

Reserved on :08.04.2019
Pronounced on :15.04.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.1376 of 2010 &
M.P.No.1 of 2010

K.Narayanasamy ... Appellant/2nd Appellant/2nd Plaintiff

Vs

1. Mr.K.Thulasiraman
2. Mr.N.Boopathy
3. Mr.B.Devaraj
4. Mr.B.Thulasiraman
5. Ms.B.Kanimozhi

...1 to 5 Defendants/1 to 5 Respondents/
Respondent

6. Tamilnadu Housing Board
rep. by its Allottee Service Manager,
Arignar Anna Nagar Division,
Tamilnadu Housing Board,
Chennai - 600 040.

...6th Defendants/6th Respondent/Respondent

7. Ms.P.Saroja
8. Mr.K.Mohan @ Baskar
9. Mr.K.Sampath Kumar

[Respondents 7 to 9 are not necessary
parties, hence given up] ... Plaintiffs 1,3,4/Appellants
1,3,4/Respondent

Prayer :- Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 21.06.2010 passed in A.S.No.28 of 2008 on the file of the II Fast Track Court, (Additional District Judge) at Chennai confirming the judgment and decree dated 30.10.2007 passed in O.S.No.3127 of 2005 on the file of the V Assistant Judge, City Civil Court, Chennai - 104 and to set aside the same and decree the suit as prayed for.

For Appellant : Mr.S.Sadasharam

For Respondents: Mr.S.B.Faziuddin - R1
Mr.R.Jayaselan - R6
R2 to 5 & R7 to R9 Given up

JUDGMENT

Aggrieved over the concurrent finding of the Courts below in dismissing the suit filed by the plaintiff for partition, the second appeal has been filed.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The brief facts of the plaintiff case is as follows :

The suit property was allotted to the father of the plaintiff Krishnasamy on lease cum sale basis by the sixth defendant. He was employed in B & C Mill. He was regularly paying the lease amount. He retired from service on 13.06.1981. After his retirement, he settled the entire amount towards the allotment. The plaintiffs and the first defendant were living together as joint family. The father of the plaintiff died on 15.08.1998 leaving behind the plaintiffs, the first defendant, his deceased daughter Renuka, the deceased wife of the second defendant and the deceased mother of the defendants 3 to 5 as his legal heirs to succeed the estate of Krishnasamy, namely the suit property. The mother of the parties also died on 22.06.1987. The daughter of Krishnasamy died in May 2003 leaving behind the defendants 2 to 4. Before his death, the deceased Krishnasamy was making payments towards the monthly lease amount to the sixth defendant. The second plaintiff was employed in Government service and he has been helping his father in making contribution towards payment of the monthly lease amount to the sixth defendant. However, arrears were liable to be paid to the sixth defendant towards the amount due under the lease-cum-sale of the suit property. On 28.04.1992, a notice was sent by the sixth defendant in the name of the plaintiff's father to pay a sum of Rs.2,444/- towards arrears due under the lease cum sale transaction. During his life time, the deceased father of the plaintiffs had divided the suit property into four shares and allotted each such share to the plaintiffs 2 to 4 and also to the first defendant in an oral arrangement. When the plaintiffs' father died, it was the second plaintiff, who was able to meet all the expenditure towards conducting ceremonies on account of death of his father. It was only the second plaintiff who incurred all expenses towards conducting the marriage of the first defendant on 11.09.1991. Since all the plaintiffs got married it was not possible for all brothers to get accommodated in the suit property and therefore, the plaintiffs were able to find their

alternative accommodations out of the suit property and are living separately. Since there was no division of the property, the second plaintiff is the Kartha of the joint family. The first defendant approached the first plaintiff in May 1997 to give consent in writing for name transfer with respect of the suit in the records. However, the first defendant approached fourth plaintiff and obtained his signature in blank revenue stamp papers on the pretext of getting the records from the 6th defendant in the name of all the brothers. Taking advantage of the fact the plaintiffs are residing out of the suit property and misusing the blank papers where the signatures of the plaintiffs were obtained, got sale deed executed in his favour from the sixth defendant. Hence, the suit for partition of the suit property and to allot 4/6 share to the plaintiff.

4. The first defendant filed a written statement stating that his father was employed in B & C Mill at Chennai and as a labourer belonging to economically weaker section of the society, an extent of 800 sq.ft. was allotted to him in the year 1983. Thereafter, the rent payable to the house has been paid by the first defendant. He paid the rent from 1981 to 1991 till his demise. His eldest sister was given in marriage in the year 1968 and his second sister was married in the year 1974. The second plaintiff and the fourth plaintiff also left the house immediately after the demise of their father. The entire amount payable to the Tamilnadu Housing Board has been paid only by him. By Order dated 30.05.1999, the first defendant was allotted the suit property and he has also paid balance in respect of the sale transaction and obtained the sale deed dated 12.06.1998. Thereafter, he was paying taxes regularly and paying the dues payable to the Tamilnadu Housing Board in respect of the suit property. To change the ownership of the suit property in his name, all the plaintiffs and the defendants 2 to 5 are fully aware of the same and they have also communicated their willingness to execute the sale deed in his favour as he had paid all the dues payable in respect of the suit property. After transfer of house in his name, he has spent Rs.2,50,000/- for repairing, renovation and alteration works in the suit property. Hence, prayed for dismissal of the suit.

5. The second defendant filed a statement. According to him, only the second plaintiff has paid the entire dues. Therefore, she is also entitled for partition.

6. The trial Court framed the following issues :

1. Whether the plaintiffs are entitled for 4/6

share in the suit property as prayed for?

2. Whether the plaintiffs are entitled to get Rs.1200/- from the income of the suit property?

3. To what relief?

7. In the trial Court, on the side of the plaintiffs P.W.1 has been examined, Ex.A.1 to Ex.A.8 were marked. On the side of the defendants, D.W.1 has been examined and Ex.B.1 to Ex.B.14 marked.

8. The trial Court after analysing the entire evidence dismissed the suit. The first appellate Court also confirmed the finding of the trial Court. As against which the present Second Appeal has been filed.

9. Heard the learned counsel for the appellant and the learned counsel appearing for the respondents at the time of admitting this Second Appeal.

10. The learned counsel appearing for the appellants would contend that the property was originally allotted to the father of the plaintiffs under the lease cum sale agreement by the sixth respondent. The father of the parties namely Krishnasamy was paying the rent regularly. He retired from the service on 13.06.1988. After his retirement, he continued to pay the rent till his death and he has paid substantial part sale consideration. After his death, the second plaintiff has paid the remaining sale consideration as Kartha of the family, in the name of the father. Taking advantage of the fact that the first defendant is residing in the suit property, he has managed to get the sale deed in his favour. Hence, submitted that since the property was allotted to the father and substantial part of the amount has been paid by the father, the property is only a joint family property and all the legal heirs are entitled to share in the property. It is his further contention that on 28.04.1992, a sum of Rs.2,440/- arrears has been paid by the second plaintiff. The trial Court as well as the first appellate Court have not considered all these aspects and dismissed the suit on the ground that the property has been transferred in the name of the first defendant under Ex.B.6. It is his contention that after the death of the allottee, the property should be transferred to all the legal heirs and not to the single legal heir. Hence, submitted that the Courts below have not considered the facts properly.

11. The learned counsel appearing for the respondent submitted that the first defendant continued to live with the father. The original allotment was in favour of their father. After the death of the father, the sale consideration has been paid by the first defendant. Therefore, the property has been changed in the name of the first defendant as per the Government Order. The property itself has been allotted under the Government policy to grant property to the weaker section and the property can be transferred to the person in occupation of the property. Only in the above circumstances, the first defendant paid the entire sale consideration and the property has been transferred to his name under Ex.B.6. Further, it is his contention that the sale has not been challenged. Only if the sale is challenged, the plaintiff can claim any share in the property. The trial Court extensively considered the oral evidence as well as the documentary evidence of the parties and rightly dismissed the suit. The first appellate Court also appreciated the facts properly and confirmed the finding of the trial Court. Hence, prayed for dismissal of this Second appeal.

12. It is the case of the plaintiff that that he came to know about the transfer of the property in favour of the first defendant only in the year 1998. Whereas, P.W.1 in his evidence has stated that he came to know about the transfer in the year 1997. The property has been transferred in the name of the first defendant as per Government Order No.128 dated 24.03.1992 as per Ex.B.6. The said Government Order is also placed before this Court. A perusal of the above Government Order clearly indicate that the original lease of the property was given to the allottees who are economically weaker in the society. Thereafter, the Government Order has been passed and based on the Government Order, the original allottees or the person residing in the same house, the property has been transferred. Admittedly, the evidence of the parties clearly indicate that the first defendant was residing with the deceased.

13. The contention of the second plaintiff that he was paying the rents to the sixth defendant has not been established and no documents have been filed to that effect. His evidence also indicate that in the year 1997 itself there was a dispute over the suit property. That being the position, he has paid money through the first defendant to the sixth defendant is highly improbable and cannot be believed. The trial Court in fact has gone into those aspects. The first defendant has filed Ex.B.11 dated 03.06.1998 to show that he had made the payment to the sixth defendant. Similarly the third and fourth plaintiffs and the defendants 2 to 5 and the mother of the plaintiffs and

the defendants have also given no objection for transferring the property in the name of the first defendant. The third and fourth defendants have not come before the Court to disprove the contention of the first defendant that they have given no objection at the time of transferring the property in favour of the first defendant. The second plaintiff alone has not given no objection for transferring the property in the name of the first defendant. Originally, it was only a lease cum sale agreement and the same has been allotted to the father. He was continuously paying rent only. Thereafter, as per government Order No. 128, sale to be executed in favour of the original allottee of the lease cum sale agreement holder or the person who is in occupation of the property. The documents filed by the defendants clearly indicate that he has paid the sale consideration and thereafter, the sale deed has been executed by the 6th defendant in favour of the first defendant as per Government Order No.128.

14. It is to be noted that the property infact was originally allotted only on the basis of lease cum sale agreement. After the death of the father as per Government Order No.128, the sixth defendant has transferred the property in favour of the first defendant. Except the second plaintiff, the other plaintiffs have given no objection at the relevant point of time. The conduct of the second plaintiff in not objection the allotment from the date of allotment also clearly indicate that he has no objection in such allotment. The suit has been filed only in the year 2005 for mere partition. Admittedly, as per Government Order 128, the sale has been executed in favour of the first defendant in the year 1998. The above sale has not been challenged.

15. In this regard, Section 31 of the Specific Relief Act as follows :

"31. When cancellation may be ordered.—(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

"(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so

registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."

On a careful perusal of the above section makes it clear that any person against whom the written instrument is void or voidable, he has to seek declaration to avoid such document or cancel the document. But it has not been done so. Therefore, without avoiding such document, the plaintiffs cannot seek for partition. The sale deed filed by the first defendant also clearly indicate that the property was originally allotted to the original allottee on rent. Thereafter, it has been transferred to the first defendant on payment of Rs.9,600/- as sale consideration. The second plaintiff has not sought any cancellation. Except the second plaintiff, others have no objection in transferring the property and the second plaintiff also not objected the said document at the time of allotment. Now when the document itself has been executed on the basis of the Government Order No.128 on the ground that he was occupying the premises and the sale consideration also paid by him, without seeking cancellation of the document, mere partition cannot be maintainable. The trial Court and the first appellate Court factually found that the first defendant has paid the consideration and dismissed the suit. Hence, this Court does not find any substantial question of law arise in this Second appeal.

16. Accordingly, the Second Appeal is dismissed and the judgment and the decree of the Courts below are confirmed. Consequently, connected miscellaneous petition is closed. No cost.

Sd/-

Assistant Registrar (CCC)

//True copy//

Sub Assistant Registrar

vrc

To

1. The Additional District Judge,
Fast Track Court -II, Chennai.

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

3. The Section Officer,
High Court, Madras-104.

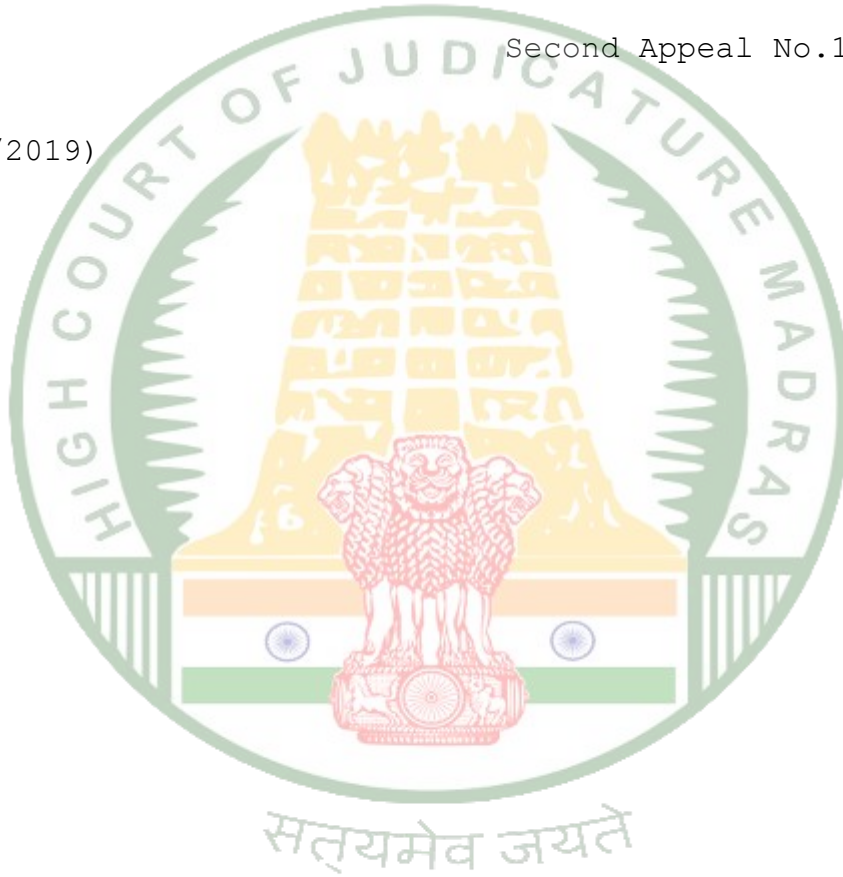
+1cc to Mr.S.B.Faziuddin, Advocate SR.No.37643

+1cc to Mr.S.Sadasharam, Advocate SR.No.37557

+1cc to Mr.R.Jayaselan , Advocate SR.No.37583

Second Appeal No.1376 of 2010

PP (CO)
GMY (22/08/2019)



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