

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.1076 of 2015
and
M.P.No.1 of 2015

K.Durai ... Appellant/Appellant/
Plaintiff
Vs.

1.Padma

Balasubramanian (deceased)

2.Murugaiyan Respondents/Respondents/
Defendants

(1st Respondent remained exparte in
Courts below Notice dispense with)

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgment and decree passed in A.S.No.120 of 2010 dated 20.11.2014 on the file of the learned Additional Subordinate Judge, Mayiladuthurai in confirming the judgment and decree passed in O.S.No.269 of 2006 dated 21.06.2010 on the file of the learned Principal District Munsif, Mayiladuthurai.

For Appellant : Mr. A.Muthukumar

JUDGEMENT

The plaintiff in O.S.No.269 of 2006 on the file of the learned Principal District Munsif, Mayiladuthurai is the appellant herein. The defendants in the suit are the respondents herein. (The second defendant Mr.Balasubramanian died during the pendency of the first appeal but, his legal representatives were not brought on record). The trial Court by decree and judgment dated 21.06.2010 dismissed the suit. As against the same, the appellant filed an appeal in A.S.No.120 of 2010 on the file of the learned Additional Subordinate Judge, Mayiladuthurai. By decree and judgment dated 20.11.2014, the First Appellate Court dismissed the appeal thereby confirming the decree and judgment of the trial Court. Challenging the same, the appellant is before this Court with this second appeal.

2. The case of the plaintiff is as follows:-

The suit property and few more properties were originally owned by one Mr.Venkatarama Iyer. Mr.Venkatarama Iyer executed

a registered Will under Ex.A.1 dated 21.09.1938. Subsequently, Mr.Venkatarama Iyer died and therefore, the Will (Ex.A.1) came into force. As per the Will (Ex.A.1), the suit property was bequeathed in favour of his son Mr.Seshaiyer for his life and after his demise, the property should go to Mr.Balasubramanian s/o Mr.Seshaiyer, the second defendant herein absolutely. Accordingly, on the demise of his father Mr.Balasubramanian, the second defendant in the suit became absolute owner of the suit property. The second defendant in turn, sold away the suit property, by means of registered sale deed, dated 10.03.2003 (Ex.A.2), in favour of one Mr.Annamalai. From Mr.Annamalai, the plaintiff purchased the suit property under a registered sale deed dated 25.06.2005 (Ex.A.3) for valuable consideration.

3.According to the plaintiff, he has been in possession and enjoyment of the suit property right from the year 2005, as absolute owner. The defendants have got no right whatsoever. Since, the defendants 1 and 3 have attempted to disturb the possession of the plaintiff, he was forced to file the present suit, for declaration of title and also for permanent injunction to restrain the defendants from in any manner interfering with his peaceful possession and enjoyment of the suit property.

4.The second defendant Mr.Balasubramanian, in his written statement, has admitted that he acquired the suit property under Ex.A.1 - Will and he sold away the suit property to Mr.Annamalai. Mr.Annamalai, in turn, sold away the suit property to the plaintiff. Thus, the second defendant sailed with the appellant herein.

5.The third defendant filed a detailed written statement as well as additional written statement. According to the third defendant, the suit property was an ancestral property of one Mr.Kirubasagar. Mr.Kirubasagar was none else than the brother of the second defendant. The first defendant is the daughter of Mr.Kirubasagar. The first defendant sold away the suit property to the third defendant by means of a registered sale deed dated 31.05.1991 (vide Ex.B.2). Mr.Kirubasagar signed Ex.B.2 as a witness. Thus, according to the third defendant, he is the absolute owner of the suit property and he has been in possession and enjoyment of the suit property right from 31.05.1991 onwards. He has further disputed the title and also the possession of the plaintiff.

6.The third defendant has further stated that earlier, when his possession was disturbed by the second defendant, Mr.Balasubramanian and Mr.Annamalai mentioned herein above, the third defendant filed a suit in O.S.No.93 of 2003 before the learned District Munsif, Mayiladuthurai, for permanent injunction to restrain the defendants therein from in any manner interfering with his peaceful possession and enjoyment of the suit property. The said suit was decreed as prayed for, on contest. As against the same, an appeal was filed by the defendants therein in A.S.No.188 of 2004 before the learned

Subordinate Judge, Mayiladuthurai. The learned Subordinate Judge by decree and judgment dated 23.06.2005 dismissed the said appeal thereby confirming the decree and judgment made in O.S.No.93 of 2003.

7. According to the third defendant herein, the plaintiff herein has suppressed all the above facts though, he was aware of the said litigation. Now, in order to thwart the third defendant's title and right over the suit property and in order to create troubles, according to the third defendant, the plaintiff, Mr. Annamalai and Mr. Balasubramanian had colluded and have created Ex.A.3 - sale deed dated 25.06.2005 as though, Mr. Annamalai had sold the suit property to the plaintiff. Thus, according to the third defendant, the plaintiff has got no title and he has also not been in possession of the suit property.

8. The trial Court framed appropriate issues. On the side of the plaintiff, five witnesses were examined and 10 documents were exhibited. On the side of the defendants, one witness was examined and four documents were exhibited. During trial, an Advocate Commissioner was appointed and whose report was marked as Ex.C.1 and his plain was marked as Ex.C.2.

9. Having considered all the above, the trial Court dismissed the suit which was confirmed by the First Appellate Court. That is how the appellant is before this Court with this second appeal.

10. In this second appeal, the learned counsel for the appellant would submit that even assuming that Ex.A.1-Will has not been proved still, Mr. Balasubramanian being the legal representative claiming through his father will have at least 1/4th share in the suit property. Therefore, the Courts below ought not to have dismissed the suit in its entirety as he has got at least 1/4th undivided share. The learned counsel would further submit that the plaintiff was not aware of the earlier litigation in O.S.No.93 of 2003 and the consequential appeal in A.S.No.188 of 2004. The learned counsel would also further submit that the third defendant cannot have absolute title for the entire extent of the suit property.

11. The learned counsel would further submit that the earlier suit in O.S.No.93 of 2003 is a simple suit for bare injunction and therefore, it will not act as a res judicata for the plaintiff to file the present suit as the issue involved herein is in respect of title. Thus, according to the learned counsel, the Courts below were not right in dismissing the suit.

12. I have considered the above submissions.

13. At the outset, I should say that there is no substantial question of law at all involved in the second appeal warranting admission. The entire arguments advanced by the learned counsel for the appellant and the grounds raised in the appeal

memorandum relate only to questions of facts. Even in the findings of these questions of facts, I do not find any perversity in the well considered judgment and decree of the trial Court which was confirmed by the First Appellate Court. I will narrate my reasons.

14. Though, it is stated that under Ex.A.1, Mr.Venkatarama Iyer had bequeathed the suit property in favour of his son Mr.Seshaiyar, for his life and then to Mr.Balasubramanian, the second defendant in the suit, absolutely, Ex.A.1, the Will has not been proved, as required in law. No witness has been examined to speak about the execution of the Will (Ex.A.1). Further, there is no pleading as to when Mr.Venkatarama Iyer died and as to when Mr.Seshaiyar died. As I have already mentioned, the third defendant herein filed O.S.No.93 of 2003 against Mr.Balasubramanian, the second defendant herein. Mr.Annamalai claims that he had purchased the suit property under Ex.A.2 from the second defendant Mr.Balasubramanian. In that suit, as an incidental issue, the question of title alone had been gone into by the trial Court. The trial Court found that neither Mr.Balasubramanian nor Mr.Annamalai had any title for the suit property and also held that they were not in possession of the suit property. Thus, the trial Court dismissed the suit in O.S.No.93 of 2003 by giving a positive finding that the suit property is in possession and enjoyment of only by the third defendant herein. There is also a finding that the third defendant has got title.

15. It is curious to note that the appeal filed against the decree and judgment in O.S.No.93 of 2003 in A.S.No.188 of 2004 was dismissed on 23.06.2005. Within two days thereafter, that was on 25.06.2005, the plaintiff herein has purchased the suit property under Ex.A.3 from Mr.Annamalai who lost the suit in O.S.No.93 of 2003 and the consequential appeal in A.S.No.188 of 2004. It is hard to believe that the plaintiff was not aware of the decree and judgment in O.S.No.93 of 2003 and the consequential appeal in A.S.No.188 of 2004. In a village situation, pendency of the suit and the judgment would be clearly known to the neighbours. It appears that Mr.Balasubramanian who has sailed along with the plaintiff herein in the present suit had colluded with Mr.Annamalai and the plaintiff herein to create Ex.A.3 so as to create yet another litigation by way of the present suit.

16. Thus, the plaintiff cannot be stated to be an innocent purchaser of the suit property. Knowing fully well that Mr.Annamalai had lost in O.S.No.93 of 2003 as well as the appeal in A.S.No.188 of 2004, within two days of the pronouncement of the judgment in the above appeal has created Ex.A.3 which would only clearly go to indicate that wantonly, the plaintiff herein has purchased the litigation. The plaintiff has also suppressed the facts relating to the above suit in O.S.No.93 of 2003 and consequential appeal in A.S.No.188 of 2004 in the present suit. Thus, it cannot be stated that the

plaintiff is an innocent purchaser and as a matter of fact, he has created Ex.A.3 only to litigate. I hold that the plaintiff has not come forward with clean hands. Thus, the plaintiff is not entitled for any relief.

17.The learned counsel for the appellant would submit that even assuming that Ex.A.1 Will has not been proved even then, the plaintiff is entitled for 1/4th share in the suit property. As I have already pointed out, since, the plaintiff has purchased only the litigation and since, in the earlier suit in O.S.No.93 of 2003, the trial Court has held that the third defendant in the present suit has got absolute title for the suit property, I hold that the plaintiff cannot succeed in his attempt to make out a case for 1/4th share in the suit property. At any rate, the Courts below were right in appreciating the facts and to give the finding that the plaintiff is not entitled for any relief. As I have already pointed out, there is no question of law at all involved in this second appeal warranting admission. Thus, I do not find any merit in the second appeal.

18.In the result, the second appeal fails and accordingly, the same is dismissed and the decree and judgment of the First Appellate Court is hereby confirmed. There shall be no order as to cost. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

jbm

To

1.The Additional Subordinate Judge,
Mayiladuthurai.

2.The Principal District Munsif,
Mayiladuthurai.

+1cc to Mr.A.Muthukumar, Advocate, S.R.No.6849

Second Appeal No.1076 of 2015

MSM(CO)
CA(04/02/2016)