

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated the 1st day of April 2010

: P R E S E N T :

THE HON'BLE MR.JUSTICE : N.KUMAR

A N D

THE HON'BLE MR.JUSTICE : V.JAGANNATHAN

REGULAR FIRST APPEAL No. 614 / 2007

BETWEEN :

L.M.Lingaraj,
S/o Late Major Sardar L.Mahadevaiah,
44 years, R/a No. 159/F2, Gururaja Vilasa,
Harischandra Road, Mysore-04.

...Appellant

(By Sri G.D.Ashwathanarayana, Sri J.Prakash,
Sri L.Vijaykumar, Advocates.)

A N D :

1. L.M.Manojkumar,
S/o Late Major Sardar L.Mahadevaiah,
24 years, R/a in the Eastern Wing of
the premiscs bearing D.No. 159 (F.2),
"Gururaja Vilasa", Uttaradi Math East Cross-1,
Fort Mohalla, Mysore-02.
2. L.M.Nagalingaswamy,
S/o Late Major Sardar L.Mahadevaiah,
35 years, R/a No.2646, 3rd Main Road,
V.V.Pura, Mysore-2.

...Respondents

(By Sri Jayaramu for M/s Jayaramu Associates,
Advocate for R-1.
Sri S.G.Bhat, Advocate for R-2.)

Regular First Appeal filed under Order 41 Rule 1 under Section 96 of the CPC against the judgment and decree dated 15.12.2006 passed in O.S.No. 325/1987 on the file of the Prl.Civil Judge (Sr.Dn.) Mysore, decreeing the suit for partition.

This appeal coming on for hearing this day, Kumar, J, delivered the following :

J U D G M E N T

This is first defendant's appeal against the judgment and decree of the trial court, which has decreed the suit of the plaintiff granting him 2/5th share in the plaint schedule property along with the second defendant who is also held to be entitled to 2/5th share on his paying requisite court fee on his written statement.

2. For the purpose of convenience, the parties herein are referred to as they are referred to in the original suit.
3. The subject matter of the suit consists of two schedules. 'A' Schedule property is a bungalow bearing D.No. 159 (F.2) known as 'Gururaja Vilasa' situated in Uttaradi Math Street, East Cross I, Fort Mohalla,

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Mysore, which is herein after referred to as the schedule property. 'B' Schedule property are the movables found in the 'A' Schedule property.

4. The case of the plaintiff is that the schedule property originally belonged to Major Sardar Sri L.Mahadevaiah, father of the plaintiff and the defendants. At the time of settling all his properties, he gave the schedule property as per the deed of settlement dated 12.11.1956 to his first son, the first defendant. Consequent to the settlement deed, the first defendant, out of natural love and affection made a gift of 1/5th undivided share in favour of each of his four brothers - plaintiff, second defendant, L.M.Nagaraj and L.M.Srikant and thus all the sons of L.Mahadevaiah became entitled to 1/5th undivided share in the schedule property. Subsequent to the execution of the said gift deed, the donees accepted the said gift and acted upon the same. Accordingly, khatha was also made in the joint names of the five brothers in the records of the Municipal Corporation. Thereafter, one of the brothers of the plaintiff and the defendants.




L.M.Shrikant, sold his undivided $1/5^{\text{th}}$ share in the schedule property to the plaintiff for valuable consideration as per the registered sale deed dated 30.7.1979. Likewise, another brother of the plaintiff, L.M.Nagaraj, also sold his undivided $1/5^{\text{th}}$ share to the second defendant as per registered sale deed dated 6.8.1979 for valuable consideration. Thus, the plaintiff became entitled to $2/5^{\text{th}}$ undivided share, the second defendant became entitled to $2/5^{\text{th}}$ undivided share, while the first defendant was entitled to $1/5^{\text{th}}$ undivided share in the suit schedule property.

5. After execution of the gift deed, though khatha was made out in the joint names of five persons, after execution of the sale deeds, khatha was made out in the name of only the plaintiff and defendants-1 and 2. The plaintiff and the defendants let out the main building to the Syndicate Bank where the Divisional Office is located and in the vacant space to the east of the main building, additional construction was made in a portion of which the second defendant is residing. However, the entire building is in the joint possession of the



plaintiff and the defendants. Since the main building of the schedule property is let out to the Syndicate Bank, the rent payable by them is being paid in accordance with the shares as specified above to their respective accounts. Though the plaintiff was earlier staying in the schedule premises, because of the differences, he was forced to leave that place and has been residing in a different place. Therefore, the plaintiff wants division of the schedule property by metes and bounds.

6. The plaintiff also has pleaded lot of movables by way of fixtures and fittings are in the schedule premises which are more fully described in the 'B' schedule and they also belong to the parties in the same shares. Therefore, he wanted both 'A' and 'B' Schedule properties to be divided according to the shares to which the plaintiff and the defendants are entitled to as above and they be put in possession of their respective separate shares. Therefore, he filed the suit for partition.



7. After service of summons, the second defendant filed his written statement. He admitted the entire case of the plaintiff except the allegation that the plaintiff was forced to leave the schedule property on account of any force or differences. He specifically set up a case that the 'B' Schedule property belonged to late Major Sardar L.Mahadevaiah who had bequeathed the said property to the second defendant by a will executed in his favour and thus, he is the absolute owner of the 'B' schedule property and the plaintiff is not entitled to any share therein. Therefore, he consented for a decree insofar as 'A' Schedule property is concerned and wanted the suit to be dismissed in respect of the 'B' Schedule properties.

8. The first defendant filed his written statement denying the execution of the gift deed by him in favour of all his four other brothers. It is his specific case that the so called gift deed is a fabricated one by the plaintiff and at no point of time, the first defendant affixed his signature to the so called gift deed. The signature found on the gift deed has been got compared and it has been opined by the handwriting expert that it does not



correspond to the admitted signatures of the first defendant and hence it is submitted that the signature has been forged by the plaintiff to knock off the valuable property belonging to the first defendant. He reserved liberty to take suitable criminal action against the plaintiff for forging the documents. Therefore, he contended that the plaintiff nor the second defendant nor L.M.Nagaraj or L.M.Shrikant have become entitled to 1/5th undivided share in the suit property. When the gift deed itself is challenged as fabricated document, the question of the donees accepting the gift deed would not arise. The plaintiff was called upon to prove the validity and executability of the deed. Making out khathas on the basis of the gift deed was denied. He was paying the taxes for the entire property. Execution of the sale deeds by L.M.Shrikant and L.M.Nagaraj in favour of the plaintiff and second defendant was also denied. It was contended that those sale deeds are also fabricated documents. Lease in favour of Syndicate Bank was admitted. But, it was denied that it was leased out jointly by the defendants and the plaintiff. Again, the




plaintiff has forged the signature in the lease deed where it is mentioned that each one of them is entitled to a share in the property. He contended that the entire property belongs to him. The first defendant was forcibly thrown out of the building by the plaintiff with the help of some goonda elements. The rent is also not paid in accordance with the shares specified in the account. The entire amount has been knocked off by the plaintiff without the knowledge of the first defendant for which act also the first defendant reserves his right to sue in the appropriate court. He denied that the plaintiff was forced to leave the schedule property because of the differences. After vacation of the building by the Syndicate Bank, the plaintiff managed to get possession of the property from the Syndicate Bank. The plaintiff has no right to a share in the schedule property and, therefore, he sought for dismissal of the suit.

9. On the aforesaid pleadings, the trial court has framed the following issues:



- i) Whether the plaintiff proves that he is entitled to partition and separate possession of 2/5th share in the suit schedule properties?
- ii) Whether the second defendant proves the execution of will by late Mahadevaiah in respect of 'B' schedule property?
- iii) What reliefs, if any, are parties entitled?

10. The plaintiff, in order to substantiate his claim, examined himself as P.W.4 and he also examined other witnesses as P.Ws.1 to 3 and 5 to 7 and he has produced 105 documents which are marked as Exs.P-1 to P-105. On behalf of the defendants, the first defendant was examined as D.W.1 and the second defendant was examined as D.W.2 and no documents were produced on their behalf. A handwriting expert by name Smt. C.V.Jayadevi was examined as Commissioner and she was examined as C.W.1 and the records produced by her were marked as Exs.C-1 to C-5.



11. The trial court, on appreciation of the aforesaid oral and the documentary evidence on record, held that the plaintiff has established due execution of the gift deed by the first defendant in favour of his brothers giving each of them $1/5^{\text{th}}$ undivided share in 'A' schedule property. It further held that the second defendant has failed to prove will by his father set up by him, under which 'B' schedule property is said to be bequeathed to the second defendant. In fact, the second defendant has not produced the will at all. Therefore, it held that the second defendant has failed to establish his case of will. Therefore, it decreed the suit of the plaintiff for partition and separate possession of his $2/5^{\text{th}}$ share in the suit property and also declared that the second defendant is also entitled for partition and separate possession of his $2/5^{\text{th}}$ share in the suit properties.

12. Aggrieved by the said judgment and decree of the trial court, the first defendant is in appeal. The learned counsel for the appellant, assailing the judgment and decree of the trial court, contended that the execution of

the gift deed is denied by the first defendant. The opinion of the handwriting expert shows the signature found on the disputed document did not tally with the admitted signatures of the first defendant on the documents such as written statement, vakalath and other documents. In spite of the same, the court below committed a serious error in holding that the gift deed is duly executed by the first defendant and the first defendant is not the absolute owner and the first defendant has retained only 1/5th share in the 'A' schedule property. Therefore, he submits that the judgment and decree of the trial court requires to be set aside.


13. Per contra, the learned counsel for the respondents supported the judgment and decree.

14. In the light of the aforesaid rival contentions, the point that arises for consideration in this appeal is as under:

“Whether the finding of the trial court that the gift deed Ex.P-13 is duly executed by the first defendant and can be sustained?”



15. From the material on record, it is clear that there is no dispute regarding the relationship between the parties. It is admitted by all of them that their father, under a registered settlement deed dated 12.11.1956 has given all his family properties in favour of his children. 'A' schedule property fell to the share of the first defendant in the settlement. The first defendant, in turn, has executed a gift deed, which is duly registered on 8.6.1970, which is marked as Ex.P-13, under which he divided the schedule property into five shares and he gave undivided $1/5^{\text{th}}$ share to his four brothers and retained $1/5^{\text{th}}$ share for himself. However, in the written statement, he has taken a contention that the said document did not bear his signature, the plaintiff has forged his signature and his case that it is a forgery is supported by the Commissioner's report and, therefore, he contends that the said document does not take away his absolute title over 'A' schedule property. In order to prove due execution, the son of the attesting witness has been examined as the attesting witnesses are no more. The evidence of P.W.5. whose evidence has



withstood the cross-examination, has rightly gained acceptance by the trial court. The gift deed, being a document which requires registration, the requirement of Section 68 of the Evidence Act has been complied with by examining the son of the attesting witness since the attesting witnesses are not alive. Thus, the legal requirement of Section 68 is complied with and the document is proved.

16. So far as the handwriting expert's evidence is concerned, it is clear from the written statement filed by the first defendant after the suit summons were served on him that, instead of filing the written statement for which he took nearly four years, he got signature on the gift deed examined by the handwriting expert C.W.1 and she gave a report saying that the said signature did not tally with the signature of the first defendant whichever signature he made available. Therefore, acting on the basis of the opinion evidence, it is pleaded in the written statement itself that the signature found on the gift deed is fabricated and it does not bear the signature of the first defendant. Very strangely, the very same



handwriting expert has been examined in this case as an expert and she could not be expected to give a different report than what she gave even before the filing of the written statement. That is what weighed with the trial court. We are not able to understand as to how the other parties agreed to her appointment as the Court Commissioner. Probably they were not aware that she was the expert who has also given her opinion prior to the filing of the suit. Be that as it may. The trial court was justified in ignoring the said expert opinion and rejecting the case of the defendant that the gift deed does not bear his signature. Probably what weighed with the judge to come to such a conclusion is the conduct for more than twenty years which clearly establishes the execution of the gift deed which has been acted upon by not only the plaintiff and the second defendant but even the first defendant and the correspondence with him by the bank. The material on record discloses that, after the settlement deed under which the first defendant got the property, khatha was made out to the first defendant by the Mysore Municipal



Corporation. After execution of the gift deed, the khatha which was standing in the name of the first defendant, was made in the names of all the five sons of their father i.e., joint khatha was made out. After the joint khatha was made out, one of the brother L.M.Shrikant executed a registered sale deed dated 30.7.1979 in favour of the plaintiff conveying his 1/5th undivided share in the property in his favour. Subsequently, L.M.Nagaraj also executed a registered sale deed dated 6.8.1979 conveying his 1/5th share in favour of the second defendant. They again approached the Mysore Municipal Corporation for deletion of the names of Shrikant and Nagaraj and confining the khatha only in favour of the three persons, which was accordingly done. It is thereafter the three persons leased the property to the Syndicate Bank. Accordingly, the bank apportioned the amount in terms of the shares and credited the amount to their respective accounts. Exs.P-5, 6, 7 and 8 witness the said fact. The trial court has meticulously examined the correspondence between the bank and the first

defendant which clearly shows that the first defendant was conscious and was duly aware of the gift deed and his share in the property and the shares of his other brothers. In fact, in the hind portion of the schedule property additional construction was put up for the residence of the second defendant and the construction of that magnitude could not have been put up overnight behind the back of the first defendant. If his case is to be believed that he has not executed the gift deed, he has not raised his little finger for the construction and admittedly the first defendant is residing in the hind portion. All of them are Income Tax assesseees. They have filed Income Tax returns. They have also filed Wealth Tax returns and in all those returns, their shares in terms of the gift deed are clearly set out, which is not disputed to this date. Thus, the preponderance of evidence, which is not disputed by the first defendant, has rightly weighed with the trial court in coming to the conclusion that the gift deed set up by the plaintiff was duly acted upon and the property tax and income tax were also paid accordingly. Rents are appropriated in

terms of the shares mentioned in the gift deed and it is too late in the day for the first defendant to turn round and contend that he has not executed any gift deed.

17. The trial court has properly appreciated the evidence on record and has rightly held that the gift deed is proved and the trial court was justified in decreeing the suit of the plaintiff. The said finding is based on legal evidence and does not suffer from any legal infirmity. As such, the said finding does not call for interference by this court.

18. Hence, we pass the following order:

Appeal is dismissed. No costs.

Sd/-
JUDGE

Sd/-
JUDGE

ckc/-