

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 03-01-2017

CORAM:

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH

Second Appeal No.714 of 2016
and
C.M.P.Nos.13468 & 13469 of 2016

Mallika

... Appellant/1st Respondent/
Plaintiff

Vs.

1. R.Nallathambi

2. R.Doraisamy

K.Muthusamy (Died)

3. Manimegalai

4. Chellammal

5. Dr.Periyasamy

6. N.Dhanabagyan

7. K.Ramasamy

8. R.Kannammal

9. D.Shanthoshkumar

10.N.Deenadayalan

... Respondents/Appellants 1 & 4
to 7/Defendants 1, 2, 4 to 11

11.P.Ayyappan

12.M.Angamuthu

... Respondents/Respondents 2 & 3/
Defendants 12 & 13

13.M/s.Martin Builders Pvt. Ltd.,
Rep. by its Director Mrs. Leema Rose
No.101, 6th Street, Gandhipuram
Coimbatore - 641 012

... Respondents/4th Respondent/
Third Party

Second Appeal against the judgment and decree dated 08-03-2016 made in A.S.No.52 of 2012 on the file of IV Additional District Judge, Coimbatore reversing the judgment and decree dated 22-03-2012 made in O.S.No.472 of 2008 on the file of the Principal Subordinate Judge, Coimbatore.

For appellant : Mr.S.Doraisamy, Senior Counsel
M/s. Muthusami Doraisami
Kandhan Doraisami

For respondents : Mr.A.K.Kumarasamy for RR1 to 10
for M/s.S.Kaithamalai Kumuran,
for R1 to R10
No appearance for RR11 and 12
Mr. K. Moorthy for R13

JUDGMENT

The plaintiff, who suffered a reversal of the decree at the hands of the Lower Appellate Court has approached this Court, as the appellant with the following substantial questions of law:

(1) Whether the Learned Additional District Judge is right in reversing the well considered Judgment and Decree of the Trial Court when the Defendants 1 and 2 failed to prove the Receipts, dated 17.11.1998 and 07.01.1998, Exhibits B7 & B9?

(2) Whether the Learned Additional District Judge is right in reversing the well considered Judgment and Decree of the Trial Court when the Sale Deeds namely Exhibits A5 to A9 in respect of the suit schedule properties have not been acted upon since the plaintiff is in continuous possession and enjoyment of the suit schedule properties and the same has also been proved beyond doubt through independent evidence namely PW2?

3. Whether the burden of proof is on the part of the Defendants 1 and 2 to prove the Receipts, dated 17.11.1998 & 07.01.1998, Exhibits B7 & B9?

2. Before going into the contentions raised by the learned counsel appearing for the parties, the background facts need a narration:

The plaintiff/appellant and her husband, who had deposed as P.W.1, were doing real estate business as seen from the evidence of P.W.1, himself. According to the plaintiff, there was a loan transaction between the plaintiff and the first defendant. In pursuance to the said transaction, she executed

a registered power deed in favour of the respondent. This power deed provides for sale of the properties owned by the plaintiff which is a subject matter in the present suit. Various sale deeds have been effected by misusing the power deed at the hands of the respondent between the year 2007-08. There were further alienations in favour of his relatives, thereafter. According to the plaintiff, the sale deeds have been executed without any authority of law. Though she had discharged the loan obtained, the plaintiff was kept in dark over the said development. She came to know about the mutation effected in the revenue records, though done several years ago. Thereafter, she initiated the present suit seeking to set aside the sale deeds and protect her possession over the suit properties. Incidentally, a relief for permanent injunction has also been sought for against the proposed alienation at the hands of the respondents.

3. The defendants set up a plea stating that it was a case of sale deeds having been executed by the plaintiff on receipt of due consideration as evidenced by Exs-B7 and B9. Thereafter, possession had been handed over and the defendants are in enjoyment. The plaintiff and her husband were doing real estate business. The suit is barred by limitation. Even as per the evidence of P.W.2, the plaintiff and P.W.1 are residing at Erode.

4. The Trial Court after holding that the plaintiff has not proved the factum of discharge as pleaded, nonetheless by placing onus on the respondents granted the decree. It doubted the transaction and held that Exs-B7 and B9 being the receipts for payments are not proved in the manner known to law; these documents have not been proved through the attesting witnesses; coupled with the fact that no amount has been mentioned therein. Accordingly, the Trial Court was pleased to hold that there was a prior transaction between the parties dealing with payment of money and only for that the power deed has been executed which has been misused by the first defendant in favour of his own relatives.

5. The Lower Appellate Court was pleased to reverse the judgment and decree of the Trial court by holding that the presumption has been wrongly placed on the defendants. It was further held that the change of revenue records, such as patta, chitta and adangal in favour of the concerned defendants in whose favour the sale deeds have been executed is a material factor to be considered. The plaintiff without even coming to the box, has not proved the factum of possession. When she has not proved her case of discharge, even as found by the Trial Court, she is not entitled for the relief sought for.

6. Challenging the said decision of the Lower Appellate Court in reversing the judgment and decree of the Trial Court, the present appeal has been preferred by the plaintiff as appellant.

7. The learned Senior Counsel appearing for the appellant submits that the case as a whole is based on Exs-B7 and B9 and Trial Court has rightly expressed its suspicion over Exs-B7 and B9. Mere mutation made in the revenue records under Exs-B14 to B23 alone would not be sufficient. The initial onus is on the defendants to dispel the allocation of fraud. A fraud would vitiate all solemn actions.

8. The learned Counsel appearing for the respondent No.1 submits that as seen from the evidence of P.W.1, he and the plaintiff were doing real estate business at Erode. They are also maintaining records. P.W.1 has also stated that he is aware of execution of power deed for the suit properties. This power deed does not indicate that they have been executed for the loan amount. P.W.1 also accepted the factum of mutation of revenue records. P.W.2 has stated in his cross-examination that plaintiff and P.W.1 are residing at Erode. For the reasons best known to her, the plaintiff has not come over the box. There is no proper explanation for the original documents given, though P.W.1 states that it is a practice adopted at the time of giving loan, Exs-B7 and B9 are mere receipts. There is no necessity to explain them through other witnesses. The fact that Exs-B7 and B9 do not indicate any amount by itself cannot be a ground to create any suspicion. There is a presumption envisaging due execution of a registered document. The Trial Court has committed an error with reference to the onus of proof which has been rightly rectified by the Lower Appellate Court by fixing the same upon the plaintiff. The finding rendered by the Lower Appellate Court on possession based upon Exs-B14 to B23, being one of fact, does not require to be interfered with. It is a case of sale consideration having been paid and received. Hence no interference is required.

9. The suit has been laid after ten years of execution of sale deeds through the power deed. P.W.1 is aware of the power deed. The plaintiff has not chosen to come before this Court by examining herself. Even as per the evidence of P.W.1, both the plaintiff and P.W.1 are doing real estate business. Therefore, it is not as if she is an illiterate. Even the Trial Court has found that the plaintiff has not proved the factum of discharge. For proving, Exs-B7 and B9, there is no necessity to hear any other third party.

10. The Lower Appellate Court being final Court of fact and law has considered both the aspects in a right

perspective. The Trial Court has completely gone wrong in fixing the onus on the defendants, that too even after holding that the alleged discharge has not been proved by the plaintiff.

11. The plaintiff has not proved the factum of possession as against the defendants whose documents under Exs-B14 to B23 have been rightly relied upon by the Lower Appellate Court. When once registered documents have been made available, then it is for the vendor, being the plaintiff to establish her case. The Lower Appellate Court has considered the materials in the right perspective. This Court finds no perversity in the judgment and decree rendered by the Lower Appellate Court. In fact, the Lower Appellate Court has considered both the oral evidence of the parties as well as the documents filed. There is no acceptable explanation forthcoming for having come to the Court belatedly. Hence, looking from any perspective, this Court is of the view that there is no perversity in the findings rendered by the Lower Appellate Court seeking reversal of the well-merited judgment. In such view of the matter, this Court does not find any substantial questions of law involved in this appeal, warranting interference.

12. Accordingly, second appeal is dismissed. However, there will be no order as to costs. The connected miscellaneous petitions are also dismissed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

glp

To

1.The IV Additional District Court,
Coimbatore.

2.The Principal Subordinate Court,
Coimbatore.

+1cc to Mr.M/s.Muthusami Doraisami, Advocate, S.R.No.357

+1cc to Mr.K.Moorthy, Advocate, S.R.No.848

+2cc's to Mr.A.K.Kumarasamy, Advocate, S.R.No.385

Second Appeal No.714 of 2016

SCD(CO)

CA(27/01/2017)