

(2014) 01 KAR CK 0065

In the Karnataka High Court

Case No : Regular First Appeal No. 60 of 2009 (EJE)

Smt. Fathima Bi, Since deceased represented by her L.Rs.
and Others

APPELLANT

Vs

Mr. Najeebulla Khan, Mr. Hidayathulla Khan and Mr.
Hefeezulla Khan

RESPONDENT

Date of Decision : 02-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6
Evidence Act, 1872 — Section 58

Citation : (2014) 01 KAR CK 0065

Hon'ble Judges : Ashok B. Hinchigeri, J

Bench : Single Bench

Advocate : Shalini John, for the Appellant; Mehter M. Azzam, for the Respondent

Final Decision : Dismissed

Judgement

Ashok B. Hinchigeri, J.—The defendants have filed this appeal aggrieved by the judgment and decree, dated 30.9.2008 passed by the Court of the XXVI Additional City Civil and Sessions Judge, Mayo Hall, Bangalore in O.S. No 16815/2002. The respondents' suit for ejectment is decreed. Smt. Shalini John, the learned counsel for the appellants submits that there is discrepancy between the schedule to the sale deed at Ex. P1 and the plaint schedule. The property numbers shown in the sale deed at Ex. P1 and the numbers shown in plaint schedule are different. She submits that the respondents are in no position to link the documents at Ex. P2 to Ex. P8 to the property, which they have purchased and to conclusively show that there is re-numbering or re-assigning of the numbers.

2. She submits that the lease deed at Ex. P7 shows the dimension of the tenanted property as 20 ft. x 40 ft. On the other hand, the plaint schedule shows the dimension of the property on the north to southern side as 33 ft. 9 inches to 35 ft. and east to western side as 38 ft. to 40 ft. If the respondents' case is to

be accepted, it means that the appellants have trespassed a portion of the property in excess of 20 x 40 ft. For the recovery of the trespassed property, the respondents have to pay the proper court fee and seek the appropriate relief.

3. The learned counsel submits that a stray admission in the statement of objections filed in H.R.C. No. 10359/1995 is used to the detriment of the appellants. She submits that the appellants are the illiterate persons. She submits that the appellants also made I.A. No. 10 in H.R.C. No. 10359/1995 seeking the amendment of the pleadings for the purpose of withdrawing the said statement inadvertently made by their learned lawyer. She submits that the said I.A. No. 10 was dismissed. However, the order dismissing I.A. No. 10 could not be challenged in view of the dismissal of the main matter itself (H.R.C. No. 10359/1995).

4. The learned counsel submits that the cousin of Sri Ahmed Khan had executed a oral gift in favour of the latter and that Ahmed Khan is the husband of the first appellant and father of the appellant Nos. 2 to 6. She submits that the said Ahmed Khan and the appellants had been running the firewood depot in the suit schedule property for the last 40 years.

5. Sri Mehter M. Azzam, the learned counsel for the respondents submits that this appeal has become infructuous, as the judgment and decree under appeal are already executed. The respondents have taken the possession two days prior to the filing of this appeal.

6. In the course of her rejoinder, Smt. Shalini John, the learned counsel for the appellants submits that if this appeal is allowed, the appellants would be entitled to seek restitution of the schedule premises.

7. At this juncture, Sri Mehter M. Azzam, the learned counsel for the respondents submits that the respondents would give up their entire claim for the recovery of the mesne profits.

8. The submissions of the learned counsel have received my thoughtful consideration. I have browsed through the L.C.Rs. The two questions that arise for my consideration are:

(i) Whether the appellants are the tenants in respect of the suit schedule property?

(ii) Whether the appellants can be treated as the owners of the suit schedule property?.

9. In Re. Question No. (i): It is not in dispute that prior to the filing of O.S. No. 16815/2002, the respondents had filed H.R.C. No. 10359/1995 seeking the eviction of the appellants. The schedule in the H.R.C. petition reads as follows:

All that piece and parcel of premises bearing khata No. 2360, House No. 1861/1, site No. 1/C, Karayanpalya, Kacharkanhalli, Kasaba Hobli with structure & open land bounded on:

North by: private property

South by: road

East by: passage

West by: private property

10. The appellants, who were the respondents in the said H.R.C., have this to say in paragraph No. 4 of their statement of objections (Ex. P15):

That the averments made in para 2 of the petition are hereby denied as false, as the same is distorted version of facts. It is true that this respondent is son of late Sri Ahmed Khan who was a tenant in respect of petition schedule premises since more than 20 years on a monthly rent of Rs. 10/-. The petitioner has deliberately suppressed all the facts, except making bold statement.

11. The appellants, who have made a categorical admission that they are the tenants in respect of the property, the schedule of which is extracted hereinabove, cannot now turn around and say that they are not the tenants of the suit schedule property or that the suit schedule property and the tenanted properties are different.

12. The description of the plaint schedule property is as follows:

All that piece and parcel of property bearing Corporation No. 114, Gospel Street, Ward No. 90, Bangalore 84 (formerly being portion of Khata No. 2360, House list No. 1861/1, Site No. 1/C, Karayanpalya, Kacharkanhalli Dakhle, Kasaba Hobli)
Bounded on:

North by: Private Property (No. 115)

South by: Road

East by: Passage

West by: Private Property

Measuring:

North: 33 feet 9 inches; South: 35 feet

East: 38 feet; West: 40 feet.

13. If the two schedules (schedule in the H.R.C. petition and the schedule in the suit) are compared, it is found that they are almost similar. The khatha No. (2360), house list No. (1861/1) and site No. (1/C) are the same. The assignment of the additional numbers by the local body cannot be used to create confusion regarding the identity of the property.

14. Based on the appellants' submission that it has filed I.A. No. 10 for withdrawing the admission in question, no relief can be given to the appellants. Admittedly, I.A. No. 10 was rejected on 25.12.1998 and H.R.C. was pending for

nearly 4 years thereafter till 9.4.2002. The fact that the order on I.A. No. 10 is not challenged and that therefore it has attained the finality militates against the appellants.

15. It is useful to refer to this Court's decision in the case of Gowdara Shivalingappa v. K. Gajendrappa, reported in 2010 (2) KLJ 380, wherein this Court upheld the decreeing of the suit for the recovery of the possession of the leased property on the basis of the admission made earlier by the tenant before the Rent Court that the suit premises used for commercial purpose had plinth area exceeding 14 sq. mts. and that the Rent Court had no jurisdiction to entertain the eviction petition. Such an admission made by the tenant binds him; he cannot be permitted to resile therefrom by raising the issue of maintainability of the suit, subsequently filed by the landlord for the recovery of possession after withdrawing the eviction petition from the Rent Court. Paragraph No. 6 of the said judgments extracted hereinbelow:

6. In the above facts and circumstances, the question whether the suit premises measured more than 14 square metres, could not have been made an issue in view of the admission by the respondent in the objection statement, which is a formal document filed before a Court of law and the tenor of Order 12, Rule 6 of the Code of Civil Procedure, 1908, which indicates that, where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, makes such order or give such judgment as it may think fit, having regard to such admissions, would apply insofar as the admission that the suit property measured more than 14 square metres and therefore, the First Appellate Court was not justified in opening up an avenue which was closed to the respondent and hence the First Appellate Court was not justified in doing so. Further, the observation of the First Appellate Court that leave ought to have been obtained in the eviction petition while withdrawing the same, in order to file a fresh suit, was also not tenable. The same was not a civil suit in which the appellant was obliged to seek such permission. There was no bar in withdrawing the said eviction petition, since the appellant apparently realised that since the property was admittedly more than 14 square metres, the provisions of the Act did not apply and the eviction proceedings were a futile exercise. Hence, the findings of the First Appellate Court that the property measured more than 14 square metres, on the footing that the appellant had not established the same is incorrect. Therefore, the substantial questions of law framed are answered in favour of the appellant.

16. It is trite position in law that the admissions made in the documents are on the higher footing compared to the evidentiary admissions. In this regard, it is helpful to refer to the Apex Court's judgment in the case of Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram and Others, . The relevant portion of the said judgment is extracted hereinbelow:

26..... Admissions, if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible u/s 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.

17. It is also profitable to refer to the decision of Calcutta High Court in the case of Gopi Kishan Vs. Bajrang Lal and Another, wherein it is held that a fact admitted need not be proved as contemplated u/s 58 of the Indian Evidence Act.

18. I therefore answer question No. (i) against the appellants and uphold the finding of the Trial Court that the appellants are the tenants in respect of the suit schedule property.

19. In Re. Question No. (ii): No documents whatsoever are produced to show that the appellants have become the owners of the suit property. Even assuming that this suit schedule property was gifted to Ahmed Khan by his cousin, there are no documents to trace the title of Ahmed Khan's cousin. It is trite that the rights of Ahmed Khan cannot be better or higher than those of the party under whom he claims. I am therefore not in a position to give acceptability to the submission urged on behalf of the appellants that they be treated as the owners of the suit schedule property. Not finding any merit in this appeal, I dismiss it. The submission of the learned counsel for the respondents that the respondents are giving up their entire claim for mesne profit is placed on record. In the result, the judgment and decree for a direction to the defendants to hand over the possession is upheld. Its direction for the payment of mesne profit is set aside based on the voluntary undertaking of the appellants' side. The appeal is accordingly disposed off. No order as to costs.