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(2002) 01 KAR CK 0068

In the Karnataka High Court

Case No : Regular Second Appeal No. 495 of 1998

Raghavendra Rao and Others — APPELLANT

Vs

N. Veeravenkatrao and Others — RESPONDENT

Date of Decision : 18-01-2002

Acts Referred:
Evidence Act, 1872 — Section 58, 68

Citation : (2002) 2 CivCC 483 : (2002) 3 KarLJ 150 : (2002) 2 KCCR 1058

Hon'ble Judges : V. Gopala Gowda, J

Bench : Single Bench

Advocate : Jayavittal Rao Kolar, for the Appellant;

Final Decision : Allowed

Judgement

V. Gopala Gowda, J.—The appellants were the plaintiffs and respondents were defendants -in the Trial Court. For the sake of convenience, the rank of the parties are referred to as in the Trial Court.

2. The 7th defendant was impleaded in the suit and the cause title was amended. After service of notice, he filed written statement but thereafter remained ex parte before the Trial Court. However, while issuing the certified copy, the 7th defendant has been omitted in the cause title. Hence, he was not made a party before the first Appellate Court as well as in this second appeal. Since he was a party in the suit and had been duly served, the result of this appeal shall bind upon him.

3. The plaintiffs filed the suit in O.S. No. 74 of 1990 against the defendants for possession of 19 acres 4 guntas of land in Sy. No. 216 of Rampur Village in Raichur Taluk, which is the suit schedule property. Rangamma, the mother of 7th defendant was the Inamdar of the said land. After her death, the 7th defendant succeeded to the property. Occupancy rights was granted in his name under Certain Inams Abolition Act, 1977 on 30-12-1981. Bhimsen Rao, the father of the plaintiffs purchased the suit schedule property from the 7th defendant under a

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registered sale deed dated 28-1-1982. After his death, the plaintiffs discontinued possession of the suit schedule property. However, defendants 1 to 6 came into possession of the same. Hence, the plaintiffs filed the suit. The suit was resisted by the defendants by filing written statement denying title of plaintiffs to the suit land. A plea was taken that the sale deed in favour of father of the plaintiffs was a forged document. Another plea taken was that the vendor had no title. It is the case of the defendants that the suit schedule property is a joint family property and in the partition that took place in the year 1980 the suit property fell to the share of defendants 5 and 6 and they sold the same in favour of defendants 1 to 4.

4. On the basis of the pleadings, the Trial Court framed issues. Both the parties led evidence by examining witnesses and producing documents. On appreciation of the material on record, the Trial Court dismissed the suit by its judgment dated 25-7-1997. The appeal filed by the plaintiffs in R.A. No. 22 of 1997 against the dismissal of the suit was also dismissed by the first Appellate Court by its judgment dated 19-3-1998. Aggrieved by the same, the plaintiffs have preferred this second appeal.

5. This appeal was admitted to consider the following substantial questions of law.--

(a) Whether the Courts below were right in holding Ex. P. 3, the registered sale deed as requiring compulsory attestation and accordingly holding that the plaintiffs had not established their title to the suit property for non-examination of the attestors to the sale deed Ex. P. 3?

(b) Whether the Courts below were justified in holding that the plaintiffs had not proved execution of Ex. P. 3 though the vendor of Ex. P. 3, defendant 7 had clearly admitted the execution and attestation of Ex. P. 3?

6. Notices of this appeal were sent to defendants twice but they returned with endorsement "no such persons". On 12-8-1999 for the reasons recorded by this Court on the submission made that they had been served in the same address before the Courts below, service was held sufficient. That is the reason for non-appearance of the defendants in this Court.

7. Heard the learned Counsel for the plaintiffs/appellants and perused the judgments and decrease of the Courts below.

8. The defendants have admitted the regrant order in favour of the 7th defendant. The Trial Court at paragraph 20 of its judgment has refused to consider Ex. P. 2, the copy of the regrant order on the ground that it was a xerox copy and neither the original nor certified copy of the same was produced. On this ground it refused to accept the same and held that since the same was not proved, the plaintiffs'' father had no title and therefore the sale of suit schedule property made by the 7th defendant is not valid. Since the defendants admitted the regrant order in favour of 7th defendant, the Trial Court should not have

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gone into the admissibility or otherwise of Ex. P. 2. u/s 58 of the Indian Evidence Act, the admitted facts need not be proved. In view of the regrant order in favour of the 7th defendant, the finding of the Trial Court at the end of paragraph 20 of its judgment that the original vendor himself was unable to prove the grant of the land in his favour and the subsequent sale in favour of the plaintiffs'' father is not valid, is contrary to the admitted fact. Even the first Appellate Court also not adverted to this aspect. Thus, the Courts below have ignored the said important aspect resulting in perverse findings.

9. The entire matter revolves round the execution of sale deed by 7th defendant in favour of plaintiffs'' father. Ex. P. 3 is the sale deed dated 28-1-1982 executed by the 7th defendant. Even though P.W. 1 has spoken about Ex. P. 3, he has admitted that he was not present at the time of execution of the same and he does not know about the said transaction. Basing this evidence of P.W. 1, the Trial Court held that since the defendants 5 and 6 have denied the sale deed calling it as a forged and concocted document, it has been held that the sale deed has not been proved as none of the attesting witnesses of Ex. P. 3 has been examined. The Trial Court gave this finding placing reliance upon Section 68 of the Indian Evidence Act. The first Appellate Court affirmed the said finding. Both the Courts below committed an error in this regard.

10. The Trial Court at paragraph of its judgment extracted a passage from page 1024 of Sarkar on "Evidence", 14th Edition 1993 and applied Section 68 of the Indian Evidence Act to the case. But, the first Appellate Court in the beginning of paragraph 24 of its judgment has stated "now I have to consider the provisions of Section 68 of the Indian Evidence Act, which is as under: ....." Having stated so, instead of extracting Section 68 of the Act, the first Appellate Court culled out the portion which has been extracted by the Trial Court from Sarkar''s edition. Having done so, the first Appellate Court held that "Under Section 68 of the Indian Evidence Act if any party denies the execution of sale deed, the other party has to lead evidence to prove the execution of sale deed". This finding of the first Appellate Court and the reliance placed upon by the two Courts below on Section 68 is contrary to the proviso to Section 68 of the Act. In order to understand the scope of Section 68, same is reproduced hereunder.--

"Proof of Execution of document required by law to be attested.--If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied".

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The words "not being a Will" in the above extracted proviso excludes a Will. That means, it is not necessary to examine any attesting witness of any document to prove the same except a Will. In addition to that, the words ''"unless its execution by the person by whom it purports to have been executed is specifically denied" in the last portion of the proviso makes it clear that the denial of execution of the document must be made by the person who purports to have executed it. In other words, only the person who is said to be the executor of a document must deny the execution of the document and none others.

11. In the instant case, the first defendant has not denied execution of the sale deed Ex. P. 3. According to him, it is a forged and got up document. That means, the execution of the document is not denied by him. He questions the genuineness of the same. So far as defendants 5 and 6 are concerned, their stand in paragraph 4 of the written statement is to the following effect in relation to Ex. P. 3.--

"It is quite incorrect and false to contend that Ramangouda for his family and legal necessities has sold the suit land to Bheemshainrao S/o. Raghavendra Rao for a consideration of Rs. 22,000/- and executed a registered sale deed dated 28-1-1982 in favour of the Bheemshainrao. Besides, Ramangouda alone was not competent to sell the suit land without the consent of defendants 5 and 6 because these defendants ore also the members of joint family members of Ramangouda, therefore the plaintiffs are and be put to strict proof of the same".

The portion underlined above implies that the sale of the suit schedule property should not have been made by 7th defendant alone without the consent of defendants 5 and 6. A combined reading of the stand taken by defendants 1, 5 and 6 is to the effect that 7th defendant had no authority or title to execute the sale deed Ex. P. 3 and the same is not a genuine document. That being the position, execution of the sale deed as such is not denied. The Courts below committed an error by going into the proof of execution of the document.

12. As per the proviso to Section 68 of the Act, specific denial of execution of the document should be made by the executant of the deed. In the instant case, neither the first defendant nor defendants 5 and 6 are the executants of the sale deed Ex. P. 3. Therefore, question of going into the genuineness or otherwise of the same was wholly unwarranted. The Courts below made a wrong approach in that direction.

13. Mr. Jayavittal Kolar, learned Counsel for the plaintiffs/appellants has rightly placed reliance upon the decision in Smt. Hans Raji Vs. Yosodanand, . In paragraph 10 of the said decision, it has been laid down as under,--

"10. So far as the applicability to the proviso to Section 68 is concerned, it must be noted that there was no occasion for the respondent to examine any attesting witness to the document in question as it was a sale deed which never required any attestation and even if some "marginal" witnesses had attested the

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document the document did not attract Section 68 of the Indian Evidence Act which in term applies to the proof of execution of document required by law to be attested. It reads as under;

"68. Proof of execution of document required by law to be attested.--If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not he necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied".

Therefore, Section 68 would not cover such a transaction. Hence there would remain no occasion to invoke the proviso to Section 68 with a view to finding out whether the execution of such a document was specifically denied by the adverse party or not. Consequently all the main contentions canvassed before the High Court which are repelled by the High Court cannot be said to be wrongly repelled".

In view of the above ratio decidendi of the law, the first substantial question of law is answered in the negative and hence the judgments and decrees of the Courts below, which are contrary to law, are liable to be set aside.

14. In the written statement filed by the 7th defendant he has admitted execution of the sale deed Ex. P. 3 in favour of the father of plaintiffs. He being the executant of the document, having admitted the execution, question of further proof is not necessary. It is no doubt true that after filing written statement he has not adduced evidence. The Court must take judicial note of the fact that a person who has parted with the property by executing sale deed, will not be interested any more in respect of the said property unless he possess dishonest intention of either creating problem to the purchaser or keep an eye to grab the sold property by hook or crook. The absence of 7th defendant after filing written statement in the Trial Court has to be viewed from this angle. Both the Courts below failed to view the aspect in that manner, Hence, the second substantial question of law is answered in the negative.

15. Once the sale deed Ex, P. 3 is held duly executed, it follows that the plaintiffs had title to the suit schedule property. As long as it is in force and not set aside or declared void by any competent Court, the right of the plaintiffs has to be protected. Defendants have utterly failed to prove independent right over the suit schedule property or that the same is joint family property. It follows that plaintiffs are entitled to the judgment and decree sought for by them in the suit.

16. Accordingly, the appeal is allowed. The judgments and decrees of the Courts

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below are set aside. The suit of the plaintiffs is decreed as prayed for. There shall be no order as to costs.

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