nos. 39310 of 2013 and 46013/2013 (GM-CPC)

Peter Isidore Lobo

APPELLANT

Vs

Irene Lobo Nee Veigus and Others

RESPONDENT

Date of Decision : 16-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1(2), Order 43 Rule 1(r)
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 63

Citation : (2015) 07 KAR CK 0134

Hon'ble Judges : A.V. Chandrashekara, J

Bench : Single Bench

Advocate : M. Vijay Krishna Bhat, for the Appellant; Cyril Prasad Pais, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.V. Chandrashekara, J—Mr. Cyril Prasad, learned counsel is permitted to file Vakalath for respondent Nos. 2, 3, 5, 8 and 9 in the office and his name shall also be shown for these respondents.

2. Heard the learned counsel appearing for the parties and perused the records.

3. These petitions are directed against the judgment passed by the First Appellate Court i.e., the Court of I Additional Senior Civil Judge, Mangalore in Misc. Appeal Nos. 27 and 28/2007 dated 28.7.2012. The petitioner is the 16th defendant in an original suit bearing O.S. No. 508/2007 pending on the file Civil Judge (Sr. Dn), Mangalore. It is a suit filed by Smt Irene Lobo and others for the relief of partition and separate possession against 18 persons, she has purchased "B" schedule property measuring 02 acres 74 cents in Gurupura Hobli, Mangalore, through registered sale deed dated 20.9.2006. According to 16th defendant i.e., petitioner herein, the property in question had been settled in

favour of first defendant by his ancestors and it is a registered settlement deed. Consequent upon the execution of the settlement deed, the name of the first defendant i.e., settle had been incorporated in the revenue records and thus, he had become the Khatedar of the property in question. Later on, he is stated to have been sold the same in favour of the petitioner through the registered sale deed dated 20.9.2006 for valid consideration.

4. According to the plaintiffs, the property in question had been settled in favour of the first defendant and Francis Lobo. In the settlement deed, it is specifically mentioned that "A" schedule property would go to Francis Lobo, "B" schedule property would go to Mathew Balthuzar Lobo and "C schedule property would go jointly to Francis Lobo and Mathew Blathuzar Lobo.

5. First defendant is one Mathew Balthuzar Lobo in whose favour "B" schedule property has been settled. The said "B" schedule property mentioned in the schedule appended to the plaint was shown as CC schedule property in the settlement deed. In the settlement deed it is specifically mentioned that 1/2 of the undivided share in "C schedule property i.e., "B" schedule property to the suit would be enjoyed by Francis Lobo till his death and later on, his undivided share would go to Mathew Balthuzar Lobo and thus Mathew Balthuzar Lobo would become the absolute owner of 02 acres 74 cents in full. Accepting this contention, the trial Court rejected the application filed under Order 39 Rules 1 and 2 of CPC filed by the plaintiffs seeking relief of injunction against defendant Nos. 1 to 4 and 16 to 18 from alienating the schedule property. Another application had been filed seeking temporary injunction against defendant No. 16 from interfering with possession and enjoyment of "B" schedule property. Against the said order two separate miscellaneous appeals had been filed in terms of Order 43 Rules 1(2) of CPC in M.A. Nos. 27 and 28/2007. These two appeals have been allowed and 16th defendant who is the petitioner herein has been restrained from not only alienating with 02 acres 74 cents in any manner during the pendency of the suit but also restrained from interfering with peaceful possession and enjoyment of 02 acres 74 cents by the plaintiffs till the disposal of the suit. Hence, present petitions are filed.

6. Admittedly, the interpretation of the contents of the settlement deed is involved. The trial Court has come to the conclusion that the name of Mathew Balthuzar Lobo was found in the revenue records relating to 02 acres 74 cents as person in possession for a quite long time. Even after the death of Francis Lobo, his name was continued and therefore he was competent to sell the property in question having become the absolute owner. The trial Court has doubted the authenticity of Mathew Balthuzar Lobo alienating the property since a Will has also been executed by Francis Lobo in favour of Mathew Balthuzar Lobo. What is observed by the First Appellate Court is that when the Will itself is to be proved in accordance with the mandatory provisions of Section 63 of Succession Act and Section 68 of Evidence act, it is too premature to disbelieve the case of the plaintiffs.

7. Admittedly, execution of settlement deed by the settler in favour of Mathew Balthuzar lobo and Francis Lobo is not in dispute. The right, as observed by the trial Court emanates from the settlement Deed. Statutory presumption is available under Section 113 of Karnataka Revenue Act, 1964 in regard to the entry of the name of the first defendant i.e., the vendor of this petitioner for quite a long time both in Column Nos. 9, 10 and 12(2) of RTC. It is also to be seen that Francis Lobo died on 25.01.1998 long ago prior to filing of the suit by the plaintiffs. All these aspects have been taken into consideration by the trial Court.

8. In view of the embargo cast upon the first appellate court in terms of Order 43 Rule 1(r) of CPC, the first Appellate Court could not have varied the order of trial Court and to substituted its opinion unless the order of granting injunction or refusing to grant injunction suffers from absurdity or perversity. Suffice to state that First Appellate Court has not been able to effectively demonstrate as to how the embargo has been lifted.

9. Though the learned Judge has referred to, two decisions cited before it by the 16th defendant, the learned Judge has not indicated as to whether the judgments are applicable to the facts of the case. When the learned Judge of the trial Court has come to a specific conclusion about the existence of prima facie case and the genuineness of the settlement deed executed, the First Appellate Court could not have altered that opinion. Viewed from many angles, the approach adopted by the trial Court is contrary to the well established provisions relating to the order of granting of or refusing to grant injunction. In this view of the matter, the petitions will have to be allowed in terms of the supervisory jurisdiction vested under Articles 227 of the Constitution of India.

10. Hence, the following:

ORDER

Petitions are allowed. The judgment passed in M.A. Nos. 27/2007 and 28/2007 are set aside. If the issues are not framed by the trial Court, the learned judge to frame the proper issues at the earliest and dispose of the suit preferably within an outer limit of 9 months from the date of framing of issues. The parties and their learned counsel appearing for the parties to cooperate with the trial Court for expeditious disposal of the suit.

Send a copy of this order to the trial court for reference and compliance.