IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.11.2016
PRONOUNCED ON : 25.11.2016

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.871 of 1996

Susila
(Impleaded as per order
dated 27.09.2011 in
C.M.P.No.744/2010

..Appellant

v

1.Selvamani
2.Gracy Victoria (died)
3.Dominic
4.Santha
5.Egammal (died)
6.Samuel Immanuvel George
7.Josva Daiel George
8.Jacob Mosses George
(Respondents 6 & 8 impleaded
as legal heirs of the deceased
second respondent by
order dated 07.11.2012 in
C.M.P.No.1074/2007

..Respondents

Prayer:- This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree passed by the VI Additional City Civil Judge, Chennai in A.S.No.24 of 1994 dated 31.08.1995, confirming the judgment and preliminary decree of the IX Assistant Judge, City Civil Judge, Chennai in O.S.No.7466 of 1984 dated 19.08.1987.

For Appellant : Mr.P.Veeraraghavan

For RR1, 3, 6 to 8 : P.Rajendran
For R.2 : Died
For R.5 : Died (abated vide order dated 23.01.2014)
For R.4 : Dismissed vide order dated 27.11.2009

JUDGMENT

The Second Appeal arise out of the concurrent finding of the Courts below, in the suit filed for partition and mense profit.

2.The short facts of the case are stated below:-

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Originally, the land and superstructure of the suit schedule property were owned by two different persons. While the land was owned by one Mr.Sulaiman Sait, the superstructure was built by one Ms.Arayamma. Later, Ms.Arayaamma sold it to one Mr.Arumugam vide Ex.B.1 dated 15.2.1935. Mr.Arumugam, his wife Mrs.Sandiyamma and their children inturn, had sold the property to one Mr.Sivagnana Mudaliar vide Ex.B.2 - dated 16.6.1944. However, possession of the said property was retained by them. This sale has not effect, in true sense. The family of Mr.Arumugam, continued to live in the suit property by paying the ground rent to Mr.Sulaiman Sait. Mrs.Sandiyamma had three sons by name Mr.Kumar, Mr.Chandrasekaran and Mr.Dakshinamoorthy. From the pleadings and the evidence, it could be seen that after efflux of time, Mr.Dakshinamoorthy left the family. Neither he, nor his children were interested in the suit property. Therefore, they are all stayed uncontested in the suit. Mr.Kumar joined Army. During the cause of action for the suit, he was living in Pune along with his wife and children. Mr.Chandrasekaran and his family were occupying a portion of the suit property and had let out the remaining portion for rent. While so, after the demise of Mr.Chandrasekaran, the land lord Mr.Sulaiman Sait has filed a suit in O.S.No.6949 of 1972 for vacant possession against Mr.J.Stephen Shanmugam, the son of Mr.Chandrasekaran. In that suit, Mr.J.Stephen Shanmugam has filed an Application under Section 9 of the Chennai City Tenants' Protection Act, 1921 for sale of the ground, on which, the superstructure stands. That Application was allowed. On payment of the value of the ground, Mr.J.Stephen Shanmugam (first defendant in this suit) has got the property registered in his name on 24.02.1982.

3.The plaintiff who is wife of Mr.Kumar filed the suit for partition on the ground that, both her husband and the father of the first defendant are brothers. They both have equal right in the superstructure. When the land lord filed the eviction suit, her husband paid Rs.4,000/- being the half cost of the land. Since, the suit for eviction filed against the first defendant alone, he got the sale deed registered in his name on 24.02.1982. After the demise of her husband, the first defendant refuse to give the share and denies her and her children's right (who were arrayed as defendants 2 and 3 in the suit), over the suit property.

4.The first defendant, claimed the suit property as his absolute property. Though, he admits the receipt of Rs.4,000/- from the plaintiff's husband Mr. Kumar, he contented that it was only a loan received from Mr.Kumar to meet out his requirement and when he tendered the money back after the death of Mr.Kumar, the plaintiff refused to receive it. He being the Tenant in the

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suit property, the right of pre-emptive purchase was only for him and by exercising that right, he purchased the suit property.

5.The trial Court, on appreciation of Exs.A-2 to A-10, which are letters written by the first defendant to Mr.Kumar and his wife, held that, through these letters, first defendant has all along been briefing Mr.Kumar, his paternal uncle, about the progress of the suit and Section 9 of the Chennai City Tenants' Protection Act, application. He had specifically requested Mr.Kumar to contribute Rs.4000/- as his share to pay the landlord. He had received that money and paid the same to the landlord. In one of his letters, the first defendant has promised Mr.Kumar that once, the sale transaction is completed with the landlord Mr.Sulaiman Sait, sharing of property among them can be arranged. At one point of time, to raise money, the first defendant had intented to mortgage the property. Therefore, he conveyed his intention to Mr.Kumar and had solicited his opinion and requested him to give power of attorney in respect of the suit property, if mortage of the property is inevitable. Therefore, it was held that, the suit property was all along been held as joint property of the first defendant and Mr.Kumar. The plaintiff being the widow of Mr.Kumar, the trial Court passed a preliminary decree on 19.08.1987 to the effect that plaintiff and her children are entitled for 1/2 share in the suit property. Application for final decree was taken out by the plaintiff and same was allowed on 31.01.1991.

6.Meanwhile, the first defendant has presented his First Appeal as against the said judgment and decree passed by the trial Court, on 19.01.1990, with defects and deficit court fees. Same has been taken on file by the First Appellate Court after rectifications of defect and payment of deficit court fees on 03.01.1994 and numbered as A.S.No.24 of 1994. The First Appellate Court confirmed the trial Court decree relying on Exs.A-2 to A-10. Further refering to Kolkatta High Court Judgement reported in Sadhu Charan Datta v. Hara Nath Datta (1914 IC 135), has held that, final decree has been passed before filing of the First Appeal against the preliminary decree. Therefore, no appeal shall lay against the preliminary decree, as it has been confirmed by the trial Court by way of final decree.

7.Aggreived by the concurrent finding of the Courts below, the Appellant/first defendant has preferred the present Second Appeal raising the following substantial questions of law:-

"1) Is the appeal against the

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preliminary decree filed after the passing of the final decree maintainable ?

2) Can the respondent's 1 to 3 claim title and share in the suit property under the sale deed executed in favour of the appellant by virtue of his accrued right under section 9 of the city tenant protection Act ?"

8.To test the sustainability of the first question of law raised by the appellant, the sequence of events and dates has to be looked into. The preliminary decree in suit O.S.No.7466 of 1984 was passed on 19.08.1987. Final decree Appplication was filed immediately and numbered as Final Decree Application No.23969 of 1987. In the order passed in final decree, the trial Court has recorded the submission made by the appellant, that he has applied for judgment copy and intended to file Appeal against the preliminary decree. In the absence of material evidence to show that Appeal was filed and stay granted against the passing of final decree, the trial Court has proceeded and passed the final decree on 31.01.1991. From the records, this Court finds that the Appeal papers against the preliminary decree had been presented on 19.01.1990. After rectifying the defects including payment of deficit court fees, the appellant could able to number it only in the year 1994. The First Appellate Court has confirmed the trial Court decree, on facts as well on law, holding that, after passing of final decree, no Appeal shall be maintainable, without preferring appeal against the final decree.

9.The learned counsel for the appellant submitted that Section 97 of C.P.C., precludes the aggreived party only from disputing the correctness of the preliminary decree in his appeal against the final decree. Whereas, when the appeal itself directed against the preliminary decree, even it is preferred after passing of final decree, the bar under Section 97 C.P.C., does not get attracted. However, the learned counsel admits that the appellant has not so far preferred any appeal against the final decree passed by the trial Court on 31.01.1991.

10.In Sadhu Charan Datta v. Hara Nath Datta (cited supra), the Hon'ble Justice J.G.Wooddroffe on the behalf of the Divison Bench of Kolkatta High Court consisting of himself and the Hon'ble Justice Henry Reynell Holled Coxe, has held as under:-

"2) This is an appeal against the preliminary decree for partition. Now, before the filing of the second appeal a final decree was passed and there has been no appeal filed against the final decree. What is the result ? The result is that the

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preliminary decree which was passed has been affirmed by the final decree and the final decree is itself not made the subject of appeal.

3) The case cited to us, [Khirodamoyi Dasi v. Adhar Chandra Ghose 21 Ind. Cas. 516: 18 C.L.J., 321], is in point and the case of Ugra Narain Singh v. Basan Narain Singh MANU/WB/0300/1913 : 19 Ind. Cas 630: 17 C.W.N.868: 18 C.L.J. 209 does not assist the appellant, because it is pointed out there that at the time when the appellant preferred his appeal no final decree had been passed. IN this case, however, a final decree has been passed and this is the material difference between the two cases."

11.In this case, though, the first appeal papers were presented prior to the passing of final decree, it was numbered only after the passing of final decree. No records placed before this Court to show the appellant has also preferred appeal against the final decree. Once the final decree is passed, the preliminary decree gets merged with the final decree. One cannot be allowed to keep his appeal papers against the preliminary decree un-numbered for years together, even after passing of final decree, and later get it numbered and canvass the merits and demerits of the preliminary decree, independently, without challenging the final decree. Thus,the first question of law is answered accordingly.

12.In one of his letter, the first defendant has informed Mr.Kumar that the sale deed cannot be executed jointly, but, only in his name since, the eviction suit was filed only against him. He has promised Mr.Kumar to divide it among the sharer later. Further, the premptive right under Section 9 of the Chennai City Tenants' Protection Act, is not just confined to the tenancy alone, but it is coupled with the ownership of the superstructure. Unless, there is a superstructure and that superstructure is put up by third party, other than the ground owner, the Chennai City Tenants' Protection Act, does not come into play. Here is a case where admittedly the superstructure was put up by Ms.Sandiyamma and only through her, both the parties are claiming right. Therefore, though the sale deed is executed in the name of the first defedant alone, he cannot claim exclusive right over the suit property. Since, the prempting right of purchase is not accrued to him alone but, to all the coowners of the superstructure. Thus the second question of law is answered accordingly.

13.That apart, the First Appellate Court has dismissed the

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appeal not only on its maintainability but, it has also gone into the merits of the case and has disbelieved the denial of the first defendant authoring letters Exs.A-2 to A-10. The Courts below, on facts, found that the letters (Exs. A-2 to A-10) were written by the first defendant to Mr.Kumar and his wife. The contents of those letters are telltale evidence to show the first defendant had recognised his paternal uncle Mr.Kumar as co-sharer of the superstructure. He has specifically received Rs.4000/- as his share, for the purchase of the ground from Mr.Sulaiman Sait. The Courts below also disbelieved the case of the first defendant that the money he received from Mr.Kumar was only a loan. The said concurrent finding of the Courts below does not warrant any interference at the hands of this Court under section 100 CPC.

14.In the result, second appeal is dismissed with costs.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

jbm

To

1.The IX Assistant Judge,
City Civil Judge,
Chennai.

2.The VI Additional City Civil Judge,
Chennai.

+2ccs to Mr.P. Veeraraghavan, Advocate, S.R.No.69329
+1cc to Mr.P. Rajendran, Advocate, S.R.No.69100

KS(CO)
EU 13.2.17

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