

AIR 1972 Kar 184

Mysore High Court

Case No: Second Appeal No. 1235 of 1969

Kamalamma

APPELLANT

Vs

Kenche Gowda and
Others

RESPONDENT

Date of Decision: Oct. 8, 1971

Acts Referred:

Transfer of Property Act, 1882 " Section 83, 91, 92

Citation: AIR 1972 Kar 184

Hon'ble Judges: C. Honniah, J

Bench: Single Bench

Advocate: C. Srinivasa Vakil, for the Appellant; Kadidal Manjappa, Papanna and T.P. Ponnappa, for the Respondent

Final Decision: Dismissed

Judgement

C. Honniah, J.

This appeal arises out of a suit instituted by the Plaintiff Kamalamma for a declaration that she is the owner of the suit lands

and for a direction to defendants 1 to 4 to put her in possession and for mesne profits for the period prior to the suit and also for future mesne

profits.

2. The trial court negatived the claim of the plaintiff in so far as it related to Survey number 94 and decreed her claim in respect of survey number

92, the extent of which is 1-29 guntas.

Against the said decision, the defendants 1 to 4 preferred an appeal in the court of the Civil Judge. Bangalore which confirmed the decree of the

trial court. On appeal to this Court by defendants 1 to 4, this court set aside the decree of the appellate court and remanded the case to hear the

appeal afresh and dispose of the same according to law. The Civil Judge, who heard the appeal has decided against the plaintiff and dismissed her

suit. The plaintiff has preferred this appeal challenging the correctness of the decision of the appellate Court.

3. The litigation in respect of the suit properties started as long back as 1924 between the predecessors of the present parties. It is unfortunate that

the parties have fought the litigation for over 47 years and I hope now at least the litigation will come to an end.

4. The facts that have given rise to this appeal briefly stated are these:

One Chikkappajigowda was the husband of the plaintiff and defendant 1 Patel Kenchegowda is his brother. Both the brothers hypothecated

survey number 91 measuring 1 acre 37 guntas assessed at Rs. 7-8-0, survey number 92/2 measuring 13 guntas assessed at Rs. 1-8-0 and Survey

number 104 measuring 1 acre 7 guntas assessed at Rs. 9-0-0 under a deed dated 18-5-1920, the certified copy of which is Exhibit IV, to one

Sanjeevegowda. A perusal of the deed shows that all the three survey numbers are described as one garden, the eastern boundary being

"Katteboranasosi" garden of Huchegowda, and the lane used by the villagers. Regarding the other boundaries, there is no dispute in this case and

therefore, it is not necessary to mention the same. Chikkappajigowda and Patel Kenchegowda failed to discharge the debt under the deed dated

18-5-1920. Sanjeevegowda filed a suit in O. S. No. 554/23-24 on the file of the Second Munsiff. Bangalore and obtained a decree against

Chikkappajigowda and Patel Kenchegowda,

5. In the meanwhile, it appears, Chikkappajigowda and Patel Kenchegowda became divided and Survey Numbers 91, 92, 94 and 104 of Patlu

Village among other properties fell to the share of Patel Kenchegowda. Sanjeevegowda assigned the decree in favour of one Siddegowda, brother

of Kamalamma. Siddegowda executed the decree in Exn. No. 32/31-32 and brought the hypothecated lands to sale. In court sale he purchased

the suit lands. On 19-10-1938. in Misc. No. 330/37-38. Siddegowda got possession of the suit lands under the delivery receipt Exhibit (A) and

the sale certificate Exhibit III. The schedule given in the delivery receipt and also in the sale certificate is almost the same as given in Exhibit IV

except omitting to mention the land of Huchegowda as one of the eastern boundaries. Siddegowda leased out the lands to one Marilingegowda

somewhere in the year 1940. That Marilingegowda. lessee, has not been examined in this case. On 23-12-1940. Siddegowda mortgaged the

lands to one Borappa under the original of Exhibit VI. Borappa leased out the lands to two persons. Borappa and his lessees have also not been

examined in this case.

6. The plaintiff purchased the equity of redemption on 17-10-1941 from Siddegowda. Three years thereafter, she mortgaged the suit lands under

the original of Ex. (G) dated 8-10-1944 to one Marilingegowda. Marilingegowda filed an application u/s 83 of the Transfer of Property Act (as it

was then in force in the erstwhile State of Mysore) for redemption in Misc. No. 237/43-44 and obtained possession through Court. Ex. II is the

application filed by Marilingegowda and Ex. (E) is the delivery receipt under which he obtained possession. He was in possession till 3-6-1950.

Then Kamalamma redeemed the mortgage of Marilingegowda and leased the suit lands to defendant 5 under Ex. (L) dated 8-1-1952. Defendant

1 Patel Kenchegowda interfered with the possession of the plaintiff. She filed an injunction suit in the court of the Munsiff. Ramanagaram in O. S.

No. 559/1951-52 and obtained an order of interim injunction against Patel Kenchegowda and his three sons who are defendants 1 to 4 in the

present suit. Defendants 1 to 4 filed an application for injunction against Kamalamma on the ground that they were in possession and enjoyment of

the suit lands. An interim injunction was granted in favour of them. Kamalamma. therefore withdrew her suit with liberty to file another suit if need

be. Under these circumstances, Karnalamma has filed the present suit.

7. The case of the plaintiff stated briefly is as follows:--

The mention of boundaries to survey number 104 in the hypothecation deed was a mistake. The intention of the parties was not to hypothecate

survey number 104. Ever since the suit lands were hypothecated, the said larros have been in continuous possession and enjoyment of the plaintiff

and her predecessors in title till she was dispossessed in the year 1951. She on these pleadings, prayed for a declaration that she was the owner

and she be put in possession of the suit properties.

8. Defendants 2, 3 and 4 are the sons of first defendant and defendant 5 is said to be the lessee of the plaintiff. Defendants 1 and 5 have not filed

written statements. The case of the defendants 2, 3 and 4 is that survey number 91, sub-number 2 in survey number 92 measuring 13 guntas and

survey number 104 were hypothecated by the husband of the plaintiff and defendant 1. Survey number 92 had been divided into three sub-

numbers. Except sub-number 2 of S. No. 92 (in that survey number) measuring 13 guntas. which was the subject-matter of hypothecation, the

remaining portion measuring 1 acre and 29 guntas assessed at Rs. 9-8-0 was and has been in their continuous possession and enjoyment and that

portion was called as "Katteboranasosi". They contended that survey number 94 measuring 6 guntas was never the subject-matter of

hypothecation and the plaintiff and her predecessors-in-title at no time were in possession and enjoyment of that land. Lastly they pleaded that the

plaintiff and her predecessors-in-title were not in possession within 12 years from the date of the suit and as such the suit was barred by limitation.

9. On these pleadings, number of issues were raised before the trial court. So far as survey number 94 is concerned, the claim of the plaintiff has

been negatived and the plaintiff has not challenged that decision. That being so, in respect of that survey number, the decision of the Courts below

has become final.

10. The main question that arises for decision is whether the plaintiff became the owner with possession of the whole of survey number 92 as

contended by her or she became the owner with possession only to the extent of 13 guntas.

11. In order to appreciate the respective contentions of the parties, it is necessary to consider the conduct of the parties with reference to the

documents in this case. If the plaintiff were to succeed, she must prove her case either by oral or documentary evidence. The parties to the

document Ex. 10 are Chikk-appajigowda. and defendant 1 being the executants and Sanjeevegowda being the person who took the lands on

hypothecation. Chikkappaigowda died somewhere in the year 1940 or so. Before his death there was a partition between him and defendant 1

and in that partition, as already stated, survey numbers 91, 92, 94 and 104 and other properties fell to his share. Siddegowda took delivery of the

properties under Ex. A in the year 1938. Chikkappaigowda was alive then and it is seen that he is one of the signatories to the delivery receipts.

Defendant 1 is alive and he was the best person who could have thrown light as to what properties were hypothecated under Ex. IV, For some

reason or the other, he has not stepped into the witness box to give evidence. Whatever may be the reason we are concerned with the state of

facts available in this case. That being the situation, one has to rely mainly on the contents of the documents. Number of witnesses have been

examined on behalf of the plaintiff and defendants 2 to 4. I am unable to get any assistance from their evidence to decide the question. But

however. I would make reference to the evidence of these witnesses at the appropriate time.

12. In order to come to a conclusion what was the intention of the parties and what was the extent of land hypothecated under Ex. IV, one has to

look into the document itself. A perusal of this document shows that the whole of survey number 91 and in survey number 92. sub-number 2

measuring 13 guntas and the whole of survey number 104 were hypothecated.

13. Mr. Vakil, learned counsel for the plaintiff contended that the eastern boundary of the lands hypothecated had been described as

Katteboranasosi". the garden of Huchegowda and a lane. If the eastern boundary is as stated in Ex. IV according to him the lands hypothecated

would only be survey numbers 91. 92 and 94. The inclusion of survey number 104. therefore was either by mistake or by inadvertance. The

description of eastern boundary has given rise to the controversy. But we have got to consider the document which was executed by the plaintiff's

husband and defendant 1 in favour of one Sanjeevegowda. This document was executed in the year 1920. The original document has not been

produced but the certified copy has been marked in this case. As already stated, the executants have not thrown any light on this document for the

reason that one of them was dead and defendant 1 did not step into the witness box. The attestors of this document have also not been examined.

u/s 92 of the Evidence Act when the terms of any such contract, grant or other disposition of property, or any matter required by law to be

reduced to the form of a document, have been proved according to Section 91, no evidence of any oral agreement or statement shall be admitted,

as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting

from its terms. However, proviso (1) to Section 92 provides that any fact may be proved which would invalidate any document or which would

entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, Want of capacity in any

contracting party, want or failure of consideration or mistake in fact or law. There is nothing in this proviso that the facts which may be proved can

only be proved in support of the claim to which those facts gave rise and such facts may be pleaded by way of defence only. The question

therefore is whether the facts which are given in evidence in this case, as such would invalidate the document, if a claim to invalidate it were made,

14. The argument of the learned counsel for the appellant was that the document was founded on a mistake. Fraud is not alleged and it is of

course, not every mistake in a document which would invalidate it. The validity of every document depends upon the presence of the animus

contracted viz. the intention of the parties to the contract. When contract is challenged on the ground of mistake, common to all parties, the remedy

is rectification because in such a case the parties have entered into an agreement, as to which, their minds were one, but in reducing the agreement

to writing, a mistake has been made and the written statement does not give effect to the agreement which the parties actually entered into. All that

the court has to do in such a case is to rectify not the contract but the document embodying it and put that document into such a form as to carry

out the contract which the parties actually entered into. Where there is a unilateral mistake, the position is different, because in that case there is in

fact, no contract. In normal cases, a party who has entered into a wrong contract and thereby represented to the other parties to the document that

he intends to be bound by the terms thereof is not entitled as against those parties to give evidence that in fact he intended something else. Unless

that were so there would be no finality in written contracts. The plaintiff in this case who is bound by the action of her husband cannot and should

not be permitted to contend that by mistake survey number 104 was included while in fact the intention of the executants was to convey under the

hypothecation deed survey number 91, the whole of survey number 92 and survey number 94. One of the parties to the document is defendant 1.

His sons namely, defendants 2 to 4 have contended that what was conveyed under the original of Ex. IV was the whole of survey number 91, sub-

number 2 in survey number 92 measuring 13 guntas and the whole of survey number 104. It is urged on behalf of them that the lands conveyed

under the original of Ex. IV are specific with reference to the survey numbers, extent and the assessment. That being so even assuming that the

eastern boundary is wrongly described the plaintiff cannot get any more than what was conveyed under the original of Ex. IV.

15. Mr. Vakil placed reliance on the description of the property by boundaries hypothecated under the original of Ex. IV. According to him survey

numbers 91, 92 and 94 are the lands that were hypothecated and not survey number 104 as the same is away from these survey numbers. On the

basis of the evidence adduced on behalf of the plaintiff. Mr. Vakil contended that the eastern boundary being "Katteboranasosi" which refers to

survey number 93, the only conclusion that could be arrived at on the basis of the boundaries mentioned in the original of Ex. IV is that survey

number 104 was not the one that was included but on the other hand, the whole of survey number 92 was the subject-matter of hypothecation.

Therefore, he contended that what was contained in the documents describing the boundaries is to be taken as the guiding factor in determining the

question in this case. Here it may be relevant to refer to the oral evidence adduced on behalf of the parties. Siddegowda (P. W. 10) has given

evidence that he took on lease survey number 93 and that land is called as "Katteborana-sosi". He has produced the lease deed Exhibit (P) Dated

12-1-1954. In the said lease deed it is mentioned that the land he took on lease is called as "Katte-boranasosi". This lease deed has come into

existence after the suit was filed. But the evidence of Siddegowda (P. W. 10) in cross-examination throws flood of light. For the sake of clarity. I

extract the relevant portion of his (P. W. 10's) evidence. "I do not know the survey number of Katteboranasosi. The plot of land which is about

six or seven guntas adjoining the land of Ananthapadama-nabhaiah is also called as "Katteboransosi". It was in possession of the first defendant i.

e. the land in dispute namely, item 2. Several adjoining plots were also called as "Katteboranasosi" and I cannot say the exact land that is called as

"Kattesbora-nasosi", It is clear from his evidence that not only survey number 93 but the other adjoining lands in that locality were also called as

"Katteboranasosi". Therefore, the boundary given in original of Ex. IV as "Katteboranasosi" was for the lands hypothecated therein may as well

be correct. But however it was urged by Mr. Vakil that the eastern boundary of survey number 92 is described as "Katteboranasosi" which is

referable only to survey number 93 belonging to Ananthapadama-nabhaiah and if that is so the whole of survey number 92 was included in the

original of Exhibit IV and subsequent proceedings culminating under delivery receipts Ex. A in which eastern boundary described as

"Katteboranasosi" also included the whole of survey number 92. Survey Number 92 was divided into three sub-numbers even before the deed of

hypothecation and if that survey number has been divided east to west into three sub-numbers, then the eastern boundary described in the original

of Ex. IV would fit in with the case of the defendants 2 to 4 that 13 guntas of sub-number 2 of Sy. 92 was hypothecated. Survey number 104

being away from survey numbers 91 and 92, the eastern boundary described as "Katteboranasosi". will not cover survey number 104. If the

eastern boundary of the lands hypothecated under Ex. IV is "Katteboranasosi" which is survey number 93 only the contention of Mr. Vakil may

well be correct. But this argument loses sight of the fact that not only survey number 93 but also several adjoining lands were also called as

"Katteboranasosi". If that be so, then there is no inconsistency in describing the eastern boundary of all the three survey numbers as

"Katteboranasosi"

16. The question therefore is whether the plaintiff is entitled to have certain area of land or certain plot of land within the specified boundaries. The

language of the deed under which these lands were hypothecated is indicative of the intention of the parties to the document. The dominant

intention of the parties appears to be that they should be governed by the area and not by boundaries. That is the reason why in the original of Ex.

IV it has been specifically stated the extent of area of each survey number and the assessment thereof.

17. In accordance with the terms of original of Ex. IV. the boundaries of the hypothecated lands under delivery receipt Ex. (A) are given and if in

that, one of the boundaries, assuming for the sake of argument, is wrongly described, the dominant intention of the parties was that they should be

governed by the area and not by the description of the boundaries, in which case the lands plaintiff purchased from Siddegowda were what he got

under the delivery receipt in pursuance of the court sale, namely, the whole of survey number 9], measuring 1 acre 37 guntas assessed at Rs. 7-8-

0, survey number 92/2 measuring 13 guntas assessed at Rs. 1-8-0 and survey number 104 measuring 1 acre 7 guntas assessed at Rs. 9-0-0. The

total extent of land hypothecated under the original of Ex. IV was 3.17 acres and the total assessment being Rs. 18-0-0. The argument of Mr.

Vakil, if accepted, the total extent of area and the assessment would vary; that would give sufficient indication about the intention of the parties.

Therefore, the terms of the document being definite, they should be given effect to. The plaintiff or any one else who is not a party to the document

cannot be permitted to vary the terms of the document. It follows therefore that whatever may be the boundaries given in the original of Ex. IV and

the delivery receipt Ex. A. what the plaintiff purchased was the whole of survey numbers 91, 92/2 measuring 13 guntas and the whole of survey

number 104.

18. Mr. Vakil urged that ever since the plaintiff purchased the suit lands which includes survey number 92, she has been in possession and

enjoyment and prior to that Borappa was in possession through his tenants and before that Siddegowda. This argument is based on no facts.

Siddegowda who purchased the lands under Court sale and took delivery of the lands under Ex. A has not been examined in this case to show that

he took possession of whole of survey number 92. Borappa who is a mortgagee of these lands has not been examined in this case to show that he

was put in possession of the whole of survey number 92; nor there is any evidence to show that Marilingegowda who took the mortgage from the

plaintiff was in possession of the whole of survey number 92. At the time Siddegowda took delivery of the lands under Ex. A, it is clear from the

delivery receipt that he took possession of survey number 92/2 measuring 13 guntas in addition to survey numbers 91 and 104. P. W. 1 is one of

the attestors to the delivery receipt Ex. A. His evidence is that Siddegowda took possession of the whole of the land, the eastern boundary of

which is "Katteboranasosi". His evidence is vague and from his evidence it is not possible to come to a conclusion that the whole of survey number

92 was taken possession of by Siddegowda under delivery receipt Ex. A. Marilingegowda (P. W. 4) who has been examined in this case has

deposed that he did not know the boundaries of the lands that he took on mortgage. His evidence shows that he did not cultivate the lands and that

he leased out to one Siddegowda (P. W. 10). Siddegowda's evidence clearly goes to show that he could not have cultivated the whole of survey

number 92.

19. In the case there is no difficulty to identify with reference to the area and assessment, the lands the plaintiff got under Ex. IV. Somewhat

indefinite reference to the boundaries of the three lands hypothecated under the original of Ex. IV will not help the plaintiff in any manner. The

boundaries are given with reference to three survey numbers. I think it would be difficult to believe in the matter of construction of the document

Ex. IV that the reference to boundaries controls the specific figures as to the extent and assessment. In my opinion, if the evidence is to be

admitted, it must be under proviso (1) to Section 92 of the Evidence Act as stated already. Whatever may be the case of the plaintiff, she cannot

be permitted to alter the terms of the document under which she got title to the properties. It follows that she is bound by the terms of the

document. The plain reading of the document conveys the impression that 13 guntas of land in survey number 92/2 was hypothecated under the

original of Ex IV. Survey number 92 had been demarcated by survey which is evidenced in Kethwar extract of 1926 (Ex. IV) Ex. XII is the index

of lands, that shows that 13 guntas of land stood in the name of Siddegowda and the remaining area in the name of defendant 1 and thereafter

Borappa is shown as being in possession of 13 guntas. Even the name of the plaintiff is shown as being in possession 13 guntas. If really the whole

of survey number 92, as contended by Mr. Vakil, came to her possession that fact would have been mentioned in the index of lands. On the

contrary, the entry in the index of lands is against her.

20. Ex. XIII series, are kiddy extracts relating to the years 1938-39, 1939-40 and 1940-41. They show that Kanda-yam was paid by the first

defendant. Ex. E is another kiddy extract relating to the year 1943-44, which also shows that the first defendant paid Kandayam. It is no doubt

true that there is no specific reference in these documents that the first defendant paid kandayam for survey number 92 excepting 13 guntas. It is

not the case of the plaintiff that she or her predecessors-in-title had paid kandayam to the whole of Sy. No. 92. The plaintiff in order to succeed,

should have placed evidence, to show that ever since Siddegowda purchased the properties in court sale and took delivery under Ex. A, he came

in possession of entire survey No. 92 and thereafter, in succession, others, and ultimately herself. There being no evidence on this point, it has to be

concluded that as per the document, the plaintiff got only survey number 92/2 measuring 13 guntas and not the whole of survey number 92.

21. If the argument of Mr. Vakil is accepted that survey number 91, the whole of survey number 92 and survey number 94 were hypothecated

under Ex. IV, the extent would be 4 acres 13 guntas. but whereas as per the document, the extent of area in survey number 91. sub-number 2 of

survey number 92 and survey number 104 hypothecated under Ex. IV would be 3 acres 17 guntas. It means that the plaintiff claims more land than

what was hypothecated under Ex. IV with reference to the eastern boundary. As already stated that the eastern boundary is not specific and if

eastern boundary which is called as "Katteboranasosi" not only refers to survey number 93 but also many other survey numbers, the eastern

boundary given will not govern the terms of the document but the extent in area. Added to these, in Exhibit IV the assessment in respect of the area

hypothecated in each survey number is mentioned which is Indicative of the intention of the parties that they should be governed by the extent of

area hypothecated. The sale certificate and the delivery receipt Ex. A under which Siddegowda sot possession must have necessarily referred to

the extent of area in each survey number hypothecated under Exhibit IV. The courts below have held that survey number 94 was not the one that

was hypothecated under Ex. IV and Siddegowda never Sot possession of survey number 94. I was told that survey number 104 was and has

been in possession of the plaintiff and her predecessors-in-title. That being so, the extent of area that plaintiff got in survey number 92 is 13 guntas

in sub-number (2) of survey number 92. The remaining area in survey number 92 measuring 1 acre and 20 guntas comprising sub-numbers (1) and

(3) was and has been in continuous possession of defendants 1 to 4.

22. If the argument of Mr. Vakil is accepted, then we would be nullifying the terms of the documents Ex. IV and Ex. A. To repeat again the

dominant intention of the parties as could be gathered from the documents was with reference to the acreage and assessment and the indefinite

reference to the eastern boundary cannot be the guiding factor to determine the extent of land which the plaintiff or her predecessors got.

23. Mr. Vakil relied upon the decision in Sheodhyan Singh and Others Vs. Musammat Sanichara Kuer and Others, In that case the final decree

and the sale certificate gave Khathna number, boundaries of the properties sold and plot number. The Khathna number was however referred to

plot numbers. In those circumstances, it was held that it was a case of misdescription and the identity of the property sold was well established with

reference to the plot. The mistake in the plot must be treated as a misdescription which did not affect the identity of the property sold. I do not see

how this decision could be made applicable to the facts of the present case.

24. The next decision on which reliance is placed is Palestine Kupat Am Bank Co-op. Society v. Govt. of Palestine. AIR 1948 PC 207. In that

case it was observed that in construing a grant of land, the description of fixed boundaries is to be preferred to a conflicting description by area.

The statement as to area is to be rejected as false demonstration. In that case, the description was precise and the extent was indefinite and

therefore it was pointed out that the description is got to be preferred to the extent. In this case, the extent is definite but the description is

indefinite. That being so the ratio of this decision has no application to the facts of the present case.

25. He lastly relied upon the decision in Subramonian Nambooripad v. Cheeran Variayathu. AIR 1950 Trav-Co 19. In that case, there was doubt

as to the identity of the properties involved. There was also doubt as to the correctness of the survey number given against certain item of property.

In those circumstances it was pointed out that the property within the boundaries given, for that item of property should be taken as guiding factor

and the survey number was incorrect and the same may be corrected and the effect may be given to the description. Again this decision has also

no bearing in the instant case.

26. Reference was made to the decision in Janardan Govind Mahale Vs. Venkatesh Waman Shenvi, In that case it was held:--

Where in a deed there is definite description of survey number to acreage and assessment and only a somewhat indefinite reference to the rent of

that survey number combined with other survey numbers, it would be difficult, as a matter of construction of the document, to say that the

reference to the rent controls the specific figures as to the acreage and assessment"".

In the present case, there is reference to the specific survey numbers, the extent in area and the assessment. That being the case, the eastern

boundary described in Exhibits IV and A is a misdescription. In such a case, if the survey number, extent and assessment thereof, are given in the

document, they prevail over the misdescription.

27. In the result, for the reasons stated above. I see no reason to interfere with the judgment and decree passed by the appellate court and dismiss

the appeal with costs. The receiver appointed in this case is discharged.