

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON: 23.01.2017
PRONOUNCED ON : 30.01.2017
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S. A.No.206 of 2011
and
CMP.No.19421 of 2016

Tmt.Thulukkanammal (Deceased)

1.S.Ramesh Babu
2.Nithyanandam

.... Appellants (Plaintiffs)
Vs.

The Commissioner,
Corporation of Chennai,
Ripon Buildings,
Chennai - 600 003. Respondents (Defendant)

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 27.07.2007 and made in A.S.No.297 of 2005 on the file of V Additional City Civil Court, Chennai, reversing the judgment and Decree dated 08.09.2004 and made in O.S.No.2777 of 1999 on the file of XII Assistant City Civil Court, Chennai.

For Appellants : Mr.V.Raghavachari
for M/s.T.Gowthaman

For Respondent : Mrs.Karthika Ashok

JUDGMENT

Challenge in this second appeal is made by the plaintiffs against the judgment and decree dated 27.07.2007 made in A.S.No.297 of 2005 on the file of the V Additional City Civil Court, Chennai, reversing the judgment and decree dated 08.09.2004 made in O.S.No.2777 of 1999 on the file of the XII Assistant City Civil Court, Chennai.

2. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in this second appeal.

(a) Whether the lower Appellate Court was right in holding that the plaintiffs had not established their title or possession over the suit property when their sale deeds, Ex.A1 and A2 as well as the revenue records, Ex.C1 clearly show that the deceased plaintiff was in the ownership and possession of the suit property?

(b) Was it right on the part of the lower Appellate Court to question the competency of the plaintiffs 2 and 3 to implead themselves in the suit when the issue had not been raised by the respondent herein before the trial Court or in the grounds of Appeal?

(c) Was the lower Appellate Court right in allowing the Appeal in spite of the respondent not substantiating its stand by way of any oral or documentary evidence?

3. The suit has been laid by the plaintiffs for permanent injunction and mandatory injunction.

4. The plaintiffs claim title to the suit property under the sale deeds dated 06.11.1940 and 29.12.1952, which are marked as Exs.A1 and 2. That the plaintiffs have title to the suit property under the above said sale deeds, is not seriously controverted by the defendant. It is found that the defendant, in the written statement, has admitted that the plaintiffs have title to the suit property by virtue of the above said two sale deeds. Now according to the plaintiffs, the defendant, without any authority of law, entered into the suit property and put up some construction and thereby, interfered with their possession and enjoyment of the suit property as such, hence, it is stated that the plaintiffs have been necessitated to lay the suit against the defendant for appropriate reliefs.

5. Per contra, though the defendant, as adverted to earlier, has admitted the title of the plaintiffs in respect of the suit property, put up a defence that the plaintiffs in respect of the suit property had granted permission to the purchaser viz., M/S.VGP Housing Private Ltd., and it is further stated that pursuant to the above said permission of the plaintiffs, the purchaser, entered into the suit property and at the time of obtaining the layout approval in respect of the suit property, according to the case of the defendant, lay out was sanctioned and the purchaser had gifted the suit property to the erstwhile town Panchayat of Velachery, now merged with the defendant through a gift deed dated 22.06.1976 and thus,

according to the defendant, it's possession over the suit property is legally projected and accordingly, the defendant had put up construction in the suit property and thus, it is stated that the suit property is vested with the defendant and hence, the suit laid by the plaintiff deserves rejection.

6. Having admitted the title of the plaintiffs in respect of the suit property under Exs.A1 & 2, it could be seen that as rightly found by the trial Court, the defendant has to establish that M/s.VGP Housing Private Ltd., had entered into an agreement with the plaintiffs in respect of the suit property and based upon the same, on the permission granted by the plaintiffs, the alleged purchaser had moved the defendant for effecting layout of the suit property and accordingly, at the time of layout approval, the purchaser had gifted the suit property to the defendant by a document dated 22.06.1976 and thereby, the suit property vested with the defendant. However, as regards the above defence put forth by the defendant, no evidence whatsoever has been placed by the defendant before the Courts below. It is found that though adequate opportunities had been given to the defendant to establish its case, the defendant, for the reasons best known to it, had not cared to place either oral or documentary evidence in support of its defence. In such view of the matter, it is found that the trial Court had also examined the court witness viz., the Sub Inspector of Survey, Mambalam, Guindy Taluk as CW1 and through him marked the Chitta, Adangal, FMB extract relating to the suit property as Ex.C1. The trial court has also noted and found that Ex.C1 also denotes that the suit property is only owned by the plaintiffs and it is only the plaintiffs, who are in possession and enjoyment of the suit property. Accordingly, the trial court had decreed the suit in favour of the plaintiffs.

7. Aggrieved over the judgement and decree of the trial Court, it is found that the defendant has preferred the first appeal. However, the first appellate Court, even though there is no material whatsoever on the part of the defendant to establish its version, accepted the defence theory and thereby, rejected the plaintiffs' case. Challenging the same, the present second appeal has been preferred.

8. As rightly put forth by the plaintiffs' counsel, when the plaintiffs' title to the suit property has been clearly admitted by the defendant in the written statement and the same has also been substantiated by the plaintiffs by marking the sale deeds as Exs.A1 and 2 and further, when the plaintiffs' possession and enjoyment of the suit property has also been amply established by the Court document marked as Ex.C1 through CW1, it could be seen that in the absence of any material or proof placed by the defendant to take a contrary view, particularly, in support of the defendant's version, it is found

that the first appellate court has completely erred in swaying its decision in favour of the defendant, particularly, sans any material in support of the case of the defendant.

9. At the foremost, the defendant having claimed that the suit property vested with it under a particular gift deed stated to have been executed by the alleged purchaser of the suit property from the plaintiffs should have placed the said document before the Court. However, the said document has not seen the light of the day. That apart, the defendant claims vesting of the suit property to it under the gift deed said to have been executed by the alleged purchaser of the suit property from the plaintiffs. However, even to prove the same, i.e. the alleged purchaser of the suit property entered into an agreement of sale or otherwise in respect of the suit property with the plaintiffs and thereby, had obtained the permission of the plaintiffs to make layouts in the suit property etc., when no material in support of the same is forthcoming on the part of the defendant and when according to the defendant, such records are available with it, it does not stand to reason as to why the defendant is feeling shy to produce the said records in support of its case. Further, leaving the documentary evidence, it is found that the defendant has not even cared to examine any of its officers in support of its case to establish the theory put forth in the written statement. It is not understood as to how come the first appellate court had accepted the defence version when the title of the plaintiffs in respect of the suit property has been admitted. It is found that even though the defendant has claimed that it has adequate records with its custody in support of its defence version, having failed to place the same before the Court, it could be seen that as rightly argued, the defendant having failed to place the best evidence available with it in support of its case, the only conclusion that could be drawn is that inasmuch the alleged records are not supporting the defence version, it is found that they are kept out of the purview of the Courts consideration. Therefore, it could be seen that the findings and conclusions of the first appellate court that the suit property had come to be vested with the defendant or for the matter, the plaintiffs have failed to establish their title, possession and enjoyment of the suit property as such are found to be totally erroneous and perverse in all aspects and therefore, they could not be sustained in any manner.

10. Further, the first appellate court has also questioned the competency of the plaintiffs 2 & 3 to prosecute the suit. On the death of the deceased the first plaintiff, it is found that pending the suit, the first plaintiff had died, the plaintiffs 2 & 3 have come to be impleaded for prosecuting the suit further. It is also found that only on due notice to the defendant, the plaintiffs 2 and 3 have been impleaded in the suit. Even

thereafter, the defendant by way of additional written statement has not challenged the competency of the plaintiffs 2 & 3 to prosecute the suit further.

11. That apart, the first plaintiff's son has also given evidence in support of the entitlement of the plaintiffs 2 & 3 to continue the suit on the death of the first plaintiff. Further, the third plaintiff has also tendered evidence on that aspect as PW1. In addition to that, it is also found that in the first appellate court, no ground has been made by the defendant in the memorandum of appeal about the lack of competency on the part of the plaintiffs 2 & 3 to prosecute the suit on the death of the first plaintiff by impleading themselves in the suit. In such view of the matter, when with reference to the above issue, no ground has been put forth by the defendant in the first appeal and no challenge has been made by the defendant before the trial Court either by adducing evidence or by filing additional written statement etc., the first appellate court has suo-motu taken up the said issue and proceeded to hold that the plaintiffs 2 & 3 are not competent to get themselves impleaded and prosecute the suit further on the death of the deceased first plaintiff. Therefore, it could be seen that as rightly put forth by the plaintiffs' counsel, the first appellate court has suo-motu invented special pleadings for the defendant and thereby, proceeded to salvage the defence theory, even though no issue has been raised by the defendant with reference to the same either before the trial Court or before the first appellate Court. Therefore, it is found that the first appellate court has completely against the cannons of the well established principles of law proceeded to advert to the issues not raised by the parties and on a special consideration, with a view to support the defence version, had rejected the plaintiff's case without any backing or any material, for the same, as regards the competency the plaintiffs 2 & 3 to get themselves impleaded in the suit and prosecute the suit further on the death of the first plaintiff. It is also found that the defendant has completely failed to place any material whatsoever either oral or documentary in support of its defence version. Accordingly, the trial court has rejected the defence version and upheld the plaintiffs' case based upon the evidence available on the part of the plaintiffs in support of their title, possession and enjoyment of the suit property. In such view of the matter, it could be seen that as rightly argued by the plaintiffs' counsel, the first appellate court has erred in accepting the defence version without the same being substantiated by any oral or documentary evidence by the defendant.

12. During the course of the second appeal, the defendant has now come forward with an application in C.M.P.No.19421/2016 preferred under Order 41 Rule 27 C.P.C for the reception of

certain documents as additional evidence in support of its case. The said petition is contested tooth and nail by filing counter affidavit. The documents sought to be produced by way of additional evidence are not claimed to be new documents coming into existence after the disposal of the first appeal as such on the part of the defendant. Further, it is also not the case of the defendant that the said documents are not within the knowledge of the defendant during the course of the trial or that the defendant was prevented by any sufficient cause to produce and mark the said documents before the Courts below. On the other hand, as adverted to earlier, the defendant has claimed in the written statement that it has got voluminous records in its custody as regards its case of the vesting of the suit property with it legally. Despite the same, as seen earlier, the defendant has not cared to produce the same before the courts below and consequently, suffered the decree before the trial Court. Even before the first appellate court, the defendant has not cared to place any proof in support of its case. Only during the course of the second appeal, the above application has come to be preferred.

13. As rightly put forth by the plaintiffs' counsel, none of the ingredients set out under Order 41 Rule 27 C.P.C has been satisfied by the defendant for receiving the additional evidence. It is also found that the additional evidence as such are also not germane or material to enable the High Court to decide the issue. The documents do not endeavour to establish that M/s. VGP Housing Private Ltd., had the authority from the plaintiffs to make layouts in the suit property and thereby, layout had been made with the approval of the plaintiffs and pursuant to the same, the suit property had been gifted to the defendant by the document dated 22.06.1976. When the legal entitlement of the above said alleged purchaser has not been established or found to be not substantiated by the proposed additional evidence and further, when the document under which, the defendant's claim vesting of the suit property on it viz., the gift deed dated 22.06.1976 has not been produced as additional evidence. It could be seen that the projected additional evidence sought to be marked are found to be not essential for disposing of the lis by the High Court. Further, as adverted to earlier, when the defendant has failed to make out a case of its entitlement to mark the documents as additional evidence and when the petition is found to be completely not conforming to the requirements enunciated under Order 41 Rule 27 C.P.C, it could be seen that the petition does not merit acceptance in any manner.

14. In support of the petition for the reception of the additional evidence, the defendant's counsel relied upon the decisions reported in AIR 2006 AP 142 (Chapala Chinnabbayi and

ors. Vs. Naralasetti Anusuyama and ors), the decisions of the Hon'ble Supreme Court dated 17.07.2012 in C.A.No.1374 of 2008 (Union Vs.Ibrahim) and (1974) 76 BOMLR 83 (Laxminarayan Deepchand Vs. Bhiku Punjaji Lewa). Per contra, the counsel for the plaintiffs as regards the reception of the additional evidence, the considerations to be taken by the appellate court on the question of the reception of the additional evidence relied upon (2012) 8 Supreme Court Cases 148 (Union of India Vs. Ibrahim Uddin And another). The Principles of Law enunciated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

15. Further, in support of the defendant's case, the counsel for the defendant has also relied upon the decisions reported in CDJ 2011 SC 1084 (Shri Girish Vyas & Others V. The State of Maharashtra & Others), CDJ 2007 MHC 2455 (Karpaga Nagar Nala Urimai Sangam Vs. Municipal Administration and Water Supply Department, Rep.by its Secretary, Chennai - 2 & Others), (1995) 1 Supreme Court Cases 47 (Pt.Chet Ram Vashist (Dead) By Lrs. Vs. Municipal Corporation of Delhi), 2007-3-L.W.259 (Sri Devi Nagar Residences Welfare Association, a registered Society regd.No.198/98, rep.by its President, G.P.Godhanavalli residing at No.43, 6A-3, M.G.G.Illam, II Street, Sri Devi Nagar, Ganapathy, Coimbatore - 641 006 Vs. Subbathal and 4 others), (2002) 3 M.L.J.375 (Villupuram Municipality represented by its Commissioner, Villupuram V. M.Subramanian and others), 2001 - 3 -L.W.828, (Krishna Nagar Residents Welfare, Association rep.by its Secretary Mr.A.V.Dhakshnamurthy and others Vs. The Director of Town and Country Planning, Madras -2 and three others), and 2006 (4) CTC 290 (R.Shanmugam and others Vs. The State of Tamil Nadu, rep.by its Secretary, Housing and Urban Development, Fort St.George, Chennai - 600 009 and others). The Principles of Law enunciated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

16. In the light of the above discussions, the substantial questions of law formulated for consideration in the second appeal are answered in favour of the plaintiffs and against the defendant.

In conclusion, the judgment and decree dated 27.07.2007 made in A.S.No.297 of 2005 on the file of the V Additional City Civil Court, Chennai are set aside and the judgment and decree dated 08.09.2004 made in O.S.No.2777 of 1999 on the file of the XII Assistant City Civil Court, Chennai are confirmed and

accordingly, the second appeal is allowed. No costs.
Consequently, connected CMP.No.19421 of 2016 is dismissed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

sms

To

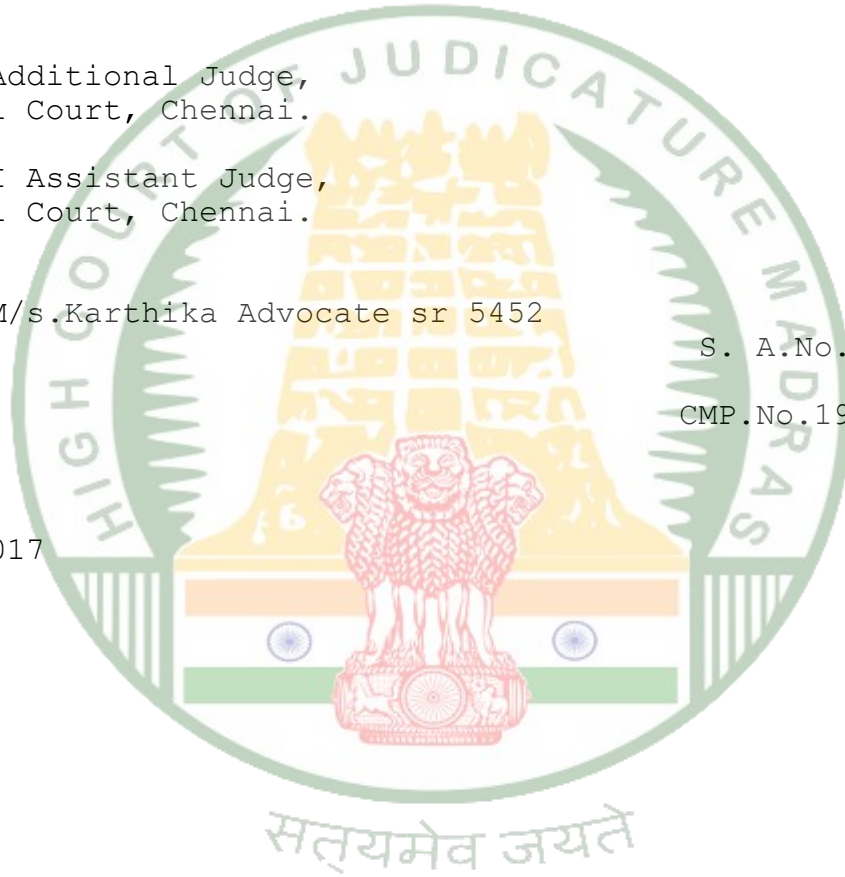
1. The V Additional Judge,
City Civil Court, Chennai.

2. The XII Assistant Judge,
City Civil Court, Chennai.

+1 cc to M/s.Karthika Advocate sr 5452

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and
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