

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 24.08.2017

Judgment Pronounced on : 21.06.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.1476 of 2011

and

M.P.No.1 of 2011

1.Ramu

2.Velayutham

3.Munniyan

4.Venkatraman

5.Perumal

... Appellants/defendants 2,4 to 7

Vs.

Rajendran

... Respondent/plaintiff

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 22.09.2011 made in A.S.No.4 of 2011 passed by the learned Subordinate Judge, Harur, confirming the Judgment and decree dated 24.07.2003 passed by the learned District Munsif Court, Harur in O.S.No.69 of 1997.

For Appellants : M/s.V.Raghavachari
for M/s.J.Bharathiraja

For Respondent : M/s.J.Hariharan
for M/s.V.Nicholas

JUDGMENT

This second appeal arises out of the judgment and decree dated 22.09.2011 made in A.S.No.4 of 2011 passed by the learned Subordinate Judge, Harur, confirming the Judgment and decree dated 24.07.2003 passed by the learned District Munsif Court, Harur in O.S.No.69 of 1997.

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

The suit property was self acquired property of the third defendant and he was in possession and enjoyment of the same. The third defendant is the maternal grandfather of the plaintiff. On 27.11.1992, the third defendant executed a sale

deed in respect of the suit property in favour of his grand son, the plaintiff herein. The possession was handed over to the plaintiff on the same date and he is in possession and enjoyment of the same. The revenue records still stands in the name of the third defendant and the steps taken by the plaintiff to effect the name transfer is pending. The first and second defendants have no right, title or interest over the suit property. The first and second defendants try to interfere with the possession of the suit property by the plaintiff. They have no interest in the suit property. The property belongs to the plaintiff in full. The second defendant claims to purchase the suit property from the third defendant and the same is not true. The sale deed executed by the third defendant in favour of the second defendant will not bind the plaintiff. Thus, the plaintiff seeks to declare the suit property belongs to him and for consequential relief of injunction and recovery of possession with regard to the 'B' schedule property against the defendants 4 to 7.

3. On the other hand, the contention of the second defendant is that the first defendant is the mother of the plaintiff and she is the daughter of third defendant. The plaintiff, first defendant and third defendant are colluding with each other to deny the title of the second defendant. It is not correct to state the suit properties were self acquired properties of the third defendant. The suit properties are ancestral properties of the third defendant and his brother Kolanthaivel Gounder. The second defendant purchased eastern $\frac{1}{2}$ share of the suit property in Survey No.77/1 from the third defendant and his brother Kolanthaivel Gounder, as per sale agreement dated 12.04.1984 and took possession of the same on that date itself. As the third defendant and his brother failed to complete the sale, the second defendant filed the suit and obtained sale deed from the Court on 14.08.1995. The property was sub-divided as 77/1-B and the second defendant is in possession and enjoyment of the same. The patta stands in the name of the second defendant. The alleged gift deed dated 27.11.1992 is a fabricated document. It is only with an intention to defeat the second defendant rights in the suit property, the said settlement deed is created. The plaintiff filed I.A.No.1239 of 1998 to implead the brother of the third defendant one Kolanthaivel Gounder as party to the suit and the said application was allowed. However the plaintiff has not taken any steps to implead the said Kolanthaivel Gounder. The claim of the plaintiff that there was no valid sale in favour of the second defendant is not correct. As per two sale deed dated 10.11.1998, the 4th and 7th defendants purchased the land in Survey No.77/1-B from the second defendant and they are in possession of the same. The second defendant sold his property for his family necessities. The plaintiff is not entitled for

recovery of possession of the 'B' schedule property. There is no cause of action in the suit. Hence, the defendants sought for dismissal of the suit.

4. After contest, the trial Court decreed the suit as prayed for. Aggrieved upon that the 2nd defendant preferred the first appeal before the lower appellate Court and after contest, the lower appellate Court dismissed the appeal by confirming the decree and judgment of the trial Court. Hence, the 2nd defendant came forwarded the present second appeal.

5. the time of admission, the following substantial question of law is framed by this Court in this appeal:-

1) "Whether the Courts below are justified in granting the decree for declaration and recovery of possession without even independently probing into the issue of title and possession?

2) Are the courts below right in repudiation the sale deed executed by the Court under Ex.B2 when the plea of fraud was neither pleaded nor placed before it for consideration?

3) Whether the gift deed under Ex.A1 could be presumed as a title document in the absence of any constant and reliable evidence to establish the manner of execution of its execution required under Section 68 of Evidence Act?

4) Whether the Courts below ought not to have drawn adverse inference as against the plaintiff for non-examination the defendants 1 and 3, parties to the document under Ex.A1?

5) Are the Courts below justified in disregarding the revenue records under Exs.B3, B4 and B8 which would establish the 1st appellant's prior right and possession holding over the suit property?

6) Whether the plaintiff is a necessary party to the specific performance suit especially when he was not a party to the agreement?

7) Whether the suit framed is maintainable in law without even challenging the sale deed executed by the Court in favour of the 2nd defendant?

8) Whether the suit claim is not barred by limitation when admittedly the plaintiff has denied the sale agreement of the 2nd defendant under Ex.B6 notice issued on behalf of his grandfather, and defendant?"

6.The learned counsel appearing for the appellants/Defendants would submit that the Courts below without even independently tracing out the title and possession of the suit property granted a decree in favour of the plaintiff. Further, the Courts below have also not considered Ex.B2, which is the sale deed executed by the Court itself. The alleged gift deed Ex.A1 was not proved as per Section 68 of the Evidence Act and the parties to the document were also not examined. Further, the Courts below failed to consider Ex.B3, B4 and B8 which are revenue records, which were prove the right and possession of the second defendant. As far as the specific performance suit is concerned as the plaintiff is not a party to the sale agreement, he is not a necessary party to the said case. Further more, the present suit itself is not maintainable as framed, since Ex.B2 sale deed executed by the Court is not challenged by the plaintiff. The issue of limitation is also not considered by the Courts below. Thus, the appellants/defendants contended that the conclusion arrived at by the Courts below is un sustainable and the same is to be set aside by allowing this second appeal.

7.On the other hand, opposing the claim of the appellants/defendants, the learned counsel appearing for the respondent/plaintiff would submit that only after considering in detail both the oral and documentary evidences available on record, the Trial Court as well as the first appellate Court came to the correct conclusion and there is no infirmity on the findings of the Courts below. Thus, it is contended that the second appeal is devoid of merits and the same has to be dismissed.

8.I have heard the rival submissions and also perused the materials available on record.

9.Admittedly, the suit property originally belonged to the 3rd defendant, namely, Govindhasamy Gounder and his brother Kolanthai Gounder. On 22.09.1973, there was a partition between the second defendant and his brother Kolanthai Gounder as per Ex.A2. In the above said partition viz., Ex.A2, the suit property was allotted to the share of the 3rd defendant as "A" Schedule. According to the plaintiff, the suit properties were gifted to him through Ex.A1. On the other hand, according to the second defendant, the suit properties were purchased by him by way of sale agreement muchalika dated 12.04.1984 for the said Kolanthai Gounder and the third defendant himself. Since the 3rd defendant and his brother failed to execute the sale deed, the second defendant filed a suit for specific performance in O.S.No.14 of 1994 and obtained decree for specific performance and also obtained sale deed from the Court, which are marked as Ex.B1 and B2. Subsequent to that, the second defendant effected the namde transfer in the revenue records and the patta stands

in his name. Subsequently, the 2nd defendant sold portion of the suit property to the defendants 4 and 5 on 10.11.1998 and also sold the remaining suit property on the same day to the defendants 6 and 7. To prove the same, the 2nd defendant has produced Ex.B13 and B16 sale deed. The subsequent purchasers also effected name transfer and obtained revenue records in their name. As such, the main contention of the plaintiff is that he is entitled to the suit property on the basis of Ex.A1 Gift Deed executed by the 3rd defendant. The 2nd defendant denied the rights of the plaintiff on the ground that in the year 1982 itself, the 3rd defendant along with his brother entered into a sale agreement with regard to the suit property and even though the entire sale consideration was paid the 3rd defendant and his brother failed to execute the sale deed. Hence the second defendant obtained sale deed through Court and subsequently sold away the same to the defendants 4 to 7.

10. Now the point for consideration is that whether the Gift Deed executed by the 3rd defendant in favour of the plaintiff is valid and (2) Whether the sale made by the Court without impleading the plaintiff in the present suit as a party in the other suit is valid and while whether it will bind upon the plaintiff?

11. The suit property originally belonged to the 3rd defendant absolutely as evidenced by Ex.A2. The revenue records also stands in the name of the 3rd defendant and to corroborate Ex.A2, the plaintiff has produced Ex.A3 and Ex.A4. The plaintiff claim right over the suit property only through Ex.A1. The 2nd defendant disputed Ex.A1 as created documents only for the purpose of defeating the rights of the 2nd defendant. Even though it is claimed by the 2nd defendant that on 12.04.1984, sale agreement was entered into but it was not produced by both sides. The 2nd defendant claimed right through the said sale agreement and through that the document alone he obtained Ex.B1 decree. Even though in the year, 1984, the sale agreement was entered into between the defendants 2 and 3, till the execution of Ex.A1, the 2nd defendant has not taken any steps to get the sale deed from the 3rd defendant. The 2nd defendant himself admitted during the cross examination by stating as to why he has not taken steps 1997-ஆம் ஆண்டில் இருந்து தான் கந்தாயம் கட்டி வந்தேன். 1994-ல் எழுதப்பட்ட ஒப்பந்த பத்திரத்திற்கு 1992-ஆம் ஆண்டில் இருந்து வாதிக்கு தானமாக சொத்து கொடுத்த பிறகு கிரயம் செய்து கொடுக்க கூப்பிட்டேன், அவர் வர மறுக்கவே வழக்கு போட்டேன். The above said admission clearly reveals that only after Ex.A1 was given in favour of the plaintiff, the 2nd defendant demanded the 3rd defendant to execute the sale deed. After knowing fully well about the execution of Ex.A1, the 2nd defendant filed the suit for specific performance without impleading the plaintiff as a party to that suit and got a decree behind the back of the

plaintiff herein. If only the 2nd defendant has added the plaintiff herein as a party in the said suit to get binding adjudication certainly the Ex.B1 decree passed in O.S.No.14 of 1994, will bind upon the plaintiff. Admittedly, on the date of suit, the 3rd defendant was not the owner of the suit property, since he gifted the suit property to the plaintiff in the year 1992 itself. So, on the date of decree, the 3rd defendant is not the owner of the suit property and the 3rd defendant has no saleable right in the suit properties. Admittedly, in the year,1984, the sale agreement was executed and till 1994, the 2nd defendant has not taken any steps to get the sale deed from the 3rd defendant. After the execution of the sale agreement, the 3rd defendant executed the gift deed in favour of the plaintiff in the year 1992. The above said fact was also informed to the 2nd defendant through legal notice Ex.B6. For which the 2nd defendant has also replied as per Ex.B6 and B7 which are the clinching evidences to show that the second defendant has knowledge of the Ex.A1 Gift deed to the 2nd defendant. The written statement in Para-7, the 2nd defendant has stated as follows:-

"The alleged Gift Deed is a created document only to cheat the right of the 2nd defendant after the property was sold to the 2nd defendant."

12.Thus, the 2nd defendant alleged in the written statement that the suit property was sold to him. To that effect, the 2nd defendant has not produced any sale deed executed in his favour prior to Ex.A1 Gift Deed. What is meant by sale is contemplated under Section 54 of the Transfer of property Act as follows:-

"54. "Sale" defined.-"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.-Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.-A contract for the sale of immovably property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

The Section itself clearly reveals about how sale is to be made and it must be made by a registered instruments only. It further clarified that agreement for sale itself was not create any interest or charge on such property. So, on the date of execution of Ex.B1 sale deed, the third defendant has no right, title or interest over the suit property and on the date of execution of Ex.A1, the 3rd defendant alone is absolute owner and he was at liberty to execute any deed to any body. Thus, he executed Ex.A1 Gift Deed in favour of the plaintiff.

13.On the side of the 2nd defendant, the learned counsel vehemently put forth his argument and also raised the question of law that Ex.A1 was not proved as per Section 68 of the Evidence Act. Ex.A1 was not challenged by anybody. The 2nd defendant has stated in his written statement that it was created only to cheat the right of himself. On the date of execution of Ex.A1 on 27.11.1992, no valid sale was made to the 2nd defendant. The 2nd defendant himself admitted the execution of Ex.A1. The only allegation is that Ex.A1 was created for the purpose of cheating his right. As such, the execution of Ex.A1 is not disputed and the same was not challenged. Thus, the admitted facts of execution of Ex.A1 need not be proved as per Section 68 of the Evidence Act, an admission itself is the best evidence for the same. Further, it is contended that the defendants 1 and 3 who are the mother and grand father of the plaintiff ought to have examined to prove Ex.A1 and as the same is not done, adverse inference ought to have been drawn against the plaintiff. However, as stated earlier, the same execution of Ex.A1 is not challenged and as the same is admitted by the 2nd defendant, there is no scope to draw adverse inference against the plaintiff.

14.As far as Ex.B2 is concerned, the specific contention of the second defendant is that the plaintiff has not pleaded fraud in obtaining Ex.B2 and the plaintiff is not a necessary party in the suit for the specific performance and both the Courts below failed to consider Ex.B2 appropriately. However, the said contention is unsustainable. It is apparent that on the date of execution of Ex.B2, the 3rd defendant is not the owner of the suit property. In Ex.B2 Sale Deed in Para No.3 it has been stated as follows:-

"எனவே இந்த வழக்கில் ஏற்பட்ட தீர்ப்பாணையின்படி எதிர்வாதிகள் கிரயப்பத்திரம் எழுதி பதிவு செய்ய தவறியிருப்பதால் எதிர்வாதிகள் ஆன குச்சா கவுண்டர் குமாரர்கள் ஆன 1.கோவிந்தசாமி கவுண்டர், 2)கொளந்தை கவுண்டர் ஆகியோர் சார்பில் அந்நர் மாவட்ட உரிமையியல் நீதிபதியாகிய நான் இந்த கிரயப்பத்திரம் எழுதி கொடுக்கிறேன். "

The above said sale deed dated 14.08.1995 and on that date both the Govnidhasamy Gounder as well as Kolanthai Gounder are not the owners of the suit property. On that date, the plaintiff has become the owner of the property through Ex.A1. Therefore, to get binding adjudication, the plaintiff herein is the necessary party in the other suit. However, the 2nd defendant herein purposely failed to implead him in the other suit. In such circumstances, the Courts below have rightly discarded Ex.B2.

15.The next contention of the appellants/defendants is that both the Courts below without considering independently and without probing title and possession of the property decreed the suit. Admittedly, the suit property originally belonged to the 3rd defendant. The same is not disputed. The fact that the 3rd defendant executed Ex.A1 in favour of the plaintiff, it is also admitted by the 2nd defendant. Even before the second defendant get sale deed in his favour to claim title of the suit property, the plaintiff has become the owner of the property as per Ex.A1. When the second defendant filed a suit for specific performance, he ought to have been aware of the Ex.A1 Settlement Deed dated 17.11.1992 and ought to have impleaded the title holder, the plaintiff herein. However, he failed to do so. As such, the decree was obtained by him in O.S.No.14 of 1994 and the Ex.B2 sale deed executed by Court in favour of the second defendant is not binding on the plaintiff. Further, the Courts below have clearly held that the second defendant has failed to prove his title under Ex.B2, and the second defendant, pending the present suit, has sold away the portion of the property to defendants 4 and 5 under Ex.B13 and defendants 6 and 7 under Ex.B16. Pursuant to the said sale, the defendants 4 to 6 effected name transfer in the revenue records as per Ex.B14, B-17 and B-18. As the sale deed and transfer of name in the revenue records was effected pending suit, they are not binding upon the plaintiff. As such, the Courts below have categorically held that the plaintiff is having valid title over the property as per Ex.A1 and no title has passed to the second defendant. As on the date of Ex.B2 sale deed, the third defendant has not title over the property. Therefore, the Courts below have rightly held that the plaintiff is having valid title and he is entitled for the relief of declaration in respect of the suit property and recovery possession in respect of the 'B' schedule property is appropriate and it is not suffer from any infirmity.

16.Considering the above aspects, I am of the considered view that the appellants/defendants have not made out a case to

set aside the finding of the Courts below and substantial question of law raised in this appeal are answered against the appellants/defendants and in favour of the respondent/plaintiff. Accordingly, the second appeal is fails and the same is liable to be dismissed.

17.In the result, the second appeal is dismissed. No costs. The Judgment and decree dated 22.09.2011 made in A.S.No.4 of 2011 passed by the learned Subordinate Judge, Harur, and the Judgment and Decree dated 24.07.2003 made in O.S.No.69 of 1997 passed by District Munsif Court, Harur, are hereby confirmed. Consequently, connected M.P. is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

rrg

To

1.The Subordinate Judge,
Harur.

2.The District Munsif Court,
Harur.

3.The Section Officer, V.R.Section High Court, Madras.(2 copies)

+1 cc to M/s.V.Nicholas, Advocate, S.R.No.38964

+1 cc to M/s.J.Bharathiraja, Advocate, S.R.No.38865

GP (CO)
SSM(31/01/2019)

Judgment in
S.A.No.1476 of 2011

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