CASE NO.:
Appeal (civil) 2434 of 2000

PETITIONER:
SMT. DAYAMATHI BAI

RESPONDENT:
SRI K.M. SHAFFI

DATE OF JUDGMENT: 04/08/2004

BENCH:
ASHOK BHAN & S.H. KAPADIA.

JUDGMENT:
J U D G M E N T

KAPADIA, J.

This appeal by special leave is filed by the original defendant against the judgment and order dated 18th December, 1998 passed by the High Court of Karnataka in R.S.A. No.802 of 1995.

Briefly, the facts giving rise to this appeal are as follows:\027

K.M. Shaffi, respondent herein instituted a suit bearing O.S. No.451/84 in the Court of Principal Munsiff, Bellary (hereinafter for the sake of brevity referred to as "the trial Court") for a declaration that a portion of T.S. No.272-A and T.S. No.273-B admeasuring 80'x120' (hereinafter for the sake of brevity referred to as "the suit plot") was his and his brother's absolute property. In the said suit, the plaintiff also sought an injunction restraining the appellant herein (defendant) from entering the suit plot.

T.G. Sreenivasa Pillai, T.G. Vivekananda Pillai and T.G. Sathyanarayana Pillai sons of Gurunatham Pillai were the owners of suit land bearing S. No.635R (which was revised to T.S. 272) admeasuring 90 cents and S. No.635T (revised to T.S. 273) admeasuring 5 acres 38 cents. The sons of Gurunatham Pillai sold the above lands to Khan Saheb Abdul Hye vide sale deed dated 14.11.1944 (Ex.P.1) for Rs.300/-. Khan Saheb Abdul died in 1947 leaving behind him his two sons, Basheer and Muneer who in turn gifted the said lands to one Sattar (father of the plaintiff) and Rahiman (plaintiff's uncle) under gift deed dated 20.6.1966 (Ex.P2). Sattar and Rahiman got the above lands sub-divided. In the partition suit No.381/72 on the file of Principal Munsiff, Bellary the plaintiff herein and his brother got the sub-divided plot Nos.T.S. 272A and T.S. 273B which included the suit plot admeasuring 80'x120'. The present title suit was filed when the appellant herein tried to enter upon the suit plot.

In the written statement, the appellant herein pleaded that the suit plot admeasuring 80'x120' was a separate plot and that it was not a part of T.S. 272A and T.S. 273B as alleged. It was pleaded that the suit plot was separately assessed by the municipality. It was pleaded that on 19.7.1967, the husband of the appellant had bought the suit plot from one Rajarathnam. That the husband of the appellant had later on executed a deed of settlement in favour of the appellant on

12.1.1973 and that the appellant had been in possession and in enjoyment of the suit plot. That Rajarathnam had purchased the suit plot in 1965 from the wife of Gurunatham Pillai. In the written statement, the appellant herein denied that the sons of Gurunatham had sold the lands to Khan Saheb Abdul as alleged. It was contended that sons had no right to sell the said lands. That the wife of Gurunatham was the owner. That she had not executed any conveyance in favour of Khan Saheb. In the written statement, appellant denied the gift by sons of Khan Saheb to Sattar and Rahiman.

Two main points arose for determination before the trial Court. Firstly, whether the plaintiff is the owner of the suit plot. Secondly, whether the suit plot formed part of T.S.272A and T.S.273B. According to PW1 the title came to him through the sons of Gurunatham vide Ex.P1 which was a registered sale deed dated 14.11.1944 and later on under Ex.P2 which is gift deed executed by sons of Khan Saheb in favour of Sattar and Rahiman.

On the other hand, the appellant (defendant) claimed title only to the suit plot admeasuring 80'x120'. She claimed it to be a separate property. She traced her title to the wife of Gurunatham. She contended that the sons of Gurunatham had no right to sell.

The trial Court found that when on 14.11.1944 the sons of Gurunatham Pillai had sold the above lands vide sale deed Ex.P1 to Khan Saheb Abdul for Rs.300/-, the wife of Gurunatham had no right to sell the suit plot in 1965 through her constituted attorney to Rajarathnam from whom the husband of the appellant claims to have purchased the suit plot. The trial Court further observed that before it there was no plea that the wife of Gurunatham was the absolute owner. The trial Court found from Ex.P1 that the sons of Gurunatham had sold the lands for family necessity. In the circumstances, the trial Court held that no title had vested in Rajarathnam. The trial Court further found that Ex.P1 was more than 30 years old document and the presumption under Section 90 of the Evidence Act applied to the said documents. Before the trial Court Ex.P2 stood proved by the plaintiff who examined the constituted attorney of Basheer and Muneer as PW2. Further, execution of Ex.P2 was not challenged.

At this stage, it may be mentioned that the appellant did not object to the registered sale deed Ex.P1 dated 14.11.1944 being marked and admitted in evidence. The appellant also did not challenge the execution of Ex.P2. Hence the trial Court decreed the suit.

Being aggrieved by the decree passed by the trial Court, the appellant herein preferred Regular Appeal no.36 of 1988 in the Court of Civil Judge, Bellary (hereinafter for the sake of brevity referred to as "the lower appellate Court"), who took the view inter alia that the plaintiff had failed to prove Ex.P1 and Ex.P2 as neither the executant nor the donor had been examined. That Ex.P1 and Ex.P2 could not be acted upon as the original deed dated 14.11.1944 (Ex.P1) had not been produced. The lower appellate Court found that the plaintiff had not laid the foundation for admissibility of secondary evidence under Section 65(a) and (f) and in the circumstances the sale was not proved. The lower appellate Court observed that although the original deed was available in the collateral proceedings the plaintiff took no steps to produce it before the trial Court in the present suit. The lower appellate Court further found that the power of attorney in favour of PW2 was duly registered. That the plaintiff could have summoned it from the office of the sub-registrar. This was not done. In the circumstances, the lower appellate Court came to the conclusion that both the Exhibits P1 and P2 were not proved. Consequently, the

lower appellate Court allowed the appeal and dismissed the suit filed by the plaintiff.

Aggrieved by the decision of the lower appellate Court, K.M. Shaffi, the original plaintiff preferred Second Appeal under section 100 of CPC before the High Court. At the time of admission of the second appeal, following substantial question of law was formulated by the High Court:\027

"As to whether the lower appellate Court has erred in holding that the certified copies of the sale deed and the gift deed being Exs.P1 and P2 respectively are not admissible in evidence and as such the plaintiff had failed to substantiate his title over the suit schedule property?"

The High Court on consideration of various authorities came to the conclusion that since the copy of Ex.P1 was a certified copy and since it is more than 30 years old document, the trial Court was right in invoking the presumption under Section 90 of the Evidence Act. Consequently, the appeal was allowed. Hence, this civil appeal.

Ms. Kiran Suri, learned counsel appearing on behalf of the appellant submitted that once the document becomes incapable of being proved for want of primary evidence, the foundation of secondary evidence must be laid, without which, such secondary evidence was inadmissible. That in the present case, no steps were taken by the plaintiff to produce the original sale deed. That no steps were taken to prove the loss of the original sale deed. That no steps were taken to establish the source from which certified copy was obtained. She submitted that if the foundation is laid under section 65 and if the plaintiff was able to prove that the original sale deed was lost then the secondary evidence was admissible but in the absence of such a foundation, the High Court erred in holding that the registered certified copy of the sale deed was admissible in evidence as the document produced was more than 30 years old.

We do not find merit in this civil appeal. In the present case the objection was not that the certified copy of Ex.P1 is in itself inadmissible but that the mode of proof was irregular and insufficient. Objection as to the mode of proof falls within procedural law. Therefore, such objections could be waived. They have to be taken before the document is marked as an exhibit and admitted to the record (See: Order XIII Rule 3 of Code of Civil Procedure). This aspect has been brought out succinctly in the judgment of this Court in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Another reported in [(2003) 8 SCC 752] to which one of us, Bhan, J., was a party vide para 20:

"20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the

first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

To the same effect is the judgment of the Privy Council in the case of Gopal Das & Anr. v. Sri Thakurji & Ors. reported in [AIR 1943 PC 83], in which it has been held that when the objection to the mode of proof is not taken, the party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. That when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. Similarly, in Sarkar on Evidence, 15th Edition, page 1084, it has been stated that where copies of the documents are admitted without objection in the trial Court, no objection to their admissibility can be taken afterwards in the court of appeal. When a party gives in evidence a certified copy, without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and such objection will not be allowed at a later stage.

In the present case, when the plaintiff submitted a certified copy of the sale deed (Ex.P1) in evidence and when the sale deed was taken on record and marked as an exhibit, the appellant did not raise any objection. Even execution of Ex.P2 was not challenged. In the circumstances, it was not open to the appellant to object to the mode of proof before the lower appellate Court. If the objection had been taken at the trial stage, the plaintiff could have met it by calling for the original sale deed which was on record in collateral proceedings. But

as there was no objection from the appellant, the sale deed dated 14.11.1944 was marked as Ex.P1 and it was admitted to the record without objection.

For the foregoing reasons, we do not find any merit in this civil appeal and the same is accordingly dismissed, with no order as to costs.