
(2009) 06 KAR CK 0052

In the Karnataka High Court

Case No : Regular Second Appeal No. 988 of 2006

Sri Sannaboraiah @ Boraiah

APPELLANT

Vs

Konana Mallaiah and Bangaraiah

RESPONDENT

Date of Decision : 03-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 3, Order 8 Rule 5, 100

Evidence Act, 1872 — Section 65, 68

Transfer of Property Act, 1882 — Section 123

Citation : (2009) ILR (Kar) 2507 : (2010) 3 KarLJ 215 : (2009) 3 KCCR 2251

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

Bench : Single Bench

Advocate : S. Nagaraja, for the Appellant; G. Balakrishna Shastry, for the Respondent

Judgement

A.S. Bopanna, J.—This second appeal is by the plaintiff who succeeded before the trial Court, but had failed before the Lower Appellate Court. The parties would be referred to in the same rank assigned to them before the trial Court for the purpose of convenience and clarity.

2. The brief facts are that the plaintiff was before the trial Court contending that the land bearing Sy. No. 37/6 measuring 2 acres 10 guntas of Mallurahalli village in Challakere Taluk was granted to Boraiah, S/o Kouana Hollaiah by the Government under Darkhast in or around the year 1955. The said Boraiah was in possession, and has gifted the said land to the plaintiff under a registered gift deed dated 9.6.1961. The plaintiff who claims to be the donee under the said gift deed is said to have accepted the gift and was also put in possession of the property. The plaintiff therefore claims to be the absolute owner of the suit schedule property and contends that his name has been entered in the revenue records from the year 1961-62 and has continued so till the year 1994-95. The plaintiff also contends that in order to develop the land and to dig a well, he had raised loan from the Primary Land Development Bank. Towards the said loan, the plaintiff claims to have mortgaged the suit land and also refers to the sinking of

the well having foiled and in that regard having taken benefit of the Government scheme and a part of the amount still being due to the Bank. The plaintiff contends that the defendants who had no manner of right to the said property made an application to the Tahsildar, Challakere Taluk for resumption of the suit land u/s 25 of the Karnataka Land Grant Rules. The said application is said to have been made seeking cancellation of the transfer made contrary to the Schedule Castes and Tribes (Prohibition and Transfer of certain Lands) Act and to restore the land to the defendant. The matter is said to have been referred with an endorsement stating that the Assistant Commissioner had already decided the matter. The grievance of the plaintiff is that despite the said position, the Deputy Tahsildar had passed an order to change the khatha of the suit property which is unsustainable. The Assistant Commissioner also dismissed the appeal of the plaintiff. Since such orders were passed stating that the gift deed was not valid, the plaintiff contends that the revenue authorities have no jurisdiction to decide upon that aspect. The further grievance of the plaintiff is that based on such illegal orders, the defendants started interfering with the possession and enjoyment of the property by the plaintiff. The plaintiff has also stated that the defendants are backed by influential persons and as such the plaintiff has sought for the relief of declaration and permanent injunction in respect of the suit schedule property.

3. The defendants on being served with the suit summons have appeared and filed their written statement. The defendants are the sons of late Boraiah and it is contended by the defendant that they along with the said Boraiah constituted an undivided Hindu Joint family and at that point in time the suit schedule property was granted to the defendants' family and the saguvali chit was issued on 8.10.1955. The upset price for grant of the said land is contended to have been paid out of the joint family income earned from the other ancestral land more particularly in Sy. No. 36. Hence it is contended that the grant is for the benefit of the joint family and the defendants along with their father were in possession of the suit schedule property. The defendants have also referred to the Karnataka Land Grant Rules contending that the granted land cannot be alienated during the period of prohibition. Hence it is contended that the alleged gift deed dated 9.6.1961 stated to have been obtained by the plaintiff is in violation of the condition of the grant and is void and no right would be conferred. Since the upset price was paid from the joint income, the said Boraiah had no exclusive right to make the alleged gift and the same was not acted upon. The Khatha of the property for the year 1965 to 1975 and 1986-1993 stood in the name of the defendants' father Boraiah and thereafter it has been mutated to the name of the defendants on inheritance. It is contended that the alleged gift deed is a farce device and with the result of legal flaws concocted by the plaintiff at the behest of his henchmen is unenforceable. The further contentions in the plaint with regard to the raising of the loan and the improving of the land has been denied. The revenue proceedings relating to the land wherein the Assistant Commissioner has dismissed the appeal, which has been averred in the plaint

has also been adverted to in the written statement The defendants contend since they are in possession and enjoyment of the suit schedule property, the allegation of interference is false and as such the defendants have sought for dismissal of the suit.

4. The trial Court on noticing the rival contentions has framed as many as 7 issues for its consideration, which read as follows:

- 1) Whether the plaintiff proves title over the suit schedule property as pleaded?
- 2) Whether the plaintiff proves his possession over the suit schedule property as on the date of suit?
- 3) Whether the plaintiff proves the interference by the defendant as pleaded?
- 4) Whether the valuation of the suit is correct?
- 5) Whether the Court fee paid on the suit is correct?
- 6) Whether the defendant proves acquisition right over the suit schedule property by adverse possession?
- 7) What decree or order?

5. In order to discharge the burden cast on the parties, the plaintiff examined himself as PW. 1 and two witnesses viz., Thippaiah and Basavaraja were examined as PWs. 2 and 3. The documents at Ex.P1 to P18 were marked. The first defendant examined himself as DW. 1 and a witness Muthaiah was examined as DW.2. The documents at Ex.D1 to D9 were marked.

6. The trial Court on analysis of the evidence has accepted the case of the plaintiff and decreed the suit by its judgment and decree dated 11.7.2003. The defendants claiming to be aggrieved by the same were before the Lower Appellate Court in RA No. 14/2003. The Lower Appellate Court on considering the rival contentions has by its judgment dated 15.12.2005 allowed the appeal and set aside the judgment and decree of the trial Court The plaintiff is therefore before this Court assailing the said judgment of the Lower Appellate Court.

7. This Court while admitting the appeal on 21.2.2002 has framed the following substantial question of law for consideration which reads as hereunder:

Whether the lower appellate Court was justified in holding that the gift deed is not duly executed when not only the executant had not denied the due execution but also the defendants who are not executants have not specifically denied the due execution by the executant?

8. Sri S. Nagaraj, learned Counsel for the appellant would contend that the Lower Appellate Court was not justified in holding that the gift deed dated 9.6.1961 was not proved merely because the attesting witness to the said document was not examined. The learned Counsel contends that in the instant case, neither the executant of the gift deed, during his lifetime had denied the

execution nor the defendants in their written statement have specifically denied the execution of the said document by the donor and as such there was no requirement in law to examine the attesting witness to the document in question in view of the proviso to Section 68 of the Evidence Act. The nature of the defence in the written statement does not amount to specific denial of the execution of the document. The mere denial of the case of the plaintiff and challenge to the title by terming the document as concocted or created would not amount to denial of the execution of the document itself. In such an event, all that the plaintiff was required to prove was that he had acquired title under the said document and on acceptance of the gift, he had also taken possession of the property. The plaintiff has tendered oral as well as documentary evidence to establish the same. Secondary evidence as permissible in law was tendered. The learned Counsel would contend that the Lower Appellate Court has failed to re-appreciate the evidence in this regard in its correct perspective even though the trial Court had appreciated the evidence to hold that the plaintiff had title to the property. In fact the Lower Appellate Court on coming to the conclusion that the gift deed cannot be accepted in view of the attesting witness not being examined has not looked into the evidence tendered on other aspects since the Court was over-ridden by that finding alone. It is therefore contended that the judgment of the Lower Appellate Court is not sustainable.

9. Sri G. Balakrishna Shastry, learned Counsel for the defendants would contend that the trial Court in fact had erred in not considering the matter in its correct perspective but the Lower Appellate Court on noticing that the suit document itself had not been proved in accordance with law has proceeded to set aside the judgment and decree. It is contended that the reading of the written statement in its entirety would indicate that the defendants had denied the genuineness of the alleged gift deed and as such it was incumbent on the plaintiff to prove the same by examining the attesting witness. The Lower Appellate Court has rightly come to the conclusion that the written statement would have to be considered in its entirety and the reading of the written statement as a whole would indicate that the denial is specific. The learned Counsel would further contend that even otherwise the plaintiff has not proved that the gift is in terms of the provisions contained in the Transfer of Property Act and since there was neither acceptance nor handing over of possession, the gift itself was not acted upon even if a document was concocted. The documents relied on, to contend that the revenue entries were changed and the plaintiff was in possession are got up documents and as such the Lower Appellate Court was justified in its conclusion and the same does not call for interference.

10. The authorities relied on by the respective learned Counsel in support of their proposition would be referred to at the appropriate stage depending on the need to refer to the same.

11. In the light of the question of law raised and also the contentions urged by the respective learned Counsel, at the outset, it is necessary to notice the

provisions contained in Section 68 of the Evidence Act so as to understand and determine the legal position and in that context to appreciate the present facts. Section 68 of the Evidence Act reads as hereunder:

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 use 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.

12. The plain reading of the said provision would indicate that if a document is required by law to be attested, such document could be used as evidence only if at least one attesting witness has been called for proving the execution of such document, subject of course to such attesting witness being alive and also being subject to the process of Court and capable of giving evidence. The proviso to Section 68 would however clarify that it shall not be necessary to call an attesting witness in proof of execution of the document, not being a WILL, which has been registered in accordance with the provisions of the Indian Registration Act unless its execution by the person by whom it purports to have been executed is specifically denied. In the instant case, the claim of the plaintiff is based on a registered gift deed. Section 123 of the Transfer of Property Act provides that a deed of gift is to be attested by at least two witnesses. Hence, the gift deed being a document required to be attested as per law, can be used as evidence by examining an attesting witness if the execution of such gift deed is specifically denied. The legal position therefore is that the requirement to examine an attesting witness to the document in question would arise only if the executant himself or any other person against whom such document is used specifically denies the execution of the document itself and not when the denial is in any other form.

13. The question for determination therefore is as to whether in the instant case the defendants have specifically denied the execution of the document by the alleged donor. The learned Counsel for the plaintiff placed reliance on the decision in the case of *Kumbara Narasimhappa v. Lakkanna and Anr.* AIR 1959 Kar 148 to point out that this Court has held that even the denial of the genuineness of the document would not amount to specific denial of the execution of the document and if the manner of proof as contemplated u/s 68 is to be imposed on the plaintiff, there should be a specific denial of the execution of the document itself. In this background the written statement filed is referred, to point out that the nature of denial does not amount to specific denial. Reference is also made to the decision in the case of *Adangan Puravan Assankutty's Daughter Kadiya Umma and Ors. v. Adangan Puravan Kutty's Son*

Mayan Kutty and Ors. AIR 1092 Ker 261 and to the case of Chhuttan Lal Vs. Shanti Prakash and Others, wherein similar view is taken. On the other hand, learned Counsel for the defendant has relied on the decision of the Hon'ble Supreme Court in the case of Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, and on the decision of this Court in the case of G. Aswathanarayana Setty v. M.N. Seshagiri Rao ILR 1987 KAR 3041. At the outset, it is to be stated that there can be no quarrel with regard to the position of law relating to the construction of the pleadings as contemplated under Order VI of the CPC and as enunciated in the decisions referred to by the learned Counsel for the defendants which is referred supra. In the present facts, the said decisions would however be of no assistance. That apart, both the learned Counsel have also referred to Order VIII Rule 3 and 5 of the CPC to contend with regard to specific denial. Keeping that in view, if the written statement in the instant case is perused, the reading of the entire written statement as a whole would no doubt indicate that the defendants have denied the case of the plaintiff wherein the plaintiff has claimed title to the property under a registered gift deed and it is in that background the issue no. 1 extracted above has been framed casting the burden on the plaintiff to prove his title to the property. However, the position does not rest at that, inasmuch as in the instant case the situation is that the denial of the case put forth by the plaintiff on all other aspects alone is not sufficient, but what is to be considered is as to whether the denial in the written statement could be considered as the specific denial of the execution of the suit document which is a compulsorily attestable document, keeping in view the proviso to Section 68 of the Evidence Act, being the question of law raised for consideration in this appeal.

14. On this aspect, the learned Counsel for the defendant would make specific reference to the following portions in the written statement to contend that the same among the other contentions would amount to specific denial. The said portion reads as hereunder;

The alleged gift deed is farce device and is the result of legal flaws concocted by the plaintiff at the behest of his henchmen and is unenforceable in law.

15. The learned Counsel would further refer to the written statement to indicate that at several places, it has been stated as "alleged gift deed" and therefore the same amounts to denial. On noticing the said contention, a reference to the view expressed in the case of Kumbara Narasimhappa AIR 1959 kar 143 would indicate that similar defence in the said case was held as not being a specific denial of the execution of the document for the purpose of Section 68 of the Evidence Act It has been emphasised in the said judgment that the execution of the document should be specifically denied so as to require the plaintiff to prove the execution itself by examining the attesting witness. Though the learned Counsel for the defendant attempted to distinguish the said case by contending that the said view was expressed in a situation wherein the passing of consideration alone has been denied, i am unable to accede to the said

contention since in the said case apart from denying the passing of consideration, it was also contended that the mortgage deed must have been got up by the plaintiff in collusion for defeating the claim of the defendant and in fact in the said case, it was also stated that the said document is not genuine. In my view, such averment in the said case could be read as a contention to the effect that the document was concocted. Even after noticing such contention, the learned Judge of this Court has stated that a denial could be considered as specific denial only if the execution of the document is denied and the said contentions were not accepted as specific denial. Similar is the situation in the other two decisions cited by the learned Counsel for the plaintiff Keeping this in view even though in the instant case the defendant has used the words "concocted" and "alleged" while referring to the gift deed, that alone would not indicate that the execution itself has been denied. Further while considering the said manner of denial as contended, what also requires to be noticed in the facts of the instant case is that, the defendants even prior to the filing of the suit, had raised a contention before the competent authority that there is violation of conditions of grant in view of the alienation during the prohibited period. That apart, it is also contended that father of the defendant was not competent to dispose the property by gift since the upset price was paid out of the joint family income and he was not the absolute owner. No doubt, the legal position is that not only alternate but contradicting contentions could also be urged in the written statement However, in the instant case, the reading of the written statement does not indicate that the execution of the gift deed itself has been denied at the outset, and the other contentions have been urged as alternate contentions in the event of the execution of the document being proved. Therefore, on the facts of the present case, keeping in view the law laid down by this Court, the only conclusion that could be arrived at is that the execution of the gift deed has not been specifically denied and as such, in the instant case, the plaintiff cannot be non-suited by holding that the gift deed is not proved in view of the non-examination of the attesting witness.

16. Having arrived at the said conclusion, it is also necessary to refer to another decision of this Court in the case of Balappa Tippanna v. Asangappa Mallappa and Anr. AIR 1960 MYS 234 wherein this Court, while considering the scope of Section 68 of the Evidence Act in relation to the proof of a deed of gift, has held that the net effect of Section 68 is that if the execution of the document of gift is specifically denied, then an attesting witness must be called to prove it. It is further held that if however such execution is not specifically denied, then it would not be necessary to call aft attesting witness to prove the same, but the document all the same will have to be proved. The effect of the proviso is that the due execution and attestation of the gift deed will have to be proved although it may be proved by calling a person other than an attesting witness.

17. in the backdrop of the legal position discussed above, a perusal of the judgment passed by the Lower Appellate Court would indicate that the learned Judge has mainly come to the conclusion that the suit is liable to be dismissed in

view of the situation that the attesting witness to the document has not been examined. No doubt, the Lower Appellate Court has made some reference to the other aspects of title matter relating to the claim of change of revenue entries by referring to the exhibits that have been produced and marked as Ex. P-2, 3 and 6 wherein the plaintiff has claimed that the revenue entries have been changed to his name and in that background has referred to the documents at Ex.D2 to D5 to initiate the case of the defendants claiming with regard to the revenue entries being in the name of their father and that too without reference to the evidence of PW-2, 3 and DW-2. Further, the said discussion has been made only after arriving at the finding in para-19 of the judgment wherein it is held that Exp-1 (gift deed) is to be excluded from consideration since the same is not proved by examining the attesting witness. In a normal circumstance, no other issue would have arisen for consideration if the document at Ex P-1 is excluded in the manner as done by the lower Appellate Court.

18. However, since I have already come to the conclusion that in the instant case, the non-examination of the attesting witness is not fatal to the case of the plaintiff even in the absence of the evidence of the attesting witness, the plaintiff is entitled to still prove the document as enunciated in the case of Balappa Tippanna AIR 1960 MYS 234. Therefore, in the Instant case, all other ingredients of making of a valid gift deed and the subsequent acceptance and putting in possession as a requirement is to be proved by the plaintiff. On these aspects of the matter, no doubt, the trial Court has held the issues in favour of the plaintiff. The Lower Appellate Court, as already noticed, has mainly relied on the non-examination of the attesting witness and on the aspects of possession and change of revenue entries, the documents alone have been noticed. However, when the issue relating to valid gift and possession is to be considered in the background of two sets of documents being available, it was also necessary to consider the oral evidence tendered by the parties for the purpose of re-appreciation of evidence by the Lower Appellate Court. In this regard, the judgment of the Lower Appellate Court would indicate that there is absolutely no reference to the evidence of the witnesses examined on behalf of the plaintiff viz., the evidence of PW.2 and 3. There is also no reference to the evidence of DW.2. Though the teamed counsel herein have referred to the oral evidence, the scope in a second appeal u/s 100 of the CPC is limited with regard to reappreciation of evidence, except for noticing the same for the purpose of finding out as to whether there is perversity in the manner of appreciation and re-appreciation. The Lower Appellate Court is the last Court to render a finding of fact and when there is no reference at all to the evidence for the purpose of re-appreciation, the same would have to be reconsidered by the Lower Appellate Court, more particularly when the edifice of the judgment of the Lower Appellate Court is eroded in view of the answer to the substantial question of law framed in this second appeal.

19. One more aspect in the present case is that the document marked as Ex.P1 is the certified copy of the gift deed which is marked as secondary evidence as

provided u/s 65 of the Evidence Act after laying the foundation vide Ex.P9 stating that the original of the document is deposited with the PLD Back. The learned Counsel for the defendant has vehemently contended that in the present circumstance the secondary evidence should not have been permitted since even as per the plaintiff, the document is said to be available with the PLD Bank and the said Bank being subject to process of the Court, the document should have been secured and marked. However, the perusal of the records would indicate that the defendants have not raised any objection before the trial Court for marking the certified copy of the document at the time of evidence nor is it indicated as a ground in the appeal memo before the Lower Appellate Court. In such situation, the law as stated by the Hon'ble Supreme Court in the case of Smt. Dayamathi Bai Vs. Sri K.M. Shaffi, is that a party not objecting to the marking of a document including secondary evidence at the time of admission cannot question the same in appeal. However, in the said case the Hon'ble Supreme Court has relied on its earlier decision rendered in the case of R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, . In that case, the Hon'ble Supreme Court has held that the objection as to admissibility of documents in evidence can be classified into two classes, first being an objection that the document which is sought to be proved is itself inadmissible in evidence and the second being, where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular and insufficient. In the instant case, there is no objection raised at the stage of marking the document as secondary evidence though it is now contended that the mode of proof is irregular and insufficient. The decision of the Hon'ble Supreme Court would indicate that the insistence on objection at the stage of marking in the second of the two classes stated above is a proposition of law play so that such party may prove the same in an appropriate manner if objection is raised at the earliest stage. Further the Hon'ble Supreme Court has also held that when the objection is with regard to the inadmissibility of the document itself, then it would be available for the objection to be raised even at a later stage or even in appeal or revision. If these two aspects are kept in view, there would be a tinge of both the classes stated above in the case on hand viz., the defendants in the present case had objected to the very admissibility of the document at Ex.P1 before the Lower Appellate Court and as such even though no objection was taken at the time of marking, the contention with regard to the admissibility of the said document had been upheld by the Lower Appellate Court and if that finding was sustained, the non-raising of objection with regard to the irregularity or insufficiency of the manner of marking secondary evidence would not have come to the fore. However, since this Court has now considered the substantial question of law and has found that the finding of the Lower Appellate Court that the document at Ex.P1 being inadmissible is not sustainable, the second of the above stated class has arisen for consideration. On the second class, since fair play is the requirement as held by the Hon'ble Supreme Court, the non-raising of objection to marking of the document should not work to their disadvantage when the

defendants had attacked the said document whole bog and have now failed. As such interest of both the parties is to be kept in view by this Court Hence in the facts of the instant case, since the matter is to be reconsidered by the Lower Appellate Court, the concept of fair play and justice could be rendered to both parties by providing appropriate opportunity. In this regard, in any event, the certified copy of the gift deed has been marked by contending that the original of the same is deposited with the PLD Bank, and at that stage if the marking was objected to and if it was upheld by the Court the plaintiff could have taken appropriate steps to summon the same for production through the official of the concerned Bank for comparison by the Court. In the background of the above discussion, such course can be permitted at this stage by the Lower Appellate Court so that it would be a just course from the viewpoint of both the parties. That apart, it is noticed that the endorsement (Ex.P9) issued by the Bank is of the year 1996 and as such if the loan has been discharged and if the document is available with the plaintiff, it would be open for him to produce the same before the Lower Appellate Court along with an application.

20. For all the above said reasons, the question of law raised in this appeal is answered in favour of the appellant and it is ordered as follows:

ORDER

I) The appeal is allowed in part and the judgment dated 15.12.2005 passed by Addl. District Judge at Chitradurga in RA No. 14/2003 is set aside.

II) The matter stands remitted to the Addl. District Judge at Chitradurga to restore RA No. 14/03 on file and reconsider the same in accordance with law keeping in view the above observations.

III) The parties shall appear before the Lower Appellate Court on 29.06.2009 without further notice and the Court below shall regulate its proceedings thereafter and dispose of the appeal expeditiously.

IV) Registry to remit the LCR forthwith.

V) Parties to bear their own costs.