

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16.11.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.695 of 2013 and
M.P.No.1 of 2015

1.Jospeh Rasaiyya
2.R.Chelin

..Appellants/Defendants

vs.

Francis Soundarrajan

..Respondent/Plaintiff

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the decree and judgment dated 19.01.2012, made in A.S.No.20 of 2007 on the file of the learned Subordinate Judge, Thiruvavarur, reversing the judgment and decree dated 18.09.2006 made in O.S.No.100 of 2005 on the file of the learned District Munsif, Thiruvavarur.

For Appellants : Mr.Srinath Sridevan
For R.1 : Mr.B.Ramamoorthy

JUDGMENT

Though the miscellaneous petition is listed today, by consent of both parties, the second appeal itself is taken up for final disposal.

2.The defendants in O.S.No.100/1999 on the file of the learned District Munsif, Thiruvavarur are the appellants herein. The respondent is the plaintiff in the suit. The said suit was filed by the plaintiff seeking declaration that the sale deed executed by the first defendant in favour of the second defendant on 18.04.2005 in respect of the suit property is void and for the consequential relief of delivery of possession by the defendants to the plaintiff and also for future profits for the use and occupation of the suit property from the date of filing of the suit till the delivery of possession.

3.The learned District Munsif by decree and judgment dated 18.09.2006 dismissed the suit. As against the same, the plaintiff filed an appeal in A.S.No.20/2007 on the file of the learned Subordinate Judge, Thiruvavarur. By decree and judgment dated 19.01.2012, the First Appellate Court set aside the decree and judgment of the trial Court and decreed the suit as prayed for. Challenging the same, the defendants are before this Court with this second appeal.

4.The case of the plaintiff in brief is as follows:-

Admittedly, the plaintiff was the absolute owner of the suit property. He was in a foreign country on account of his employment. During his absence, in order to manage his estate, he had executed a general power of attorney in favour of the first defendant on 14.12.1989 which covers the suit property also. The first defendant is none else than the brother of the plaintiff. The second defendant is the wife of the first defendant. When he returned to India, during the month of December 2001, as promised by him, the first defendant surrendered possession of all the properties to the plaintiff except the suit property.

5.According to the plaintiff, the first defendant told the plaintiff that he would surrender possession of the suit property after cultivating the sugar cane that he had raised in the suit property. The plaintiff, believing the words of the first defendant, allowed him for the same. But, even after cultivating the sugar cane, the first defendant did not surrender possession of the suit property to the plaintiff. At that point of time, the plaintiff came to know that the first defendant had executed the sale deed dated 18.04.2005 in favour of the second defendant fraudulently. According to the plaintiff, no sale consideration was received by the first defendant from the second defendant under the said sale deed and the transaction is nothing but a fraudulent transaction to commit fraud upon the plaintiff. Therefore, according to the plaintiff, the said document is void. With this pleading, he has prayed for declaration to declare the alleged sale deed as void and for future profits for the use and occupation of the suit property by the defendants and also for delivery of possession.

6.The defendants took the stand that the sale deed dated 18.04.2005 is valid and the same is not void. According to them, the said document is supported by sale consideration. They took the plea that the first defendant had paid huge amount on various occasions in instalments to the plaintiff. Similarly, the second defendant also, in instalments, had paid a total sum of Rs.1 lakh to the plaintiff. When the second defendant demanded repayment of the said amount from the plaintiff, the plaintiff agreed to sell the suit property to the second defendant for a sale consideration of Rs.86,000/-. It was also agreed upon by both parties that the said amount of Rs.86,000/- shall be adjusted towards Rs.1 lakh paid earlier by the second defendant to the plaintiff directly. It was only with the said agreement and with the consent of the plaintiff, the first defendant executed the sale deed in favour of the second defendant and thus, the second defendant has got perfect title for suit property. Hence, according to the defendants, the sale deed dated 18.04.2005 is valid and the same is not void.

7.The trial Court framed appropriate issues on the above pleadings. On the side of the plaintiff, five witnesses were examined and 22 documents were exhibited. On the side of the defendants, they were examined as defendants 1 and 2 and 21 documents were exhibited. Having considered all the above, the trial Court found that the alleged sale deed was valid and accordingly, dismissed the suit in its entirety. As against the same, the plaintiff filed an appeal in A.S.No.20/2007 on the file of the learned Subordinate Judge, Thiruvarur. By decree and judgment dated 19.01.2012, the First Appellate Court set aside the decree and judgment of the trial Court and decreed the suit as prayed for. That is how the appellants are before this Court with this second appeal.

8.Having heard the learned counsel on either side and having perused the records, this Court framed the following substantial questions of law:-

(i)Whether the First Appellate Court being the Court on facts was right in hearing the appeal to dispose of the same without having Ex.A.19, a vital document despite containing the issues involved in the case on record ?

(ii)Whether the First Appellate Court was right in holding that Ex.B.1 the general power of attorney does not cover the suit property, whereas, it is the admitted case of the plaintiff himself that the said document covers the suit property as well ?

(iii)Whether the First Appellate Court was right in simply setting aside the decree and judgment of the trial Court without specifying the reliefs granted to the plaintiff by way of decree ?

(iv)Whether the decree passed by the First Appellate Court is in accordance with law ?

(v)Whether First Appellate Court was right in not framing appropriate points for consideration as required under Order 41 Rule 31 C.P.C., ?"

9.I have heard the learned counsel for the appellants and the learned counsel for the respondent and I have also perused the records carefully.

10.Ex.A.19 is the letter written to the plaintiff by one Ramamurthy. It is not the case of both parties that the said

document is an irrelevant document. This document pertains to some payments said to have been made in connection with the transactions involved in the suit property. It is seen from the records that the First Appellate Court did not have any occasion even to have a glimpse of the said document. The records reveal that the first appeal was admitted on 20.08.2007 and the records of the trial Court was called for by the First Appellate Court. Thereafter, the appeal came up for hearing for several hearings before the First Appellate Court but every time, the appeal was adjourned since, the trial Court records had not been received. No reason was assigned as to why the original records were not received from the trial Court for about 5 years. The records would further reveal that the trial Court records were received only in the year 2011. But, according to the learned Subordinate Judge, in the records, Ex.A.19, was not found. Few letters appear to have been written by the learned Subordinate Judge for the production of the said document by the trial Court. But, the records would further reveal that the said document was never traced out. The First Appellate Court without having regard for the loss of the said document, heard the learned counsel on either side on 12.01.2012. The judgment of the First Appellate Court reveals that there was no discussion about the said document at all. Simply the said document was ignored by the First Appellate Court and the learned Subordinate Judge did not take any steps to reconstruct the said document. If the document is misplaced in the Court, the remedy is not to simply ignore the document and to proceed further but, the Court should re-construct the said document and then to hear the appeal. But, shockingly and also surprisingly, the First Appellate Court simply ignored Ex.A.19 as though the said document is an irrelevant document and disposed of the appeal. This procedure adopted by the First Appellate Court, in my considered view, is not a mere irregularity but, a serious illegality. Therefore, the decree and judgment of the First Appellate Court is liable to be set aside on this ground by itself.

11. There are also other grounds. The only point for consideration framed by the First Appellate Court is "Whether the appeal is liable to be allowed or not?". The Hon'ble Supreme Court as well as this Court have repeatedly held that the points for determination in the First Appeal should be identified scrupulously and they are to be framed and finally answered by the First Appellate Court.

12. In the instant case, there are several such other points for consideration to be framed by the First Appellate Court to decide as required under Order 41 Rule 31 C.P.C. But, the First Appellate Court has framed one point for consideration, which is not at all a point to be considered. On this ground also, the decree and judgment of the First Appellate Court is liable to be interfered with.

13.The next ground of attack is the finding of the First Appellate Court in respect of Ex.B.1. Ex.B.1 is the general power of attorney executed by the plaintiff in favour of the first defendant. It is not the case of the plaintiff himself that Ex.B.1 does not cover the suit property. A reading of the plaint would clearly go to show that it has been admitted that the suit property is also covered under Ex.B.1. There was also no issue raised by either the party before the First Appellate Court that Ex.B.1 does not cover the suit property. But strangely, the First Appellate Court has given a finding in paragraph No.10 of the judgment that Ex.B.1 does not cover the suit property. This, in my considered view, is beyond the scope of the suit and in this regard, I may say that the First Appellate Court has exceeded its jurisdiction. On this ground also, the judgment of the First Appellate Court is liable to be interfered with.

14.The next one is in respect of the reliefs granted by the First Appellate Court. A perusal of the plaint would go to show that the plaintiff had prayed for three main reliefs. The first one is for a declaration that the sale deed in question is void, the second one is, for the recovery of possession and the third one is for future profits from the date of suit till the delivery of vacant possession to the plaintiff.

15.The trial Court negatived all these reliefs. But, the First Appellate Court set aside the decree and judgment of the trial Court but, the First Appellate Court has not specified as to what are the reliefs that are given to the plaintiff. The judgment and decree of the First Appellate Court states only as follows:-

- "(i) The Appeal is allowed;
- (ii)The decree and judgment of the trial Court in O.S.No.100 of 2005 dated 18.09.2006 is hereby set aside;
- (iii)The respondents shall pay cost of the appeal to the appellant and
- (iv)A copy of the decree shall be forwarded to the Sub Registrar for necessary action."

16.A reading of the above decree of the First Appellate Court would go to show that it has not specified as to what are all the reliefs that are granted to the plaintiff. In my considered view, it would be very difficult to execute the decree as the decree does not specify the reliefs granted to the plaintiff. On this ground also, the decree and judgment of the First Appellate Court is liable to be interfered with.

17.Thus, all the questions framed in this second appeal are answered in favour of the appellants and accordingly, I am inclined to set aside the decree and judgment of the First Appellate Court and to remand the appeal to the First Appellate Court for fresh disposal in accordance with law.

18.It is further directed that the learned District Judge, Thiruvarur shall hold enquiry as to how Ex.A.19 was found missing and the persons responsible for the same and take necessary action. The First Appellate Court shall take steps to trace out Ex.A.19 and then, hear the appeal and afford an opportunity to both parties and dispose of the appeal afresh. If the said document Ex.A.19 could not be traced out within a period of one month from today, the First Appellate Court shall re-construct Ex.A.19 and then dispose of the appeal after affording sufficient opportunity to both parties by considering both oral as well as documentary evidences including Ex.A.19.

19.In view of the foregoing discussions, the Second Appeal is allowed and the decree and judgment of the First Appellate Court in A.S.No.20 of 2007 dated 19.01.2012 is set aside and the appeal in A.S.No.20 of 2007 is remanded back to the learned Subordinate Judge, Thiruvarur, who shall dispose of the appeal, within a period of four months from today. It is made clear that the First Appellate Court shall trace out Ex.A.19 or, if the same could not be traced within a period of one month from today, the same shall be re-constructed and then dispose of the appeal afresh in accordance with law after affording opportunity to both parties. There shall be no order as to cost. Consequently, connected MP. is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

jbm
To

1.The Subordinate Judge,Thiruvarur.

2.The District Munsif, Thiruvarur.

+ 1 cc to M/s. B. Ramamoorthy, Advocate SR.61949

+ 1 cc to M/s. Srinath Sridevan, Advocate SR.62107

S.A.No.695 of 2013

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