

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.03.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.R.P.No.194 of 2016
and
C.M.P.No.1726 of 2016

1.M.Nagendra
2.M.Kasamma

...Petitioners/Defendants
Petitioners

Vs

1.Karra Bhammaiah
2.Annapoorna
3.Lavanya
4.Devi
5.Badhrinath
6.Prameela
7.Deepa
8.Hari Krishna

...Respondents/Plaintiffs
/Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 14.09.2015 passed by the learned IV Assistant Judge, City Civil Court, Chennai, in I.A.No.11487 of 2014 in O.S.No.2309 of 2013.

For Petitioners : Mr.T. Sundar Rajan

For Respondents: Ms. Kokilavani

ORDER

The above Civil Revision Petition is filed challenging the dismissal of the petition filed under Order VII Rule 11(d) read with 151 of the Code of Civil Procedure and Order II Rule 2 of the Code of Civil Procedure, to reject the Plaint in O.S.No.2309 of 2013 filed by the respondents herein.

2.The brief facts before venturing into discussing the order under revision are as follows:

The respondents herein had originally filed a suit O.S.No.10191 of 2009 for the following reliefs:

(a)for declaration to declare that the Sale Deed executed by the 1st defendant on 21.04.2009 in favour of the 2nd defendant vide Document No.420 of 2009 at Sub Registrar Office, Sowcarpet, Chennai, based on alleged power of attorney from the plaintiff on 01.08.2004 in favour of 2nd defendant is null and void.

As no such power has been executed in favour of the 1st defendant by the plaintiff and consequently, seeking for delivery of possession of the suit property from the defendants by the plaintiff,

(b)for permanent injunction restraining the defendants their men or agent or servants or anyone acting under them in dealing with the suit property in any manner by way of sale, lease or any mode of encumbrance over the suit schedule mentioned property,

(c)for damages at the rate of Rs.20,000/- per month commencing from June 2009 to till delivery of possession of the suit property obtained from the defendants,

(d)to declare that the alleged power of attorney dated 01.08.2004 alleged to have been executed by the plaintiffs in favour of the 1st defendant is a sham document and no such authority has been given to the

1st defendant to have such power,

(e)for mandatory direction directing the defendants to return all the originals such as, (1)parent document of Sale Deed executed by Rodda Pedda Venkatsamy and Rodda Chinna Venkatasamy (2)Settlement Deed dated 05.05.1980 vide Document No.281/1980 executed by Karra Ragavalu alias to Karra Ragaiah in favour of 1st plaintiff to the 1st plaintiff in respect of suit schedule mentioned property and for costs."

3.This suit was contested tooth and nail and the defence which was taken by the respondents was that they had only mortgaged the property and the mortgagor is entitled to receive the rents. It is also the case of the respondents that the revision petitioners and the defendants has misused the blank papers signed by the plaintiffs and prepared an unregistered Power of attorney. Based on which, the Sale Deed dated 05.05.1980 was

executed by the 1st defendant in favour of the second defendant. In the said suit, two issues are relevant for disposing of the present revision.

4.Issue No.1 is as follows:

"1.Whether the plaintiff is entitled for an order of declaration declaring that the Sale Deed executed by first defendant on 21.04.2009 in favour of the second defendant vide document No.420/2009 at Sub Registrar Office, Sowcarpet, Chennai, is null and void."

5.Issue No.5 is as follows:

"5.Whether the plaintiff had received the sale value of the property from the first defendant and entered into an Agreement of Sale dated 29.07.2004 received an advance amount of Rs.1,00,000/- and thereafter balance sum of Rs.2,10,000/- on

10.08.2004 and execute receipt towards the same and also executed General Power of Attorney dated 29.07.2004?”

6.While considering the Issue No.1, the learned VI Assistant Judge, City Civil Court, Chennai, has stated that the plaintiffs therein who are the respondents herein though had come forward with the case that the money received by them was only a loan and that they orally mortgaged the property, however, it is seen that on the basis of the Power of Attorney, a Sale Agreement has been executed and the plaintiffs had only intended to sell the property. Therefore, the case of the plaintiffs that it was a mortgage and not a sale was found against them. However, the learned Judge has proceeded to decree the suit only with reference to first relief namely, to declare the Sale Deed executed by the 1st defendant in favour of the 2nd defendant as null and void. The suit decree was taken on appeal in A.S.No.373 of 2012 on the file of the learned XVIII Additional Judge, City Civil Court,

Chennai, by the revision petitioners herein. The learned Judge reversed the Judgment and Decree of the trial Court and allowed the appeal and set aside the Judgment and Decree passed in O.S.No.10191 of 2009, whereby the Court below has upheld the Sale Deed executed by the 1st respondent in favour of the 2nd respondent.

7.It is informed that the said Judgment and Decree is the subject matter of this appeal in S.A.No.340 of 2014. In the meanwhile, after the Judgment in suit O.S.No.10191 of 2009 by the learned VI Assistant Judge, City Civil Court, Chennai, the plaintiffs, the respondents herein have come forward with the present suit which is the subject matter before this Court, namely, O.S.No.2309 of 2013 for the following relief:

“(a)Direct the first defendant to redeem the mortgage by receiving the mortgage loan amount of Rs.3,40,000/- from the plaintiffs.

(b)Direct the first defendant to return all the

original documents pertaining to the suit property which were handed over by the first plaintiff at the time of the mortgage.

(c)Direct the defendants to deliver the vacant possession of the suit property to the plaintiffs.

(d)Permanent injunction restraining the 2nd defendant from altering the suit property."

8.In the said suit, they have once again reiterated their claim that they had executed a mortgage in favour of the defendants and not a Sale. On receiving summons in the above suit, the revision petitioners/defendants have taken out an application under Order VII Rule 11(d) read with Section 151 and Order II Rule 2 of the Code of Civil Procedure on the following grounds:

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(1)The basis on which that the suit is barred by res judicata.

(2) It is barred by Order II Rule 2 of the Code of Civil Procedure and the issue was agitated in the earlier suit O.S.No.10191 of 2009 is once again sought to be agitated in the present suit.

9. The said application was opposed by the plaintiffs inter alia contending that in the Judgment in O.S.No.10191 of 2009, a window was opened to the defendants to get back their property and the original documents on payment of Rs.3,40,000/- and therefore, they are only exercising the right granted under the said Judgment. They would further contend that the earlier suit is pending disposal of S.A.No.340 of 2014. They would further argue that the revision petitioners have filed their Written statement and after issues have been framed and posted for trial the revision petitioners have come forward with the present application. He would further contend that they are ready to pay the amount borrowed by them to show their bonafides, a sum of Rs.3,40,000/- was deposited to the credit of this Court in

I.A.No.3197 of 2014. Therefore, the plaintiffs would contend that their suit was very much maintainable and should not be rejected at the threshold.

10.The learned IV Assistant Judge, City Civil Court, Chennai, before whom the matter is pending, had by his order dated 14.09.2015, dismissed the application filed by the defendants. The reason for rejecting the contention of the defendants was that the question of *res judicata* under Order II Rule 2 is a mixed question of fact and law which has to be decided in the trial. With the above observation, the application was dismissed. Challenging the same, the revision petitioners are before this Court.

11.Mr.T. Sundar Rajan, learned counsel appearing for the revision petitioners would contend that the earlier application was also argued on the ground that the money that was received by the plaintiffs was only towards a mortgage loan and they never

intended to sell the property. The very same plea is once again reiterated in the present suit. The learned counsel would argue that this itself is a clear case of the subsequent suit being hit by the provisions of Order II Rule 2 of the Code of Civil Procedure. When the plaintiffs have filed the earlier suit O.S.No.10191 of 2009, their remedy to get mortgage "if it was sold" had opened and the defendants ought to have filed for redeeming the mortgage. Instead of doing so, they have merely filed a suit for declaring the Sale Deed that has been executed by the 1st defendant in favour of the defendants is only fraud and for other reliefs. He would further argue that now the Judgment and Decree in O.S.No.10191 of 2009 has been reversed in the First Appeal where the Court has clearly held that the Sale Deed executed by the 1st defendant in favour of the 2nd defendant is a valid document. He would further argue that the arrangement between the defendants and the plaintiffs was not a mortgage Deed but only an Agreement of Sale and the same had not been challenged by the plaintiffs in the earlier suit.

12.No doubt in S.A.No.340 of 2014, it is now challenged, however, the finding was not challenged in the First Appeal. Therefore, the present suit for redemption is barred not only by the principles of *res judicata* but also on the ground of the same being barred under the provisions of order II Rule 2 of the Code of Civil Procedure. The Court below has not considered this aspect and has simply relegated the issue to trial.

13.In an application for rejecting the Plaint what has to be considered is the Plaint and the documents filed therewith. In the suit O.S.No.2309 of 2013, the plaintiffs have made the very same averment which has been made in the earlier suit. The second suit is based upon the *obiter* contained in the Judgment in O.S.No.10191 of 2009 that the choice is left to the plaintiff to get back the property and the original documents from the 1st defendant on payment of Rs.3,40,000/-. As stated earlier, this findings has been overturned in A.S.No.373 of 2012. In fact, the

very cause of action for filing the present suit is only the Judgment in O.S.No.10191 of 2009. These factors have not been considered by the learned IV Assistant Judge, City Civil Court, Chennai. The order suffers from infirmity and non application of mind on the part of the learned Judge and consequently, this Civil Revision Petition is allowed. The Plaint in O.S.No.2309 of 2013 is rejected. No costs. Consequently, connected Miscellaneous Petition is closed.

29.03.2019

Index : Yes/No
Internet : Yes/No
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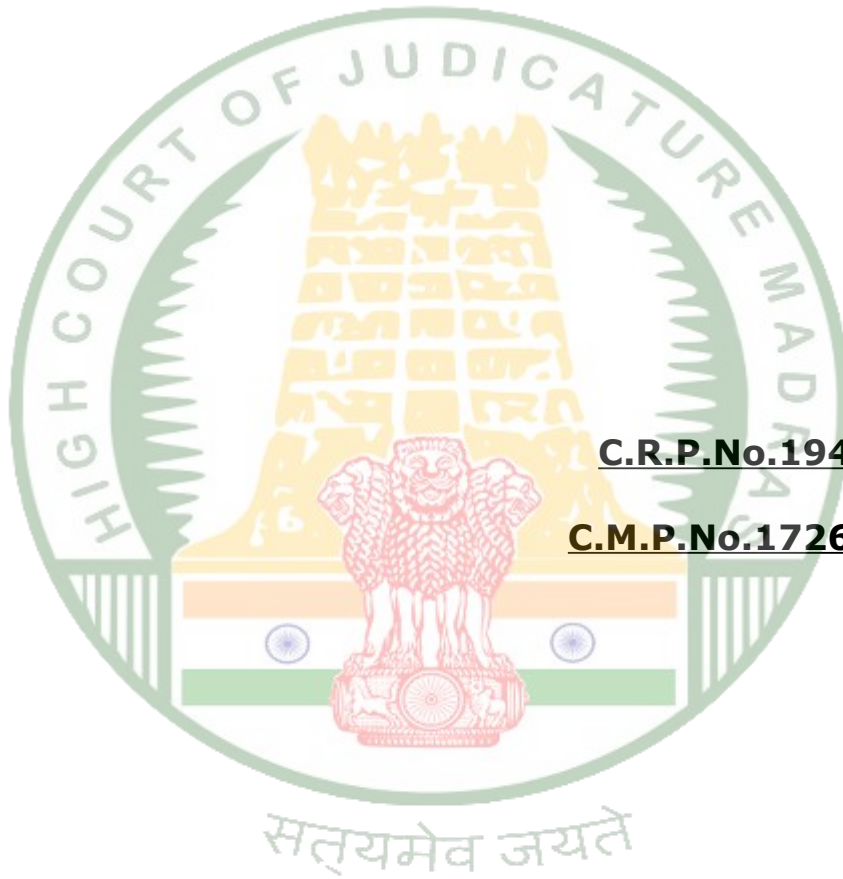
To

The IV Assistant Judge,
City Civil Court,
Chennai.

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P.T. ASHA, J,

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