Avalappa Vs. Krishnappa

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Court : Karnataka

Decided On : Mar-28-1988

Reported in : ILR1988KAR3347

Judge : Hiremath, J.

Acts : Evidence Act, 1872 - Sections 65

Appeal No. : R.S.A. No. 1167 of 1978

Appellant : Avalappa

Respondent : Krishnappa

Advocate for Def. : V. Krishnamurthi, Adv.

Advocate for Pet/Ap. : Madusudana Rao, Adv. for M.S. Gopal

Disposition : Application allowed

Judgement :

Hiremath, J.

1. The appellant is the plaintiff in the original suit and respondent-1 is the second defendant where as the 2nd respondent is the first defendant. One Jangamaiah was the father of the plaintiff and first defendant. Plaintiff brought the original suit for declaration of his title to the schedule properties and for permanent injunction

restraining the defendants from interfering with his possession. He claims to be owner of as many as eight agricultural lands shown in the schedule and he pleaded that these properties had fallen to his share in a partition that took place on 22-6-1962 between him and his elder brother defendant-1 Narayanappa. Their father died in or about the year 1946. Since partition he had been in actual possession and enjoyment of all the schedule properties fallen to his share. Munivenkatappa the paternal grandfather of the second defendant happens to be the elder brother of Jangamaiah. Narayanamma wife of said Munivenkatappa and Doddakempamma wife of Jangamaiah were full sisters being the daughters of Chowdamma. Though admittedly Doddakempamma was the wife of Jangamaiah, Chikka Kempamma was alleged to be in the keeping of said Jangamaiah and the plaintiff and first defendant were born to her. Doddakempamma had no issues. It is rather significant that even the first defendant agreed with the case of the second defendant when he contended that Chikka Kempamma was a kept mistress of their father Jangamaiah. But the Courts below have not accepted this plea of the defendants but have found that even Chikka Kempamma was the wife of Jangamaiah. It is now unnecessary to examine this relationship as the finding of the Courts below on this point is accepted by parties to this appeal. The plaintiff alleges that he was compelled to file the suit as the second defendant had started interfering with his possession of the schedule properties by trespassing on them. He even attributed jealousy to the first defendant of his affluence and further alleged collusion between him and the second defendant with ulterior motive.

2. Inter alia the first defendant also pleaded that their father had settled some properties on their mother Chikka Kempamma in consideration of keeping her, under registered settlement deed dated 11-6-1936. In spite of that, these properties continued to be in possession of Jangamaiah till his death. The 2nd defendant's father was one Errodappa. In about the year 1956 according to him the plaintiff and himself went to Chintamani and joined the second defendant and Doddakempamma who were in possession of the properties covered by the settlement deed and all the properties of the second defendant. At that time the second defendant was a minor and Doddakempamma was looking after him and his properties. The plaintiff also started looking after the second defendant and Doddakempamma and also his properties and this is how the plaintiff and both the

defendants lived with Doddakempamma till her death and thereafter. While admitting that there was a partition between him and the plaintiff in the year 1962, he pleaded that by false representation the plaintiff had included four items of the properties shown in the schedule in the partition and also survey No. 275/2 of Nekkundi village. It may be mentioned here that these four items are the properties in dispute in this appeal and they are :- survey No. 230/6 - 24 guntas ; survey No. 354/ 1 - 3 guntas ; survey No. 274/3 -6 guntas ; and survey No. 2277/1 - 17 guntas of Nekkundi. village in Chintamani Taluk of Kolar District. The plaintiff and the second defendant according to him have been living together and it is the second defendant who has been cultivating these four properties.

3. The second defendant pleaded that after effecting settlement of some of the properties over his mistress; Chikka Kempamma, Jangamaiah sold these four items and two other properties, namely, survey No. 275/2 and a portion of the house in Chintamani to his father Errodappa under registered sale deed dated 25-11-1943 and put him in possession of the same. Since then these properties have been in their actual possession. In the early part of the year 1945 the parents of the 2nd defendant his younger brother, as well as Jangamaiah died of plague and he was hardly 3 1/2 years of age and his elder sister 5 years of age at that time.

4. Thus both of them became orphans, there were none to look after them and their properties and therefore Dodda Kempamma the widow of Jangamaiah took custody of these minor children and their properties and sent for Doddanagappa the husband of Errodappa's sister from Sonnenahalli in Siddalagatta Taluk and entrusted these minor children of Errodappa and their properties to him. Thus for two or three years the second defendant was in their custody and was later taken to Chintamani by Doddakempamma. Even wara was being collected from tenants by Doddakempamma. This continued till 1955-56 and in that year plaintiff who was away from Chintamani came back and joined them as Doddakempamma had become too old by that time. The plaintiff voluntarily introduced himself to manage the properties of this defendant and when Doddakempamma also died shortly thereafter the plaintiff became practically a defacto guardian of his person and properties. The second defendant who was in his teens was looking on the plaintiff with great reverence and respect. He was not schooled by the plaintiff but was put

to agriculture. The plaintiff is a Mason by profession and never cultivated these properties. It was the plaintiff who got him married on 1-3-1968 and even when the suit was filed the plaintiff and his wife as well as the second defendant, his wife were living in the same house constructed in the plaint schedule Item No. 3. The differences arose when this defendant called upon the plaintiff to render account of what all he had received from his properties till then. Thus in sum he maintains that these four disputed items are in his actual possession as owner and the plaintiff has made a false claim.

5. The trial Court found that Chikka Kempamma as already stated was the legally wedded wife of Jangamaiah that defendant-2 had not proved that these four items of the suit properties were sold to his father by Jangamaiah; that he was never in possession of these properties; that these properties had fallen to the share of the plaintiff in a partition between him and defendant-1 his brother; that it was the plaintiff who was in actual possession of the same and decreed the suit.

6. The first Appellate Court allowed the appeal preferred by the unsuccessful defendant in part and modified the decree of the trial Court deleting Items 3, 4, 7 and 8 of the plaint schedule and confirmed the decree in respect of the other items. In doing so it found that that the second defendant had proved that these four items were sold to his father by Jangamaiah; that the evidence given by the second defendant by producing certified copy of the sale deed in favour of his father is acceptable in support of the transaction and also found that the plaintiff and his mother for some years and after his mother's death the plaintiff was Managing the properties of the second defendant. It also reversed the finding of the trial Court that defendant-2 was not in actual possession of the suit properties and on these findings dismissed the plaintiff's suit with regard to these four items.

7. In this second appeal during admission the substantial question of law set down for determination is :-

'Whether on facts and circumstances of the case, the Appellate Court was justified in concluding that the plaintiff has not established title to the suit Items 3, 4, 7 and 8?'

8. It is now clear from the contentions raised by the parties that the second defendant has based his title on a registered sale deed said to have been executed by Jangamaiah on 25-11-1943. It is not seriously challenged that in about the year 1945 parents of the 2nd defendant, his uncle, and even Jangamaiah died of plague epidemic and at that time the second defendant was a child of 3 1/2 years. It is thus not disputed that even these four disputed items were the properties of the family of the plaintiff, defendant-1 and their father Jangamaiah. Certified copy of the partition deed has also been produced to show that there was a partition between plaintiff and defendant-1 in the year 1962. Thus when the second defendant wanted to assert his title basing on a registered sale deed it was incumbent on him to produce the original sale deed in favour of his father Errodappa. But that however has not been produced and the second defendant has relied on a certified copy thereof and marked as Exhibit D-16 during trial. The fate of his claim hinges around proof or otherwise of this sale transaction in favour of his father.

9. It is urged on behalf of the appellant that the trial Court was right in rejecting Exhibit D-16 as a document not proving the title of the second defendant but the first Appellate Court went wrong in accepting it and holding that the second defendant has proved the sale in favour of his father Errodappa. The original sale deed which naturally ought to be with the second defendant has not been produced and no foundation is laid for leading secondary evidence of the sale deed as required under Section 65 of the Evidence Act. The second defendant has not stated why he was relying on secondary evidence and why the original is not produced. Everything is left to surmises and speculation. When the requirements for enabling a party to produce secondary evidence are not fulfilled the Appellate Court was not justified in reversing the well reasoned finding of the trial Court. It is further urged that even in his evidence the second defendant did not state why he had not produced the original sale deed. The second defendant however examined an official of the Sub Registrar's office who produced a register maintained in their office which is marked as Exhibit D-11 and described as Book. No. 1, Volume No. 308 in which the transaction of sale, settlement, etc., are entered. He was a Clerk working in the Sub-Registrar's Office at Chintamani for over two years before. He refers to an entry relating to a settlement deed executed

by Jangamaiah in favour of Chikka Kempamma on 11-6-1936 and the document was registered on that date. Ex.D-12 is the L.F.M. Register maintained in the Office and at Ex.D-12(a) it is stated that it was the L.T.M. of executant Jangamaiah. The Court is not concerned with this settlement deed. Exhibit D-13 is Book No. 1, Volume No. 408 and Exhibit D-13(a) relates to the contents of the document of sale dated 25-11-1943 said to have been executed by Jangamaiah in favour of Errodappa son of Munivenkatappa. Ex.D-14 is the L.T.M. Register and as per entry at Ex.D-14(a) Errodappa has produced document for registration on 25-11-1943 put his left thumb mark and Ex.D-14(b) it is said to be the L.T.M. of Jangamaiah attested by B. Govindarao. Obviously he had no personal knowledge of any of these entries and he could not have done anything better than referring to these entries and reading the same to the Court. He also stated about the procedure that is adopted at the time of registration, namely, that on presentation of a document for registration, L.T.M. would be taken in the L.T.M. Register (Left thumb mark) as well as in the documents after registration of document the contents of the document would be copied and documents are returned to parties and the copy would be compared. This according to the learned Counsel for respondent-second defendant is the best evidence that the second defendant could place before the Court under the circumstances. Admittedly the executant, the purchaser, the scribe and the witnesses whose names are to be found on the sale deed are dead, the original is not in the custody of the second defendant and therefore the first Appellate Court was justified in relying on Ex.D-16, certified copy of the original sale deed.

10. Section 64 of the Evidence Act relating to proof of documents states that documents must be proved by primary evidence except in cases mentioned in the foregoing provisions. Section 65 relates to cases in which secondary evidence relating to documents may be given and Section 65(a) states as follows :-

'When the original is shown or appears to be in the possession or power -

of the person against whom the document is sought to be proved or.

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in Section 66, such person does not produce it,'

Section 65(c) is applicable when the original has been destroyed or lost or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

11. The learned author of the book 'Law of Evidence' by Woodroffe and Ameerali at page' 1579 of the 14th edition has quoted Lord Tenterden in support of the necessity of the documents to be proved by primary evidence He says :-

'I have always acted most strictly on the rule that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule.'

At the same time Section 65 deals with circumstances which are beyond the control of a party relying on a document and therefore is almost an exception to Section 64. Sri V. Krishnamurthy learned Counsel for the respondents does' not dispute the obligation of the respondents to lay foundation for producing secondary evidence. He maintains that this obligation has been discharged adequately by showing that the original was with the plaintiff-appellant or must have been under the circumstances in which respondent defendant-2 was placed soon after the death of his parents. According to him notice was given to the plaintiff's Counsel in the trial Court to produce the original sale deed but the plaintiff never complied. The Advocate for the second defendant gave notice to the plaintiff's Counsel on 16/6 (the Counsel has not dated the notice and the Court has noted the date of receipt as now stated). As it is quite material it is as follows :-

'IN THE COURT OF THE CIVIL JUDGE AT KOLAR O.S. No. 50/1970.

Plaintiff : Avalappa.

v.

Defendant : Narayanappa and anr.

Notice under Order 11 Rule 16 CPC :-

Sir,

Please take notice that the second defendant requires you to produce the sale deed dated 25-11-1943 executed by Jangamaiah in favour of Yerrappa.

Your's faithfully,

Sd/- A.S. Balasundaram,

Advocate for 2nd deft.'

12. According to Sri Krishnamurthy, plaintiff's Counsel never responded and therefore notice as required in law has been given. Section 66 of the Evidence Act is clear and unambiguous and states specifically that the secondary evidence of the contents of the documents referred to in Section 65, Clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case. The circumstances when such notice shall not be insisted upon are not necessary to be stated here in view of the specific stand taken by the second defendant that the plaintiff was in custody of this sale deed and that he was required to produce it by giving notice as prescribed by law. It is very significant that Section 66 refers to 'such notice to produce it as is prescribed by law.'

13. Sri. M.S. Gopal for the appellant has referred to the provisions of Order 11 Rule 16 CPC under the caption 'Notice to produce'. It states that notice to any party to produce any document referred to in his pleading or affidavits shall be in

Form No. 7 Appendix-C with such variations as circumstances may require. Even Form No. 7 relates specifically and particularly to the documents referred to in the plaint, written statement or affidavit of the party calling to produce the same. To say that a notice under Section 66 of the Evidence Act should conform to this form would be stretching the scope of Order 11 Rule 16 CPC beyond what the Legislature intended. It clearly states that the adversary who is called upon to produce such a document must have referred to it in the pleading or affidavit. It is the second defendant who wants to rely on the sale deed which he states was executed in favour of his father by the father of the plaintiff and it is not referred to anywhere in the pleading of the plaintiff, namely, the plaint. It is not his case that such a sale deed came to be executed by his father. Therefore, it cannot be said that all notices under Section 66 of the Evidence Act should conform to this Form-7 in Appendix-C of the Code of Civil Procedure. This however does not absolve the liability of the second defendant from laying the foundation for adducing secondary evidence. Even if the notice is taken as it is, it is argued for the appellant that this notice does not in any way say why the plaintiff was called upon to produce a document which ought in the nature of things and ordinarily to be in the custody of the second defendant himself. It does not state why the second defendant requires the plaintiff to produce the sale deed. Whether the second defendant has given any evidence to show that the plaintiff was in custody of this document is also the subject of debate at the Bar.

14. As already stated it is the case of the second defendant that even when he was too young to understand things plaintiff took custody of his person and property and was managing the same. Under these circumstances, Sri. Krishnamurthy argues that the plaintiff must be presumed to have come into possession of all the title deeds relating to the property of the second defendant and particularly the sale deed in question.

15. Now what was represented to the trial Court while letting into evidence Ex.D-16 could be made out from the evidence of the second defendant examined as DW-5. At para-2 he says :-

'Items 3, A. 7 and 8 were purchased by my father from Jangamaiah. Ex.D-16 is the copy of the sale deed. (Sri. S.K. objects to the exhibiting of this document. Since it is said that the original is not available, the copy is allowed to be marked). Plaintiff was a Mason and was not doing agriculture. Plaintiff and his wife were looking after me as their child and I was treating as parents. I was not sent to School and so I am illiterate. Plaintiff performed my marriage. Ex.D-17 is the marriage invitation (Lagnapathrike). Ex.D-18 is the invitation.'

Even in para-3 of his evidence he stated that he and plaintiff were living in joint family prior to dispute and after dispute he was living in the original house whereas the plaintiff shifted to the house built for rearing silk cocoons. He also deposed that a house is built in Item-3 of the schedule by himself and the plaintiff together. Thus if at the time of evidence anybody had gone out of this house jointly inhabited by plaintiff and defendant-2, it was the plaintiff. This is necessary to be stated because the defendant alone continued to occupy this house built in the schedule land along with his family and for that reason it is all the more necessary for him to state what happened to the original sale deed. Nowhere he stated in his evidence that the plaintiff was in custody of all his documents of title and that while leaving the house he took them away with him. As urged by Sri. M.S. Gopal, it is not a matter of presumption but of allegation and proof. Even though the notice given by the Counsel for second defendant to the plaintiff's Counsel states that it was given under Order 11 Rule 16 CPC and even though it can be assumed that strict compliance with the requirement of Order 11 Rule 16 CPC by way of giving the same in the prescribed form cannot be insisted upon; the reason for calling upon the plaintiff to produce it has to be stated in order to lay the foundation for producing secondary evidence. It was argued for the appellant that simply because such a notice has been given it does not follow that the plaintiff is in possession of the same. It may as well be that the second defendant wanted to avoid his liability to produce the original for reasons best known to him and therefore he must have intended to make out a case of issuing notice to the plaintiff.

16. It is pertinent to note that when it was tendered in evidence as pointed out above from the deposition of second defendant it was only stated 'that the original

was not available.' It is significant that it was not represented to the Court even at that stage that the original was with the plaintiff and in spite of notice he had not produced it and therefore the second defendant has laid the foundation for admitting certified copy in evidence. The conditions laid down in the Section must be fulfilled before secondly evidence can be admitted and secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for, in such a manner as to bring it within one or other of the cases provided for in the Section. This Section is not intended to. be utilised for the benefit of persons who deliberately or with sinister motives refuse to produce in Court a document which is in their possession power or control. It is designed only for the protection of persons who in spite of best efforts are unable from circumstances beyond their control to place before the Court primary evidence as required by law, nor this can be invaded, in cases where the party wilfully fails to produce the document at all relevant periods, but puts it at the time of the arguments in Court of the last resort. (Woodroffe and Ameerali, Law of Evidence, 14th Edition, 1585). A similar situation arose in the case of LAXMAN GANPAT v. ANSUYA BAI, : AIR1976 Bom264 wherein it was alleged that the original deed was in plaintiff's possession. It was not proved to be so and therefore the defendant was held not entitled to lead secondary evidence.

17. The Supreme Court in the case of SITAL DAS v. SANT RAM AND ORS., : AIR 1954 SC606 had to deal with the copy of a will and even the aid of Section 90 Evidence Act was sought as the document was more than 30 years old. Their Lordships observed that no foundation was laid for reception of secondary evidence under Section 65 of the Evidence Act nor the copy produced therein be regarded as secondary evidence within the meaning of Section 63. If the document produced is a copy, admissible as secondary evidence under Section 65 of the Evidence Act and is produced from proper custody and is over 30 years old, then only the signatures authenticating the copy may be presumed to be genuine; but production of a copy is not sufficient to raise the presumption of the due execution of the original. In this case availability of presumption under Section 90 of the Evidence Act would be considered at a later stage. Suffice it to note that the contention of the appellant's Counsel that foundation is not laid for reception of secondary evidence in the instant case is well founded.

17. The learned Counsel urged that the trial Court correctly appreciated this important lapse on the part of the second defendant but the first Appellate Court did not view it in its proper perspective. In fact the first Appellate Court did not consider this aspect at all. Its observations are based on surmises and not on evidence or facts elicited according to the Appellate Counsel.

18. At para-6 of its Judgment the first Appellate Court observed, that Ex.P-34 of the year 1945 has been produced by the plaintiff to show that the management of the properties of the minor second defendant was handed over to one Doddanagappa. If the case of the plaintiff is that all the properties in the name of Jangamaiah were being enjoyed jointly by them including these items it has to be taken that possession of these items was not passed over to Doddanagappa and these properties including the title deed in respect of it which has been taken possession of by said Doddanagappa were retained by the plaintiff himself. The case of the first defendant who is the elder brother of the plaintiff is that such a sale deed was executed in favour of Errodappa. Under these circumstances it can be concluded that the original of the sale deed was with the plaintiff who purposely kept it back. Thus according to the Appellate Counsel is a far fetched inference not based on evidence or allegations. It is noteworthy that not even in the written statement the second defendant has pleaded that the documents of title of his properties and more particularly the original of Ex.D-16 was retained by the plaintiff himself. It was not stated in the evidence either. Therefore, the decision rendered in the case of MD. IHTISHAM ALI v. JAMNA PRASAD, AIR 1922 PC 56 is not attracted. When the law clearly makes an exception under Section 65 for the production of primary evidence, it is absolutely necessary that a case for producing such secondary evidence should be made out by laying a foundation for it and in the instant case the allegations as well as the evidence do not establish that such a foundation has been laid. Therefore, secondary evidence by producing certified copy of the sale deed cannot be accepted as establishing that the original sale deed was executed by Jangamaiah.

19. The point formulated at the time of admission is comprehensive enough to bring within its fold all the necessary facts and circumstances to see if the plaintiff has established his title to these suit properties. Necessarily therefore this Court,

as the Courts below did has to look to the various circumstances which in one way or the other affect the balance. While the trial Court took into consideration each and every circumstance pointing to improbability of title having passed to the father of defendant-2, the first Appellate Court mainly confined itself to the admissibility of the certified copy. Therefore in brief it could be proper to see if father of defendant-2 or defendant-2 exercised the rights of ownership on these properties. The first and foremost circumstances is one of father of second defendant not getting his name mutated as owner of these properties even though admittedly he. lived for nearly 2 years after the sale deed came into existence. As already stated defendant-2 pleaded that his father died in the early part of the year 1945. The natural conduct of any person in the position of 2nd defendant's father as a purchaser of these properties could have been to get the khata changed to his name in the revenue records which he did not do. It is pertinent to note that defendant-2 who gave evidence as DW-5 in July 1977 stated that his parents died 30 years before which takes the year of death to 1947 and if this is considered, for nearly four years after the purchase the said Errodappa never took any action to assert his title by getting the khata changed. The trial Court perhaps took this factor into consideration when it found that there is nothing on record to show that from 25-11-1943 till 1947 Errodappa enjoyed his properties.

20. Admittedly the lands continued in the katha of Jangamaiah as could be seen from the third Extracts Exhibits.D-9(a) to D-9(h). These are for the years 1948-49 to 1955-56 Ex.P-34 is a document that Doddanagappa gave when he took upon himself the management of the properties of the 2nd defendant from Dodda Kempamma. The trial Court has particularly pointed out and it is not disputed that this document which makes mention of all the properties including even minute moveables does not state anywhere that the suit properties also went to the possession of Doddanagappa for management. In fact other properties of the second defendant are entered in Ex.P-34. Therefore Doddanagappa paying kandayam for these lands on behalf of the second defendant does not assume much importance and the kandayam of Rs.5.63 ps. for these properties is not shown to have been paid by Doddanagappa. This is one of the most important circumstance which rightly weighed with the trial Court and the first Appellate Court did not attach any importance to it.

21. The pahani extracts at Exhibit D-10(a) to (f) for the years 1956-57 to 1963-64 have been referred to by the trial Court at para-13 of its Judgment, At no time they reveal that Errodappa or the second defendant cultivated these properties. The age of the second defendant was shown as 30 years when the suit was filed in the year 1970 and at least for about 12 years before the institution of the suit the second defendant ought to have managed these properties and it is the case of the second defendant that the plaintiff and he were living together in the same house, that it was the plaintiff who performed his marriage and when this suit came to be filed the plaintiff was no longer residing in the same house and had left it. Therefore for atleast 10 to 12 years prior to the filing of the suit second defendant ought to have come into possession of these properties and there is no reason, why he should not have come into possession of the same, when other properties did pass on to his hands on he being capable of managing his own affairs. Exhibits D-1 to D-8 the ledger extracts also show that the suit lands continued in the khata of only Jangamaiah.

22. Exhibits D-19 to D-20 are the other two documents to which reference was made by Sri V. Krishnamurthy. Ex.D-19 is the mortgage deed executed by the plaintiff and the second defendant to the Land Development Bank, Chintamani on 21-3-1968. Survey No. 230/3 measuring 13 guntas and survey No. 230/5 measuring 28 guntas belonging to the second defendant were mortgaged to the Bank whereas survey No. 230/4 and 230/6 of Narayanappa and plaintiff were also mortgaged to the Bank. That Ex.D-20 is a lease deed to show that the same lands were taken back on lease by them, none of these suit items find place in these documents. Survey No. 230/6, which stood in the name of the plaintiff and his brother was mortgaged by the plaintiff to the Bank along with survey No. 230/4. Therefore, this Ex.D-19 instead of helping the second defendant helps the case of the plaintiff that he and the first defendant Narayanappa dealt with this property as jointly owned by them. The fact that, tax was demanded from the second defendant for the house built in survey No. 230/6, for the years 1974-75 to 1975-76 is not of much consequence as, in the first instance they were sent long after the suit was filed and secondly, admittedly the second defendant was also living in the same house. In view of the relation between the parties and also in view of the fact that it was the mother of the plaintiff who was looking after the second

defendant during childhood, the fact that the second defendant continued to live in the same house does not assume much importance. Thus the conduct of the second defendant or his father right from the date of sale deed does not in any way indicate that they had exercised ownership rights over these properties at any time and simply because the plaintiff performed his marriage does not in any way militate against the plaintiff himself exercising his rights of ownership over these properties. In the face of this documentary evidence oral evidence led by the second defendant cannot be of any help. Even Ex.P-8, P-9 P-12, P-13, P-26, P-27, and P-29 and 30 the Pahani Extracts clearly indicate that it was the plaintiff alone who was cultivating these lands for the years 1965-66 to 1969-70. Similarly Exhibits P-26 to P-30 show that it was the plaintiff alone who was in possession of these lands for the year 1969-70. Even the entry of the name of the plaintiff in the Index of Lands is not disputed by the second defendant. Plaintiff has paid kandayam to katha No. 88 up to the year 1965. The evidence of one Shanbhogue was also referred to by the trial Court as supporting the case of the plaintiff. Very curiously the first Appellate Court did not give importance to Ex.P-34 wherein these properties are not shown as taken over by Doddanagappa and that is the error that the first Appellate Court committed. This is how the trial Court considered every piece of material documentary evidence and found that defendant-2 was never in possession. This clearly goes to show that neither defendant-2 nor his father came in possession of the suit properties and indicates that the document, if any, was not acted upon.

23. The next important question whether a certified copy of the registered sale deed, if any, could be admitted in evidence now only assumes an academic question for the reason that I have come to the conclusion that no foundation has been laid for leading secondary evidence as required under Section 65 of the Evidence Act and that neither Jangamaiah nor the second defendant came in possession of these properties. It has been urged for the appellant that the first Appellate Court was wrong in admitting the certified copy Ex.D-16 in evidence without actual proof of execution. Ex.D-13 is the book maintained in the Sub-Registrar's Office in which the recitals in the original document are noted at Ex.D-13(a) and Exhibits D-14(a) and (b) are the thumb impressions of Jangamaiah and Errodappa given before the Sub-Registrar which is usually taken at the time of the

execution of the document. The argument advanced on behalf of the second defendant that the only way of proof is by producing the registration copy and the evidence of the execution of the original by summoning the book from the Sub-Registrar was accepted by the Court below.

24. It is urged for the appellant that this Court in the case of T.N. NARAYANACHAR & ORS. v. V.S. VENKATANATHAN & ORS., 1961 Mys.L.J. 794 clearly laid down as to how an original document could be proved. Their Lordships of the Division Bench observed that under Section 67 of the Evidence Act, when a document is said to have been signed by a particular person the signature of that person has to be proved before the document can be admitted in evidence. If a document is required by law to be attested, the evidence of one attesting witness atleast would be necessary. But if the document required by law to be attested is registered then it would not be necessary to call an attesting witness in proof of execution of the document. Nevertheless if the execution is specifically denied then even in a case where a document is required to be attested is registered the execution has to be proved by calling an attesting witness. The document cannot be proved without proving the signature of the person who is said to have executed by other circumstances. The execution of the document cannot be held to be proved by the fact of the registration itself. What Section 60(2) of the Registration Act provides is that the registration certification is proof that the document was duly registered and not that it was duly executed. In laying down this law their Lordships overruled an earlier decision of the High Court of Mysore prior to the reorganization of the States rendered by Division Bench in the case of HUTCHE GOWDA v. CHENNINGE GOWDA, ILR 1952 Mysore 49. Their Lordships ruled that when the plaintiff claims that the original document of which the copy is filed is not in his possession and the defendant does not object to the production of the copy and plaintiff is not cross-examined on the point of his not being in the possession of the original, it cannot be objected in appeal that the copy was wrongly allowed to be put in by the lower Court. The evidence that a document was duly registered is some evidence of its execution by the person by whom it purports to have been executed. Having observed as extracted above at page 802 of the Report his Lordship Chief Justice Das Gupta who rendered the Judgment held as follows :-

'In my opinion, therefore, the plaintiff has failed to prove his title. It may be unfortunate for the plaintiff, but this Court cannot help him. The attesting witnesses were alive at the time when the case was heard. But no attempt was made to call them to prove the signature of the executant of the document in question. No other person was called to identify the signature of the executant. That being so, the consequences must rest with the plaintiff. In the result, therefore I hold that the plaintiff has failed to prove his title.'

In my view this decision does not apply to the facts of the instant case for the reason that admittedly neither the scribe nor the executant nor any of the witnesses is alive, and a document of the year 1943 was sought to be proved after the suit was filed in the year 1970. 27 years may not be such a long period as to say that all concerned have left this world but there is no evidence that any one concerned with execution was alive when evidence was being recorded. The Courts have proceeded on the footing that there is none alive to speak about the actual execution and the case of Narayanachar v. Venkatanathan, 1961 Mys.L.J. 794 (supra) presents a case where atleast the attesting witnesses were alive and none was called to prove the execution of the document. Therefore we have to accept the situation that none is alive to speak about due execution as required by the decision in the case of Narayanachar, 1961 Mys.L.J. 794 (supra) and then consider what would be the effect of registration and whether secondary evidence could be adduced under such circumstances.

25. Section 65 of the Evidence Act relates to cases in which secondary evidence relating to documents may be given. If the conditions required thereunder are fulfilled for giving secondary evidence then the Court cannot shut secondary evidence solely on the ground that execution is not proved. To say so would be rendering the very scope and spirit of Section 65 nugatory. The provisions thereof are intended to meet the situation of this nature. Here again a decision of this Court in the case of REVANNA DEVARU v. DR. A.V. RANGA RAO & ORS. AIR 1952 Mysore 119 rendered by Mallappa, J has been referred to on behalf of the respondents. His Lordship held that in cases where it is impossible for any person to prove the execution of a document on account of the death of all persons concerned, the best and only possible evidence that may be available is that of a

certified copy of the registered document. It is particularly in cases of this kind that the presumption that arises under Section 60 of the Registration Act should be raised. A presumption also arises under Section 114 of the Evidence Act and presumption is one of fact that the Court is at liberty to infer from all the circumstances that the document was executed by the person by whom it purports to have been executed. After all the fact that the document is registered is only a piece of evidence. It is open to the Court to accept it or reject it. While it is clear that the presumption of genuineness of a document is not unrepeatable it is one that the Court may raise considering the circumstances of each case including the hardship that might be caused by not raising such a presumption in a proper case. In that case the mortgage deed of which a copy was sought to be relied upon was executed about 60 year before. It was pointed out from the decision in the case of Hutche Gowda v. Chenninge Gowda, ILR 1952 Mysore 49 (supra) that in case of a registered document the document is registered only after the Officer appointed for the purpose of satisfies himself that the document has been duly executed. In many cases an endorsement of the Sub-Registrar proves that a person who purports to have executed the document has presented it for registration and has received consideration in the presence of the Sub-Registrar. It is pointed out from the copy Exhibit D-16 in this case that one of the identifying witnesses was the Shanbhougue. Therefore according to Sri. V. Krishnamurthy the presumption should be raised and the document was properly held proved by the Court below.

26. Relying on a decision of the Privy Council in the case of GANGAMOYI DEBI v. TROILUCHYA NATH CHOWDHRY, ILR 1906 PC 537 it was pointed out that the Privy Council held that the registration of a document is a solemn act to be performed in the presence of a competent official appointed to act as Registrar whose duty it is to attend the parties during the registration and to see that the proper persons are present and are competent to act and are identified to his satisfaction and all things done before him in his official capacity and verified by his signature will, unless it be shown that a deliberate fraud on him has been successfully committed be presumed to be done duly and in order. Though the case related to the proof of a will the observations are clearly apposite.

27. The respondents' Counsel has also relied on Section 34 of the Registration Act which requires an enquiry to be held by the registering Officer before registration. Under Section 59 the registering Officer shall affix the date and signature to all endorsement made Section 60 relates to certificate of registration. As this Court pointed out in the case of Narayanachar, 1961 Mys.L.J. 794 (supra) Section 60(2) of the Registration Act only raises a presumption that the document was duly registered in the manner provided under this Act. In case proper foundation is laid for admitting secondary evidence the presumption available under Section 114 of the Evidence Act could certainly be raised. According to the respondents' Counsel the presumption even under Section 4 could be raised in this case. To sum up briefly on this point I hold that if foundation is laid as required under Section 65 of the Evidence Act, that the original is lost or is in the custody of the adversary who does not produce it in spite of notice then secondary evidence is certainly admissible and if all those concerned with the execution of the document have departed from this world then a presumption of due execution could also be drawn. Otherwise Section 65 of the Evidence Act would be rendered wholly nugatory. In view of this finding consideration of applicability of Section 90 of the Evidence Act becomes unnecessary and hence not of much relevance.

28. In the instant case though reliance is placed on a decision of the Privy Council in the case of Md. Ihtisham Ali v. Jamna Prasad, AIR 1922 PC 56 there is no evidence of defendant-2 that the document has been lost. I have dealt with this aspect in greater detail above and it is sufficient to note here that the second defendant has not even given evidence that he has lost it. Only some representation was made when the evidence was being given perhaps a submission by the Counsel that it was 'not available' and production of the certified copy was objected to by the plaintiff's Counsel at the earliest. In spite of that only acting on the representation that it was 'not available' the Court proceeded to admit it in evidence. Secondly the notice given to the plaintiff's Counsel is wholly insufficient as it was not stated why plaintiff's Counsel was being called upon to produce the document when the second defendant himself was the person to have the custody of this document. It is rightly urged by the appellant's Counsel that without stating anywhere the reasons for the plaintiff to produce the sale deed a bald notice without fulfilling the requirements of Order 11 Rule 16 was given and

this cannot be a drab formality when the basis for admitting secondary evidence was required to be laid. The provisions of Section 64 of the Evidence Act have to be strictly construed and the requirements therein cannot be diluted by soft pedalling the requirements thereof. It is the duty of the Courts to enforce strictly what is required under Section 65. The first Appellate Court therefore went wrong in not considering this fundamental deficiency in the evidence with regard to the foundation for leading secondary evidence. Therefore as a law it could be laid down that when there is no witness to speak about the execution of the document secondary evidence thereof can be given and presumption under Section 114 of the Evidence Act could be raised provided that sound foundation for leading secondary evidence is laid. As I found that no such foundation is laid secondary evidence cannot be looked into and for the reasons aforesaid the Judgment and decree of the first Appellate Court cannot sustain.

29. The appeal therefore, has to be allowed, it is allowed and Judgment and decree of the first Appellate Court are set aside and that of the trial Court restored decreeing the suit of the plaintiff.