

(2015) 03 KAR CK 0065

In the Karnataka High Court

Case No : Regular First Appeal No. 654 of 2009

S. Nanjappa

APPELLANT

Vs

Kendriya Upadhyaya Sangha and Others

RESPONDENT

Date of Decision : 10-03-2015

Acts Referred:

Evidence Act, 1872 — Section 63, 64, 65, 65(f), 74
Karnataka Co-operative Societies Act, 1959 — Section 125

Citation : (2015) 2 KCCR 1736

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : P.D. Surana, for the Appellant; M.G. Satheesha, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—Heard the learned Counsel for the appellant and the learned Counsel for the respondents.

2. This is an appeal by the plaintiff. The parties are referred to by their rank before the trial court for the sake of convenience. The suit was filed seeking a declaration that documents executed by defendant No. 1 in favour of defendant No. 2 were not binding on the plaintiff, for a permanent injunction restraining interference with his possession of the suit property and for a mandatory injunction to remove certain construction by defendant No. 2 on the suit property.

It was the case of the plaintiff that the plaintiff and his two brothers were the owners of land bearing Survey Nos. 1/2, 1/3, 1/4, 1/5 of Nagarabhavi, Yeshwanthapura Hobli, Bangalore South Taluk. The same is said to have been bequeathed to them under a registered will by their mother, Thimmakka. The plaintiff and his two brothers are said to have executed a General Power of Attorney on 25.1.1985 in favour of the first defendant - Society authorising it to form a housing layout and the Society, in turn, is said to have got prepared a layout plan identifying a site, bearing No. 160, which is more fully described in

the Schedule to the plaint, to be retained by the plaintiff The plaintiff is said to have continued in possession of the suit schedule site and was never transferred in favour of the defendant No. 1. The khata in respect of the site was said to have been registered in the name of the plaintiff

The plaintiff, thereafter, is said to have issued a notice to the Registrar of the Co-operative Societies on 9.12.2002 under Section 125 of the Karnataka Co-operative Societies Act, 1959 (Hereinafter referred to as the "KCS Act", for brevity), seeking to regularize the possession of the site.

In the meanwhile, it was claimed that defendant No. 1 had tried to interfere with the suit schedule property by breaking the wire fencing, which the plaintiff is said to have put up around the property. Hence, he is said to have filed a civil suit in O.S. No. 3602/2003, which however, was said to have been withdrawn on 8.4.2004 with liberty to file a fresh suit. An order of temporary injunction which is said to have been granted in favour of the plaintiff against the defendants, was said to have been subsequently vacated. It was claimed that defendant No. 2, seeking to take advantage of the said order, is said to have put up a temporary shed on the north-eastern corner of the suit property and attempted to dispossess the plaintiff by putting up a construction on the suit schedule property. The plaintiff had thus filed a fresh suit.

Defendant No. 1 having entered appearance, is said to have filed written statement admitting the purchase of 7 acres of land from the plaintiff and his brothers and having got prepared the layout plan, but denied the possession of the plaintiff it was contended that a lease-cum-sale agreement was executed by defendant No. 1 in favour of defendant No. 2 on 13.7.1989 in respect of the suit schedule site and neither the plaintiff nor defendant No. 2 had taken steps to obtain a registered sale deed from defendant No. 1.

Defendant No. 2 had filed written statement contending that in the earlier suit in O.S. No. 3602/2003, the plaintiff had sought for temporary injunction against the defendant and the said application was rejected on merits on 8.12.2009. It was also contended that the plaintiff had filed a Miscellaneous First Appeal which was withdrawn on 8.4.2004. And that the suit was bad for non-joinder of the brothers of the plaintiff

It was further contended that defendant No. 1 had purchased 28 acres of land comprised in land bearing Survey Nos. 1/2, 1/3, 1/4, 1/5, 1/6, 1/7, 2, 10, 50/1, 53, 54/1, 54/4A, 54/4B and 55/5 of Nagarabhavi and had obtained the approval of a layout plan from the Bangalore Development Authority (BDA) in respect of the proposed formation of 425 sites. And site No. 160 was allotted to defendant No. 2 on payment of sale consideration of Rs. 80,000/- and defendant No. 1 had executed a Deed of Lease-cum-Sale agreement dated 13.7.1989 and possession certificate as well as the khata certificates were issued in favour of defendant No. 2 and she had been paying taxes to the competent authority.

The trial court, on the above pleadings, had framed the following issues:

"1. Was the suit site No. 160 measuring 57 feet x 59 1/2 feet in the layout formed in Sy. Nos. 1/2, 1/3, 1/4, and 1/5 of Nagarabhavi village by Kendreeya Upadhyayara Sangha (Defendant No. 1), reserved by the plaintiff at the time of execution of power of attorney executed in first defendant- society by the plaintiff and others?

2. Did 1st defendant issue no objection letter in plaintiffs favour on 25.1.1985?

3. In the document i.e., lease-cum-sale agreement dated 13.7.1988 executed by 1st defendant in favour of 2nd defendant in respect of suit schedule property invalid and inoperative?

4. Did 2nd defendant put up shed measuring 10 feet x 12 feet. At the north-eastern corner of suit property after the filing of suit as alleged by plaintiff?

5. Was plaintiff in lawful possession of suit schedule property on the date of suit?

6. Is alleged interference true?

7. Was 2nd defendant validly allotted suit site by first defendant?

8. Is the suit properly valued and the Court fee paid sufficient?"

The suit having been dismissed, the plaintiff had preferred an appeal before this court in RFA 196/2007 and this court had remanded the matter to the trial court to be heard on the admissibility of the documents that were produced.

The trial court, on such remand, after hearing the Counsel for the parties, has answered issues No. 1, 2 and 7 in the affirmative and issue Nos. 3, 5, 6 and 8 in the negative and as regards issue No. 4, it was held that the second defendant had put up a shed subsequent to the disposal of O.S. No. 3602/2003, and dismissed the suit of the plaintiff

It is that which is under challenge in the present appeal.

3. It is contended by Shri P.D. Surana, appearing for the plaintiff- appellant that the trial court has committed serious errors in considering the facts and in applying the law, in having dismissed the suit. It is pointed out that a glaring error committed by the trial court is the circumstance that Exhibits D-14 to D-33, produced and marked by defendant No. 2 during the course of his evidence, were marked subject to serious objection raised by the plaintiff, as the same were not original documents, but certified copies thereof. The said defendant had not claimed or demonstrated that the original documents were not available or could not be secured. However, the court having permitted the defendant to place reliance on the same ultimately, while concluding that reliance could be placed on the said documents, under Section 65(f) of the Evidence Act, 1872 (Hereinafter referred to as the "Evidence Act", for brevity), is clearly an erroneous view, as the said Section would apply only in respect of certified copies of a public document and not otherwise.

Further, there were also no pleadings in the written statement of defendant No. 2

in respect of the said Exhibits D-14 to D-33 and hence, the same could not have been admitted in evidence and no reliance could be placed on the same.

More particularly, the learned counsel would urge that the document marked as Exhibit - D.32 has been relied upon by the trial court, to hold that the plaintiff and his brothers had expressly relinquished their right over the suit property in favour of the first defendant- Society. Interpretation of the said document with reference to oral evidence was clearly opposed to Section 92 of the Evidence Act. In that, when a document is in writing, no oral evidence is admissible for the purpose of contradicting, varying, adding or subtracting the terms of the same. The said document, on the face of it, did not disclose that the plaintiff had surrendered possession of the suit property to the Society. There is also no finding by the trial court that the said document was proved in accordance with law.

The finding of the trial court that Exhibits D-1 to D-13 were not disputed by the plaintiff is an assumption and not with reference to any such admission or acceptance by the plaintiff

It is contended that the finding of the trial court that the suit was bad for non-joinder of the brothers of the plaintiff was an unfair finding, as in law, a co-owner is not precluded from maintaining the suit. Especially when the brothers of the plaintiff had filed affidavits to state that there was an internal arrangement between them in the plaintiff retaining the suit property.

It is pointed out that the letter dated 25.1.1985, Exhibit P-5, the tax paid receipts and the assessment extract, at Exhibits P-2, P-3 and P-4, respectively, disclosed that the plaintiff had retained possession of the suit property. The trial court had not considered the above documents.

It is contended that the finding of the trial court was that the first defendant Society was in a position to convey title in respect of the suit property in favour of defendant No. 2. Defendant No. 1 is not shown to have had title to the suit property and it is hence perplexing that the court below has arrived at such a finding. There was no title deed produced by defendant No. 1, to demonstrate that title had been conveyed to it. The categorical admissions of D.W.-1, the Secretary of the first defendant Society as to the suit property not having been conveyed to Defendant No. 2, in accordance with law, is completely ignored by the trial court.

Shri Surana would, therefore, contend that the judgment of the trial court be set aside and the suit be decreed, as prayed for.

4. On the other hand, the learned counsel for defendant No. 2 would seek to justify the judgment of the trial court.

5. It is seen from the record that the suit had been dismissed by the trial court as on 11.12.2006, holding that the plaintiff had failed to prove that the suit property was reserved by the plaintiff, while executing a general power of

attorney - authorizing the first defendant - Society to assume possession of other extent of the lands that were subject matter of a disputed transfer. It was also held that there was a lease-cum- sale deed executed by the Society in favour of the second defendant. Aggrieved by the said judgment, an appeal in RFA 196/2007 was preferred to this court. The matter was said to have been remanded to the trial court, by order dated 3.9.2007, with the following observations:

"All other questions may not be relevant for the purpose of deciding the issue involved in this case. In order to decide the right of the plaintiff as regards to site No. 160, whether it is retained by the plaintiff or not and whether the consideration is paid by defendant No. 1 to the plaintiff or not, would depend upon the admissibility of Ex. D32, Ex. P5 and other documents. As such, the trial court should have decided the admissibility of the said document. Hence, I am of the opinion that, without going into other issues, it is suffice, if the trial Court is directed to consider the admissibility of Exs. D14 to DF32 and then decide as to whether the plaintiff is entitled for the relief sought or not. Hence, the matter requires adjudication on merit after considering the admissibility of the said document." The trial court had, pursuant to the remand, in the first instance heard the parties with regard to the admissibility of Exhibits D-14 to D-33, which were said to be certified copies of original documents. The trial court had, by an order dated 10-12-2007 held thus:

"Exs. D-14 to D33 produced in the case and marked subject to objections raised by the plaintiffs counsel are all certified copies obtained from the Hon"ble High Court in the records in O.S. No. 2443/1984 and RFA 671/2005. It is submitted on behalf of defendants that RFA is still pending in the Hon"ble High Court and therefore the original documents could not be taken back and produced before this court. In my opinion, the defendants have properly explained the reason for non-production of originals of Exs. D14 to D33 in the case. Since Ex. D14 to D33 are the certified copies of the documents produced in a court proceedings and the originals cannot be obtained or summoned in the case as the same is required by Hon"ble High Court to decide another matter pending before that Court, I am of the view that the documents produced by the defendant are admissible in evidence as secondary evidence. Hence, the objections raised by the plaintiff for marking of Exs. DH to D33 is over-ruled." As one of the primary grounds raised in this appeal is that the said exhibits D-14 to D-33, could not be marked in evidence as the originals ought to have been summoned, as they were available, is concerned, it is to be seen whether the trial court was right in its view that the same could be permitted in terms of Section 65(f) of the Evidence Act.

The documents marked as Exhibits D-14 to D-33 are the following:

"a. Exhibit D.14 - A Certified copy of an agreement dated 21.12.1981 executed by the plaintiff and his brothers agreeing to sell 27 guntas in Survey No. 1/2; 2 acres 8 guntas in Survey No. 1/3; 2 acre 36 guntas in Survey No. 1/5, of Nagarabhavi in favour the first defendant and acknowledging the receipt of Rs.

30,000/- under three cheques for Rs. 10,000/- each and further acknowledging that the possession of the said lands was handed over by them to the first defendant.

b. Exhibit D.15 - A certified copy of the agreement dated 19.11.1981 executed by the plaintiff and his brothers agreeing to sell 30 gutnas in Survey No. 1/4 of Nagarabhavi for a consideration of Rs. 80,000/- per acre and received Rs. 15,000/- taking time to handover possession to the first defendant.

c. Exhibit D.16 - A certified copy of the registered sale deed dated 18.5.1966 executed in favour of one Thimmakka Gangamma and her son.

d. Exhibit D.17 - A certified copy of the irrevocable power of attorney dated 20.1.1985 executed by the plaintiff and his brothers in favour of the first defendant - society agreeing to sell the lands and acknowledging receipt of full consideration for the sale.

e. Exhibit D.18 - A certified copy of the affidavit dated 24.4.1986 sworn by the plaintiffs' sister Puttasiddamma stating she has no objection and no right over the suit schedule property.

f. Exhibit D.19 - A certified copy of a letter dated 19.5.1988 written by the BDA to the first defendant with regard to approval of layout plan.

g. Exhibit D.20 - A certified copy of an agreement dated 7.7.1988 executed by the first defendant with one Laxman a Contractor with regard to formation of layout.

h. Exhibit D.21 - A certified copy of the Work Order dated 6.2.1989 issued by the BDA with regard to formation of layout.

i. Exhibit D.22 - Certified copies of the receipts executed by the plaintiff and his brothers acknowledging the receipts of sale consideration under different cheques towards sale consideration from the first defendant - Society.

j. Exhibit D.31 - A Certified copy of the agreement dated 25.3.1982 entered into by plaintiff and his brothers agreeing to sell 1 acre of land in Survey No. 1/7 and receipt of part sale consideration by the first defendant and acknowledging that the possession of said land has been handed over to the first defendant - Society.

k. Exhibit D.32 - A certified copy of the agreement dated 30.3.1989 executed by the plaintiff and his brothers acknowledging handing over possession of lands to the defendant.

l. Exhibit D.33 - A certified copy of an agreement dated 29.8.1986 executed by the plaintiff and his brothers in favour of the first defendant Society acknowledging receipt of full sale consideration and further acknowledging that the possession of the lands has been handed over to the first defendant."

Section 65 of the Evidence Act has been enacted in order to safeguard the interest of a person, who is unable to produce either the original or the

secondary evidence of the types mentioned in Section 63 of the Evidence Act. The contents of a document must be proved by the production of the original document and secondary evidence of it is not generally admissible, vide Section 64 of the Act. There are exceptions to the Rule and Section 65 states the various class of cases, in which secondary evidence relating to documents may be given. The principle is that so long as the original exists and is available, it being the best evidence, must be produced. If it cannot be had on account of its loss, destruction, detention by the opponent or third person, who does not produce after notice, physical or legal irremovability, or any other cause, secondary evidence is admissible.

The opinion expressed by the trial court that the documents could be received in terms of Section 65(f), however, may not be the correct view. Clauses (e) and (f) of Section 65 are with reference to a public document, as are referred to in Section 74 of the Act and a certified copy of a original that would be permitted by the Act, are those documents referred to in Section 78 of the Act. The documents in question did not fall under either category.

But given the circumstance that the documents in question were part of the record in a pending appeal before this court, and this having been brought to the attention of the trial court, which circumstance was not also disputed by the plaintiff- except that it was asserted that the same could have been secured. The trial court could very well have acted in its discretion under Clause (c) of Section 65 in permitting the said certified copies of the documents to be produced and marked. Hence, there is no serious infirmity committed by the trial court in allowing the documents to be marked and being relied upon.

It is also not in dispute that the originals of the very documents were produced and marked in a suit to which the plaintiff was a party and therefore the genuineness of the documents and their source was not suspect.

On the merits of the claim of the plaintiff, the trial court has found that the arrangement by which the first defendant was permitted by the plaintiff and his brothers to develop their lands along with other lands into a housing layout in consideration of having received the entire sale consideration thereof - it was agreed that the plaintiff and his brothers were to be permitted to retain one house site each on formation of the layout. This had been duly acknowledged by the Society as per Exhibit P-5. The contents of that document dated 25.1.1985 are extracted by the trial court in the body of the judgment. This document is also admitted by D.W.-1. However, under Exhibit D-32, dated 30.3.1989, the plaintiff and his brothers have each received Rs. 25,000/- from Defendant No. 1 to relinquish their claim to the three sites reserved in their favour. While in law, relinquishment of interest in property could only be by way of a duly stamped and registered document, having regard to the arrangement between the parties, where the Society was authorized to deal with the property, the reservation of any sites being waived was not exactly a transfer and would therefore bind the plaintiff and his brothers.

The subsequent transfer made on the strength of the power of attorney, by the Society in favour of Defendant No. 2, who has produced ample material to establish her possession over the suit property, as discussed in detail by the trial court, was binding on the plaintiff and hence the suit has been rightly dismissed by the trial court. The appeal lacks merit and is dismissed.