

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29-10-2015

CORAM:

THE HON'BLE MRS. JUSTICE PUSHPA SATHYANARAYANA

S.A. No.200 of 2013

and

M.P. No. 1 of 2013

and

M.P.No. 1 of 2015

K.S.Kaliappan ... Appellant/3rd Respondent
Vs.

1. N.Dharmalingam
2. A.A.Vasudevan
3. P.M.Yoganathan
4. Minor P.Y.Raguprasad
5. N.Senniappan
6. Paavaaiyammal

(Minor Rep.by his Natural
Guardian and Father

P.M.Yoganathan) ... Respondents/plaintiffs/1 and 2
Defendant

Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 08.10.2012 passed by the learned Subordinate Judge, Gobichettipalayam, in A.S.No.21 of 2011, reversing judgment and decree passed by the learned District Munsif, Gobichettipalayam, in O.S.No.167 of 2001, dated 13.07.2011.

For Appellant : Mr. S.Parthasarany
for Mr.M.Easan

For Respondents: Mr.R.Subramanian

for Mr.V.P.Karthikeyan for R1 to
R4
Mr.K.Balaji for R5

JUDGMENT

The unsuccessful third defendant has preferred the above Second Appeal.

2. The plaintiffs / respondents 1 to 4 herein, who had purchased the properties from the sixth respondent herein, who was the second defendant in the suit, are the absolute owners of the suit properties by way of a sale deed dated 31.03.2001. The first defendant is the husband of the second defendant and the third defendant is the son of the defendants 1 and 2. According to the plaintiffs, the second defendant / appellant, who has got right and title over the suit property had conveyed the same to the plaintiffs 1 to 4 / respondents 1 to 4. Earlier, the third defendant / appellant attempted to disturb the possession and enjoyment of the second defendant in the suit property, which resulted in filing of O.S.No.181 of 1991, on the file of the District Munsif, Gobichettipalayam. The said suit was decreed in favour of the second defendant herein. The plaintiffs 1 to 4 / respondents 1 to 4 have been in possession of the properties from the date of purchase and mutation of revenue records also effected in the name of the plaintiffs. The third defendant / appellant lodged a police complaint, contending that he had entered into an agreement with Sakthi Sugar Mills and there are sugarcane crops standing in the suit property. However, it is the case of the plaintiffs that the said loan was availed by the second defendant who had entered into an agreement with them. On repayment of the said loan, she had, infact, sent a letter to cancel the agreement and the same was also acknowledged by the said Sakthi Sugar Mills. In view of attempts by the appellant herein, the plaintiffs have filed the above suit for declaration of title and for permanent injunction.

3. The defendants 1 and 2, though remained ex parte, had filed a written statement earlier, supporting the case of the plaintiffs.

4. The third defendant / appellant had filed his written statement, contending that the sale deed in favour of the plaintiffs dated 31.03.2001 is not supported by any valid consideration. Due to the misunderstanding between the

appellant and the defendants 1 and 2, a portion of the suit property in Survey No.97/13 was sold to one Vedhanayagam, who, in turn, had sold to Ayyappan and Balasubramaniam and since then, the said persons were in enjoyment and possession of the suit properties. The appellant herein was lessee in the said properties and also had given up leasehold rights on receipt of Rs.25,000/-. The first defendant had purchased the suit properties in the name of the second defendant, who is his wife, out of the joint family income. The appellant also had admitted the partition of the properties orally as early as in the year 1980 and later, the same had been reduced to writing in the year 1985. According to him, despite the partition, the agricultural activities were carried out in the said properties by the appellant who had obtained loan from the Sugar Mills and Agricultural Co-operative Society by mortgaging the suit properties.

5. Further, it is also contended that the suit in O.S.No.180 of 1991 was originally decreed ex parte, which was later set aside and thereafter, the second defendant herein who was the plaintiff therein had not pressed the same. The said judgment in O.S.No.180 of 1991 is binding on the plaintiffs. Hence, the third defendant / appellant, contended that the suit is barred by res judicata. It was also contended that the sale obtained by the respondents 1 to 4 herein / plaintiffs during the pendency of O.S.No.283 of 1982 is hit by doctrine of lis pendens.

6. The trial Court, on appreciation of evidence let in by the respective parties and evidence in support of the same based on the record, dismissed the suit. Aggrieved by the same, the respondents 1 to 4 herein had preferred appeal in A.S.No.21 of 2011, wherein, the lower appellate Court had reversed the judgment and decree of the trial Court, thereby decreeing the suit. Aggrieved by the said judgment, the above Second Appeal has been preferred.

7. At the time of admission, the following substantial questions of law were formulated as hereunder:

"1. Whether the first appellate Court was right in allowing the appeal and decreeing the original suit, by giving a finding on collusion and fraud among D1, D2 and D3, even though the plaintiffs in

O.S.No.167 of 2001 happened to be the pendente lite purchasers, so to say, the persons who purchase the suit property during the pendency of O.S.No.283 of 1982 filed by Kaliappan-D3 herein as against D1 and D2 herein?.

2. Whether the first appellate Court was justified in holding that there was collusion and fraud, even though the plaint in the present suit O.S.No.167 of 2001 is niggard and bereft of averments concerning such factors?

3. Whether the dismissal of S.A.No.2246 of 2004, which arose out of the previous partition suit O.S.No.283 of 1982, on withdrawal, despite C.M.P.No.490 of 2000 filed by the plaintiffs in the present suit O.S.NO.167 of 2001, for impleadment in that Second Appeal was pending would in any way enure to their benefit to establish the alleged fraud and collusion among the defendants herein and the said Pavayammal, who happened to be the original owner of the suit property"

4. Whether the theory of lis pendens can be pressed into service as against the plaintiffs.

5. Whether there is any illegality in the judgment passed by the trial Court.

8. The lower appellate Court, after considering the rival contentions of the parties and evidence held that the sale executed by the second defendant in favour of the plaintiffs is supported by valid consideration. The evidence of DW.2, who is the sister of the appellant was disregarded by the lower appellate Court with respect to the passing of consideration, as she is a third party to the document. Similarly, with respect to the contention of the appellant / third defendant that the suit properties were purchased by the first defendant in the name of his wife / second defendant, out of the income from the joint family properties. The appellant also had examined independent witnesses, namely, DW.3 and DW.4, who had spoken about the financial status of the sixth respondent / second defendant herein. The evidence of D.W3 and D.W4 were mutually contradictory for which reasons, the lower appellate disbelieved their evidence and concluded that the suit properties were purchased by the first defendant, out of the income from the joint family properties.

9. Similarly, considering the sale deeds under Exs.A7 and A8 dated 23.12.1987, pertaining to a portion of the property in Survey No.97/13 purchased by one Vedhanayagam from sixth respondent, who, in turn, sold in favour of Balasubramanian and Iyyappan vide sale deed dated 16.09.1994, it is seen that the appellant herein had attested said sale deed. In Ex.A14-sale deed, which related to the purchase of 8 cents by the appellant herein from Balasubramanian and Iyyappan, DW.1 has categorically admitted the exclusive ownership of his mother, the second defendant over the title to the suit properties held by her under sale deeds dated 28.10.1970, 07.09.1973 and 20.09.1980 that included the suit properties also.

10. The above said finding of the lower appellate Court, after careful consideration of the rival contention of the parties and appreciation of evidence and materials on record, pertains only to the factual aspects and does not involve any substantial question of law. Hence, the same does not merit any interference by this Court under Section 100 of Civil Procedure Code.

11. On the question of lis pendens, now it has to be seen whether the sale by the plaintiffs is affected?.

Two suits were instituted prior to the institution of the present suit. O.S.No.283 of 1982 was filed by the appellant herein, seeking declaration that the suit properties are joint family properties and for declaration of his half share in the suit properties, standing in the name of the defendants 2 and 3 herein. The second suit in O.S.No.180 of 1991 was filed at the instance of the second defendant, seeking declaration of her right and for permanent injunction over the suit properties, which includes the present suit property also.

12. The learned counsel for the appellant vehemently contended that the sale in favour of the plaintiffs herein with respect to the present suit property executed by the second defendant was made during the pendency of the above mentioned two suits, thereby the same is hit by lis pendens. On the other hand, the learned counsel for the respondents invited the attention of this Court towards the conduct of the defendants 1 and 2, who are the parents of the appellant herein with respect

to their participation in the above mentioned cases. As far as in O.S.No.283 of 1982 is concerned, the same is contested only by the subsequent purchasers from the second defendant. The suit in O.S.No.180 of 1991 was originally decreed ex parte and later it was set aside and thereafter the second defendant herein who was the plaintiff therein did not choose to continue with the suit. Even in the present suit, the defendants 1 and 2, though filed their written statement in support of the case of the respondents 1 to 4 herein / plaintiffs, later, remained ex parte. From the above facts, this Court may safely conclude that there has been collusion between the third defendant and defendants 1 and 2.

13. In support of his contention, the learned Counsel relied on AIR 1956 SC 593 Nagubai Amman and others Vs B. sharma Rao and others and more particularly referred to para 15 is as follows:-

15. Now, there is a fundamental distinction between a proceedings which is collusive and one which is fraudulent. "Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose.

In such a proceeding, the claim put forward is fictitious, the contest over it is unreal and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceedings is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant had managed, to obtain the verdict of the Court in his favour and against his opponent by practicing fraud on the Court. Such a proceeding is started with a view to injure the opponent, and there can be question of its having been initiated as the result of an understanding between the parties. While is collusive proceedings the combat in a mere sham, in a fraudulent suit it is real and earnest.

14. The learned Counsel also seeks in aid the judgment of this Court in 2009-2-L.W-522 Devasena Ammal -Vs- K.Rathnavelu Mudaliar and another and relied on para 13, which reads as follows:

"13. Mr.V.Ragavachari, learned Counsel appearing for the appellant submitted that in as much as the appellant in her written statement had stated that "the sale is not vitiated by the doctrine of lis pendens", it should be construed that the appellant had questioned the compromise entered between the second defendant and the plaintiff on the ground of fraud and collusion. The learned Counsel further submitted that the pleadings in mofussil Courts in our Country are loosely drafted and a liberal construction has always to be given to such pleadings. The learned counsel further submitted that though the suit filed by the second defendant might have been filed bonafidely and it was contentious in the beginning but after transferring the property in favour of the first defendant since the second defendant had fraudulently entered into a compromise with the plaintiff to defeat the rights of the purchaser, namely, the appellant, it cannot be said that the termination of the suit was honestly brought out in one of the visual modes and therefore, contended that the doctrine of lis pendens will have no application".

15. Further, a perusal of the records would make it clear that the suit in O.S.No.180 of 1991 was decreed ex parte on 03.11.1994. Thereafter, on the strength of the ex parte decree, the suit properties were sold to the plaintiffs herein on 31.03.2001 by the second defendant. Subsequent to the sale, the said ex parte decree was set aside. However, the suit was not continued further. The third defendant, who is the appellant during his cross examination had admitted the knowledge of the above mentioned sale in favour of the plaintiffs, subsequent, to the exparte decree and judgment in O.S.No.180 of 1991. Despite admitting the knowledge of the above mentioned sale, neither the appellant herein, who is the third defendant nor the sixth respondent, who is the second defendant had taken any steps to implead the subsequent purchasers in the said suit or bringing the fact of the subsequent transaction to the judicial notice of

the Court concerned. Instead, the second defendant chose not to press the above mentioned suit in O.S.No.180 of 1991, affecting the rights of the subsequent purchasers, namely, the plaintiffs. This act of the said sixth respondent in not pressing the suit instead of either impleading the respondents 1 to 4 / plaintiffs in the said suit or bringing the fact of subsequent transaction to the judicial notice of the concerned Court, clearly established the collusion between the third defendant and the second defendant.

16. In so far as the suit in O.S.No.283 of 2002 is concerned, as mentioned earlier, the appellant herein, during his cross examination had admitted the knowledge of the above mentioned sale deeds dated 31.03.2001 in favour of the plaintiffs, subsequent to the ex parte judgment and decree in O.S.No.180 of 1991.

17. The trial in the said suit had commenced only in August 2003 and the said suit was dismissed on 08.10.2003. The first appeal against the same in A.S.No.39 of 2003 was allowed on 23.07.2004, decreeing the suit. At this juncture, this Court, at the cost of repetition, points out that despite admitting the knowledge of the above mentioned sale, neither the appellant / third defendant nor the defendants 1 and 2 choose to implead the plaintiffs herein in any of the above mentioned proceedings or to bring the fact of the subsequent transaction to the judicial notice of the Court concerned. Hence, on appreciation of the above facts without any hesitation, I am holding that there is a clear collusion between the third defendant and the defendants 1 and 2, who are his parents and as such the decrees obtained in the above mentioned suits in O.S.No.180 of 1991 and in O.S.No.283 of 1992 are collusive in nature.

18. It is the endeavour of the learned counsel to convince this Court that though the said act is collusive, it is not fraudulent. The said submission cannot be countenanced by this Court for the simple reason that O.S.No.180 of 1991 and O.S.283 of 1992 were both collusive and fraudulent. The appellant cannot be now allowed to change his front in the present suit on the principle that a person cannot both approbate and reprobate. In such view of the matter, the above judgments relied on by the appellant cannot be of much helpful to the facts of the instant case.

16. In view of the above finding, the sale transaction dated 31.03.2001 in favour of the respondents 1 to 4 / plaintiffs executed by the second defendant is not hit by Section 52 of Transfer of Property Act.

17. The next issue that has arisen for consideration in this Second Appeal is as to whether the suit is hit by principles of res judicata.

As mentioned earlier, the suit in O.S.No.283 of 1982 was filed at the instance of the appellant / third defendant, seeking declaration that suit properties are joint family properties and for declaration of his half share in the said properties, standing in the names of the defendants 1 and 2. Admittedly, the suit was dismissed on 08.10.2003 and on appeal, it was decreed on 27.03.2004. Though the judgments and decrees of the suit in O.S.No.283 of 1982 and A.S.No.39 of 2003 are filed, the third defendant in his written statement had not specifically raised the plea of res judicata. Therefore, in the absence of any plea raised by the third defendant with respect to principles of res judicata, any amount of evidence in support of the same cannot be looked into. It is also held earlier that the above said decrees were obtained by the parties behind the back of the plaintiffs herein despite having knowledge about the purchase by the plaintiffs from the second defendant.

18. Even otherwise, it has been held that there was collusion between the third defendant and the defendants 1 and 2 and decrees were obtained by them in collusion, affecting the rights of the bona fide purchaser. Hence, the judgment and decree in O.S.No.283 of 2002 shall be ignored in so far as the plaintiff is concerned, as the same is not binding on them.

19. For the above reasons and after considering the case laws cited by the respective learned counsels, the issues are held in favour of the respondents 1 to 4 herein/plaintiffs and the suit is not hit by principles of res judicata.

20. In the result, the Second Appeal is dismissed, confirming the judgment and decree of the lower appellate Court decreeing the suit in O.S.No.167 of 2001. However, in the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-II)

True Copy

Sub Assistant Registrar

To

1.The Subordinate Judge,
Gobichettipalayam.

2.The District Munsif,
Gobichettipalayam.

3.The Record Keeper
V.R. Section, High Court, Madras

+1cc to Mr.M.Easan, Advocate Sr.58999

+1cc to Mr.V.P.Karthikeyan, Advocate Sr.58978

+1cc to Mr.K.Balaji, Advocate Sr.59441

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