

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.03.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.129 of 2015

Ezhumalai

.. Appellant/Appellant/1st Defendant

-Vs-

1. M.Murugesan

2. M.Sankaran

.. Respondents/Respondents/Plaintiff /
2nd Defendants

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 19.08.2014 in A.S.No.177 of 2012 on the file of the VII Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 23.09.2011 in O.S.No.8164/2010 on the file of the II Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.P.B.Balaji

For Respondents : ...

J U D G M E N T

The 1st defendant in O.S.No.8164 of 2010 on the file of the learned II Assistant Judge, City Civil Court, Chennai is the appellant herein. The respondents 1 and 2 are the plaintiffs in the suit and the 3rd respondent is the 2nd defendant in the suit. The said suit was filed seeking declaration that the decree and judgment passed by the learned III Assistant Judge, City Civil Court, Chennai in O.S.No.3513 of 2006 dated 11.09.2007 is void on the ground of fraud, collusion and misrepresentation and for declaration that the 1st defendant was never in possession of the suit property as a tenant and also for permanent injunction to restrain the 1st defendant from interfering with the peaceful possession and enjoyment of the plaintiffs in the suit property. The trial court decreed the suit by decree and judgment dated 23.12.2011. As against the same, the appellant herein filed an appeal in A.S.No.177 of 2012 before the learned VII Additional Judge, City Civil Court, Chennai. By decree and judgment dated 19.08.2014, the lower appellate court dismissed the appeal thereby confirming the decree and judgment of the trial court. Challenging the same, the appellant/1st defendant is before this Court with this Second Appeal.

2. This Second Appeal has come up before me for admission. I have heard the learned Counsel for the appellant and I have also perused the records carefully.

3. The case of the plaintiffs is as follows:

The plaintiffs and the 2nd defendant are brothers. The suit property, which is a shop, belongs to them. It is alleged by the appellant herein that for the purpose of running a STD and PCO Booth, he entered into a tenancy agreement with the 2nd defendant and paid a sum of Rs.10,000/- as advance and accordingly took possession of the same. It is further alleged by the appellant that from the month of May, 2001, he has been in possession of the shop. But, since he could not get the proper licence from the Postal and Telegram Department, he was not able to actually run the business from the shop. While so, it is alleged that in the month of November, 2004, the plaintiffs dispossessed him and took forcible possession. These allegations of the appellant are denied by the plaintiffs. According to the plaintiffs, they were not aware of the payment of Rs.10,000/- as advance to the 2nd defendant. It is their further case that they came to know latter that the 2nd defendant has repaid Rs.10,000/- to the 1st defendant. At any rate, according to the plaintiffs, the 1st defendant was never in possession of the suit property and he was never dispossessed. But making a false claim that he was dispossessed from the suit property in the month of November, 2004, the 1st defendant filed a suit in O.S.No.3478 of 2001 against the plaintiffs and the 2nd defendant herein. In that suit, an ex-parte decree was passed by the trial court on 11.09.2007. Seeking to set aside the said ex-parte decree, the plaintiffs filed an interlocutory application in which also, there was a delay. Seeking to condone the said delay, the plaintiffs filed I.A.No.6195/2009 before the trial court. That petition was dismissed. As against the same, a revision was filed by the plaintiffs in CRP.(NPD).No.1079 of 2010. That was also dismissed. Thereafter, the appellant has filed an Execution Petition in E.P.No.15 of 2008. In that, the plaintiffs filed E.A.No.8301 of 2009 and the same was also dismissed on 17.10.2009. As against the same, they filed an appeal in CMA.No.31 of 2010 before this Court and the same is pending. According to the plaintiffs, the decree obtained in O.S.No.3513 of 2006 is void since the same was obtained by making a false claim that the appellant was in possession of the property as a tenant and played fraud upon the court.

4. The appellant/the 1st defendant in his written statement has stated that he was in possession and enjoyment of the suit property as a tenant and he was dispossessed in the month of November, 2004 and therefore, he filed the suit for restoration of possession. The suit was decreed ex-parte since the plaintiffs had remained ex-parte. It is also contended that there is a collusion between the plaintiffs and the 2nd defendant.

5. Based on the above, the trial court framed appropriate issues. On the side of the plaintiffs, the 1st plaintiff was examined as P.W.1 and as many as 11 documents were exhibited and on the side of the defendants, one witness was examined as D.W.1 and no document was exhibited. Having considered the same, the trial court decreed the suit as prayed for. As against the same, the appellant filed an appeal in A.S.No.177 of 2012 and the same was also dismissed. That is how, the appellant is before this Court with this Second Appeal.

6. In this Second Appeal, it is contended by the learned Counsel for the appellant that in the earlier proceeding in CRP. (NPD).No.1079 of 2010, this Court has held that there was no fraud played by the appellant herein in obtaining the ex-parte decree in O.S.No.3513/2006. The learned Counsel for the appellant would further submit that since this Court has already held that the ex-parte decree passed in O.S.No.3513/2006 is not as a result of fraud, the courts below ought not to have held that the decree is void. The learned Counsel would also submit that the courts below have burdened the appellant to prove that he was a tenant. The learned Counsel for the appellant would further submit that by holding that the appellant has not proved the tenancy, the courts below have decreed the suit as prayed for which according to the learned Counsel is illegal.

7. I have considered the above submission.

8. At the outset, I should say that there is no question of law, much less a substantial question of law, involved warranting admission of this Second Appeal. The reasons are many. First of all, the reliance placed by the learned Counsel for the appellant on the Order passed by this Court in CRP.(NPD).No.1079 of 2010 is totally misplaced. That was a proceeding relating to condonation of delay. The scope of enquiry in CRP.(NPD).1079 of 2010 was as to whether the plaintiffs herein had explained away the delay in filing the petition to set aside the ex-parte decree. Any observation made therein by this Court, while considering the said issue, cannot operate as res judicata or as a conclusive finding by this Court so as to estop the plaintiffs from raising the same issue in subsequent suit. Therefore, this submission made by the learned Counsel for the appellant is rejected.

9. Secondly, the learned Counsel for the appellant would submit that the courts below have burdened the appellant to prove that he was a tenant. In this also, in my considered opinion, absolutely, there is nothing illegal. Fundamentally, the question is as to whether the appellant was ever in possession of the suit property as a tenant. Except making a vague allegation that he has paid Rs.10,000/- and he was in possession, he has not substantiated his contention. When the appellant has failed to prove that he was in possession of the property as a tenant, then, obtaining the ex-parte decree by representing to the court that he was in possession

as a tenant is nothing, but a fraud played upon the court. Therefore, the courts below were right in holding that the appellant has not at all proved that he was ever in possession of the property as a tenant prior to the month of November, 2004. Therefore, this ground is also rejected. Apart from that, the issues are purely based on facts and there is no substantial question of law involved warranting admission of this Second Appeal as I have already narrated.

10. In the result, the Second Appeal fails and the same is accordingly dismissed.

Sd/-

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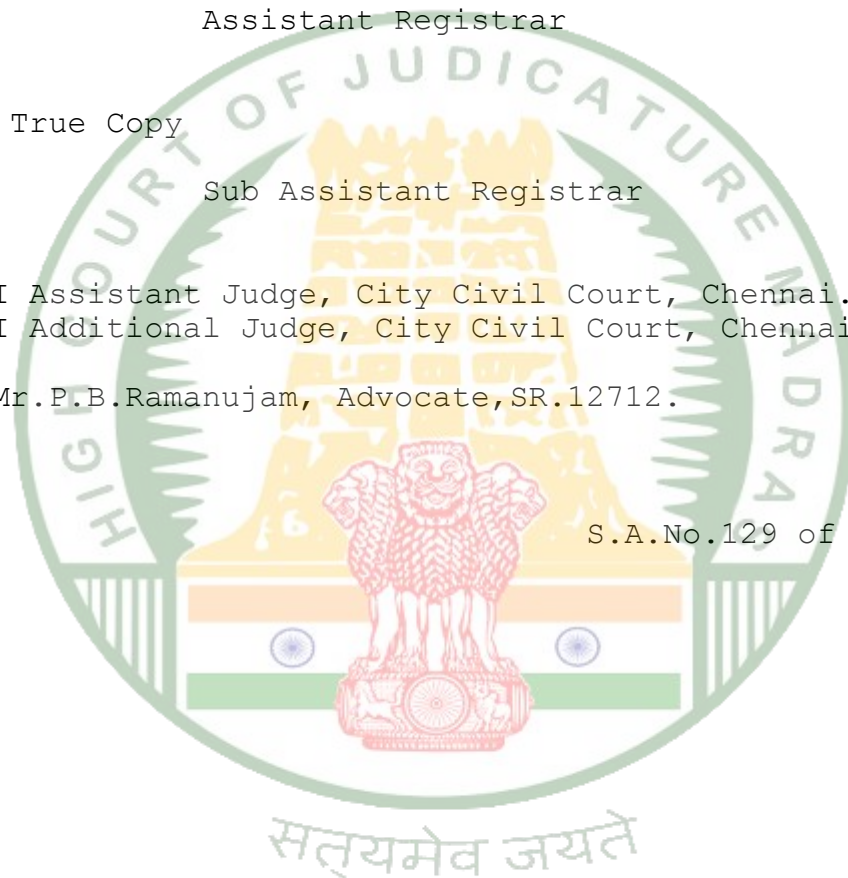
To

1. The II Assistant Judge, City Civil Court, Chennai.
2. The VII Additional Judge, City Civil Court, Chennai.

+1 cc to Mr.P.B.Ramanujam, Advocate,SR.12712.

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S.A.No.129 of 2015



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