

ishwarappa Vs. Arunkumar

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Court : Karnataka

Decided On : Sep-24-2003

Reported in : AIR2004Kant417; 2006(2)CTLJ91(Kar)

Judge : K. Sreedhar Rao, J.

Acts : [Contract Act, 1872](#) - Sections 202

Appeal No. : R.S.A. No. 672 of 1999

Appellant : ishwarappa

Respondent : Arunkumar

Advocate for Def. : Mallikarjun S. Mylar, Adv. for ;S.S. Patil, Adv.

Advocate for Pet/Ap. : Jayakumar S. Patil, Adv.

Disposition : Appeal dismissed

Judgement :

K. Sreedhar Rao, J.

1. The Appeal filed against the judgment and decree in R.A. No. 66/99 on the file of the Addl. Civil Judge (Sr. Dn.), Hubli, arising out of the judgment and decree passed in O.S. No. 483/96 on the file of the III Addl. Civil Judge (Jr. Dn.), Hubli.

2. The appellant is the defendant. The respondent-plaintiff filed a suit for declaration that the Power of Attorney executed by the plaintiff in favour of the defendant at Ex.D.13 has been revoked and that the defendant does not have the authority of agency to represent the plaintiff under the Power of Attorney. Further, seek an injunction against the defendant not to deal with the suit property.

3. Plaintiff was employed in Indian Army. He was allotted a site. The plaintiff executed Power of Attorney Ex.D.13 in favour of defendant to attend to the construction of the building on the suit site and thereafter its management. It is said that defendant misusing the Power of Attorney indulged in excessive and reckless borrowings fastening unreasonable liabilities on the plaintiff. Therefore seek a relief declaration with a consequential relief of injunction against the defendant not to deal with the suit property any more. The defendant contends that he has borrowed loans in his individual capacity and also borrowed loans on the strength of Power of Attorney from several persons and financial institutions encumbering the suit property. The defendant contends that, apart from the private loan of Rs. 5 lakhs incurred, loans are also borrowed from Cooperative Societies in his individual capacity. The defendant contends that without settlement of accounts, the Agency cannot be terminated and prayed for dismissal of the suit.

4. The trial Court allowed the suit declaring that the defendant-Agency under Ex.D.13 is revoked and also granted injunction not to meddle with the suit property. The Appellate Court held that the Power of Attorney Ex.D.13 is not an Agency coupled with interest and only a General Power of Attorney. Therefore, revocation held to be valid and confirmed the findings and judgment and decree of the trial Court. Hence this second appeal.

5. The Admission Judge has framed the following substantial question of law for consideration.

'Whether the Power of Attorney executed by the plaintiff-respondent can be said to be the Power of Attorney coupled with interest?'

6. For convenient reference, the terms at 1 to 15 in the Power of Attorney are extracted hereunder :

- '1. To receive Sales Deed Certified copy from Sub-Registrar and to apply for the Property Extract.
2. To raise loan for construction of the house in the said property.
3. To apply to obtain permission in H.D.M.C., Town Planning and City Improvement Board, etc., regarding construction of the House in the said property.
4. To hand over the constructed, building to the tenants or Lease Holder and to receive rent, Lease Amount, Deposit.
5. To dispose or to make statement or to make Affidavit.
6. To purchase or to obtain refund of Stamp Duty or Court Fee etc.
7. Generally to do all the act or things necessary for the said construction of the House and to raise loan in respect of the said property.
8. To Borrow any money or hypothecated the said property of the construction are create any charge encumbrance on the said property.
9. To possess, manage and make wahiwat etc. of the said property for any of the said or other purposes or discharge the said from time to time on such terms and conditions as deemed fit.
10. To execute and to make all such deeds as shall be required, may be deemed proper or in relation to all or any of the matter or purpose aforesaid.
11. To give worthy, make statement either personally or otherwise etc. to pass the mutation entries etc., where necessary, affected in the City Survey and other record to effectuate the said purposes.
12. To pay all the cess, taxes, assessment, local fund etc. regarding the said property.
13. Generally to act as my attorney or agent in relation to the matters aforesaid and all other matters in which I was are (or ?) I am or may be interested or concerned and on my behalf to execute or to do all the deeds, acts or things fully

and effectually in all respect as I am myself if (sic) personally present.

14. I hereby for myself, execute administer and legal representation ratify and confirm and agree to ratify and confirm whatsoever my said attorney shall do or purport to do by virtue of this deed.

15. In WITNESS WHERE OF I have set my hands unto this deed this day of 4th February, 1986 at Hubli.'

7. Interpreting stipulations 2, 9 and 10 of the Power of Attorney Sri Jayakumar S. Patil, strenuously contended that the Power of Attorney delivers possession of the property to the defendant authorising him to borrow loans for construction of the building, let-out the premises to the tenants, manage the property, collect rents and also to pay taxes and to discharge liabilities. Therefore pursuant to the Power of Attorney, it is said that the defendant has incurred a personal liability of Rs. 5 lakhs. Unless, the said loan liabilities are discharged, the plaintiff is not entitled to revoke the Power of Attorney and to disturb the management of the property by the defendant.

8. In order to prove the loan liability personally incurred by the defendant, he has examined himself, no independent witness is examined nor documentary evidence is produced to corroborate or substantiate the fact that loan of Rs. 5 lakhs has been incurred personally by the defendant for the purpose of construction. Persons who have lent Rs. 5 lakhs are not named and they are not examined. No documents are produced to show the existence of personal liability of Rs. 5 lakhs incurred by the defendant for the purpose of construction. The Courts --below have concurrently found that the defendant has failed to prove the existence of personal liability of Rs. 5 lakhs set-up by him. The said concurrent finding of fact is sound and proper. The terms of Power of Attorney if read carefully, it does not specifically authorise the (defendant) to incur the loan liabilities in his personal capacity for the purpose of construction of the building. In general terms, the defendant has been authorised to raise loans and to encumber the property as a security. Such general Authority cannot constitute in law to authorise the defendant to incur personal liability. The property is also not offered as a security for the pecuniary liabilities incurred by the defendant at the time of creation of an

Agency. The Power of Attorney in order to be one coupled with interest, Under Section 202 of the Contract Act, the property should have been given as a security to the Agency along with possession but, any liabilities incurred after the creation of agency, voluntarily by the agent does not make a Power of Attorney one coupled with interest. In fact, under the Power of Attorney there is no specific authorisation on the defendant to incur personal liabilities in his personal capacity. Without such specific stipulation under the terms of Power of Attorney, it is impermissible for the defendant to contend that in view of the personal liabilities incurred, the agency becomes irrevocable unless the accounts are settled and liabilities are discharged.

9. The decision of Madras High Court in *Garapati Venkanna v. Mullapudi Atchutaramanna* AIR 1938 Madras 542, the following observations are made.

'But it is contended that this is an agency coupled with interest and is saved by Section 202, Contract Act. This argument cannot prevail. Ex.F contemplates the agent incurring costs in future for the filing and the conducting of the suit. The principle applies only to cases, where authority is given for the purpose of being a security or a part of the security, and not to cases where the interest of the donee arises afterwards and incidentally; in such cases there is no authority coupled with an interest; but an independent authority, and an interest subsequently arising (1848) 5 CB 895 Illus, (b) to the section refers to a consignment made after the factor's advance and with an express request by the principal to repay himself out of the price of goods : see Pollock and Mulla, commentaries under Section 202, the Indian cases cited there. I am therefore of the opinion that the plaintiff's agency had become revoked before the date of the suit and that the plaint that he filed is thus an invalid and ineffectual document. That would be sufficient to dispose of the appeal as in this view the suit fails'.

10. The Counsel for the respondent relied on the decision of this Court in *Corporation Bank, Bangalore v. Lalitha H. Holla*, : AIR1994 Kant133 at para 17. the following observations are made.

'It is well-settled that an instrument which creates a right or interest in the rents, profits, benefits and income from an immovable property, is a document which is

compulsorily registrable (See the decision of Privy Council in M.E. Moola Sons Ltd. v. Official Assignee reported in AIR 1936 PC 230 and the decision of the Supreme Court in Bihar Eastern Gangetic Fisherman Co-operative Society Ltd. v. Sipahi Singh, reported in : [1978]1SCR375). Thus a document creating an assignment of a debt will not require registration, but a document assigning rents will require registration. If the Power of Attorney in question is to be treated as creating an equitable assignment of rents, it will require registration and if not registered will be void and unenforceable. The Power of Attorney in question as already held does not create or recognise any right in or relating to any immovable property or benefit arising therefrom in favour of the Bank. It merely authorises the Bank to act as the Company's Agent to perform the acts stated therein. That is not an equitable assignment'.

11. The defendant in the instant case, does not claim exclusive possession with a right to collect rents and appropriate towards liabilities. The possession of the defendant is only as that of an Agent. If it was delivery of possession with an intention to create a right or interest in rents and profits, of course, registration would become necessary. Therefore, the decision in : AIR1994 Kant133 may not apply to the facts of this case.

12. Apart from the legal aspects, from the facts, as per the statement submitted by the defendant in this appeal, totally a sum of Rs. 11,51,000/- was spent for the construction. The defendant admittedly has received rents deposit of Rs. 1,14,500/- from the tenants and collected total rent of Rs. 6,07,500/-. In respect of the loans borrowed from co-operative institutions, which are due, the suit property is encumbered.

13. The defendant has failed to substantiate liability of Rs. 5,00,000/- incurred by him personally. Therefore, on facts, also the defendant has failed to show that plaintiff is due to him in any manner.

For the reasons and discussions made above. I am of the view that the Power of Attorney is not one coupled with interest.

Accordingly, the substantial question of law is answered in negative. Appeal dismissed.

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