



S.A.(MD).No.437 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.03.2023

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

S.A.(MD).No.437 of 2019

and

C.M.P.(MD).No.8714 of 2019

Pon Esakki

... Appellant/Appellant/Second Defendant

Vs.

1.Muthulakshmi

...1st Respondent/1st Respondent /Plaintiff

2.Rayappan Fernando

...2nd Respondent/2nd Respondent/
1st Defendant

Prayer: Second Appeal is filed under Section 100 of CPC to set aside the Judgment and Decree dated 09.04.2019 passed in A.S.No.77 of 2014 on the file of Honourable Sub Court, Thoothukudi confirming the Judgment and decree dated 05.06.2014 passed in O.S.No.20 of 2010 on the file of the Honourable District Munsif Court, Thoothukudi.

For Appellant : Mr.I.Robert Chandrakumar

For R-1 : Mr.R.Maheswaran



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JUDGMENT

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This Second Appeal has been filed challenging the concurrent findings of the Courts below. The second defendant in the suit in O.S.No.20 of 2010 on the file of the Principal District Munsif Court, Thoothukudi is the appellant herein. The first respondent is the plaintiff and the second respondent is the first defendant in the said suit. The suit was filed for declaration that the first respondent/plaintiff is the absolute owner of the suit schedule property and also for recovery of possession.

2. The first respondent/plaintiff claimed ownership of the suit schedule property by virtue of a sale deed dated 31.07.1988 marked as Ex.A1 before the Trial Court. The plaintiff and her husband Muniyasamy had a strained relationship. According to the plaintiff, though Muniyasamy, her husband is not the owner of the suit schedule property, he had executed a power of attorney in favour of the second respondent dated 19.11.2001 marked as Ex.B3 and thereafter, the said power agent has executed a sale deed dated 22.09.2006 in favour of the appellant/second defendant. The first respondent/plaintiff claimed that the sale deed executed by the second respondent/first defendant in favour of the appellant/second defendant is null and void. In such



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circumstances, a suit was filed for declaration and for recovery of possession from the appellant/second defendant.

3. Before the Trial Court, the appellant/second defendant took a stand that she is a bonafide purchaser for valuable consideration in respect of the suit schedule property. Before the Trial Court, five documents were filed by the first respondent/plaintiff and the same were marked as exhibits A1 to A5. On the side of the first respondent/plaintiff, two witnesses were also examined, namely, the first respondent/plaintiff as well as another witness, P.W.2 by name, Thanesh. On the side of the appellant/second defendant, six documents were filed and the same were marked as exhibits B1 to B6. Four witnesses were also examined on the side of the appellant/second defendant, namely, the appellant/second defendant and three other witnesses, D.W.2, the attesting witness to the sale deed by name Aathisamy, D.W.3, the Office Assistant in the Sub-Registrar's office and D.W.4, Arockiyasamy, a Sub Inspector in the Fisheries Department. Through the Sub Inspector of Fisheries Department (D.W.4), two documents were marked as exhibits X1 and X2.

4. The Trial Court, after giving due consideration to the oral and documentary evidence available on record, has held that the first



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respondent/plaintiff is the absolute owner of the suit schedule property based on Ex.A1, namely, the registered sale deed bearing Document No.505 of 1988 standing in the name of the first respondent/plaintiff. The encumbrance certificate for the suit schedule property was also filed by the first respondent/plaintiff and the same was marked as Ex.A2, which is dated 12.02.2007. The Trial Court has also considered the same and has rightly held that the first respondent/plaintiff is the absolute owner of the suit schedule property based on the sale deed dated 31.07.1988 (Ex.A1) referred to supra.

5. The first respondent/plaintiff has also pleaded in the plaint that for a period of nine years, she did not visit the suit schedule property and therefore, she was not aware of the fraudulent sale effected in favour of the appellant/second defendant on 22.09.2006. The plaintiff also has contended that immediately after coming to know about the sale in the year 2009, she had sent a legal notice to the appellant/second defendant calling upon her to vacate and hand over possession of the suit schedule property to her. After giving due consideration to the aforementioned documents and based on the oral evidence let in by both the parties, the Trial Court has rightly come to the conclusion that the first respondent/plaintiff is the absolute owner of the suit schedule property.



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6. The documents filed by the appellant/second defendant before the Trial Court, namely, exhibits B1 to B6 does not establish that the first respondent/plaintiff's husband, Mr.Muniyasamy had the legal right to sell the suit schedule property to the appellant/second defendant through his power agent, namely, the second respondent/first defendant. The general power of attorney executed by the first respondent/plaintiff's husband, Muniyasamy in favour of the second respondent/first defendant is dated 19.11.2001, which is marked as Ex.B3 before the Trial Court. Subsequent to the execution of the said power of attorney dated 19.11.2001, the second respondent/first defendant, the power agent of Muniyasamy, has executed a sale deed dated 22.09.2006 in favour of the appellant/second defendant, which is marked as Ex.B4 before the Trial Court. The sale deed has also been executed only after a lapse of more than four years, though the power of attorney is dated 19.11.2001. The appellant/second defendant claims that she is a bonafide purchaser having paid the valuable consideration to the second respondent/first defendant, the power agent of the first respondent/plaintiff's husband, Muniyasamy. Apart from the documents filed by both the parties, the Sub Inspector of Fisheries, namely, Arockiyasamy (D.W.4), who was also examined as a witness, had produced two documents before the Trial Court, which were marked as exhibits X1 and X2.



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The documents marked through D.W.4 are the general power of attorney dated 11.11.2013 and 09.08.2005 as well as a copy of the Board resolution marked as Ex.X2.

7. Admittedly, the property stands in the name of the first respondent/plaintiff as seen from the sale deed dated 31.07.1988 (Ex.A1) standing in her name. A person should have title over the property and only then, he can convey the same to a purchaser under a sale deed. The sale deed by which the appellant/second defendant claims ownership is the sale deed dated 22.09.2006 marked as Ex.B4. The said sale deed was not executed by the first respondent/plaintiff, but was admittedly executed by the second respondent/first defendant, who claims to be the power agent of Muniyasamy, the husband of the first respondent/plaintiff, without authority of Muniyasamy. The second respondent/first defendant has executed a sale deed dated 22.09.2006, though the property conveyed under the said sale deed was never owned by Muniyasamy, who had executed a power of attorney dated 19.11.2001 marked as Ex.B3 in his favour. The Trial Court based on the oral and documentary evidence available on record has rightly come to the conclusion that the first respondent/plaintiff is the absolute owner of the suit schedule property and has rightly granted the relief of declaration that she is the



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absolute owner of the suit schedule property and has also rightly granted the relief of recovery of possession.

8. The Lower Appellate Court, namely, the Sub Court, Thoothukudi by its judgment and decree dated 09.04.2019 passed in A.S.No.77 of 2014 has rightly confirmed the findings of the Trial Court by dismissing the first appeal filed by the appellant/second defendant.

9. This Court on 17.10.2019 admitted this Second Appeal by formulating the following substantial questions of law:

"i) Whether Courts below are correct in law in overlooking the description of the property provided in the power deed, which was marked as Ex.B.1, wherein, northern boundary has been shown as a house of Muniyasamy, the husband of the plaintiff and whose favour Ex.B.1 allotment has been given?

ii) Whether the Courts below are right in law in overlooking that the plaintiff's husband was the ostensible owner of the suit property particularly when the second defendant purchased the suit property bonafide for valuable consideration and entitled to the benefit under Section 42 of Transfer of Property Act?

iii) Whether lower Appellate Court below are correct in



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law in holding the sale deed by the plaintiff's husband in favour of the second defendant is unenforceable on the ground that the sale was effect in violation of the allotment order by the Government?"

10. As observed earlier, the substantial questions of law formulated above were rightly considered by the Courts below against the appellant/second defendant as she is not the owner of the suit schedule property and she is also not a bonafide purchaser.

11. Apart from the above referred questions of law, the learned counsel for the appellant for the first time before this Court contended that as per the provisions of Section 41 of the Transfer of Property Act, 1882, the transfer by an ostensible owner is a valid transfer. She would contend that the first respondent/plaintiff's husband Muniyasamy is an ostensible owner as in the power of attorney dated 09.08.2005 (Ex.X1) executed by the first respondent/plaintiff in the boundaries to the schedule of the property mentioned therein, the name of Rayappan Fernando, the second respondent/first defendant is mentioned and therefore, the first respondent/plaintiff has implied consent for sale of the suit schedule property in favour of the appellant/second defendant.



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The issue of ostensible owner as per provisions of Section 41 of the Transfer of Property Act was never raised by the appellant/second defendant in her pleadings before the Trial Court.

12. The learned counsel for the first respondent/plaintiff on the other hand relies upon a judgment of the Hon'ble Supreme Court in the case of ***Hardev Singh Vs. Gurmail Singh (Dead) By Lrs*** reported in ***(2007) 2 SCC 404*** and would submit that the appellant/second defendant has not satisfied the conditions required for attracting Section 41 of the Transfer of Property Act, which pertains to an ostensible owner conveying a property. In paragraph 10 of the judgment referred to supra, it has been made clear that to satisfy Section 41 of the Transfer of Property Act, the following ingredients are required, namely,

- a) the transferor is the ostensible owner;
- b) he is so by the consent, express or implied, of the real owner;
- c) the transfer is for consideration;
- d) the transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.

Apart from satisfying the ingredients referred to supra, the Hon'ble Supreme Court in paragraph 12 has also observed that to get the benefit of Section 41 of the Act, the conditions which must be satisfied are:



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a) the contract of transfer was made by a person who was competent to contract; and

b) the contract would be subsisting at the time when a claim for recovery of the property is made.

13. Admittedly, the appellant/second defendant has not pleaded in her written statement that the first respondent/plaintiff's husband Muniyasamy was the ostensible owner of the suit schedule property. The appellant/second defendant will have to substantiate that she had acted in good faith and has taken reasonable care to ascertain that the transferor had power to transfer. Admittedly, if the encumbrance certificate was obtained, the appellant/second defendant would have noticed the sale deed dated 31.07.1988 (Ex.A1) standing in the name of the first respondent/plaintiff. Any prudent purchaser of any property will apply for an encumbrance certificate and only thereafter, decide as to whether the property is having a marketable title or not. Therefore, it is clear that the appellant/second defendant has not taken reasonable care to ascertain that the transferor, namely, the husband of the first respondent/plaintiff, through his power agent had the authority to execute a sale deed in her favour.



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14. This Court is of the considered view that both the Courts below have rightly held that the first respondent/plaintiff is entitled for the declaratory relief as well as for recovery of possession. The substantial questions of law formulated by this Court at the time of admission of the Second Appeal are answered against the appellant/second defendant and there is no merit in the Second Appeal. Accordingly, this Second Appeal is dismissed. If at all, the appellant/second defendant has suffered damages on account of the sale executed in her favour by the husband of the plaintiff, Muniyasamy, she is at liberty to proceed against him in the manner known to her under law. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

17.03.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
Lm

To

1.The Sub Court,
Thoothukudi.

2.The Principal District Munsif Court,
Thoothukudi.

3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court, Madurai.

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ABDUL QUDDHOSE, J.

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