

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 15.09.2017
Orders Pronounced on : 07.11.2017

CORAM :

THE HONOURABLE MR.JUSTICE D. KRISHNAKUMAR

Second Appeal No. 576 of 2017
and
C.M.P. NO.14382 of 2017

Usharani .. Appellant/3rd Party
vs.
R. Viswanathan .. Respondent/Plaintiff

PRAYER : This Second Appeal is filed under Section 100 C.P.C., against the Judgment and decree passed in A.S. No. 32 of 2013 on the file of the Principal District Judge, Thiruvallur dated 31.10.2013 partly confirming the judgement and decree passed in I.A. No.289 of 1996 in O.S. No.247 of 1996 on the file of Subordinate Judge, Poonamallee dated 30.04.2012.

For Appellant ... Mrs. Chitra Sampath, Sr. Counsel
for Mr. C.P.G. Yoganand

For Respondent ... Mr. P. Sunil
for Mr. T. Viswanatha Rao

J U D G M E N T

This Second Appeal arises out of the Judgment and decree passed in A.S. No. 32 of 2013 on the file of the Principal District Judge, Thiruvallur dated 31.10.2013, partly confirming the judgement and decree passed in I.A. No.289 of 1996 in O.S. No.247 of 1996 on the file of Subordinate Judge, Poonamallee dated 30.04.2012.

2. Brief facts of the case is as follows :-

The respondent herein filed a suit in O.S. No.247 of 1996 for partition. A preliminary decree was passed on 31.12.2008, allotting 1/5th share in favour of the plaintiff/respondent. Pursuant to the preliminary decree passed by the Sub Court, Poonamallee, I.A. No. 289 of 2009 was filed by the plaintiff/ respondent in O.S. No. 247 of 1996, for passing of final decree, by appointing an Advocate Commissioner to inspect and measure the suit property, divide the same by metes and bounds into 5 equal shares. Hence, a final decree was passed on 30.04.2012 in I.A. No. 289/2009 by the learned Subordinate

Judge, Poonamallee. Aggrieved by the said final decree, the appellant preferred an appeal in A.S. No.32 of 2013 before the Principal District Judge, Thiruvallur.

3. The contention of the appellant before the Appellate Court is that the appellant has purchased items I and II of the suit schedule properties. The 1st item is a house site in plot No.25A measuring an extent of 1300 sq.ft. and the 2nd item is a house site in plot No.25 measuring an extent of 2035 sq.ft. The appellant claims to be the purchaser of the above said suit properties from the vendor, who is also a party in the partition suit. The Appellate court, after considering the contention of both the parties, confirmed the final decree passed by the trial court and dismissed the appeal, by holding that the appellant is not entitled to any equity claim made by her, in the matter of allotment of property purchased by the appellant, during the pendency of the suit. Challenging the aforesaid judgment and decree, the appellant has preferred the present Second Appeal before this Court.

4. The learned counsel for the appellant submitted that the courts below has not appreciated the claim of the appellant and has passed the final decree on the basis of the report of the learned Advocate Commissioner. The appellant has also made an objection to the Advocate Commissioner's report in allotting the properties, which is contrary to the direction issued in the preliminary decree. Further, it is contended by the learned counsel for the appellant that the entire sale consideration amount has been received and the vacant possession was handed over to the agreement holder and therefore the said suit itself is not maintainable. Further, on the basis of the substantial question of law raised by the appellant, the judgment and decree passed by both the courts below are erroneous and the same is unsustainable in law. Further, it has been contended that the Appellate Court has to consider the equity in favour of the appellant since the said property has been purchased and the appellant is in possession of the said property.

5. The learned counsel for the respondent would submit that the preliminary decree was passed as early as on 31.12.2008. The appellant's vendor Siddha raj, from whom the appellant had purchased a portion of the suit property, has purchased the said properties only on 10.02.2006 from one Suresh Kumar, Son of Kasi Viswanathan and Mrs. Saroja, through their Power of Attorney Mrs. L. Rukmani and Mrs. J. Jenitha. The aforesaid purchases of the suit property are admittedly, after filing of the original suit in O.S. No. 247/1996 by the respondent/ plaintiff, for separate possession. Therefore, even the vendors of the appellant are hit by prohibition under the

Doctrine of Lis Pendens, the appellant have no right to agitate on merits, at this stage. Eventhough the respondent/ plaintiff has filed the suit in the year 1996, the appellant/ defendant is still dragging on the proceedings in various courts for all these years. The appellant had the knowledge about the pendency of the suit in various proceedings and the subsequent final decree passed and the fact that in the aforesaid proceedings, properties were allotted to the respondent/ plaintiff, in the presence of the appellant's vendor, who were party to that proceedings as well as subsequent appeal proceedings. The appeal filed by one R. Rajeswari in A.S. No.33/2013 was partly allowed, in so far as the allotment of eastern part of Plot No.27 to the plaintiff and in other aspects, the appeal was dismissed. Pursuant to the judgment and decree passed in A.S. No.32/2013, the respondent/ plaintiff herein filed E.P. No. 64 of 2012 seeking delivery of possession of plot Nos. 21, 25, 25A, 27 and 29A in S. No. 402 of Maduravoyal Village, as per the final decree passed by the trial court. The Execution Court passed an order on 11.03.2014, directing delivery of possession of plot Nos. 25 and 25A to the respondent by 04.08.2014. After such delivery, the bailiff recorded the delivery of possession of the said plots to the respondent/ plaintiff as early as 20.08.2014. Subsequent to such date, the respondent/ plaintiff has been in physical possession of the said suit property. It is also denied that the appellant/ defendant is not in possession of any portion of the suit property. Subsequent to the possession taken by the respondent herein, the said property has already been settled in favour of the respondent's daughter on 27.04.2016 and necessary changes have been made in the revenue and other records. Therefore, based on merits and due to the subsequent facts, there is no warrant to interfere with the judgment and decree passed by the lower Appellate Court.

6. In support of his contention, the learned counsel for the respondent also placed reliance on the decision of this Court in the case of Subramani vs. Unnamalai Ammal reported in 2008 (5) CTC 147, wherein this Court has considered the scope of doctrine of lis pendens and held that any transaction between the parties to the suit during the pendency of the suit, much less a suit for partition, as in this suit, would be affected by doctrine of "lis pendens". In the case of T.G. Ashok Kumar vs. Govindammal & anr., reported in 2010 (1) LW 193, this Court has considered that the doctrine of lis pendens is applicable under Section 52 of the Transfer of Property Act. By considering and referring to various decisions on the principles of doctrine of lis pendens, it is observed in paragraph 30 of the judgment that the purchaser of the suit property pendente lite and he is bound by the decree passed as against the vendor. The said decision of this Court has been confirmed by the Hon'ble Supreme Court reported in 2011 (4) CTC 585, relying upon the decision of the

Hon'ble Supreme Court in the case of Hardev Singh v. Gurmail Singh, reported in 2007 (2) CTC 78 (SC), wherein it is held that Section 52 of the Act does not declare a pendente lite transfer by a party to the suit as void or illegal, but only makes the pendente lite purchaser bound by the decision in the pending litigation. It has also been held that where a co-owner alienates a property or a portion of a property representing to be the absolute owner, equities can no doubt be adjusted while making the division during the final decree proceedings, if feasible and practical i.e. without causing loss or hardship or inconvenience to other parties, by allotting the property or portion of the property transferred pendente lite, to the share of the transferor, so that the bonafide transferee's right and title are saved fully or partially.

7. Further, the respondent has also relied on the unreported judgment of this Court in S.A. No. 943 of 2014 dated 19.11.2014, wherein this Court has considered the very same subject matter of this appeal suit and the same subject matter of the partition suit, as one of the 28th respondent has filed an appeal before this Court, challenging the judgment passed in A.S. No. 38 of 2012. In paragraph 4 therein, this Court has held as follows :-

" 4. When the matter is taken up, learned counsel for the respondent/plaintiff made a preliminary objection bringing to the notice of this Court that even in paragraph No.23 of the final decree Application it has been clearly pointed out that the appellant herein, who herself has purchased the property during the pendency of the suit, has settled the property in favour of her son, by name, Pradeep Kumar and thereafter, her son in turn has sold the property to a third party. He would further add that the respondent/plaintiff has filed the suit on 15.07.1996 and the present appellant herein has purchased the property on 19.11.1997, which is admittedly during the pendency of the suit, therefore, she is pendente lite purchaser. Thereafter, she had executed a Settled Deed on 14.06.2007, which is marked as Ex.P.1 in the name of his son Pradeep Kumar and thereafter, Pradeep Kumar in turn sold the property to one D.Prakash appointing his father as power of Agent on 13.06.2011. Therefore, as on date, the appellant has no right over the property, inspite of that, the appellant herein has filed this petition, which amounts to clear abuse of process of law and the same was pointed out in paragraph No.23 of the final decree Application, which reads

as follows:

"23. The 28th Respondent already settled the property in favour of his son, and her son in turn sold the property after the date of an appointment of an advocate commissioner, so since she alienated the property she cannot claim any benefit and maintain any petition. The 28th respondent filed Second Appeal before the High Court in S.A. No.161/2011, the same was disposed on 11.07.2011, before that her son sold the property through his father as power Agent on 10.06.2011, inspite of that this respondent filed this petition it amounts to abuse the process of law. The Hon'ble High Court observed that while disposing of second appeal, the appellant/respondent herein can work out remedy of her vendors entitled to share, here the respondent sold out the property so she cannot claim any benefit or right under the order passed by the Hon'ble High court in Second Appeal"

8. In the present case on hand, the respondent has filed the counter affidavit stating that pursuant to the judgment and decree passed by the lower Appellate Court, the Execution court has passed a detailed order on 11.03.2014, directing delivery of possession of Plot Nos.25 and 25A to the respondent by 04.08.2014 and after such delivery, the bailiff recorded the delivery of possession of the said plots, on 20.08.2014. Subsequent to the recovery of possession, the subject property has been settled by the respondent in favour of his daughter, as early as 27.04.2016 and the necessary mutation has been entered into the revenue and other records. Therefore, this Court does not warrants to interfere with the judgment and decree passed by the courts below. The substantial question of law is answered against the appellant.

9. In view of the facts and decision cited supra, the Second Appeal fails and the same is dismissed. Consequently, the connected Miscellaneous petition is closed. No order as to costs.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

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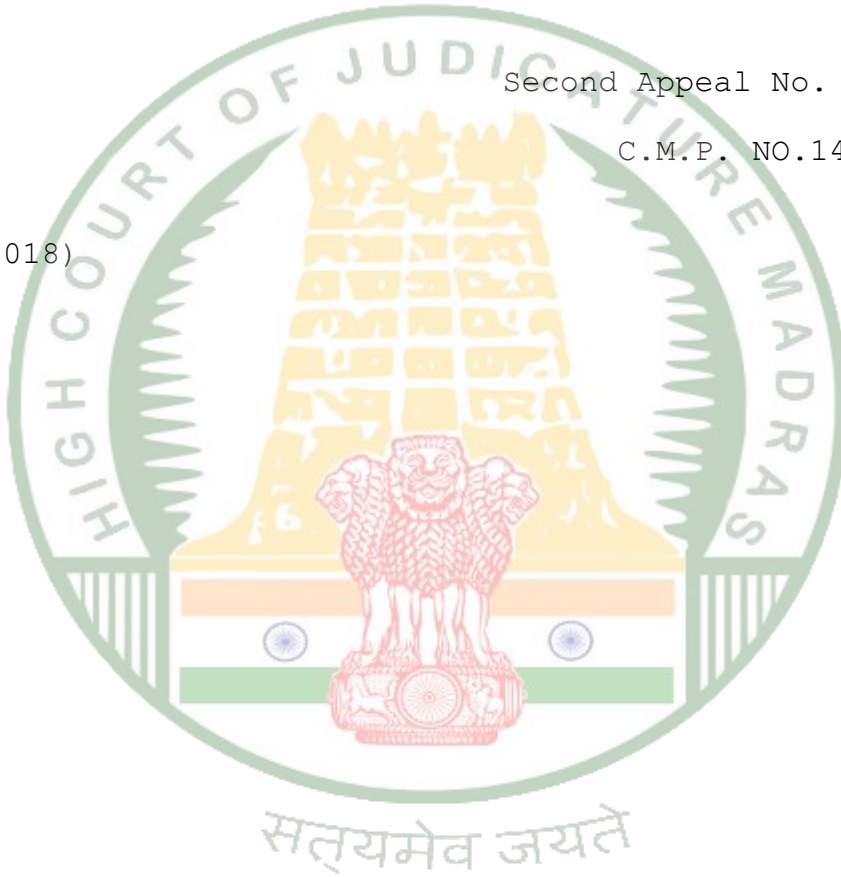
To

1. The Principal District Judge,
Thiruvallur.
2. The Subordinate Judge,
Poonamallee.
3. The Section Officer, V.R. Section,
High Court, Madras.

+lcc to Mr.CPG.YOGANAND AND ASSO.Advocate, S.R.No. 78524

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RK (CO)
TR(02/01/2018)



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