

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

S.A.No.197 of 2017

Nanvit Narayanan ..Appellant/Appellant/Plaintiff

vs.

1.K.A.Mohammed Salahudeen,

2.M/s.City Union Bank Ltd.,

Main Branch,

Rep. by its Manager,

Having office at TSR Big Street,

Kumbakonam.

..Respondent/Respondent/Defendants

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 19.09.2016 passed in A.S.No.99 of 2015 on the file of the XVIII Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 22.01.2015 passed in O.S.No.9254 of 2011 on the file of the VIII Assistant Judge, City Civil Court, Chennai and decree the Suit.

For Appellant : Mr.J.R.K.Bhavanantham

For 2nd respondent
Caveator : Mr.Mohammed Fayaz Ali

JUDGMENT

The plaintiff, who lost before the Courts below, is the appellant herein. The appellant/plaintiff filed the Suit in O.S.No.9254 of 2011, on the file of the Court of VIII Assistant Judge, City Civil Court, Chennai, praying for a permanent injunction restraining the first defendant and his men, agents, representative or any other persons acting on his behalf from alienating 3/4th share in the suit schedule property to any third parties except to the plaintiff and for a permanent injunction restraining the first defendant, his men, agents, representative or any other person acting on his behalf from interfering with the plaintiff's peaceful possession and enjoyment of the suit schedule property and for a permanent injunction restraining the second defendant, their men, agents, representative or any other persons acting on their behalf from handing over the original documents

pertaining to the suit schedule property to the first defendant or to his authorized agents and also cost of the suit. The Suit, after contest, came to be dismissed, vide judgment and decree dated 22.01.2015 and challenging the legality of the same, the petitioner filed A.S.No.99 of 2015 on the file of the XVIII Additional City Civil Court, Chennai and vide impugned judgment and decree dated 19.09.2016, the said appeal was also dismissed and challenging the legality of the same, he has filed this Second Appeal.

2. It is the case of the appellant/plaintiff that he is the owner of the property bearing Door No.643 (New No.362), Anna Salai, Thousand Lights, Chennai and he is running a Software Development business and the adjoining property of the appellant's/plaintiff's property was owned by Mr.K.A.Mohamed Salahudeen and his mother, sister and younger brother, each of them having 1/4th undivided share in the suit property and it is under the management and control of Mr.K.A.Mohamed Saluhudeen-first defendant and he is also in possession of entire original title deeds in respect of the suit schedule property. The plaintiff would further aver that the younger brother of the first defendant, namely, Akbar Ali, had approached him to sell his 1/4th undivided share to the appellant/plaintiff and a sum of Rs.65 was fixed as sale consideration. The plaintiff, on going through the documents, found that the first defendant had mortgaged the suit property by depositing the entire title deeds with the second respondent/second defendant and availed loans.

3. The first defendant had also approached the plaintiff and offered to sell his 1/4th undivided share of the suit schedule property along with total management rights and it was also agreed for a sale consideration of Rs.85 lakhs and an agreement was also came into being and the first defendant has executed sale deed in respect of his 1/4th undivided share under Ex.A2/Sale Deed. The first defendant also gave a letter of undertaking to the second respondent/second defendant to get the remaining 3/4th share of the other family members to be sold to the plaintiff either directly or through him and an advance of Rs.3,00,000/- was received by way of cheque.

4. The first defendant, in order to fulfill his commitment and in the process of getting the remaining undivided share of his family members sold to the plaintiff, got the remaining 3/4th shares settled in favour of the plaintiff under Ex.A4. However, the first defendant did not evince any interest thereafter to enter into a binding agreement in respect of 3/4th undivided share of land and in the light of the conduct exhibited by the first defendant and his family members that they are attempting to sell the remaining 3/4th undivided share by alienating to third parties, the plaintiff came forward to file the Suit.

5. The first defendant remained exparte before the trial Court. The second defendant filed the written statement reputing the allegations made in the plaintiff and would further contend that 1/4th undivided share was given as security by the first defendant for availing loan and after the charge over 1/4th undivided charge was released by the second respondent/second defendant, the first defendant sold the same in favour of the appellant/plaintiff and also took a stand that they are having Memorandum of Deposit of Title Deed dated 11.01.2011 in respect of 1/4th undivided share and further that they were unaware of the title in respect of remaining 3/4th undivided share. It is also the categorical stand of the second respondent/second defendant that by virtue of the Sale Deed dated 18.10.2010 marked as Ex.A2, the plaintiff is put in possession of only 1/4th undivided share of suit property and not the entire extent of property and therefore, prayed for dismissal of the Suit.

6. The Trial Court, on consideration of the pleadings, has framed the following issues:

(1) Whether the plaintiff is entitled for permanent injunction?

(2) To what relief?

During the course of trial, the plaintiff examined himself as PW1 and marked Exs.A1 to A7. On behalf of the defendant, the manager of the second defendant was examined as DW1 and Exs.B1 to B6 were marked. The Trial Court, on a consideration and appreciation of oral and documentary evidence, thought fit to dismiss the Suit, vide judgment and decree dated 22.01.2015.

7. Aggrieved by the judgment and decree passed by the trial Court, the appellant/plaintiff filed an appeal in A.S.No.99 of 2015 on the file of the VIII Assistant City Civil Court, Chennai. The lower Appellate Court, on consideration of the materials placed before it, framed the following points for consideration:

(1) Whether the appeal can be allowed?

The Lower Appellate Court, on consideration and appreciation of entire materials placed before it, has found that as regards 3/4th undivided share in the suit property, copy of the cheque or related documents have not been filed and the Suit was filed only for permanent injunction not to alienate the property with regard to 3/4th share and in the absence of prayer for specific performance, the relief sought for by the appellant/plaintiff cannot be granted. The lower Appellate Court has also taken into consideration the stand of the second respondent/second defendant that they are concerned only with 1/4th share as the Memorandum of Deposit of Title Deed pertains to the same and they were unaware of the title in respect of remaining 3/4th share and also they are not concerned with the same and in the absence of any averment as to when and how the appellant/plaintiff was put in possession of entire extent of the property coupled with the fact that

the appellant/plaintiff also failed to prove his possessory right in respect of 3/4th share, thought fit to dismiss the appeal and accordingly, dismissed the appeal, vide judgment and decree dated 19.09.2016.

8. Aggrieved by the same, the appellant/plaintiff filed this Second Appeal and in the Memorandum of Grounds of Appeal, raised the following questions of law:

(i) Whether the finding of the lower Court is perverse for non appreciation of evidence?

(ii) Whether the lower Court is right in dismissing the Suit in entirety even against the first defendant against whom the reliefs 1 and 2 for permanent injunction was claimed, remained exparte?

(iii) Whether the lower Court could have exercising the power under Order VII Rule 6 CPC to mould the relief?

9. The learned counsel appearing for the appellant/plaintiff has drawn the attention of this Court to the impugned judgment and decree passed by the Courts below and would submit that the pleadings and surrounding circumstances lead to the only inference that there was an agreement for 3/4th undivided share and despite overwhelming evidence, the Courts below had failed to appreciate the same and in the light of the fact that the appellant/plaintiff has been put in possession in respect of entire extent of the suit property, the Courts below ought to have upheld the same and granted the relief of permanent injunction, but it failed to do so and therefore, prays for interference.

10. Heard the submissions of the learned counsel appearing for the caveator who would submit that no substantial question of law arises and since the findings are concurrent in nature, the Second Appeal is to be dismissed with costs.

11. This Court has considered the submissions of the learned counsel appearing for the appellant and also perused the entire materials placed before it.

12. Admittedly, in respect of the conveyance of 3/4th undivided share, the plaintiff did not mark any document and as rightly pointed out by the lower Appellate Court, no evidence has been made available before the Courts below as to the possession of the plaintiff in respect of 3/4th undivided share. Admittedly, the plaintiff filed the Suit for Permanent Injunction and he should have filed the Suit for Specific Performance and he also did not chose the amend the plaint at a later point of time. The documents marked on behalf of the plaintiff pertain only to 1/4th share, which is mortgaged by way of equitable mortgage and in respect of 3/4th undivided share, no document worth credence have been filed and the Courts below, on a proper appreciation of oral and documentary evidence, has rightly reached the conclusion to dismiss the

case of the appellant/plaintiff. In the considered opinion of the Court, no question of law much less substantial question of law arises for consideration in this second appeal and finds no merit in this second appeal.

13. In the result, this Second Appeal is dismissed in the admission stage itself, confirming the judgment and decree dated 19.09.2016 passed in A.S.No.99 of 2015 on the file of the XVIII Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 22.01.2015 passed in O.S.No.9254 of 2011 on the file of the VIII Assistant Judge, City Civil Court, Chennai. No costs.

Sd/-
Asst.Registrar (CS VIII)

/true copy/

Sub Asst. Registrar

jvm

To

1.XVIII Additional Judge, City Civil Judge,
Chennai.

2.VIII Assistant Judge,
City Civil Court, Chennai

+1cc to M/s.Mohammed Fayaz Ali,Advocate sr.15812

+1cc to M/s.R.K.Bhavanthan,Advocate sr.15609

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ss(13/4/2017)

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