

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.08.2017

Coram:

The Honourable Mr.Justice D.KRISHNAKUMAR

S.A.No.268 of 2015
& M.P.No.1 of 2015

1.K.Sivaji

2.R.Ganesan

3.K.S.Natesan

4.S.P.Subramaniam .. Appellants /Respondents/Defendants

Vs.

1.Panneer Selvam

2.Karunakaran .. Respondents/Appellants/Plaintiffs

Second Appeal is filed under Section 100 C.P.C., as against the judgment and decree dated 11.10.2012 made in A.S.No.102 of 2010 on the file of II Additional Subordinate Judge, Salem, reversing the judgment and decree dated 08.06.2010 made in O.S.No.600 of 2008 on the file of I Additional District Munsif, Salem.

For appellants : Mr.T.Dhanasekaran
For respondents : Mr.P.Jagadeesan

JUDGMENT

The defendants, who suffered decree before the lower appellate Court, are the appellants herein. Seeking to reverse the same, they have filed the above second appeal.

2. For the sake of convenience, the parties are arrayed in the same position as mentioned in O.S.No.600 of 2008.

3. The brief facts of the case:-

3.1. According to the respondents/plaintiffs, originally the suit property belongs to one Palanisamy. The said Palanisamy sold the said property to one Muthu and his wife

Pachaiammal on 14.12.1980 under Ex.A1. As per the oral partition, Muthu became the owner of the suit property. Thereafter, the suit property was sub divided as S.No.44/4D4 with an extent of 8 acres. Later, the said Muthu died. Chinnammal and Pachaiammal are the widows of the said deceased Muthu. Chinnammal had two daughters viz., Saroja and Chellammal. Pachaiammal had no issues. Chinnammal and her daughter viz., Chellammal filed a suit in O.S.No.222 of 1984 on the file of District Munsif Court, Salem. As per the preliminary decree, the properties were divided into two equal shares and allotted to Chinnammal and Chellammal and thereafter, a final decree was also passed. Chinnammal and Chellammal have executed a Deed of power of attorney on 14.07.1995 in favour of one Kumaresan. The said power agent sold the suit property measuring 900 sq.ft., to one Ravi on 27.09.2001 under Ex.A5. The said Ravi had executed a registered sale deed dated 16.04.2008 in favour of the first plaintiff-Panneerselvam under Ex.A6. The remaining extent of property i.e. 900 sq.ft., was sold to the second plaintiff-Karunakaran by the power agent on 16.04.2008 under Ex.A7. The plaintiffs, who are the subsequent purchasers, have filed the suit in O.S.No.600 of 2008 before the I Additional District Munsif, Salem, seeking permanent injunction.

3.2. On the side of the plaintiffs, P.Ws.1 and 2 were examined and Exs.A1 to A13 were marked. On the side of the defendants D.Ws1 to 3 were examined and Exs.B1 to B8 were marked.

3.3. Based on the oral and documentary evidence, the trial Court has come to the conclusion that the plaintiffs were not entitled to the relief of permanent injunction. Challenging the abovesaid judgment and decree, the plaintiffs have filed A.S.No.102 of 2010 on the file of the II Additional Subordinate Judge, Salem. Pending appeal, the respondents/plaintiffs have filed I.A.No.1 of 2012 for amending the prayer in the suit as one for declaration. The said application was allowed on 22.06.2012 and the said order has become final. After allowing the said application, the lower Appellate Court has considered the appeal and set aside the judgment and decree passed by the trial Court and granted a decree in favour of the plaintiffs. Challenging the said judgment and decree dated 11.10.2012, the appellants/ defendants, have preferred the instant appeal before this Court.

4. The above second appeal was admitted on 30.04.2015 on the following substantial questions of law.

1. Whether the lower appellate Court was correct in reversing the well considered judgment and decree of the trial Court?

2. Whether the lower appellate Court was correct in decreeing the suit when the vendors had no right to execute the documents viz., Exs.A5 to A7 without setting aside the decree in O.S.NO.772 of 1995 when the properties are one and the same?
3. Whether the lower appellate Court was correct in decreeing the suit when the respondents had not proved title of the suit properties right from their vendors?

5. Heard Mr.T.Dhanasekaran, learned counsel for the appellants/defendants and Mr.P.Jagadeesan, learned counsel for the respondents/plaintiffs and perused the oral and documentary evidence on record.

6. The learned counsel appearing for the appellants would submit that the subject matter of the suit property, already a subject matter in O.S.No.772 of 1995. One Papammal and others had obtained a decree against the power agent-Kumaresan and Pachaiammal, however, they did not prefer any appeal as against the said decree. So, when there was a decree for injunction, then the sale deed executed by the power agent in favour of the respondents/plaintiffs is void and illegal, hence, the present suit is barred by res-judicata.

7. The learned counsel for the respondents/plaintiffs would submit that the fact has been considered in detail by the lower appellate Court by holding that both the suit properties are different and not one and the same as contended by the appellants and seeks to dismiss the appeal.

8. In paragraph 15 of the judgment in A.S.No.102 of 2010, the lower appellate Court has held as follows:

"So from the description of property this property lies south of the property which was sold by Palanisamy. Palanisamy sold the property which lies on the south of the bypass road. The 2nd item of property has not mentioned in the Ex.B1 sale deed. Nowhere in Ex.B2 it has been stated how the property mentioned in the suit in O.S.No.772/95. So the property in suit in O.S.No.772/95 and the property in the power of attorney deed Ex.B2 is entirely different. There is no iota of truth or document to show that the principles were having right over the property mentioned in the power of

attorney deed Ex.B2. Not even as a single document has been filed by the respondent to show that the property which lies south of the bypass road belong either to Pappammal or other executants of the power of attorney deed. Whereas the appellant has proved title of the suit properties right from their vendors. The appellants were able to file documents from the year 1980. When there is a dispute in measurement then the four boundary prevails. Admittedly the suit property is a vacant site. So the possession follows title. Even in this suit the Pappammal has admitted that the property sold by the Palanisamy lies on the north to their property. So the suit property is the property which lies on the north of the suit property in O.S.No.772/95. Since the suit property is entirely different from the present suit property, the earlier suit in O.S.NO.772/95 will not operate as res-judicata to the present suit."

A perusal of the judgment of the lower appellate Court would show that the suit property is entirely different from the present suit property and the appellant has not placed any material to prove that the suit property in O.S.No.772 of 1995 and the present suit property are one and the same and hence, the suit in O.S.NO.772/95 will not operate as res-judicata to the present suit and the finding rendered on the above aspect warrants no interference and the second question of law is answered accordingly.

9. In respect of the other substantial questions of law i.e. 1 and 3 , the learned counsel appearing for the appellants would submit that the respondents/ plaintiffs had not proved the title of the suit property. According to the appellants, the respondents/plaintiffs have filed an application in I.A.No.1 of 2012 to amend the prayer for declaration in the appeal suit. It is an admitted fact that the said application has been allowed and as against the said order, no appeal has been filed and hence, the said order has become final. Even though the appellants/defendants had raised the plea that allowing the prayer for declaration by the appellate Court is wrong, without considering the period of limitation, they have not objected before the Appellate Court for allowing the said application and hence, the contention of the appellant by raising the limitation at this stage cannot be accepted and the same is liable to be rejected.

10. It is clear from Ex.A4 power of attorney deed executed by the legal heirs of Muthu Gounder in favour of Kumaresan, the abovesaid power agent-Kumaresan had executed a sale deed in favour of one Ravi to an extent of 900 sq.ft., on 27.09.2001 under Ex.A5 and the said purchaser Ravi had executed a sale deed in favour of the first plaintiff under Ex.A6 on 16.04.2008 and the remaining property has been sold by the power agent to the second plaintiff under Ex.A7 on 16.04.2008. The abovesaid execution of the deed has not been challenged, now they cannot raise the said contention in the second appeal, and therefore, this Court is of the view that there is no merits in the appeal. Accordingly, there is no error or illegality in the judgment passed by the lower Appellate Court. Hence, questions of law are answered against the appellant.

11. In view of the above facts and circumstances, the second appeal fails and the same is dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

raa

To

1.II Additional Subordinate Judge, Salem,
2.I Additional District Munsif, Salem.

+1cc to Mr.T.Dhanasekaran, Advocate SR.No.63143
+1cc to Mr.P.Jagadeesan, Advocate SR.No.62888

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