

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved Date :30.09.2019

Pronounced Date :19.05.2020

Coram:

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

S.A.No.1109 of 2005
and
CMP.No.15223 of 2005

Angalammal ... Appellant/Respondent/Plaintiff

Vs.

1. T.V.Nagappa Mudaliar (Died)
2. N. Anandan
3. N. Annamalai

[R2 and R3 are recorded as LRs of the deceased viz Nagappa Mudaliar vide order of Court dated 20.09.2019 made in S.A.No.1109 of 2005 as per memo dated 20.09.2019] ... Respondents/Appellants/Defendants

PRAYER: This Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree dated 14.10.2003 in A.S.No.130 of 2001 passed by the Sub Court, Thiruvallur, reversing the Judgment and Decree dated 17.11.2000 in O.S.No.178 of 1992 passed by the District Munsif Court, Thiruttani.

For Appellant : Mr.N. Subbarayalu

For Respondents : Mr.Mr.A. Muthukumar

JUDGMENT

This Second Appeal has been filed by the plaintiff against the judgment and decree passed by the learned Sub Judge Thiruvallur,

in A.S.No.130 of 2001 dated 14.10.2003 reversing the judgment and decree passed by the learned District Munsif, Thiruttani, in O.S.No.178 of 1992 dated 17.11.2000.

2. The appellant herein had filed a suit in O.S.No.178 of 1992 on the file of the District Munsif, Thiruttani, for

delivery of possession of the suit property and for recovery of arrears of rent of Rs.108/-. The learned District Munsif, Thiruttani, by the judgment dated 17.11.2000 had decreed the suit as prayed for with cost.

3. Aggrieved by the same, the defendants had filed an appeal in A.S.No.130 of 2001 on the file of the Sub Judge, Thiruvallur. The learned Sub-Judge, by the judgment and decree dated 14.10.2003 had allowed the said appeal with cost and set aside the judgment and decree passed by the Trial Court and dismissed the suit with cost.

4. Feeling aggrieved by the aforesaid judgment and decree of the First Appellate Court, the plaintiff has filed the present second appeal.

5. For the sake of convenience, the parties are referred to as described before the Trial Court.

6. The averments made in the plaint are in brief as follows:-

The plaintiff is the absolute owner of the suit property by virtue of a registered sale deed dated 24.08.1963. She took possession of the suit property on the date of purchase itself. Subsequently, on 26.08.1963, the first defendant who is the brother of the plaintiff's husband, has taken the suit property for lease from the plaintiff for monthly rent of Rs.3/- and executed a registered lease deed. As per the said lease deed, the lease was granted till 25.08.1968. After expiry of the said lease period, the first defendant should surrender possession of the suit property whenever demands made by the plaintiff. The first defendant had failed and neglected to pay the rent for the past three years and hence, a notice was issued on 06.03.1992 calling upon the first defendant to surrender possession of the suit property. The first defendant had received the said notice and sent a reply notice on 11.03.1992 with false allegations. But, he refused to surrender possession of the suit property. Further, the first defendant causing damage to the suit property and acting adverse to the interest of the plaintiff. The suit property is required to the plaintiff for the personal occupation. Hence, the plaintiff was constrained to file the above suit for eviction and for recovery of rent from 01.04.1989 to 31.03.1992. Subsequently, the defendants 2 and 3 who are the sons of the first defendant also claimed certain interest in the suit property and hence, they were added as defendants 2 and 3.

7. The averments made in the written statement filed by the first defendant are in brief as follows:-

It is false to state that the plaintiff had purchased

the suit property for a valid consideration and that she was put in possession of the same. It is also false to state that on 26.08.1963, the plaintiff had leased out the suit property to the first defendant. It is also false to state that the first defendant had failed and neglected to pay the rent for three years and he is causing damage to the suit property. The real fact is that the plaintiff is the wife of the first defendant's elder brother. The first defendant is the youngest brother of one Velappa Mudali and Subramani Mudali. The said Velappa Mudali being the eldest brother of the said family, he managed the joint family till his death. After his death, the plaintiff's husband Subramani Mudali was managing the joint family. In the year 1963, the joint family indebted to many persons in the village and the said family had no capacity to discharge the debts. Hence, there was a move to knock out the suit property by creditors for the debts. Hence, the said Subramani Mudali had executed a sham and nominal sale deed along with the first defendant and widow of Velappa Mudali in the name of the plaintiff who is the wife of the said Subramani Mudali and also a member of the said house. Under the aforesaid circumstances only, the sale deed was created in the name of the plaintiff without any consideration. Hence, the said sale deed is not valid and not binding on the defendants. Further at the time of execution of sale deed, the family has got only the suit house. Hence, to make the creditors to believe, the first defendant was forced to put his signatures on blank paper which was subsequently created as lease agreement and thus the first defendant was never a tenant under the plaintiff and hence, he is not liable to pay any rent to the plaintiff as alleged. Thus, the plaintiff's title to the suit house is denied by the first defendant. The first defendant has been in possession and enjoyment of the suit house even before the sale deed dated 24.08.1963 and thus he perfected his title by adverse possession also. The plaintiff was never in possession of the suit house at any point of time. Therefore, the first defendant prayed to dismiss the suit.

8. The averments made in the written statement filed by the third defendant and adopted by the second defendant are in brief as follows:-

The defendants 2 and 3 are denying the allegation that the plaintiff had purchased the suit property for valid consideration. One Valliappa Mudaliar had three sons namely Velappa Mudaliar, Subramani Mudaliar and Nagappa Mudaliar (D1). The defendants 2 and 3 are the sons of the first defendant. The plaintiff is the wife of Subramani Mudaliar who is the younger brother of the first defendant. The defendants 1 to 3 are residing in the suit property even before the execution of the alleged sale deed. The alleged sale deed is a sham and nominal document and it was not acted upon. The defendants 1 to 3 had

mortgaged the suit property on 19.04.1990 in favour of one Muniappa Mudaliar and subsequently, the same was redeemed on 05.12.1994. The defendants are in possession of the suit property for more than the statutory period without any interruption and hence, they perfected title by adverse possession also. Therefore, the defendants 2 and 3 prayed to dismiss the suit.

9. Based on the aforesaid pleadings, the learned District Munsif, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff's husband was examined as P.W.1 and two more witnesses were examined as P.W.2 and P.W.3 and 5 documents were marked as Exs.A1 to A5. On the side of the defendants, the first defendant was examined as D.W.1 and the second defendant was examined as D.W.2 and two more witnesses were examined as D.W.3 and D.W.4 and 21 documents were marked as Exs.B1 to B21.

10. The learned District Munsif, after considering the materials placed before him found that Ex.A1 sale deed is not a sham and nominal document as alleged by the defendants, on the contrary, the said document is a real sale deed and through which the title for the suit property was transferred to the plaintiff. He further found that subsequently, the first defendant took the suit property on lease by executing Ex.A2 lease deed dated 26.08.1963. He further found that the said lease was properly terminated by issuing Ex.A3 notice dated 06.03.1992 and as such, the defendants are bound to surrender the possession of the suit property to the plaintiff and also they are liable to pay the arrears of rent. Accordingly, he decreed the suit as prayed for with cost.

11. Aggrieved by the aforesaid judgment and decree passed by the Trial Court, the defendants had filed an appeal in A.S.No.130 of 2001 on the file of the Sub Judge, Thiruvallur. The learned Sub Judge, had allowed the said appeal with cost and set aside the judgment and decree passed by the Trial Court and dismissed the suit with cost. Feeling aggrieved, the plaintiff has filed the present second appeal.

12. This court at the time of admitting the second appeal has formulated the following substantial questions of law:-

"(i) Whether the Lower Appellate Court was right in setting aside the Judgment and Decree of the Lower Court when the plaintiff is the owner of the property under Ex.A1 and the plaintiff is the lesser under the registered lease deed marked as Ex.A2?

(ii) Whether the Lower Appellate Court is right in granting relief of title by adverse possession in favour of the defendants, when there was no such issue framed?

(iii) Whether the Lower Appellate Court is correct in setting aside the Trial Court's Judgment and decree without considering and discussing the evidence of P.W.1 the plaintiff's husband, who speaks about the possession of the defendants by paying rent till 1987 as a tenant?

(iv) Whether the Lower Appellate Court is correct in holding that there was no evidence for the payment of sale amount paid by the plaintiff to the defendants for the execution of the sale deed and therefore it cannot be a sale in favour of the plaintiff?

(v) Whether the Lower Appellate Court is correct in setting aside the judgment and decree of the Trial Court by finding that unless the plaintiff was not let in evidence the correct fact regarding the plaintiff's case could not be arrived and without consideration and discussing about the evidence of P.W.1 the plaintiff's husband?"

13. Heard Mr.N. Subbarayalu, the learned counsel for the appellant/plaintiff and Mr.A.Muthukumar, the learned counsel for the respondents/defendants.

14. The substantial questions of law 1 to 4:-

The learned counsel for the appellant/plaintiff has submitted that the First Appellate Court erred in reversing the well-considered judgment and decree of the Trial Court. He further submitted that since the defendants have admitted the execution of Ex.A2 sale deed dated 24.08.1963 in favour of the plaintiff, the burden is upon them to prove that the said document is a sham and nominal document, but the First Appellate Court has wrongly placed burden upon the plaintiff to prove that the said document is a real and genuine document. He further submitted that the First Appellate Court failed to see that the defendants have not discharged their burden that the Ex.A1 sale deed is only a sham and nominal document and it was not came into force. He further submitted that the First Appellate Court failed to consider that the defendants have not proved the fact that there were debts in the joint family and only with a view to protect the suit property, Ex.A1 sale deed was executed in favour of the plaintiff. He further submitted that as per Section 54 of the Transfer of Property Act, payment of consideration is not sine quo non for completion of sale. If

any amount of sale consideration was due, it is open to the seller to file the suit and recover the same. He further submitted that since the Ex.A1 sale deed is a registered document, no oral evidence could be adduced to show that no title passed on to the respondent under the said sale deed.

15. He further submitted that the First Appellate Court erred in holding that since the plaintiff did not enter into the witness box, an adverse inference has to be drawn against her. He further submitted that the First Appellate Court failed to see that as per Section 116 of the Evidence Act, during continuance of the tenancy, a lessee cannot deny the title of the landlord. He further submitted that the First Appellate Court failed to consider that the defendants did not plead that when their possession has become adverse to the plaintiff. He further submitted that the First Appellate Court failed to see that landlord has statutory right under Section 108 (q) and 111 (a) of Transfer of Property Act to get possession of property and tenant has statutory obligation to vacate. He further submitted that as per Ex.A2 lease deed, the lease expired on 25.08.1968 and thereafter, the first defendant is in possession of the property as tenant at sufferance and hence, eventhough, there was no need of notice for termination of lease under Section 106 of Transfer of Property Act, the plaintiff has issued Ex.A3 notice. He further submitted that the Trial Court taking into consideration of the evidence in a proper perspective had decreed the suit as prayed for, but the First Appellate Court without considering the evidence in a proper perspective had erroneously reversed the findings of the trial court and therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the First Appellate Court and restore the judgment and decree passed by the Trial Court.

16. In support of the aforesaid contentions, the learned counsel for the appellant/plaintiff has relied upon the following decisions:-

(i) Annamalai Mudaliar and 2 Others v. Krishnaveni Ammal and 5 Others, 2002-1-L.W. 425.

(ii) Bishundeo Narain Rai (Dead) by Lrs. and Others v. Anmol Devi and Others, (1998) 7 SCC 498.

(iii) M/s Raptakos Brett & Co. v. Ganesh Property, AIR 1998 (SC) 3085.

17. Per contra the learned counsel for the respondents has submitted that the PW1 has admitted in his evidence that at the time of executing Ex.A1 sale deed there were debts in the family and only to save the property, Ex.A1 sale deed was executed in favour of the plaintiff without receiving any sale consideration. He further submitted that the Ex.A2 lease

agreement was also executed only to make the creditors to believe that the transactions are true. He further submitted that the plaintiff though claimed that she leased out the suit property to the first defendant on 26.08.1963 itself through Ex.A2 lease deed, she has not produced a single piece of paper to show that she received any rent from the first defendant and that itself would show that Exs.A1 and A2 were executed only for name sake and they are not real documents and through the said documents no transfer is effected. He further submitted that even assuming that the Ex.A1 and A2 are real documents, as per Ex.A2 the lease was expired on 25.08.1968 itself and as such the lease was terminated by efflux of time by 25.09.1968 itself and in such a case, the plaintiff ought to have filed a suit for recovery of possession within 12 years from 25.08.1968, but the suit was filed only on 24.04.1992 and hence, the suit is clearly barred by limitation. He further submitted that the trial court without taking into consideration of the aforesaid facts had erroneously decreed the suit. Hence, the First Appellate Court had rightly interfered with the findings of the trial court and set aside the judgment and decree passed by the trial court and in the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the second appeal.

18. In support of the aforesaid contentions, the learned counsel for the respondents/defendants also relied upon the decision in:

Raptakos Brett & Co. Ltd., v. Ganesh Property, (1998) 7 SCC 184.

19. It is an admitted fact that the suit property originally belonged to one Valliappa Mudaliar and he had three sons namely (i) Velappa Mudaliar, (ii) Subramani Mudaliar and (iii) Nagappa Mudaliar (D1). It is also an admitted fact that the plaintiff is the wife of one of the sons of Velappa Mudaliar namely Subramani Mudaliar. It is also an admitted fact that after the death of Velappa Mudaliar, his widow Kuppammal, Subramani Mudaliar and Nagappa Mudaliar (D1) had executed Ex.A1 sale deed dated 24.08.1963 in favour of the plaintiff. It is also an admitted fact that Ex.A2 lease deed was executed by the first defendant in favour of the plaintiff on 26.08.1963.

20. According to the defendants, Exs.A1 and A2 are not real documents and they are only sham and nominal documents and no consideration was passed and they were executed only to save the joint family property (suit property) from the creditors as the joint family indebted to several creditors and the said creditors made attempts to knock away the suit property. So, the burden is upon the first defendant to prove that the aforesaid Exs.A1 and A2 are sham and nominal documents and they were not acted upon.

21. Though the defendants took a plea that the joint family incurred to heavy debts, to prove the said plea, the defendants have not produced any documentary evidence. The first defendant, while examining himself as D.W.1 has deposed that the joint family debts were discharged, but to prove the said fact also he has not produced any documentary evidence. The defendants not even mentioned the list of creditors who advanced loan to the said family.

22. In Annamalai Mudaliar and 2 Others v. Krishnaveni Ammal and 5 Others (cited supra), this Court has held that payment of consideration is not sine quo non for completion of sale under Section 54 of the Transfer of Property Act. It also held that it is well-established that non payment of consideration does not prevent the passing of title.

23. In Bishundeo Narain Rai (Dead) by Lrs. and Others v. Anmol Devi and Others, (cited supra), the Hon'ble Supreme Court has held that a combined reading of Section 8 and Section 54 of the Transfer of Property Act, suggests that though on execution and registration of a sale deed, the ownership and all interests in the property pass to the transferee, yet that would be on the terms and conditions embodied in the deed indicating the intention of the parties. It also held that on execution and registration of a sale deed, the ownership, title and all interesets in the property pass to the purchaser unless a different intention is either expressed or necessarily implied which has to be proved by the party asserting that title has not passed on registration of the sale deed.

24. In this case, in Ex.A1 sale deed it is clearly stated that the plaintiff had paid the sale consideration of Rs.1,500/-. Therefore, the burden is upon the defendants to prove that consideration has not been passed and that the intention of the parties was that unless consideration is passed, title will not pass. In this case, the defendants have not adduced any evidence to show that the parties intended that unless the consideration is passed, title will not pass. Therefore, even assuming that a consideration for Ex.A1 sale deed was not passed as alleged by the defendants, that would not stand in the way of transferring the title to the plaintiff. If any amount was due, it is always open to the vendors to file suit and recover the balance sale consideration, subject to limitation. Therefore, the contention of the defendants that Ex.A1 sale deed is only a sham and nominal document cannot be accepted.

25. It is to be pointed out that Ex.A1 sale deed was executed on 24.08.1963 and in the said document itself it is clearly stated that the possession of the suit property was also handed over to the plaintiff on the same day. Ex.A2 shows that on 26.08.1963 i.e., after two days from the date of executing Ex.A1, the first defendant executed a registered lease deed in favour of the plaintiff and took the suit property for lease for the period from 26.08.1963 to 25.08.1968. It is also mentioned in the said document that the first defendant has to pay Rs.3/- as rent per month to the plaintiff. So again the burden is upon the first defendant to prove that the said document is also a sham and nominal document and the same was not acted upon. According to the defendants, since the plaintiff has not produced any receipt to show that she received rent, it has to be presumed that the alleged lease is not true. Further, they relied upon Ex.B2 Mortgage Deed said to have been executed by the defendants and also house tax receipts (Exs.B5 to B.21).

26. P.W.1 has deposed that the plaintiff is not having any document for payment of rents. Since this Court has held that as per Ex.A1 sale deed, the plaintiff is the absolute owner of the suit property and on the date of execution of the said sale deed itself, she took possession of the suit property, it is for the first defendant to prove that on which capacity, he is in possession of the suit property. As already pointed out that the first defendant failed to prove that Ex.A2 lease deed is also a sham and nominal document. Once it is held that Ex.A2 is also a real and genuine document, it has to be presumed that the first defendant is in possession of the suit property only as a tenant and not as an owner.

27. As per Section 116 of the Evidence Act, during subsistence of the lease, the tenant cannot deny the title of the landlord. In Ex.A2 it is stated that the suit property was leased out to the first defendant from 26.08.1963 to 25.08.1968 and after expiry of the said period, whenever the landlord asks, the tenant has to surrender the possession of the property. So after expiry of the lease period, the tenancy can continue only at the will of the landlord (plaintiff herein). According to the plaintiff, after expiry of the original lease period, the first defendant continued as a tenant and paid rent but later on, he did not pay rent and hence, she issued a notice (Ex.A3) on 06.03.1992 terminating the lease and the first defendant had received the said notice and sent a reply notice vide Ex.A4, but he did not surrender the possession. Ex.A3 shows that on 06.03.1992, the plaintiff had sent a notice to the first defendant stating that the tenancy has been terminated and calling upon the first defendant to surrender possession of the

suit property on or before 31.03.1992. Ex.A4 shows that the first defendant after receipt of Ex.A3 notice had sent a reply on 11.03.1992. As already pointed out that through Ex.A3 notice, the tenancy has been terminated. So, the first defendant is bound to surrender possession.

28. As already pointed out that under Ex.A1 sale deed the title was transferred to the plaintiff and subsequently, as per Ex.A2, the suit property was leased out to the first defendant and that being so, merely because the defendants had mortgaged the suit property and subsequently, they discharged the said mortgage would not create any title on them. As rightly held by the Trial Court, if really Ex.A1 sale deed was executed with a view to save the property from the hands of the creditors, after discharging the debts, the defendants would have taken steps to reconvey the suit property in their favour. Admittedly, the defendants have not taken any steps for getting reconveyance of the suit property. Under the said circumstances, from the act of creating mortgage by the defendants it cannot be presumed that the title was not transferred to the plaintiff under Ex.A1.

29. In Raptakos Brett & Co. Ltd., v. Ganesh Property (Cited supra), the Hon'ble Supreme Court has held that a statutory obligation is foisted on the lessee on determination of the lease which earlier existed in his favour. Further it was held that on a conjoint reading of Section 108 (q) r/w Section 111 (a) of the Transfer of Property Act, it becomes obvious under the law, erstwhile landlord is entitled to base his of cause of action on the statutory obligation of the erstwhile lessee on determination of the lease to put the lessor in possession of the property. In this case, as per Ex.A2 lease deed, the lease period expired on 25.08.1968 by efflux of time. Thereafter, an option was given to the plaintiff to ask delivery of possession of the suit property as and when she requires. As already pointed out that the tenancy was terminated by issuing Ex.A3 notice dated 06.03.1992 and as such the contention of the learned counsel for the respondents that the suit is barred by limitation cannot be accepted and therefore, the first defendant is bound to surrender possession.

30. As already stated that the plaintiff is the Landlord and the first defendant is a tenant and in such a case, the first defendant has to plead and prove that when the possession has become adverse to the knowledge of the plaintiff. But in this case, the first defendant has not discharged the aforesaid burden. Hence, the findings of the First Appellate Court, that the first defendant has perfected title by adverse possession cannot be upheld.

31. The trial Court after taking into consideration of the aforesaid facts had rightly held that the plaintiff is the owner of the suit property and the first defendant is in possession of the property only as a tenant and the said tenancy has been properly terminated and hence, the first defendant is bound to deliver the possession of the suit property and also held that the defendants are liable to pay the arrears of rent of Rs.108/-, but the First Appellate Court without considering the aforesaid facts in a proper perspective had erroneously reversed the findings of the trial Court. Hence, the judgment and decree passed by the First Appellate Court are liable to be set aside. Accordingly, the substantial questions of law are answered in favour of the appellant/plaintiff.

32. In the result, the Second Appeal is allowed. Consequently, connected miscellaneous petition is closed. The judgment and decree passed by the First Appellate Court, Thiruvallur in AS.No.130 of 2001 dated 14.10.2003 are set aside. The judgment and decree in O.S.No.178 of 1992 dated 17.11.2000 passed by the District Munsif Court, Thiruttani, are restored. The defendants are directed to surrender the possession of the suit property to the plaintiff within a period of three months from the date of receipt of a copy of this judgment. Considering the facts and circumstances of the case, both the parties are directed to bear their respective costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Subordinate Judge,
Thiruvallur.

2. The District Munsif,
Thiruttani.

Copy to
The Section Officer,
VR Section, High Court, Madras.

S.A.No.1109 of 2005
and
CMP.No.15223 of 2005

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