

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.09.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.397 of 2014
and
C.M.P.No.14872 of 2019

1.D.Vimala ..1st Appellant/3rd Respondent/3rd Defendant
2.G.Prema ..2nd Appellant/4th Respondent/4th Defendant

Vs.

1.C.Janardhanan ..1st Respondent/Appellant/Plaintiff
2.D.Soloman ..2nd Respondent/1st Respondent/1st Defendant
3.D.Jones Inbakumar ..3rd Respondent/2nd Respondent/2nd Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 25.04.2012 made in A.S.No.10 of 2012 on the file of the I Additional District and Sessions Judge, Vellore reversing the judgment and decree dated 19.10.2010 made in O.S.No.138 of 2003 on the file of the Subordinate Court, Vellore and prays to set aside the same.

For Appellants : Mr.D.Pradeep Kumar
 for Mr.T.Dhanyakumar

For Respondents : Mr.S.R.Raghunathan for R1

J U D G M E N T

The defendants 3 and 4 in O.S.No.138 of 2003 are the appellants. The said suit was filed by the 1st respondent herein seeking declaration of his title and recovery of possession.

2. The case of the plaintiff is that the suit property originally belonged to Ramasamy Gounder and Unnamalai. They had executed a power of attorney in favour of the 2nd defendant Jones Inbakumar on 04.04.1998 authorizing him to deal with the property. Acting under the said power of attorney the 2nd defendant had sold the property to the plaintiff under the registered sale deed dated 31.08.2001.

3. The defendants 1, 3 and 4 who are the brother and sisters of the power of attorney agent viz., 2nd defendant, were in possession of the property. The 1st defendant executed an agreement agreeing to vacate and hand over possession of the property to the plaintiff within a period of 3 months on 31.08.2001. Since the defendants did not vacate and deliver vacant possession as agreed to by them and the defendants 3 and 4 claimed hostile title setting up an agreement of sale, the plaintiff had come forward with the above suit seeking the reliefs stated supra.

4. The suit was resisted by the defendants 1 and 2. Separate written statements were filed claiming that the sale deed dated 31.08.2001 was not executed by the 2nd defendant and it is a forged document. It was also claimed that the 2nd defendant had entered into an agreement of sale with the defendants 3 and 4 on 05.01.2001 agreeing to convey the property for a consideration of Rs.7,00,000/- and the defendants 3 and 4 were put in possession since they had paid the entire sale consideration by 12.07.2001.

5. The defendants 3 and 4 filed a separate written statement claiming that the sale deed dated 31.08.2001 was obtained by misrepresentation and undue influence from the 2nd defendant. It was further claimed that as per agreement dated 05.01.2001, they have been put in possession upon payment of sale consideration and they have 3 years period from 05.01.2001 to seek specific performance of the said agreement.

6. Not stopping with defending the suit filed by the plaintiff, the defendants 3 and 4 filed an independent suit for injunction restraining the plaintiff herein from interfering with their possession of the suit property. The suit that was filed as O.S.No.22 of 2003, was transferred to the Subordinate Court Vellore and renumbered as O.S.No.35 of 2007. Both the suits were tried jointly.

7. At trial, certain evidence was produced before the trial court to demonstrate that the plaintiff in O.S.No.138 of 2003 had sold the property to one Kalaiselvi on 13.12.2002 and had subsequently cancelled the said sale deed on 13.01.2003. The encumbrance certificate evidencing such transfers was filed as Ex.B1.

8. The trial court upon consideration of the evidence on record came to the conclusion that the plaintiff in O.S.No.138 of 2003 had not proved his title. The trial court pointed out that there is a difference in extent of property sold under Ex.A1 sale deed and the power of attorney Ex.A9. Though the plaintiff had produced Ex.A15, the signature and the

thumb impression of the vendor under Ex.A1 maintained by the Sub-Registrar through official witness PW4, the trial court rejected the document on the ground that it does not contain the name of the 2nd defendant. Upon the said conclusion the trial court found that the plaintiff in O.S.No.138 of 2003 has not proved the due execution of Ex.A1 sale deed dated 31.08.2001.

9. On the suit for injunction the trial court found that the agreement set up by the plaintiffs in O.S.No.35 of 2007 is false and in any event they would only be entitled to seek specific performance and not the relief of permanent injunction. On the said findings the trial court dismissed both the suits in O.S.No.138 of 2003 and O.S.No.35 of 2007.

10. Aggrieved the plaintiff in O.S.No.138 of 2003 filed an appeal in A.S.No.10 of 2012. The decree in O.S.No.35 of 2007 was left unchallenged. The learned appellate Judge upon reconsideration of the evidence concluded that the trial court had erred in its finding that the sale deed dated 31.08.2001 was not proved. The lower appellate court faulted the trial court for concluding that the sale deed is invalid because of the difference in the extent of the property in the power of attorney and the sale deed.

11. The lower appellate court rightly observed that if there is any difference in the extent, it is for the owners viz., Ramasamy Gounder and Unnamalai to have taken up the matter. Similarly, on the question of sale in favour of Kalaiselvi and its cancellation also the learned appellate Judge found that it is the matter between the plaintiff and the purchaser viz., Kalaiselvi and the defendants cannot seek to invalidate the plaintiff's title or to question the capacity of the plaintiff to maintain the suit. On the aforesaid findings, the learned appellate Judge allowed the appeal in A.S.No.10 of 2012 and decreed the suit in O.S.No.138 of 2000 as prayed for. Aggrieved the defendants 3 and 4 are on appeal.

12. The following questions of law were framed at the time of admission:

1. Whether the appellate court is right in concluding that Ex.A1 Sale deed is genuine document, since the extent of land is rectified, when specifically not rectified in POA and parent document?

2. Whether the Appellate court is right in holding that plaintiff has legal right and title right since Kalaiselvi is not a party to the suit?

13. On 20.03.2019 the following additional question of law has been framed:

Whether the second appeal is barred by the principle of resjudicata, on the ground that the decree passed in O.S.No.35 of 2007 filed by the appellant has not been challenged by filing appeal?

14. I have heard Mr.D.Pradeep Kumar, learned counsel appearing for Mr.T.Dhanyakumar for the appellants and Mr.S.R.Raghunathan, learned counsel appearing for the respondents.

15. Mr.D.Pradeep Kumar, learned counsel appearing for the appellants would vehemently contend that the plaintiff has not proved the execution of Ex.A1 sale deed. Even assuming that Ex.A1 sale deed had been proved, the plaintiff having parted with title on 13.12.2002 as evidenced by Ex.B1 encumbrance certificate the plaintiff is not entitled to maintain the present suit. Therefore, according to him, the lower appellate court was not right in decreeing the suit.

16. The learned counsel would also contend that the lower appellate court was not right in upholding the sale on the conclusion that the mistakes in the power of attorney had been rectified in the sale deed in the absence of any rectification deed rectifying the power of attorney document. Therefore, according to him both the questions of law framed must be answered in favour of the appellants.

17. Contending contra Mr.S.R.Raghunathan, learned counsel appearing for the 1st respondent/ plaintiff in O.S.No.138 of 2003 would submit that if there is a difference in the extent of property sold by the power agent, the right to question the same is available only to the original owners and not to the person who claims possession under an agreement of sale which has been found to be invalid.

18. He would also draw my attention to the measurements found in Ex.A9 power of attorney executed by Ramasamy Gounder and Unnamalai in favour of the 2nd defendant and the sale deed dated 31.08.2001 executed by the 2nd defendant in favour of the plaintiff. Pointing out the fact that the measurements are same in both the documents, the mistake in calculation need not have a separate rectification deed. Therefore, according to the counsel what has been conveyed in Ex.A1 sale deed is the property that was authorized to be conveyed under Ex.A9 power of attorney. Merely because there is a difference in calculation of the extent will not invalidate Ex.A1 sale deed. He would also point out that the extent

mentioned in Ex.B2 agreement entered into by the defendants 3 and 4 in O.S.No.138 of 2003 with the 2nd defendant is also the same 4029 ½ sq.ft and not 3915 sq.ft.

19. Pointing out the evidence, Mr.S.R.Raghunathan, learned counsel would submit that conveyance of extra extent is only a boogie created by the defendants 3 and 4 in order to enable them to stick on to their illegal possession. A perusal of the document would justify the contention of Mr.S.R.Raghunathan on the facts relating to execution of Ex.A1 sale deed. As regards the extent of house Mr. S.R.Raghunathan would also draw my attention to the description of the property in Ex.A9 power of attorney, wherein it is very clearly stated that ,தன் மத்தியில் பஞ்சாயத்து டோர் எண்.15 போட்ட தார்க் மெத்தை மாடி வீடானது. According to him, the above recital would show that the power of attorney included the house also. A perusal of the documents would show that the above contention of Mr.S.R.Raghunathan is fully justified. Ex.A9 power of attorney dated 04.04.1997 gives the measurement of the property as follows:-

East West on the North 36 ft, East West on the South 35 ft., North South on the East 114 ft., North South on the West 113 ft. The total extent in sq.ft has been given as 3915 ¾.

20. The measurement of property as per Ex.A1 sale deed in favour of the plaintiff in O.S.No.138 of 2003 is as follows:-

East West on the North 36 ft., East West on the South 35 ft., North South on the East 114 ft., North South on the West 113 ft. Total extent is given as 4029 ¼ sq.ft.

21. In the description of the property in agreement of sale viz., Ex.B2 said to have been executed by the 2nd defendant in favour of the defendants 3 and 4 the measurements are given as follows:-

East West on the North 36 ft., East West on the South 35 ft., North South on the East 114 ft., North South on the West 113 ft. and the total extent of sq. ft is given as 4029 ¾.

22. This would clearly demonstrate that the claim that there is a difference in the extent or that the power agent attempted to sell larger extent than what he was empowered to has been made by the defendants 3 and 4, as already stated, only with a view to continue with their illegal possession of the property.

23. The trial court in O.S.No.35 of 2007 has held that the defendants 3 and 4 as plaintiffs therein are not entitled to a permanent injunction restraining the plaintiff in O.S.No.138 of 2003 from interfering with their possession. In the course of that judgment, the trial court had held that the agreement Ex.B1 was not proved in accordance with law. Hence, the

validity or otherwise of the Ex.B1 agreement need not be gone into in the present suit. Once the plaintiffs title is declared, he will be entitled to possession automatically since the defendants 3 and 4 have not challenged the decree dismissing their suit in O.S.No.35 of 2007.

24. I therefore find that the conclusion of the lower appellate court on the validity of the sale deed dated 31.08.2001 is based on correct appreciation of evidence and it is a factual determination with which I do not think that I can interfere with, sitting in a Second Appeal. Therefore, the 1st question of law is answered against the appellants.

25. On the 2nd question of law, Mr.D.Pradeed Kumar, learned counsel appearing for the appellants would vehemently contend that the plaintiff having sold the property on 13.12.2002 is not entitled to maintain the present suit for declaration and recovery of possession.

26. This plea relating to sale of the property was not raised in the written statement filed by the defendants or no additional written statement was filed by the defendants raising the said issue. However, evidence in the form of encumbrance certificate viz., Ex.B1 was projected in the cross-examination of PW1. Of course, the encumbrance certificate shows that the plaintiff in O.S.No.138 of 2003 has sold the property on 13.12.2002 to one Kalaiselvi and the said sale has been cancelled on 13.01.2003. There is no evidence as to whether the said cancellation is a unilateral cancellation so as to make it invalid.

27. Even otherwise the plaintiff has a right to maintain the suit as a vendor who has covenanted perfect title and possession to his purchaser. Any vendor is under obligation to ensure that the purchaser gets an absolute title and possession of the property. A vendor alienating immovable property free of encumbrances is bound to resolve any issue regarding title and possession at his own expense. This is what is generally called as covenant of title which is incorporated in all the sale deeds, whereby the vendor declares that there are no encumbrance and he shall at his own expense remove any encumbrance that may be found in future also.

28. Even assuming the sale deed dated 13.12.2002 is true and the cancellation dated 13.01.2003 will not affect the validity of the said sale deed, the plaintiff as a vendor is well within his rights to sue for possession in order to discharge his obligation under the sale deed. I therefore do not find that the plaintiff can be said to be barred from instituting the suit for having sold the property to a third

party. Therefore the 2nd question of law is also answered against the appellants and in favour of the 1st respondent.

29. On the question of resjudicata, I am of the prima facie opinion that the dismissal of the suit in O.S.No.35 of 2007 will not amount to resjudicata. However, I do not think there is a need to answer the said question, since I have found the other questions of law framed in the appeal against the appellants.

30. In fine the Second Appeal fails and it is dismissed with costs throughout. The judgment and decree of the lower appellate court will stand confirmed.

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31. This petition has been filed to receive the documents viz., sale deed dated 13.12.2002 and the cancellation deed dated 13.01.2003. In view of the disposal of the appeal for the reasons given in the judgment S.A.No.397 of 2014, I find that these documents are wholly unnecessary for deciding the appeal. Hence, the Civil Miscellaneous Petition is dismissed. No costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

dsa

To

1. The learned I Additional District and Sessions Judge,
Vellore.

2. The learned Subordinate Court, Vellore.

3. The Section officer
VR Section
High Court, Madras 104.

+1 CC to Mr.S.R.Raghunathan, Advocate sr 83436

+2 Ccs to Mr.T.Dhanyakumar, Advocate sr 84220 & 83746.

S.A.No.397 of 2014

VBA(CO)
SP(15/07/2020)