

CASE NO.:
Appeal (civil) 992-993 of 1997

PETITIONER:
REMCO Inds. Workers House Bldg Coop. Soc.

RESPONDENT:
Vs.
Lakshmeesha M. & Ors.

DATE OF JUDGMENT: 28/08/2003

BENCH:
Shivaraj V. Patil & [D.M. Dharmadhikari.

JUDGMENT:
J U D G M E N T
Dharmadhikari J.

These two appeals arise out of common judgment dated 06.9.1996 passed by the High Court of Karnataka at Bangalore in cross appeals filed by the plaintiff and defendants [Regular First Appeal Nos. 191/1987 & 747/1986] against the judgment dated 30.10.1986 of City Civil Court, Bangalore in Civil Suit No.5634 of 1980. The appellant which is a housing co-operative society of workers in REMCO Industries, was defendant no. 1 before the trial court.

The subject matter of dispute is the land in Survey No. 132/2 measuring 1 acre 3 guntas [now said to have been merged into Survey No. 305] situate in village Kempapur (now part of Bangalore City). The present appellant &200\223 Society of workers claims title to the land and it is submitted that it has built houses for its members on it. It is not in dispute that the suit land was an Inam land. Inams were abolished by Karnataka (Personal & Miscellaneous) Inams Abolition Act, 1954. Under the said Act, tenants in occupation of land are given preferential right to apply for Occupancy Rights and if they fail to do so, the Inamdar has been given a right to apply for grant of Occupancy Rights.

The plaintiff [respondent no. 1 herein] is the purchaser of suit land from Smt. Subbalakshamma, the Inamdar. One Muniyappa who claimed to be a tenant, applied on 22.4.1959 for grant of occupancy rights - amongst others on the suit land. His application for grant of Occupancy Rights for suit land in Survey No. 132/2 with other lands was allowed by the Special Deputy Commissioner by Order dated 28.5.1965 which was produced by the defendants before the trial court and was admitted as Ex. D-3 in the suit. During pendency of application for grant of Occupancy Rights, Muniyappa's heirs sold the suit land with other lands to REMCO factory in 1963. REMCO factory obtained permission for conversion of the use of land for non-agricultural purpose. The REMCO factory then sold the suit land with other 24 Acres of land to the present appellant &200\223 Society of its workers for construction of housing colony.

The plaintiff's case is that three years after the grant of Occupancy Rights to Muniyappa, by order dated 28.5.1965 of Special Deputy Commissioner [Ex. D-3], the Inamdar - Smt. Subbalakshamma made an application on 16.12.1968 to the Special Deputy Commissioner for grant of Occupancy Rights for the remaining areas in the Inam land in her favour. In her application, she did not claim any specific land but prayed that "the court be pleased to determine the extent of land which she is entitled to be registered as an occupant and register her name as an occupant &200|\&200|."

On the basis of above application, the Special Deputy Commissioner passed an order dated 09.12.1969 [marked as Ex. P-1] granting Occupancy Rights to her amongst other lands in Survey No. 132/2 area 1 Acre 3 Guntas.

The plaintiff based her title and claimed possession of the suit land in Survey No. 132/2 on the basis of the grant of Occupancy Rights in her favour by the Order dated 09.12.1969 passed by Special Deputy Commissioner [Ex. P-1] in which the area in Survey No. 132/2 granted is 1 acre 3 guntas which is less than her claim in the suit to the land of area 1 acre 12 guntas.

It is true that in the written statement of the defendant no. 1, there is no specific reference to the order dated 28.5.1965 [Ex. D-3] passed by Special Deputy Commissioner granting Occupancy Rights to tenant Muniyappa in Survey No. 132/2 area 1 acre 3 guntas. In the course of trial, however, copy of the order dated 28.5.1965 passed by the Special Deputy Commissioner in favour of tenant Muniyappa was admitted in evidence and marked as Ex. D-3 without any objection by the plaintiff.

On the provisions of the Act under consideration, it is not disputed, as a legal position, by the counsel appearing for the parties that the Inamdar could be granted Occupancy Rights in Inam lands on which no tenant had been granted any Occupancy Rights. The necessary consequences of this legal position is that if the suit land is included in the grant of Occupancy Rights to Muniyappa in the order dated 28.5.1965 [Ex. D-3] of the Special Deputy Commissioner, the same land could not have been granted to Inamdar, Subbalakhshamma by order dated 09.12.1969 [Ex. P-1]. Apparently, suit land in Survey No. 132/2 is carved out from Survey No. 132 and the land in Survey No. 132/2 also has an area larger than 1 acre 3 guntas because the plaintiff's own suit is for title and possession of land in the said Survey No. 132/2 to the extent of 1 acre 12 guntas.

It has also been pointed out from the contents of the order dated 09.12.1969 [Ex. P-1] passed by Special Deputy Commissioner in favour of Inamdar that she was granted Occupancy Rights amongst others in suit land of Survey No. 132/2 to the extent of her undivided 1/7th share. The identification of land in Survey No. 132/2 to the extent of 1/7th share of the Inamdar was not done in the order dated 09.12.1969. The plaintiff's case is that the identification of land in Survey No. 132/2 to the extent of 1 acre 3 guntas was done when on the basis of grant of Occupancy Rights to the extent of 1/7th share in her favour, she approached Revenue authorities for mutation of her name. It is in the mutation proceeding that the Occupancy Rights to the extent of her 1/7th share in Survey No. 132/2 were identified in her favour. These documents are the basis of her suit for title and possession of Survey No. 132/2 area 1 acre 3 guntas.

The trial court being the VI Addl. City Civil Court of Bangalore City partly decreed the suit by declaring the respondent/plaintiff to be owner of 1 acre 3 guntas of land in Survey No. 305/2 which is said to be the new number of old Survey No. 132/2. The trial court did not grant any decree for delivery of possession of land on a finding that the plaintiff's Occupancy Rights were declared for her 1/7th share and she would have to work out her rights for possession of specific portion of land in her favour by a suit for partition.

The High Court in cross appeals preferred by plaintiff and defendant no.1 not only confirmed the decree of declaration of the title of the plaintiff to the suit land but also granted decree of delivery of possession of the land holding that if in the suit land of Survey No. 132/2, no Occupancy Rights had been granted to any tenant, the

plaintiff's 1/7th share could be ascertained to the extent of 1 acre 3 guntas.

The learned senior counsel appearing for the appellant submits that the main contesting issue between the parties is whether the suit land in Survey No. 132/2 area 1 acre 3 guntas being already covered by the grant dated 28.5.1965 [Ex. D-3] in favour of the tenant, could be a subject of further grant in favour of the Inamdar under order dated 09.12.1969 [Ex. P-1]. It is further submitted that as Survey No.132/2 is apparently carved out of Survey No. 132. The Survey No. 132/2, according to plaintiff's own claim has an area larger than 1 acre 3 guntas because the decree for declaration and possession is sought for area 1 acre 12 guntas in Survey No. 132/2. The other contesting issue before the court was identity of the suit land. The legal position is not controverted that the Inamdar could be granted Occupancy Rights only in respect of land in the Inam for which no Occupancy Rights had been granted to the tenants. The learned counsel appearing for the appellant, therefore, submits that the plaintiff's suit ought to have been dismissed for want of identification of the suit land under the alleged grant dated 09.12.1969 [Ex. P-1] made in favour of Inamdar. In the alternative, for the appellant, it is submitted that the case be remitted to the trial court for framing a specific issue on the identity of the suit land covered by earlier order dated 28.5.1965 [Ex.D-3] containing grant of Occupancy Rights in Survey No. 132/2 area 1 acre 3 guntas in favour of the tenant Muniyappa and the identity of the suit land in the grant dated 09.12.1969 [Ex.P-1] made in favour of erstwhile Inamdar for the same Survey No. 132/2 with same extent or area - 1 acre 3 guntas.

The prayers made in the appeals have been strongly opposed by the learned senior counsel appearing for plaintiff/ respondent. It is submitted that although order dated 28.5.1965 in favour of the tenant was produced in the trial court and marked as an admitted document [Ex. D-3], it was never made foundation of the title of the defendant by raising pleadings in that behalf in the written statement of defendant no. 1. It is also submitted that at no stage in the trial court or the High Court in appeals, any issue was raised basing title of defendant no. 1 on the order dated 28.5.1965 [Ex. D-3]. It is, therefore, submitted that no case is made out for setting aside the decree in favour of the plaintiff or for remand of the matter to the trial court for framing and trial of any additional issue based on the orders dated 28.5.1965 [Ex. D-3] and dated 09.12.1969 [Ex. P-1].

After hearing the learned counsel appearing for the parties, we have formed an opinion that the interest of justice demands remand of case to the trial court for framing and trial of specific issue on the grant of Occupancy Rights under order dated 28.5.1965 in favour of the tenant [Ex. D-3] and the order dated 09.12.1969 [Ex.P-1] in favour of erstwhile Inamdar. True it is that in the written statement of defendant no. 1, no clear and specific pleading to base their claim for title and possession of the suit land on grant dated 28.5.1965 [Ex. D-3] was raised. No specific prayer appears to have been made either in the trial court or in the High Court in appeals to consider issue of identity of the land on the basis of the grant dated 28.5.1965 [Ex. D-3].

It cannot, however, be lost sight of that the burden to prove title and claim for possession of specific land in Survey No. 132/2 was initially on the plaintiff. The defendant no. 1 in the written statement contested the claim of the plaintiff and claimed title in itself. The grant of Occupancy Rights in favour of tenant Muniyappa contained in the order dated 28.5.1965 [Ex. D-3] was produced in the trial court without objection from the plaintiff and allowed to be exhibited and marked as Ex. D-3. When such a document of grant of suit land

to the extent of 1 acre 3 guntas in favour of defendant no. 1 was before the trial court, it was necessary for it to consider its effect on the subsequent grant dated 09.12.1969 [Ex. P-1] in favour of the erstwhile Inamdar. The legal position not in dispute is that if the suit land in Survey No. 132/2 area 1 acre 3 guntas had already been granted by order dated 28.5.1965 [Ex. D-3] to the tenant, Muniyappa, the same land could not have formed part of the grant to the extent of 1/7th share to erstwhile Inamdar in the order dated 09.12.1969 [Ex. P-1]. A clear legal issue, based on earlier grant dated 28.5.1965 [Ex. D-3] and the subsequent grant dated 09.12.1969 [Ex. P-1] with the identity of the land under the two grants did arise before the trial court as well as the appellate court. The said issue has not been answered by any of the two courts below. The plaintiff has to succeed on the strength of its own case and not on the weakness of the case of the defendant. In opposing the prayer for remand, learned counsel appearing for the plaintiff/respondent has placed strong reliance on the decision of Privy Council in Kanda & Ors vs. Waghu [AIR (37) 1950 Privy Council 68]. The contention advanced is that since pleadings based on Ex. D-3 were not raised in the written statement of defendant no. 1 and no issue on the basis of Ex. D-3 having been raised in the trial court, this Court should not remit the matter for retrial on the said issue.

As we have stated above, document [Ex. D-3] was admitted and marked as evidence before the trial court. When such document was admitted, naturally the question of effect of that document on the subsequent grant [Ex. P-1] in favour of plaintiff did arise for consideration of the trial court as well as appellate court. Surprisingly, the trial court while discussing the claim of title of the plaintiff to Survey No. 132/2 for area 1 acre 12 guntas did not make any mention of the document admitted and exhibited before it as Ex. D-3. The relevant part of the discussion in the judgement of trial court apparently shows that the document of earlier grant of Occupancy Rights to the tenant [Ex. D-3] had been overlooked. The said part of judgment reads thus :-

"They also do not show what was the extent of land comprised in S.No. 132/2. The only material available on record to show the extent of land in S.No. 132/2 is Ex. P-12 the revised mutation order passed by the Deputy Tahsildar of Bangalore North Taluk dated 30.5.1972. According to para 2 of the said order the total extent of area comprised in S.No. 132/2 corresponding to S.Nos. 305 and 472 was 8 acres and 12 guntas and if that is so than 1/7th of the total extent of land comprised in S.No. 132/2 would be 1 acre 7.4 guntas and not 1 acre and 12 guntas. No doubt the Deputy Tahsildar, North Taluk in Ex.P-12 has stated that Subbalakshamma's share was 1 acre 12 guntas as there was a balance of 200\223 acres 29 guntas as remaining in S.No. 305 after the lands previously registered in the name of one Muniyappa, Sakamma and Lakshamma and therefore it was possible to allot 1 acre 12 guntas in S.No. 305 and he has therefore recognised the share of P.W. 2 Subbalakshamma in S.No. 305 and as 1 acre and 12 guntas. However, the question is not whether 1 acre and 12 guntas was available in S.No. 305 so that he could recognise P.W. 2 Subbalakshamma as the owner of the said 1 acre and 12 guntas in S.No. 305 which is now given S.No. 305/2 but as to whether Subbalakshamma was entitled to in pursuance to the order passed as per the original of Ex. P-1 to 1 acre and 12 guntas.

In the cross appeals before the High Court, document [Ex. D-3] had again been overlooked. See the following part of the judgment of the High Court in paragraph 18 :-

"At some stage it was canvassed by Sri N.S. Krishnan that the land in

question and many other lands were purchased by the management of the REMCO factory for formation of a layout from the tenants in the occupation of the Inam land. Not a scrap of paper is produced in the suit to show that these tenants had claimed occupancy rights under any provisions of Inams Abolition Act before the Authority namely the Special Deputy Commissioner for Inams Abolition. But subsequent purchasers namely the management of the REMCO factory have also not made any claim before the authority for occupancy rights.

[Underlining to supply emphasis]

From the above resume of facts and the nature of orders of grants of Occupancy Rights to the contesting parties, we find that the basic issue of the effect of earlier grant dated 28.5.1965 [Ex. D-3] in favour of the tenant - Muniyappa on the subsequent grant dated 09.12.1969 [Ex. P-1] in favour of plaintiff/respondent was neither addressed to by any of the courts below nor a decision has been rendered on the same. The issue of effect of Ex. D-3 on Ex.P-1 and the identity of the land under the two grants is vital to the just decision of the case. The powers of the appellate court are not inhibited by the acts or omissions of the parties. Rule 25 of Order 41 of Code of Civil Procedure empowers the appellate court to frame an issue and remit it for trial which has been omitted to be framed and tried by the trial court and which appears to the appellate court essential to the right decision of the case. Rule 23 A Order 41 introduced by CPC Amendment Act No. 104 of 1976 w.e.f. 1.2.1977 confers powers on the appellate court to remand whole suit for retrial. In our considered opinion, this is a fit case where this Court should exercise powers of remand under Order 41 Rule 25 read with Rule 23 A of CPC.

Consequently, we allow these appeals. The judgment and decree dated 30.10.1986 of the City Civil Court, Bangalore and the common judgment and decree dated 06.9.1996 of the High Court in appeals are set aside. The whole case is remitted to the trial court for deciding specific issues on the effect of grant dated 28.5.1965 [Ex.D-3] on the subsequent grant dated 09.12.1969 [Ex. P-1] and the identity of the land under the two grants. The trial court shall recast the issues with the issue indicated above and after giving additional opportunities to both the parties to lead additional evidence on the issues involved, decide the suit afresh in accordance with law.

In view of the order of remand passed by us, we leave the parties to bear their own costs in these appeals.