

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.11.2015

CORAM:

THE HON'BLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.314 of 2014

1.Muniammal
2.Gopal
3.S.Jothi

...Appellants/LRS of the Plaintiff

Vs.

1.Mani
2.Natarajan
3.Murugesan
4.Thirunavukkarasu
5.Banumathi

...Respondents/LRS of the Defendant

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the learned Subordinate Judge, Rasipuram dated 09.11.2012 made in A.S.No.183 of 2008 confirming the Judgment and decree of the District Munsif, Rasipuram dated 18.07.2003 made in O.S.No.431 of 1984.

For Appellants : Ms.R.Subramanian

For Respondents : Mr.N.Suresh
for R1 to R3 and R5
R4-NA

JUDGMENT

One Mr.Sivasankara Mudaliar filed O.S.No.431 of 1984 on the file of the learned District Munsif, Rasipuram against one Radhakrishna Mudaliar. The said suit was filed for declaration of title for the suit property and for consequential relief of permanent injunction to restrain the defendant Mr.Radhakrishna Mudaliar from in any manner interfering with the peaceful possession and enjoyment of Sivasankara Mudaliar. By a decree and judgment dated 18.07.2003, the trial court dismissed the suit. As against the same, Mr.Sivasankara Mudaliar filed an appeal in A.S.No.183 of 2008 on the file of the learned Subordinate Judge, Rasipuram. During the pendency of the appeal, the sole defendant Mr.Radhakrishna Mudaliar died. Therefore, the responders herein were brought on record as his

legal representatives. The lower appellate court, by a decree and judgment dated 09.11.2012 dismissed the appeal thereby confirming the decree and judgment of the trial court. It is alleged that on 13.11.2012, the sole plaintiff Mr.Sivasankara Mudaliar went missing. His whereabouts could not be ascertained. Therefore the appellants herein filed the present second appeal challenging the decree and judgment of the trial court and confirmed by the lower appellate court. That is how the said appeal is before me.

2. The case of the appellants is as follows:

i) The suit property was originally owned by Mr.Sivasankara Mudaliar and his brother. They executed a sale deed on 12.02.1964 in favour of Mr.Radhakrishna Mudaliar. The said sale deed is not valid as it was only a sham and nominal one. The said document was not acted upon. Mr.Sivasankara Mudaliar continued to be in possession of the property. Thus despite the execution of the above said document dated 12.02.1964, Mr.Sivasankara Mudaliar continued to be owner of the suit property and thus he has got title. It is further contended that his possession of the suit property based on his title needs to be protected and the defendants have no right whatsoever to interfere with the same.

ii) Mr.Radhakrishna Mudaliar took a plea before the trial court that the sale deed dated 12.02.1964 is valid, as the same was executed for valid consideration. According to him, the sale deed was acted upon and however, since Mr.Sivasankara Mudaliar requested to reside in the house for some more time, he was permitted to occupy the same. Thus Mr.Sivasankara Mudaliar was only a permissive occupant.

iii) Based on the above pleadings, the trial court framed appropriate issues. On the side of the plaintiffs, as many as five witnesses were examined and 37 documents were marked. On the side of the defendants, four witnesses were examined and as many as six documents were marked. Having considered all the above, the trial court dismissed the suit, which was confirmed by the lower appellate court. As against the same, the appellants are before this court with this second appeal.

3. I have heard the learned counsel for the appellants and the learned counsel appearing for the respondents and I have perused the records carefully. This appeal has come up today only for admission.

4. The learned counsel for the appellants would submit that the sale deed dated 12.02.1964 is not valid, as it is only a sham and nominal document. He would further submit that the courts below have not appreciated the evidences, both oral and documentary, in their proper perspective. The learned counsel would further submit that the plaintiffs have also perfected their title by adverse possession. He would further submit that the defendant himself has admitted that the plaintiffs are in possession and enjoyment of the suit property and therefore, the courts below ought to have granted a decree as prayed for in the plaint.

5. The learned counsel appearing for the respondents would vehemently oppose this appeal. According to him, there is no question of law involved in this second appeal at all. He would further submit that on appreciating both oral as well as documentary evidence, the courts below have come to the conclusion that the sale deed dated 12.02.1964 is supported by consideration and the same is valid. The learned counsel would further submit that though the defendant admits that the plaintiff is in possession and enjoyment of the suit property, his possession is only as a permissive occupant. The learned counsel would further submit that there is enormous evidence to prove the same and the same have also been appreciated by the courts below. The learned counsel would further submit that to recover the possession from the plaintiff, the defendants have filed a suit in O.S.No.38/2013 on the file of the learned Subordinate Judge, Rasipuram, and the same is pending trial. Therefore, according to the learned counsel for the respondents the second appeal deserves to be dismissed.

6. From the above submissions, and from the pleadings and the records, I find the following substantial questions of law involved in this second appeal:

1. Whether the finding of the courts below that the sale deed dated 12.02.1964 is supported by consideration and the same is valid is correct in law?

2. Whether the courts below were right in dismissing the suit without even granting a decree for permanent injunction when the defendants have admitted the possession of the plaintiff?

7. I have considered the rival submissions.

8. So far as the first question of law is concerned, in my considered view, the courts below were right in holding that the sale deed dated 12.02.1964 is a valid document, as the same is supported by consideration. Essentially, in order to prove that a transaction is sham and nominal, it is the duty of the party who pleads such a sham and nominal transaction, should plead and prove the circumstances under which such sham and nominal transaction was entered into between the parties. It is not suffice to simply make an averment that the sale deed is sham and nominal without giving the circumstances under which it was necessitated. Here, in this case, in the pleadings, the plaintiff has not stated the circumstances under which the said sale deed dated 12.02.1964 came to be executed as a sham and nominal document. Except the ipse dixit statement of the plaintiff that the said sale deed is a sham and nominal document, absolutely there is no material to prove the said contention. That apart, the courts below have appreciated both oral as well as documentary evidence to come to the conclusion that the said document is a valid document, as the same was supported by consideration. In conclusion, I do not find any infirmity at all.

Therefore, the first question of law needs to be answered only in favour of the defendants.

9. So far as the second question of law is concerned, I find force in the contention of the learned counsel for the appellants. The defendants have admitted that the plaintiff is in possession and enjoyment of the suit property. But according to the defendant, the plaintiff is a permissive occupant, whereas according to the plaintiff, his possession is on account of his title. At any rate, it is not even the case of the defendants that the plaintiff is a trespasser. Therefore, it is for the defendants to take steps to recover possession from the plaintiff by following the procedure established by law. The Learned counsel for the defendants would submit that the defendants have filed a suit in O.S.No.38 of 2013 on the file of the learned Subordinate Judge, Rasipuram for recovery of possession. Therefore, it is for the defendants to work out their remedies in the said suit. Until lawfully the possession is recovered from the plaintiff, the defendants shall not interfere with the same. To that extent, the plaintiff is entitled to a limited decree in their favour. Accordingly, the second question of law is answered in favour of the plaintiff.

In the result, the second appeal is partly allowed in the following terms:

1. The decree and judgment of the trial court and confirmed by the lower appellate court dismissing the prayer for declaration of title is hereby confirmed.

2. The decree and judgment of the trial court and confirmed by the lower appellate court declining to grant a decree for injunction in favour of the plaintiff is hereby set aside and instead, a decree for permanent injunction is granted restraining the defendants from in any manner interfering with the peaceful possession and enjoyment of the plaintiff until the possession is recovered by defendants from the plaintiff by following the procedure established by law. In other words, the defendants may work out their remedy independently in O.S.No.38/2013 on the file of learned Subordinate Judge, Rasipuram.

3) No costs.

asr

Sd/-
Asst.Registrar

/true copy/

To

1. The Subordinate Judge, Rasipuram.

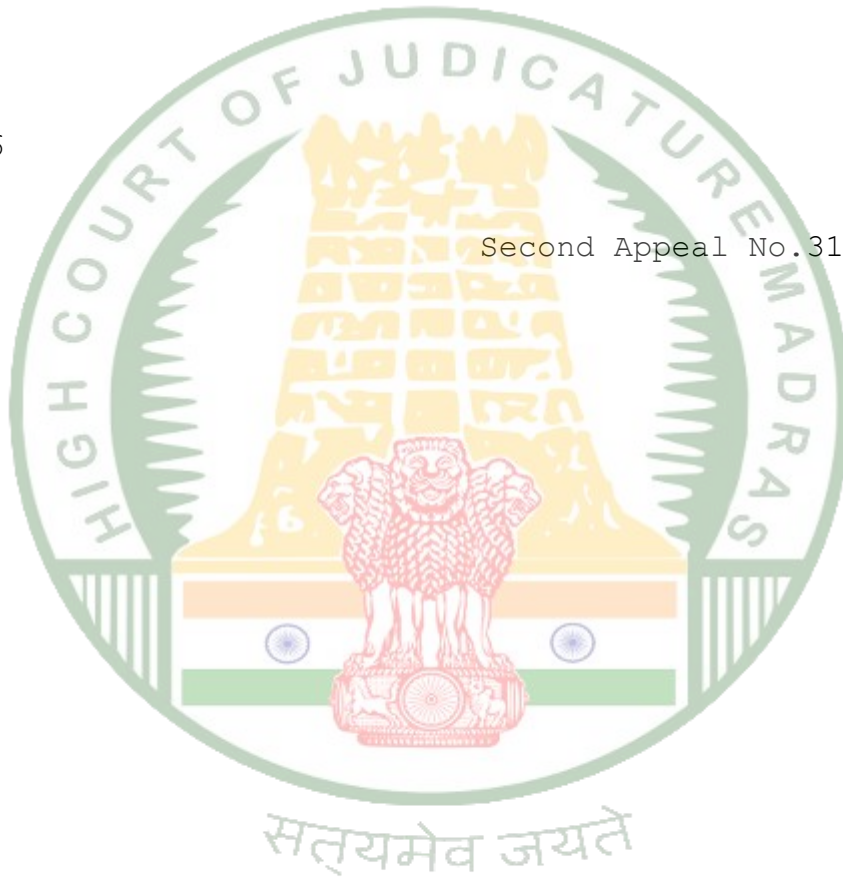
2. The District Munsif, Rasipuram.

+ 1 CC TO MR.R.SUBRAMANIAN, ADVOCATE SR 62551

+ 1 CC TO MR.N.SURESH, ADVOCATE SR 62747

TEJ/CO
KR/12/1/16

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