

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:18.08.2017

Pronounced on:23.08.2017

Coram

The Hon'ble Dr.Justice G.Jayachandran

Second Appeal No.1673 of 1991

Sinnammal .. Appellant/Plaintiff/Respondent

/versus/

1.Durairaj (died)

.. 1st respondent/1st defendant/1st appellant

2.D.Sreerangam

3.Malarkodi

4.Jayalakshmi

5.Kamaraj (died)

(R2 to R5 are brought on record as LRs of the deceased 1st respondent vide C.M.P.Nos.8025 and 8026 of 1995 dated 21.02.1997)

6.Dhanalakshmi

(6th respondent is brought on record as LRs of the deceased 5th respondent (proposed) vide order of Court dated 18.09.2003 made in C.M.P.Nos.11450 to 11452 of 1999) .. Respondents

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree of the learned Subordinate Judge, Ariyalur dated 09.08.1985 passed in A.S.No.26 of 1984 preferred against the judgment and decree of the learned District Munsif of Ariyalur, dated 18.10.1982 made in O.S.No.1593 of 1980.

For Appellant :Mr.P.Dinesh Kumar for
M/s Sarvabhuman Associate

For Respondents :Mr.R.Sethuvarayar R2 to R4
R6-No appearance
R1 and R5 -died

J U D G M E N T

The appellant herein is the plaintiff in the suit for declaration of title and possession of the suit schedule property succeeded before the trial Court, but lost in the appeal preferred by the respondents herein/defendant. Hence, the second appeal is directed against the reversing judgment of the lower appellate Court.

2. The factual background of the dispute is as below:-

The suit property measuring to an extent of 20½ cents with 1/3 share in the well was originally a part of larger extent of land measuring 65 cents and a well thereon owned by one Duraisamy Padaiyachi. He had 3 sons and they got the land divided among themselves long back. The southern portion was allotted to Durairaj (1st defendant), the northern portion was allotted to Sivasamy and the middle portion was allotted to Chinnathambi (2nd defendant). The case of the plaintiff is that, the 1st defendant Durairaj and his brother Chinnathambi the 2nd defendant jointly sold their respective shares, totally 41 cents lying on the south to one Vaithayalingam a minor represented by his father Chellamuthu on 18.06.1965 vide sale deed Ex.A1. The remaining 22 cents on the north held by Sivasami was sold to one Duraisamy Padaiyachi. The plaintiff purchased 20 1/2 cents of land from Vaidayalingam on 13.08.1979 under sale deed Ex.A3 and since then she is in possession and enjoyment.

3. Whereas, the case of the defendants is that the suit property was never in possession or enjoyment of the plaintiff. The sale deed dated 18.06.1965-Ex.A1 executed in favour of Vaithayalingam is a sham and nominal document. No title or possession has been passed to Vaithayalingam or his father, who represented his minor son. The first defendant has put up construction in the suit property and has been residing in it. The first defendant created a sham document in the name of Vaithayalingam represented by his father and Guardian Chellamuthu on 18.06.1965 to bring back his estranged wife who threatened him to file suit for maintenance.

4. The trial Court, after considering the evidence let in by the parties and the Commissioner Report, allowed the suit. The trial court has based its decision on Exs.A4 and A5-joint patta, which stands in the name of Duraisamy (father of the 1st defendant) and Chellamuthu (the plaintiff's predecessor-in-title); kist receipts Exs.A6 to A13 and the lease deeds Ex.A14 and Ex.A15 executed by Vaidayalingam, the exchange of notice between the 1st defendant and Vaithayalingam regarding the validity of the sale deed Ex.A1, three years prior to alienation of the property and inaction on the part of the defendant, after receipt of the reply denying his claim over the suit property.

5. On appeal, the lower appellate Court, on re-appreciating the evidence had reversed the judgment of the trial Court on the ground that Vaithayalingam did not get patta transferred in his name immediately, on attaining majority in the year 1967. He got the patta transferred to his name only in the year 1977. The plaintiff, who claims to have purchased the property, did not get the patta transferred in her name. Hence, the sale deed Ex.A1 is a sham document.

6. Further, the lower appellate Court, comparing the price of the land mentioned in Ex.B13, a sale deed dated 18.04.1962 entered between one Thangavel Padayachi and

Chinnadurai Padayachi and the price of the suit property found in Ex.A1-sale deed dated 18.06.1965, had concluded that, the sale consideration in later point of time is lesser than the earlier sale and hence, Ex.A1 ought to be sham and nominal document. Yet another reason stated by the lower appellate Court to dismiss the suit is the possession of original document Ex.B6 with the first defendant, which according to him the most important test to decide, whether the document Ex.A1 is sham and nominal.

7. The substantial questions of law formulated while admitting the Second Appeal are:

Whether the reasons given by the lower appellate Court are sustainable to hold that Ex.A1 is a sham and nominal document without fully advertng to the attending circumstances discussed by the trial Court? and

Has not the appeal filed by the defendants in the lower appellate Court abated inasmuch as the second defendant died on 05.03.1985 during the pendency of the appeal and no steps having been taken to bring his legal representatives on record?

8. The reasoning given by the lower appellate Court as capsulized above clearly show, how erroneously the lower appellate Court has understood the law and facts of the case. When a party denies the title on the ground of sham and nominal, the burden is on a person, who take that defence. In this case, the defendants say, he executed Ex.A1 to defeat the claim of his wife, who threatened him to sue for maintenance. Then, why should his brother Chinnathambi also jointly executed Ex.A1 inclusive of his share, is neither answered by the defendants, who claim Ex.A1 a sham document, nor by the lower appellant Court, which has held it as sham and nominal document. Secondly, by comparing the sale consideration of two documents executed by the different parties at different period, cannot be a test to hold a document nominal. Strangely, the lower appellate Court has compared the price found in the sale deed Ex.B13 to hold the sale deed Ex.B14 as nominal deed.

9. Lastly, the lower appellate Court has gravely erred by saying Ex.B5 is the original sale deed and it being in possession of the defendants, Ex.A1 is a sham document. In fact, Ex.B5 is the repurchase deed dated 19.10.1961. The recital of this document says that the first defendant sold 22 cents of land, which he got through the partition to one Rangasamy Padayachi, in the year 1960 and Rangasamy Padayachi has sold it back to first defendant through Ex.B5 a year later.

10. How the possession of original sale deed Ex.B5 with the first defendant could render the subsequent sale deed

dated 18.06.1965 executed by the first defendant and his brother jointly in respect of 41 cents of land of Vaithayalingam represented by his father and guardian Chellamuthu, is beyond anyone's comprehension. No legally trained brain could arrive at such conclusion. Hence, for the above said reason the Substantial Question of Law are answered in favour of the appellant.

11. In the result, the second appeal is allowed. No costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1.The Sub Judge, Ariyalur.

2.The District Munsif, Ariyalur.

+1cc to Mr.Sarvabhauman Associates, Advocate SR.No.60851

S.A.No.1673 of 1991

RSY(CO)
GN(06/11/2017)



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