

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
30.08.2016	21.09.2016

Coram:

The Hon'ble Mr. Justice A.SELVAM
and
The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.164 of 2016
& CMP No.11469 of 2016

Jambuveni .. Appellant

Vs.

1. Leelavathy
2. Balaguru
3. Pattamma
4. Arumugam
5. Gandhima
6. Mahalingam

.. Respondents

This Appeal is preferred under Order XXXVI Rule 1 of O.S.Rules r/w Clause 15 of the Letters Patent Act against the order of this Court dated 9.2.2015 in C.S.Diary No.31735 of 2014.

For Appellant : Mr.A.A.Lawrance

For Respondent-1 : Mr.S.Suresh Kumar

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED
BY A.SELVAM, J.)

This Original Side Appeal has been directed against the rejection order dated 9.2.2015 passed in C.S.Diary No.31735 of 2014 by the learned Single Judge of this Court.

2. The material averments made in the plaint filed in C.S.Diary No.31735 of 2014 may be summarized as follows:

The first defendant herein, as plaintiff, has instituted O.S.No.32 of 1986 on the file of Small Causes Court, Chennai, praying to pass a decree of eviction, wherein the present plaintiff and defendants 2 to 6 have been arrayed as defendants. The said suit has been decreed as prayed for, on 22.9.2003 and the same has been challenged in Civil Revision Petition (NPD) No.1961 of 2012 on the file of this Court and the same has also

been dismissed. Against the order passed in C.R.P.(NPD) No.1961 of 2012, the first defendant therein/the plaintiff herein has filed a Special Leave Petition in SLP No.20156 of 2014 before the Hon'ble Supreme Court and the same has also been dismissed on 8.5.2014. Further, it is averred in the plaint that in O.S.No.32 of 1986 on the side of the plaintiff, Ex.P.23 and Ex.P.24 have been filed and Ex.P.23 and Ex.P.24 are nothing but fraudulent documents and the trial court, without considering the contentions raised on the side of the first defendant therein/plaintiff herein, has erroneously decreed the suit. The present plaintiff has originally occupied 742 Sq.ft as a tenant and the same has been sub-leased in favour of the defendants 2 to 6. The first defendant/plaintiff in O.S.NO.32 of 1986 has obtained a decree of eviction against the extent mentioned in Ex.P.1 Sale Deed executed in her favour and since the judgment and decree in O.S.No.32 of 1986 have been obtained by way of filing fraudulent documents, the present suit has been instituted for setting aside the same.

3. The Registry, without numbering the present suit, has returned it by way of raising certain queries, especially as to how the present suit is legally maintainable? Under the said circumstances, the plaint filed in C.S.Diary No.31735 of 2014 has been placed in open court. The learned Single Judge, after considering the contentions raised on the side of the plaintiff, has rejected the plaint by way of passing the impugned order and the same is being challenged in the present Original Side Appeal.

4. Before contemplating the rival submissions made on either side, the Court has to look into the following decisions relied on the side of the appellant/plaintiff:

- I. In AIR 1994 SC 853 (S.P.Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others, the Hon'ble Supreme Court has held that the plaintiff therein has filed a suit for partition by way of suppressing the release deed executed in respect of the suit property of the plaintiff in favour of his employer. Under such circumstances, since the plaintiff has committed fraud, he should be thrown out at any stage of litigation.
- II. In (2003) 6 SCC 595, (Roop Kumar vs. Mohan Thedani), at paragraph No.17, the Hon'ble Supreme Court has observed as follows:

"17. It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties,

to be the repositories and memorials of the truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence."

III. In (2007) 4 SCC 221, (A.V. Papayya Sastry and others vs. Government of Andhra Pradesh and others), the Hon'ble Supreme Court has held that if any judgment or decree or order is obtained by fraud, it has to be treated as non-est and nullity.

IV. In (1995) 4 SCC 163 (Asharfi Lal vs. Koili (Smt) Dead by LRs.), the Hon'ble Supreme Court has held that the judgment of a competent court is normally binding on the parties to the proceeding and it operates as res judicata in a subsequent proceeding between the same parties. An exception to the said rule is engrafted by Section 44 of the Evidence Act which provides that any party to a suit or other proceeding may show that any judgment, order, or decree, which is relevant under Sections 40, 41 and 42, and which has been proved by the adverse party was delivered by a court not competent to deliver it, or was obtained by fraud or collusion. The effect of the said provision is that a judgment delivered by a court not competent to deliver it or a judgment which is obtained by fraud or collusion does not operate as res judicata and is not binding on the parties to the said proceedings (See: Beli Ram v. Chaudri Mohammad Afzal). A judgment can be avoided in a subsequent proceeding by a party which is able to show that it was delivered by a court not competent to deliver it or it was obtained by fraud or collusion. Since such a judgment does not operate as res judicata it is not necessary to

institute a proceeding for setting it aside. A party to a proceeding against whom a judgment in an earlier suit is relied can successfully avoid the said judgment if he can establish in the subsequent proceeding that the said judgment was delivered by a court not competent to deliver it or that it was obtained by fraud or collusion."

V. In AIR 1994 SC 591 (Government of Andhra Pradesh and others vs. Karri Chinna Venkata Reddy and others), the Hon'ble Supreme Court has held that as per Sections 62 and 63 of Indian Evidence Act, 1872, admission of secondary evidence is not permissible.

VI. In AIR 1995 Madhya Pradesh 134 (Sitaram v. Ram Charan and others), it is held that entries in public records made after commencement of lis cannot be looked into.

VII. In (2005) 4 SCC 424 (U.P. State Road Transport Corporation through its Chairman vs. Omaditya Verma and others), the Hon'ble Supreme Court has held that dismissal of Special Leave Petition in limine by a non-speaking order does not justify any inference that by necessary implication the contentions raised in the special leave petition on the merits of the case have been rejected by Supreme Court. The effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that Supreme Court had decided only that it was not a fit case where special leave should be granted. It cannot be assumed that it had necessarily decided by implication all the questions in relation to the merits of the award, which was under challenge before Supreme Court in the special leave petition.

5. From a cumulative reading of the decisions, the Court can easily discern that if any judgment or decree or order has been obtained by fraud or collusion, the same can be set aside. Further, if any Special Leave Petition filed before the Hon'ble Supreme Court and the same has been dismissed in limine, it does not mean that the Hon'ble Supreme Court has dismissed the same purely on merits.

6. The learned counsel appearing for the appellant has repeatedly contended that in O.S.No.32 of 1986 on the side of the plaintiff, Exs.P.23 and P.24 have been filed and those

documents are nothing but fraudulent documents and despite of proper objection raised on the side of the present plaintiff, the trial court has erroneously decreed the suit and the said plea has also been raised in Civil Revision Petition filed on the file of this Court, but the same has not been considered and since by way of playing fraud, the first defendant/plaintiff in O.S.No.32 of 1986 has filed Ex.P.23 and Ex.P.24 and obtained an executable decree, the same is nothing but a nullity. Under the said circumstances, the present suit has been instituted for the relief sought therein. But, the learned Single Judge, without considering the evidentiary value of Ex.P.23 and Ex.P.24 and also the fraud played by the first respondent/plaintiff in O.S.No.32 of 1986, has erroneously rejected the plaint filed in C.S.Diary No.31735 of 2014 by way of passing the impugned order and the plaint filed in C.S.Diary No.31735 of 2014 is liable to be taken on file.

7. The learned counsel appearing for the first respondent has sparingly contended that the present contention has also been raised in the earlier proceeding, but the same has been rejected and further Ex.P.24, a Rough Sketch, has been marked only through the vendor of the first respondent/plaintiff in O.S.No.32 of 1986, during the course of cross-examination and the present plaintiff and respondents 2 to 6 are in occupation of a small portion of the suit property to an extent of 742 Sq.ft and the same is situate in the North Eastern corner of the suit property. Since the present plaintiff and the present respondents 2 to 6 are nothing but lessees in O.S.No.32 of 1996, proper judgment and decree have been passed and the same have also been confirmed in Civil Revision Petition and the Hon'ble Supreme Court has rightly rejected the Special Leave Petition. After getting successive defeat, the plaintiff has instituted the present suit. The Registry has rightly returned the same and the learned Single Judge has also rightly rejected the plaint by way of passing the impugned order and therefore the order passed by the learned Single Judge does not call for any interference.

8. The entire argument advanced on the side of the appellant/plaintiff is based upon Ex.P.23 and Ex.P.24. Ex.P.23 is nothing but a Patta issued by the concerned Tahsildar, wherein the suit property is mentioned. Ex.P.24 is a Rough Sketch, relating to R.S.No.16, Door no.23 (Old Door No.69/27). At this juncture, it would be apropos to look into the evidence given by the vendor of the plaintiff in O.S.No.32 of 1986/lessor of the plaintiff in C.S.Diary No.31735/2104, by name Mohammed Sheriff and he has been examined as D.W.1. He would say in his evidence that Ex.P.24 has been given by him at the time of execution of sale deed in favour of the plaintiff therein. Further he admits that the property mentioned in Ex.P.24 has been sold to the plaintiff therein. Further he adduced evidence

to the effect that after selling the suit property in favour of the plaintiff, he has not received rents from the tenants. Further, the candid admission of D.W.1 is that no document has been filed for the purpose of proving that old Door No.69/27 is related to new Door No.23.

9. From a close reading of the evidence given by D.W.1, the Court can easily come to a conclusion that the first defendant/plaintiff in O.S.No.32 of 1986 has purchased the property in dispute, as per Ex.P.24.

10. The sale deed executed in favour of the first defendant/plaintiff in O.S.No.32 of 1986 has been marked as Ex.P.1, wherein four boundaries have been given. On the North of the property mentioned in Ex.P.1, a vacant land is situate. On its Eastern side, the house of one Sakuntala Prakasam is situate. On the Western side, common passage is situate. On the Southern side, a street is situate. It is an admitted fact that the vacant land mentioned on the Northern side does not belong to D.W.1. Of course, it is true that in Ex.P.1, the total extent is mentioned as 1737 Sq.ft, whereas in Ex.P.23, excess extent has been mentioned. It is a well known principle of law that boundaries prevail over area. In Ex.P.24, a larger extent has been mentioned. Therefore, it is quite clear that in O.S.No.32 of 1986, proper decree of eviction has been granted. Further, it is not the case of the present plaintiff and present respondents 2 to 6 that the property, which is under their occupation, is situate somewhere else. Therefore, it is quite clear that Ex.P.23 and Ex.P.24 are admissible in evidence.

11. Even assuming without conceding that Ex.P.23 and Ex.P.24 are inadmissible in evidence, even from the four boundaries given in Ex.P.1, the first respondent/plaintiff in O.S.No.32 of 1986 is entitled to get a decree of eviction. The defendants therein are not real owners and they are nothing but tenants. Since they are nothing but tenants, they are not entitled to challenge the four boundaries given in Ex.P.1.

12. As stated earlier, the entire argument put forth on the side of the appellant/plaintiff is based upon the fraud alleged to have been committed by the first respondent/plaintiff in O.S.No.32 of 1986 for getting a decree of eviction. Since Ex.P.24 has been marked only through D.W.1 and he has candidly admitted to that effect and since Ex.P.23 is nothing but a Patta granted in favour of the plaintiff, the Court cannot come to a conclusion that both documents are fraudulent documents.

13. In fact, the contention put forth on the side of the appellant/plaintiff has already been raised in the previous proceeding and the same has also been rejected. Therefore, viewing from any angle, the rejection order passed by the

learned Single Judge does not suffer from any infirmity nor illegality. Under the said circumstances, the present Original Side Appeal deserves to be dismissed.

In fine, this Original Side Appeal is dismissed with cost. The rejection order dated 9.2.2015 passed in C.S.Diary No.31735 of 2014 by the learned Single Judge is confirmed. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CS V)

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Sub Asst. Registrar

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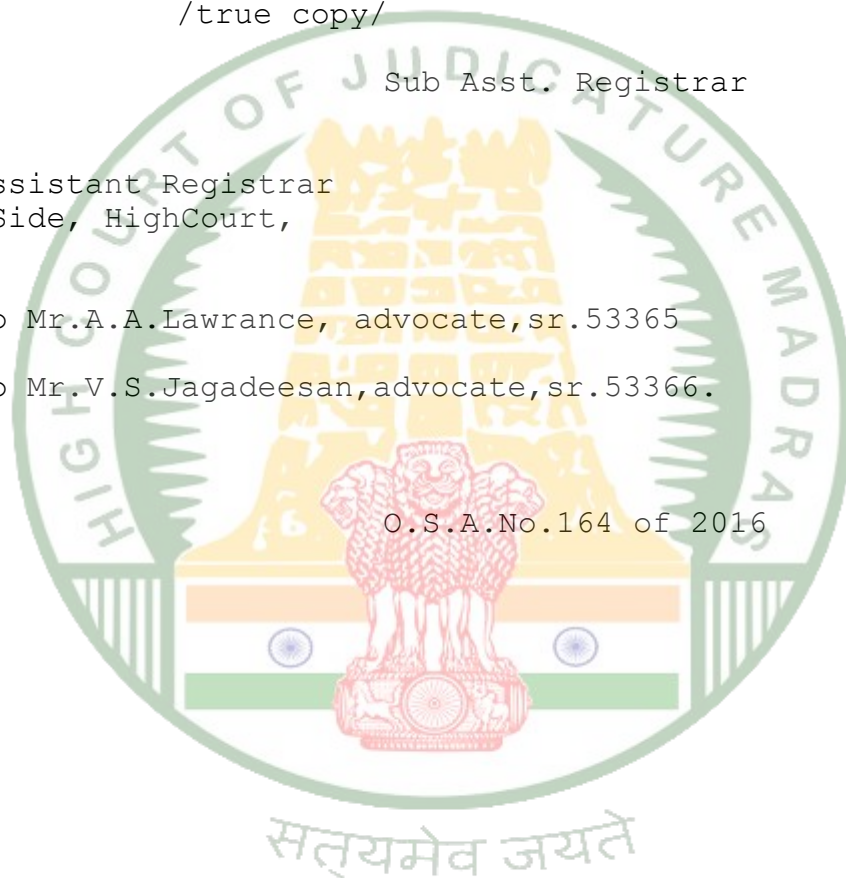
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