



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved Dated: 14.09.2016

Delivered dated: 21.09.2016

CORAM :

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

WEB COPY

Second Appeal (MD) Nos.370 and 371 of 2016

S.A.(MD)No.370 of 2016

1.Rajkumar

2.Rajammal

... Appellants/Respondents/Defendants

-Vs-

Chellammal

... Respondent/Appellant/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, praying to set aside the judgment and decree passed by the Court of the Subordinate Judge, Srivilliputhur in A.S.No.28 of 2012 on 29.10.2014 reversing the well considered judgment and decree passed by the Additional District Munsif Court, Srivilliputhur in O.S.No.242 of 2007 on 09.12.2011 and allow this Second Appeal.

For Appellants

: Mr.M.Jothi Basu

For Respondent

: Mr.M.Thirunavukkarasu

S.A.(MD)No.371 of 2016

1.Rajkumar

2.Rajammal

... Appellants/Respondents/Defendants

-Vs-.

Chellammal

... Respondent/Appellant/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, praying to set aside the judgment and decree passed by the Court of the Subordinate Judge, Srivilliputhur in A.S.No.29 of 2012 on 29.10.2014 reversing the well considered judgment and decree passed by the Additional District Munsif Court, Srivilliputhur in Cross Objection in O.S.No.242 of 2007 on 09.12.2011 and allow this Second Appeal.

For Appellants

: Mr.M.Jothi Basu

For Respondent

: Mr.M.Thirunavukkarasu

**COMMON JUDGMENT**

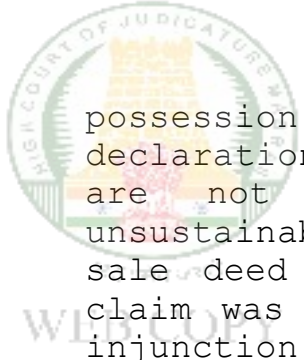
The defendants in O.S.No.242 of 2007 has filed Second Appeal (MD) No.370 of 2016 as against the judgment and decree in A.S.No.28 of 2012 on the file of the Sub Court, Srivilliputhur, confirming the judgment and decree in O.S.No.242 of 2007 on the file of the Additional District Munsif Court, Srivilliputhur.

2.The appellants in S.A.(MD)No.370 of 2016 are also the appellants in S.A.(MD)No.371 of 2016 and this second appeal is preferred against the judgment and decree in A.S.No.29 of 2012 on the file of the Sub Court, Srivilliputhur as against the judgment and decree in Cross Objection in O.S.No.242 of 2007 on the file of the Additional District Munsif Court, Srivilliputhur.

3.The respondent in these two second appeals filed a suit in O.S.No.242 of 2007 on the file of the Additional District Munsif Court, Srivilliputhur, originally for permanent injunction restraining the appellants herein from interfering with the plaintiff's peaceful possession and enjoyment of the suit property. The suit property is a tiled house property bearing Door No.1/105 (Old) and New Door No.7/1 situate in Survey No.223/17 in Aathikulam Sengulam village in Srivilliputhur sub registration District, Virudhunagar District. The plaint was subsequently amended as one for declaration of title and consequential injunction or in the alternative for recovery of possession.

4.The case of the plaintiff / respondent is that the suit property originally belonged to one Rajammal, wife of Seenivasakan, by virtue of a sale deed dated 28.11.1981 and that by virtue of a settlement deed executed by her on 06.09.1996 in favour of his younger son one Selvakumar, the same belonged to the said Selvakumar. It is the further case of the plaintiff / respondent that the said Selvakumar executed a sale deed in respect of a portion of the vacant land in favour of the plaintiff's husband one Muthumuniyandi on 10.10.2003 and that after the death of the said Selvakumar, the wife and minor son of Selvakumar executed a sale deed in respect of the suit property in favour of the plaintiff on 19.02.2007.

5.Originally, the second defendant was not a party and however, the first defendant in the suit filed a written statement disputing the settlement deed executed by Rajammal in favour of the plaintiff's predecessor-in-interest and contended that the said Rajammal was in possession and enjoyment of the suit property. The first defendant also raised a plea that the suit is bad for non-joinder of necessary party, namely, Smt.Rajammal. Thereafter, Smt.Rajammal, the second defendant in the suit was impleaded as second defendant and the defendant preferred a counter claim praying for a declaration that the documents dated 06.09.1996 and 10.10.2003 are invalid and for a permanent injunction restraining the plaintiff and her men from interfering with the second defendant's peaceful possession and enjoyment of the suit property. The Trial Court dismissed the suit as well as the counter claim holding that the second defendant is in



possession and enjoyment of the property and that the relief for declaration declaring the document dated 06.09.1996 and 10.10.2003 are not sustainable as the prayer is misconceived and unsustainable without impleading the person in whose favour the sale deed dated 10.10.2003 was executed. However, the counter claim was partly allowed in respect of the prayer for permanent injunction.

6.As against the judgment of the Trial Court, the appellants have not preferred any appeal. However, the plaintiff / respondent preferred A.S.No.28 of 2012 as against the dismissal of the suit in O.S.No.242 of 2007. The plaintiff / respondent also filed A.S.No.29 of 2012 against the decree that was passed in the Cross Objection in O.S.No.242 of 2007.

7.Despite the fact that the appellants were not granted the relief of declaration declaring the documents dated 06.09.1996 and 10.10.2003 as null and void, no appeal has been filed by the appellants against the judgment and decree of the trial Court disallowing the main prayer in the counter claim.

8.The appellate Court after framing necessary issues and considering the oral and documentary evidence, came to the conclusion that the registered gift settlement dated 06.09.1996 executed by the second defendant in favour of the of her son is true and that the same was acted upon. Since pursuant to the settlement deed the mutation of entries in the revenue records had taken place, the lower appellate Court came to the conclusion that merely because the second defendant / second appellant was allowed to continue in the suit property, it cannot be concluded that the settlement deed under Ex.A2 was not acted upon. Since the genuineness of the settlement deed under Ex.A2 was accepted by the lower appellate Court, the lower appellate Court came to the conclusion that the plaintiff / respondent has proved that she is the owner of the property under the subsequent sale deed under Ex.A6 executed by the beneficiary of the settlement deed under Ex.A2. Since the plaintiff / respondent has also prayed in the alternative for recovery of possession, the lower appellate Court came to the conclusion that the plaintiff / respondent is entitled to the decree for recovery of possession after setting aside the judgement and decree of the trial Court in O.S.No.242 of 2007. The appellate Court also set aside the judgement and decree of the trial Court insofar as it relates to the counter claim and the counter claim in toto was dismissed, as per the judgement of the lower appellate Court.

9.The learned counsel for the appellants submitted that the document Ex.A2 is not valid and not acted upon, especially in the absence of any oral and documentary evidence to prove the genuineness of the document under Ex.A2.

10.The appellate Court has not framed proper issues in the relevant points for consideration as required under Order 41, Rule 24, C.P.C. The learned counsel also referred to the judgement of the appellate Court and argued that the documents and oral evidence are not considered in a proper perspective and that the

judgment of the appellate Court is vitiated for the erroneous appreciation of the facts.

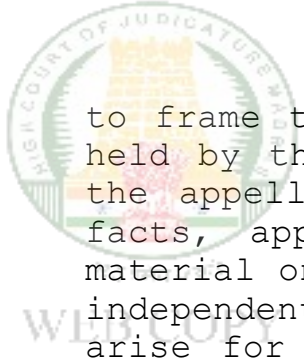
11. The learned counsel for the appellant submitted that the lower appellate Court has disposed of the first appeal in a cryptic manner without framing the points for determination and hence, the judgement of the lower appellate Court is liable to be set aside. He also relied upon the judgement of the Hon'ble Supreme Court in the case of **B.V.Nagesh and another vs. H.V.Sreenivasa Murthy** reported in **2010 (5) CTC 719** wherein it has been held as follows:

"4) How regular first appeal is to be disposed of by the appellate Court/High Court has been considered by this Court in various decisions. Order XLI of C.P.C. deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:

- a) the points for determination;
- b) the decision thereon;
- c) reasons for the decision; and -
- d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put-forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide Santosh Hazari vs. Purushottam Tiwari, (2001) 3 SCC 179 = JT (2001) 2 SC 407 and Madhukar and Others vs. Sangram and Others, (2001) 4 SCC 756]"

12. It is to be noted that the judgement of the Hon'ble Supreme Court cited above is not applicable to the facts of this case. In the present case, the lower appellate Court, of course, has framed only two issues. However, all the factual issues were dealt with by the lower appellate Court in detail. In the course of discussion on every document and evidence adduced on both sides were discussed and the findings of the lower appellate Court were supported by reasons. No doubt, the appellate Court is duty bound



to frame the points for determination and it has been repeatedly held by this Court that it must be evident from the judgment of the appellate Court that the Court has properly appreciated the facts, applied its mind and decided the case considering the material on record. If the appellate Court's judgment is based on independent assessment of the relevant evidence on all issues that arise for consideration and the findings of the appellate Court are well founded and convincing, the judgment of the appellate Court cannot be complained of as one being contrary to Order 41, Rule 31 of CPC.

13. On the other hand, the learned counsel for the respondent Mr. M. Thirunavukkarasu submitted that the appeal is not maintainable in view of the admitted fact that the appellants have not challenged the decree of the lower Court refusing to grant the decree prayed for in the counter claim namely the declaration that the settlement deed under Ex.A2 and the subsequent sale deed under Ex.A3, dated 10.10.2003 are null and void.

14. The learned counsel for the plaintiff / respondent relied upon a judgment of this Court in the case of **Vasantha vs. Ranganathan and another** reported in **2010 (1) CTC 833** and another judgment of the Hon'ble Supreme Court in the case of **Banarsi and others vs. Ram Phal** reported in **AIR 2003 Supreme Court 1989**. The Hon'ble Supreme Court in **AIR 2003 SC 1989** dealt with the case where the plaintiff filed a suit for specific performance and in the alternative for compensation in view of or in addition to the relief of specific performance. Though the trial Court has granted only decree for refund of money, the plaintiff therein has not preferred any appeal aggrieved by the rejection of prayer for specific performance. Only the defendant filed an appeal challenging relief of compensation or refund of money. The Appellate Court, therefore, cannot grant a decree in favour of the plaintiff for specific performance. Since the plaintiff did not prefer any cross appeal or cross objection, the Hon'ble Supreme Court has held as follows:

"13. We are, therefore, of the opinion that in the absence of cross appeal preferred or cross objection taken by the plaintiff-respondent the First Appellate Court did not have jurisdiction to modify the decree in the manner in which it has done. Within the scope of appeals preferred by the appellants the First Appellate Court could have either allowed the appeals and dismissed the suit filed by the respondent in its entirety or could have deleted the latter part of the decree which granted the decree for specific performance conditional upon failure of the defendant to deposit the money in terms of the decree or could have maintained the decree as it was passed by dismissing the appeals. What the First Appellate Court has done is not only to set aside the decree to the extent to which it was in favour of the appellants but also granted an absolute and out and out



decree for specific performance of agreement to sell which is to the prejudice of the appellants and to the advantage of the respondent who has neither filed an appeal nor taken any cross objection.

15. Considering the fact that the appellants have not challenged the decree of trial Court refusing to grant declaration, they cannot maintain the present Second Appeal challenging the settlement deed.

16. Going through the judgment of the lower appellate Court in this present case I find that the lower appellate Court has considered all the issues which arise for consideration on the basis of the pleading and evidence both oral and documentary. The findings of the lower appellate Court are well founded. Hence, the contention of the learned counsel for the appellant that the judgment of the lower appellate Court is vitiated for not following Order 41, Rule 31 CPC, has no merit.

17. The contention of the learned counsel for the appellant on merits are not appealing to this Court. The fact that the settlement deed under Ex.A2 was executed by the second defendant in favour of her son is not disputed. The only contention of the second defendant that the settlement deed was not acted upon is not acceptable merely because the second defendant was allowed to be in possession of the suit house by her son, the beneficiary of the settlement deed under Ex.A2. The fact that the settlement deed was accepted by her son is supported by sufficient materials. The mutation of revenue records pursuant to the settlement deed is not in dispute. The lower appellate Court has considered the evidence both oral and documentary. Since I do not find any infirmity in the judgment of the lower appellate Court, this Court is not in a position to interfere with the findings of fact. Hence, the Second Appeals are dismissed. There is no order as to costs.

Sd/-

Assistant Registrar (CS-II)

/True copy/

Sub Assistant Registrar

To

1 THE SUBORDINATE JUDGE, SRIVILLIPUTHUR

2 THE ADDITIONAL DISTRICT MUNSIF, SRIVILLIPUTHUR

+2 CC to Mr.G.MARIMUTHU, Advocate, SR No.54001 & 54002

+1 CC to Mr.M.THIRUNAVUKKARASU, Advocate, SR No.54128

Pre-Delivery Judgment made in
Second Appeal (MD) Nos.370 and 371 of 2016
21.09.2016