

(2012) 08 KAR CK 0205

In the Karnataka High Court

Case No : Regular First Appeal No. 821 of 2011

Sri Basappa

APPELLANT

Vs

Sri V Ramakrishnappa Since deceased by his LRs (1(a) Smt. Munivenkatamma) and Others

RESPONDENT

Date of Decision : 02-08-2012

Acts Referred:

Citation : (2012) 08 KAR CK 0205

Hon'ble Judges : A.S. Bopanna, J

Bench : Single Bench

Advocate : M. Ram Bhat and M/s. Sreepada Associates, for the Appellant; P.N. Nanjareddy, for R1, R2, R3. and R4, R6, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Bopanna

1. The appellant herein is the plaintiff in O.S. No. 1243/1995. The suit in question was initially filed on 22.02.1995 seeking for the relief of injunction against the defendants restraining them from interfering with the plaintiffs developmental work in progress in the suit schedule properties. The prayer against alienation was also sought by way of injunction. During the pendency of the suit, the same was amended on 27.10.1997 and the additional prayer for specific performance was also sought. Subsequently once again the plaint was amended and the prayer was limited to the specific performance in respect of the sites indicated in the plaint "E" schedule property. The Court below after considering the matter in detail has dismissed the suit by its judgment and decree dated 01.02.2011 The plaintiff claiming to be aggrieved by the said judgment is before this Court in this appeal. The parties would be referred to in the same rank as assigned to them before the trial Court for the purpose of convenience and clarity.

2. The brief facts are that the plaintiff contends that the defendants along with

their mother are the owners of the property bearing Sy.No.32 of Kammagondanahalli village, Yeshwantpura Hobli, Bangalore North Taluk having acquired the same under the deed dated 12.03.1958. In respect of the said properties since the defendants had definite shares in the properties, the defendants executed sale agreement in favour of the plaintiff in respect of their respective portions. The portions to which the different defendants were indicated as owners is delineated as schedule "A" to "D" properties. In that regard, it is the claim of the plaintiff that the agreement of sale dated 30.05.1993 was executed by the first defendant in respect of the plaintiff schedule "A" property agreeing to sell the property for the sale consideration of Rs.1,25,000/- and an advance consideration of Rs.50,000/- was received in that regard. It is further contended that a similar agreement dated 30.05.1993 was executed by the second defendant for a sale consideration of Rs.2,25,000/- towards which a sum of Rs.45,000/- was paid.. Insofar as the third defendant, it is contended that he had executed the agreement dated 30.05.1993 where the sale consideration being Rs.2,25,000/- in respect of "C" schedule property for which an advance of Rs.50,000/- was paid in that regard. It is the contention of the plaintiff that the fourth defendant also executed an agreement dated 30.05.1993 in respect of the "D" schedule property and the sale consideration agreed therein was Rs.1,25,000/- towards which advance of Rs.30,000/- was paid.

3. The plaintiff also contends that the defendants had executed general power of attorney and affidavits in favour of the plaintiff creating right in respect of the property. Hence, the plaintiff having entered into the said agreement was also put in possession of the property and he was entitled to develop the property by forming sites therein. At the initial stage, it is contended that when the work was in progress, there was certain interference caused by the defendants. Accordingly, the suit was filed claiming for the relief of injunction only. Subsequently since the defendants had entered appearance and had disputed the claim of the plaintiff the additional relief of specific performance was also claimed. Ultimately since during the pendency of the suit certain items of the property had been sold, the plaintiff once again amended the plaint to indicate that the properties indicated in plaintiff schedule E being the sites formed in the layout are available and as such the specific performance be granted in respect of the said items of the property.

4. The defendants on being served with the suit summons entered appearance and filed their written statements separately and would however at the first instance, admit that the agreement had been executed. But, since the plaintiff had failed to secure the sale deed within the time agreed therein, the advance amount had been refunded and the agreement had been cancelled. Therefore, the question of plaintiff seeking for specific performance would not arise. In fact the fourth defendant had totally denied the case of the plaintiff that he had executed any agreement. The other defendants though had admitted the signature on the agreement, had also contended that they being illiterates were

not aware of the details indicated in the agreement. With regard to the amounts as claimed by the plaintiff, in any event, it was contended by the defendants that the plaintiff had not been put in possession of the property and the defendants continue to be in possession of the property. Therefore, the defendants on referring to these aspects of the matter had contended that the plaintiff is not entitled to the relief as prayed for in the plaint. No doubt after the amendment was made, the defendants have not filed any additional statement.

5. In the light of the rival contentions which have been put forth before the trial Court, the trial Court framed as many as 12 issues initially and 3 additional issues. The issues framed originally and the additional issues read as hereunder:

ISSUES

1. Whether the plaintiff proves that the deceased first defendant agreed to sell "A" schedule property for a consideration of Rs.1,25,000/- and executed an agreement of sale dated 30.05.1993?
2. Whether the plaintiff proves that he has paid advance of Rs.50,000/- to the deceased first defendant?
3. Whether the plaintiff proves that the 2nd defendant agreed to sell "B" schedule property for a consideration of 2,25,000/- and executed an agreement of sale dated 30.05.1993?
4. Whether the plaintiff proves that he has paid advance of Rs.45,000/- to the 2nd defendant?
5. Whether the plaintiff proves that the 3rd defendant agreed to sell "C" schedule property for a consideration of Rs.2,25,000/- and executed an agreement of sale dated 30.05.1993?
6. Whether the plaintiff proves that the 4th defendant agreed to sell "D" schedule property for a consideration of Rs.1,25,000/- and executed an agreement of sale dated 30.05.1993?
7. Whether the plaintiff proves that he has paid Rs.30,000/- to both defendants on the date of agreement?
8. Whether the plaintiff proves that he has been ever ready and willing to perform his part of contract?
9. Whether the plaintiff proves that he is in lawful possession and enjoyment of the suit properties?
10. Whether the plaintiff proves that he entitled for the permanent injunction sought?
11. Whether the plaintiff proves that he is entitled for specific performance of the agreements of sale?

12. What decree or order?;-.

ADDITIONAL ISSUES

1. Whether the suit is bad for non-joinder of necessary parties?

2. Whether the suit is barred by limitation?

3. Whether the plaintiff is entitled for specific performance of contract in respect of plaint "E" schedule properties?

6. In order to discharge the burden cast on the parties, the plaintiff examined himself as PW. 1 by filing affidavit in lieu of oral evidence. The documents at Exhs.P1 to P45 were relied upon. The defendants though had cross-examined the plaintiff-PW.1, had not tendered any evidence nor had relied on any documents. The Court below after taking note of the evidence which was available on record, has proceeded to dismiss the suit.

7. Sri Ram Bhat, learned senior counsel appearing for the appellant while assailing the judgment of the Court below would refer to the evidence which was tendered on behalf of the plaintiff. It is contended that when the plaintiff had tendered evidence and had also marked documents in support of the case, the Court below ought to have relied on the same, more particularly in the circumstance when the defendants did not choose to lead evidence and rely on any documents. It is his case that the Court below in fact has held the material issues relating to validity of the agreement executed by defendant Nos. 1 to 3 in favour of the plaintiff. Though the issue relating to the agreement which was executed by the fourth defendant has been held against the plaintiff, the same is erroneous. Since the agreement was held to be proved, the Court below should have proceeded further to decree the suit for specific performance. It is his case that the Court below in fact has not properly appreciated the material available on record. To prove the issue relating to readiness and willingness of the plaintiff to perform his part of the contract, the documents viz., the letters sent by certificate of posting were marked in evidence at Exhs.P11 to P14 and the postal certificates were marked at Exhs.P15 to P18 and as such the Court below should have taken note of the same to arrive at the conclusion that the plaintiff was ready and willing and it is the defendants who had not executed the sale deed, despite demand by the plaintiff. It is also the case of the learned senior counsel that the Court below ought to have taken note of the conduct of the defendants in executing the parallel power of attorneys and selling the properties to third parties which was demonstrated by the plaintiff by relying on the sale deeds at Exhs.P33 to P45. In such circumstance, the plaintiff had excluded the properties which were the subject matter of the said sale deeds and limited his claim only to plaint schedule-"E" property and the Court below should have decreed the suit to the said extent. Hence, it is contended that the judgment of the Court below is liable to be set aside and the suit is to be decreed by allowing the appeal.

8. Sri Nanja Reddy, learned counsel appearing for the defendants/respondents

would however seek to sustain the judgment of the Court below. It is his case that the law is well settled that in a suit for specific performance, mere production of agreement or proving the same would not be sufficient to seek for specific performance. In any event, the Court below has assessed the evidence and has clearly arrived at the conclusion that there is discrepancy with regard to the pleading and the evidence tendered by the plaintiff as compared to the document which has been marked to indicate that the dates and the amounts stated therein have not been correctly stated by the plaintiff as PW.1. Therefore, when such inherent discrepancies are noticed, the Court below was justified. Even otherwise, the readiness and willingness is an important aspect which is required to be considered by the Court below in a suit for specific performance. In this regard, the Court below has framed a specific issue and thereafter has answered it based on the evidence which was available. The communications said to have been addressed to the defendants at Exhs.P11 to 14 were never received by the defendants and the only document relied on to show that the said notices were sent are the certificate of posting. The Court below has rightly indicated that it does not prove the fact of service. There is no other evidence tendered to show that the plaintiff was ready and willing to perform his part of the contract and that he possessed the funds to pay the balance amount, even if the plaintiffs case that the agreement was executed is to be accepted. Further, the Court below having noticed the fact with regard to the subsequent sale deeds having been executed; that the plaintiff at the first instance had only sought for injunction and thereafter amended the plaint as suit for specific performance, had come to the appropriate conclusion that the plaintiff has not made out a case for granting specific performance and the suit had been dismissed. This conclusion of the Court below is based on the evidence available on record and the mere non-examination of the defendants would not defeat the case of the defendants when the burden had been cast on the plaintiff had not been discharged. In that regard, the witness PW.1 had been cross-examined to indicate that the evidence tendered in support of the issues was not sufficient. Hence the judgment of the Court below is justified and does not call for interference in his contention.

9. In the light of the rival contentions and the pleadings as well as the evidence which was put forth before the trial Court, the points for consideration before this Court is as to,

- i) Whether the Court below was justified in the conclusion reached, based on the evidence which was available on record ?
- ii) Whether the Court below has correctly arrived at the conclusion with regard to the finding that the plaintiff has not proved his readiness and willingness even in respect of the admitted agreements relating to schedule A to C properties ?
- iii) Whether the Court below was justified in the conclusion with regard to the fact that the agreement in respect of Schedule "D" property had not been proved ?

10. In order to consider these aspects of the matter, the nature of the pleading and the evidence tendered before the Court below requires to be noticed. The only oral evidence which was available before the Court below was that of Sri Basappa i.e., the plaintiff who was examined as PW.1. Since the affidavit in lieu of oral evidence had been filed by the plaintiff, it is nothing short of the averments which had been made in the plaint as well as in the amended plaint. The case put forth therein is also similar to what has been pleaded in the plaint to contend that the agreements dated 30.05.1993 had been executed by defendant Nos.1 to 4 but, the agreement dated 26.04.1993 executed by the first defendant is marked. The documents are marked at Exhs.P1 to P4. Insofar as the agreements stated to have been executed by defendant Nos.1 to 3, it is not necessary to dwell in detail inasmuch the execution of the agreement had not been denied by them but it was contended that the same was not acted upon further and therefore the same had been cancelled. The issues in that regard has been in any case held in the affirmative.

11. With regard to the agreement alleged to be executed by the fourth defendant, it is rightly noticed by the trial Court, there is variance between the pleadings wherein it had been stated that it is dated 30.05.1993 but, the actual date in the agreement at Ex.P-9 is 12.05.1993. The sale consideration stated as against what is stated is also at variance. When this aspect of the matter is noticed while reappreciating that aspect of the matter and when it is found to be correct, the question of the said agreement having been proved would not arise and in such circumstance, the finding in that regard is appropriate. The plaintiff has further relied on the cash vouchers at Exhs.P5, P6 and P7. In fact a perusal of the said receipts and the amount stated as having been paid under the agreement would not be relevant for the purpose. The document at Ex.P8 is the general power of attorney which has been claimed to have been executed.

12. In the circumstance, the matter has been ultimately considered by the trial Court with regard to the readiness and willingness. In the light of the said documents and the plaint having been ultimately amended and specific performance of the agreement having been sought, the Court below had in fact framed a relevant issue with regard to the readiness and willingness in issue No.8. This aspect of the matter becomes relevant for consideration since even assuming the agreements are proved, this aspect requires to be proved by the plaintiff. To contend that the plaintiff was always ready and willing, the plaintiff has relied on the letters at Exhs.P11 to P14 said to have been dispatched by the plaintiff to defendant Nos. 1 to 4. The said letters are dated 03.05.1994, 15.06.1994, 03 04.1994 and 29.09.1993. The said letters no doubt indicate reference to the agreements and has indicated that the plaintiff should execute the sale deed in their favour. The certificate of posting have been marked at Exhs.P15 to 18. Firstly the certificate of posting at best would only indicate that the letters had been posted. As rightly noticed by the Court below, there is no evidence to indicate that the letters have been served on the defendants calling upon them to indicate his readiness and willingness and to have the sale deed

executed in his favour Secondly, what is to be noticed is that there are certain alterations in the seal of the postal authorities in the date portion and therefore, even the certificates do not inspire confidence even to prove the fact of dispatch and further as indicated the dates do not tally.

13. When such doubt arises in the mind of the Court, one of the most important aspect which is relevant to consider is as to whether the said notices calling upon the defendants for execution of the sale deed could be believed to have been sent or are they got up documents. In this regard, as noticed, the suit initially was filed only for bare injunction and the prayer for specific performance was included thereafter. The suit was filed on 22.02.1995. The alleged demand letters seeking for execution of the sale deeds as relied on by the plaintiffs are all dated in the year 1994 as noticed above and the postal receipts for certificate of posting are all dated 1993 which do not correlate. That apart, the said letters are dated much prior to the date of filing the suit. Therefore, at that stage, if in fact a situation had arisen for the plaintiff to seek for execution of the sale deed pursuant to the agreement and if he was ready and willing for which he issued the alleged letters and as on such day, even to the knowledge of the plaintiff, when the defendants had not come forward to execute the sale deed despite the demand made by the plaintiff, the normal conduct should have been to initiate the suit for specific performance at the first instance itself. Instead, the suit has been limited only to injunction and no prayer was made for specific performance pursuant to the demand having already made therein. Therefore, in my view, this aspect itself would make the case of the plaintiff claiming to be ready and willing doubtful by relying on the said document. Therefore, the said documents in any event do not establish the fact that the plaintiff had proved his readiness and willingness.

14. In addition to that aspect of the matter, though it is well settled that the plaintiff seeking for specific performance to show his readiness and willingness need not flaunt the cheque everyday, atleast the source which was available with him to indicate that as on the date of filing the suit, he was ready and willing to perform his part of the agreement should have been established. There is absolutely no evidence either oral or documentary in this direction and therefore, in my view, the Court below was justified in holding issue No.8 against the plaintiff and there is no error in that regard.

15. Notwithstanding the above, what is also to be noticed is that the plaintiff himself has relied on the sale deeds at Exhs.P33 to 45 to contend that the power of attorney holders of the defendants have been executing sale deeds in respect of sites formed therein to the third parties. If these documents are perused carefully, it is seen that all the sale deeds are of the year 2003 which is much" subsequent to the filing of the suit. In that regard, a reference to some of the documents therein relied on by the plaintiff for example Ex.P.41 would indicate that the plaintiff himself has signed as a witness to the GPA based on which the said document dated 09.02.2004 was executed. Even otherwise, the plaintiff was

aware of the said sale deeds and therefore, he has brought it on record by way of evidence and has not challenged the same. Hence, in a circumstance when the plaintiff seeks specific performance by relying on the agreements and thereafter even after filing of the suit for specific performance, if he has been aware of the sale of certain portion of the property and has also affixed his signature as witness to the document which enabled the sale, it is too late in the day for the plaintiff to contend that the agreement in its original form still subsists and he is entitled to specific performance of the suit agreement notwithstanding that he has amended the suit schedule. Therefore, if the above discussions are kept in mind and if the judgment of the Court below is perused, the Court below has assessed the evidence on record in its correct perspective and has arrived at the proper conclusion. On re-appreciation of the evidence, I see no error committed by the Court below. Hence, the points raised herein would have to be answered against the plaintiff/appellant which is accordingly done. In that view, I see no reason to interfere with the judgment passed by the Court below.

In the result, the appeal fails and the same is accordingly dismissed.

In the peculiar facts and circumstances of the case, the parties to bear their own costs.