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IN THE HIGH COURT OF JUDICATURE AT MADRAS

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THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.507 of 2012 &
M.P.No.1 of 2012

1. Ramesh
2. Ramanathan

... Appellants/Respondents/
Defendants

Vs

1. Mrs.P.Usharani
2. Mr.Kannan

... Respondents/Appellants/
Plaintiffs

Prayer :-

Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 31.01.2012 in A.S.No.10 of 2008 on the file of the Additional Subordinate Judge, Dharmapuri reversing the judgment and decree dated 11.12.2007 passed in O.S.No.9 of 2006 on the file of the District Munsif, Dharmapuri.

For Appellants : Mr.N.Manoharan

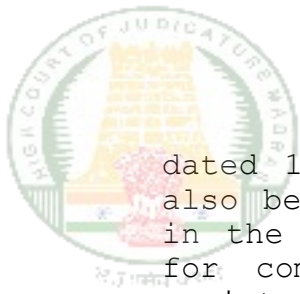
For Respondents : Mr.V.Ragavachari

JUDGMENT

Aggrieved over the judgment of the first appellate Court in reversing the decree and judgment of the trial Court dismissing the suit filed for declaration and permanent injunction, the second appeal has been filed.

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

3. It is the case of the plaintiffs that the suit property originally belong to one Rangasamy and his brother Duraisamy. Duraisamy sold a part of 'A' schedule property and 'B' schedule property to one Singarammal. After the demise of the said Singarammal, her son Rajendran and daughter Kondammal partitioned the properties. After the partition, the said Kondammal executed a Power of Attorney in favour of her son Ashok Kumar in respect of the suit properties and other properties. The said Ashok Kumar has executed sale agreement



dated 16.03.2001 and in pursuant to the same, a sale deed has also been executed. However, he did not execute the sale deed in the Registrar Office. Therefore the document was presented for compulsory registration. The Registrar has refused to register the document and an appeal has been filed against the same before the District Registrar on 23.06.2005. The Registrar has ordered compulsory registration of the document. It is the contention of the plaintiff that from 18.04.2001, they are in possession of the suit property. The defendants have no right in the suit property. It is the further contention of the plaintiffs that the plaintiffs had purchased to an extent of 0.59.0 hectares in the survey No.446/2, other survey number was improperly mentioned in the document. Whereas, the boundaries are given properly. Further, it is their contention that they purchased an extent of 1.45 Acres in 'A' schedule and another 53 cents in 'B' schedule. Hence, the suit for declaration and injunction.

4. The defendants denied the alleged sale deed in favour of the plaintiffs. They have also denied the agreement dated 16.03.2001. They also denied the compulsory registration. It is their case that one Kondammal is the mother-in-law of the first defendant. The first defendant married her daughter. It is their contention that the suit properties belong to one Singarammal maternal grandmother of one Arunadevi. Thereafter, Singarammal and Kondammal have given the property to Arunadevi as Sridhana. Ashokkumar brother of the first defendant acted against the defendant's wife with the help of their mother. Therefore, the said Arunadevi filed a suit in O.S.No.71 of 2009 on the file of the District Munsif and same is pending. On 16.04.2001, the second defendant also issued notice to the second plaintiff. Notice also issued to Sub Registrar with regard to the creation of encumbrance over the suit property on 21.01.2002. The said Kondammal also filed a suit in O.S.No.110 of 2001 on the file of District Munsif against the defendants. Hence, prayed for dismissal of the suit.

5. The trial Court framed the following issues :

1. Whether the suit has been acquired by the plaintiff?

2. Whether it is true that the suit properties have been given to the wife of the first defendant Aruna Devi as Sridhana?

3. Whether the first plaintiff is entitled for declaration in respect of the suit properties?

4. Whether the plaintiff is entitled for



declaration of 0.590 hectares in 'A' schedule property and the property in 'B' schedule property as prayed for?

5. Whether permanent injunction can be given against the defendant?

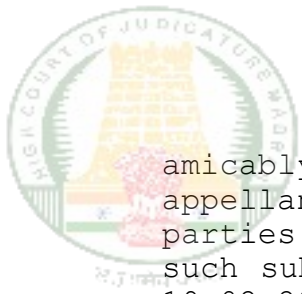
6. To what other relief, the plaintiffs are entitled?

6. In the trial Court, on the side of the plaintiffs P.W.1 to P.W.4 were examined, Ex.A.1 to Ex.A.7 were marked. On the side of the defendants, D.W.1 was examined and Ex.B.1 to Ex.B.8 were marked.

7. On appreciation of evidence, the trial Court has found that the plaintiff has not proved the case for declaration and injunction and dismissed the suit. As against which an appeal has been filed before the first appellate Court. Before the first appellate Court, an application under Order 41 Rule 27 has been filed by both sides. The application filed by the appellants was opposed by the respondents on the ground that the documents cannot be received in evidence. However, the first appellate Court received the documents filed by both sides and marked the documents filed by the appellants as Ex.A.5 to Ex.A.11 and the document filed by the respondents as Ex.B.9. The first appellate Court having received the document without recording any evidence and granting an opportunity to the parties, relying upon the above documents, decided the appeal and partly allowed the appeal by decreeing the suit as follows :

It is declared that the first plaintiff is the owner of the properties covered under the sale deed dated 18.04.2001. Consequently granted injunction restraining the defendants from interfering with the plaintiff's possession and enjoyment covered under Ex.A.3 and dismissed the suit with regard to the declaration in respect of 'A' schedule property in survey number 446/2 1.45 acres in total within 4 boundaries and the 'B' schedule property in S.F.No.448/1A. Aggrieved over the same, the present second appeal has been filed.

8. During hearing, this Court having found that there is a discrepancy in the description of properties in the sale deed, put the same to both the counsels and in fact both the counsels also fairly agreed such discrepancy and they tried to bring amicable settlement between both sides. When posted on 19.02.2009, it was suggested that the matter can be settled



amicably. At that stage, the learned counsel appearing for the appellants submitted that the matter is settled between the parties and the properties have to be demarcated, in view of such submission, the appeal has been adjourned to 19.02.2019. On 19.02.2019, the parties are directed to appear before this Court and the appeal has been adjourned to 22.02.2019. From 22.02.2019, it was adjourned for reporting settlement finally on 04.03.2019. On 04.03.2019, the appellant and the first respondent filed their respective sketches. Originally there was a proposal to leave 46 cents. Thereafter, it was agreed for 55 cents and finally, it is agreed before this Court for 77½ cents. Thereafter, the matter has been posted for recording compromise. On 18.04.2019 and the appellant and the second respondent were present and filed compromise memo and it is specifically stated that the first respondent will appear before this Court on 19.04.2019 to sign a compromise memo. On 19.04.2019, the first respondent appeared before this Court and said that she is not willing for compromise. Above procession recorded to show what transpired before this Court. Since the compromise did not materialise, this court proceeded to dispose the appeal on merits.

9. Mr.N.Manoharan, learned counsel appearing for the appellants submitted that the suit has been filed seeking declaration in respect of the entire 'A' and 'B' schedule properties. It is the specific case of the plaintiffs that they had purchased the above properties on the basis of the sale deed executed by the Power of Attorney of the vendor Kondammal. The contention of the plaintiffs that they are in possession of the property cannot be true at all. In fact the sale deed itself has been registered under compulsory registration. Therefore, their contention that the properties have been demarcated and handed over to them cannot be countenanced. In para 5 of the plaint, the plaintiffs have pleaded as if they had purchased 1.45 acres in Survey No.446/1. Whereas, Ex.A.3 indicate that only 46 cents were covered under Ex.A.3 in respect of Survey number 446/2. Hence, without identifying the properties and establishing clear title of the vendor, the first appellate Court allowing the appeal granting declaration in respect of the properties covered under Ex.A.3 is not valid. Further, it is their contention that the first appellate Court proceeded to dispose of the suit based on the additional documents without even affording any opportunity to the parties. Hence, the entire finding of the first appellate Court is not sustainable under law.

10. Whereas, Mr.V.Raghavachari, learned counsel appearing for the respondents submitted that under Ex.A.3 the plaintiffs have purchased the property. Though the plaintiffs have pleaded larger extent in Survey No.446/2, the first appellate Court has



rightly declared that Ex.A.3 sale deed as valid one and granted declaration in respect of the properties covered under Ex.A.3. Hence, it is his contention that the first appellate Court has rightly granted declaration of the property covered under Ex.A.3. Therefore, there is no confusion in the judgment of the first appellate Court. It is his further contention that the additional evidence though is given before the first appellate Court, the parties have not objected for receipt of the documents. Therefore, the first appellate Court has proceeded on the additional documents and allowed the appeal in part and hence, submitted that the finding of the first appellate Court does not require any interference.

11. The following substantial question of law have been formulated by this Court :

i) Whether the Additional Subordinate Judge was right in holding that the plaintiffs are in possession overlooking the stand of the defendants who to hve proved that they are in possession through Ex.B.3?

ii) Whether the Additional Subordinate Judge was right in accepting the case of the plaintiffs when it had come to the conclusion that the plaintiffs are claiming more than what was allegedly purchased by them and also overlooking the fraudulent nature of their claim?

iii) Whether the Additional Subordinate Judge had rightly applied the mandate of Section 52 of the Transfer of Property Act 1882 to the facts and circumstances of the case?

iv) Whether the Additional Subordinate Judge was right in granting relief of declaration solely on the basis of Ex.A.3 when it came to the conclusion that that there were discrepancies in he relief sought for by the plaintiffs coupled along with the lack of bonafides on their part?

In addition to that following question of law has been framed.

i) Whether the first appellate Court is right in deciding the appeal on the basis of the documents without affording any opportunity to parties to adduce any evidence as per law?

12. The suit has been filed for declaration in respect of 'A' and 'B' schedule properties. The plaintiffs laid the suit on the strength of the sale deed executed by the Power Agent of the vendor Kondammal on 13.08.2001. The pleading of the



plaintiffs clearly indicate that the Power of Attorney has not co-operated for registration. Therefore, Ex.A.3 sale deed has been originally presented for compulsory registration. At that time, the Registrar refused to register the document. Thereafter, it appears that an appeal has been filed before the District Registrar and the District Registrar by his Order dated 23.06.2005 issued a direction for registration of the document. The very pleading of the plaint indicate that the registration of the document has not been executed before the Registrar Office. However, the document came to be registered under compulsory registration under section 35 of the Registration Act. Be that as it may.

13. The plaintiffs have filed the suit on the strength of Ex.A.3 sale deed executed in their favour. The plaintiffs have purchased 46 cents out 1.45 acres in Survey No.446/1. Similarly, he had purchased another 24 cents in Survey No.447. In survey No.446/2, for 46 cents, boundaries have been given in Ex.A.3. Whereas, in respect of survey No.447 for an extent of 24 cents no boundaries whatsoever, shown in Ex.A.3. Similarly, he has also purchased 29 cents in survey No.448/1D with specific boundaries. Ex.A.3 title deed in favour of the plaintiffs clearly indicate that they have purchased three items of properties in various survey numbers. Whereas, the suit has been filed claiming an extent of 1.45 acres in survey No.446/2. It is the specific contention of the plaintiffs that a lesser extent has been mentioned in respect of survey No.446/2. Actually, they have purchased only 1.45 acres in the above survey number. Similarly, the 'B' schedule property instead of survey No.448/1A, it is mentioned as 448/1D in the description. The above mistakes also crept in the parent document. Whereas, his actual purchase is to an extent of 1.45 acres in Survey No.446/1 and entire 'B' schedule properties. The trial Court, taking note of the fact that the allegation of the plaintiffs has not been established and no parent title deeds have been filed, dismissed the entire suit.

14. The defendants have contended in the suit that the plaintiffs allegedly purchased the properties during the pendency of the suit and a legal notice also has been issued to the plaintiffs in respect of the suit filed by the wife of the first defendant. Besides, they have denied the execution of the sale deed Ex.A.3. Taking note of the above defence and that the plaintiffs have not described the suit properties properly, the trial Court has dismissed the suit. As against which an appeal has been filed by the plaintiffs. In the appeal, an application was taken out by the plaintiffs under Order 41 Rule 27 and filed previous title deeds of one Singarammal, who was the original



owner and also other documents in the respect of the suit property. The above documents were in fact opposed by the respondents on the ground that there is no valid reason to receive the documents. Similarly, the respondents also filed an application to receive the document, namely Power cancellation deed. The first appellate Court allowed both the applications and marked the documents filed by the appellants as Ex.A.8 to Ex.A.11 and marked Ex.B.9 on the side of the defendants. Admittedly, Ex.A.10 and Ex.A.11 are subsequent to the suit.

15. The first appellate Court considered the entire documents and allowed the appeal in part. In fact, the first appellate Court has in paragraph 26 gave a finding in respect of Section 52 of Transfer of Property Act. Admittedly, the suit in O.S.No.71 of 2001 was pending on the date of the alleged purchase by the plaintiffs. The first appellate Court based on the above document has come to the conclusion that the above suit itself is a collusive one and therefore, the sale in favour of the plaintiffs will not be affected and the principle of Section 52 of the Transfer of Property Act is not applicable to this case.

16. It is to be noted that without any evidence to prove the alleged sale deed, merely on the basis of some additional documents, the first appellate Court has arrived on such a finding, which in view of this Court is not sustainable in the eye of law. Similarly, without giving an opportunity to the parties, the first appellate Court allowed the appeal in part declaring Ex.A.3 sale deed as valid one. Whether the sale has been executed under compulsory registration and properly done or not has not been gone into by the first appellate Court. No doubt, the proceedings under section 35 of the Transfer of Property Act has not challenged by the defendants. Though they may be estopped from questioning now by passage of time, the first appellate Court ought to have seen the title to the property by giving an opportunity to the parties to prove through the documents. Whereas, the first appellate Court has not adopted the mandatory procedure and simply allowed the appeal which is contrary to the provisions of Order 41 Rule 28 and 29. Order 41 Rule 28 reads as follow :

"28. Mode of taking additional evidence

Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.



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Order 41 Rule 29 reads as follows :

29. Points to be defined and recorded

Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined and record on its proceedings the points so specified."

The above provision makes it clear that whenever additional evidence is produced, the appellate Court either take evidence or direct any other subordinate Court to take such evidence and send it to the appellate Court. Similarly, the appellate Court shall also specify the points to which the evidence is to be confined and record on its proceedings the points so specified. But the first appellate Court has not followed any such proceedings, but simply relied upon the documents. Mere marking of the document is not a proof of the document. The documents have to be proved in the manner known to law. However, the first appellate Court having found that the plaintiffs are the owner of 'A' and 'B' schedule properties as per Ex.A.3, in clause II of the judgment in paragraph 43 dismissed the suit in respect of entire 'A' schedule property and also 'B' schedule property. The judgment is also contradictory to clause -II. Hence, this Court is of the view that the judgment of the first appellate Court is liable to be set aside and the substantial questions of law are answered in favour of the appellants.

17. Accordingly, this Second Appeal is allowed and the judgment of the first appellate Court is set aside and the matter is remanded back to the first appellate Court for giving opportunity to the parties to adduce evidence in respect of the additional documents received by the first appellate Court. Thereafter, frame necessary point for consideration and hear the appeal afresh and dispose of the appeal within a period of six months from the date of receipt of a copy of this Order. Consequently, connected miscellaneous petition is closed. No cost.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vrc



To

1. The Additional Subordinate Judge,
Dharmapuri.

2. The District Munsif,
Dharmapuri.

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

+1cc to Mr.V.Ragavachari, Advocate, S.R.No.37237

+1cc to Mr.N.Manoharan, Advocate, S.R.No.37514

Second Appeal No.507 of 2012

RR(CO)
CS/08/01/2020