

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.03.2020

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.946 of 2014
and MP No.1 of 2014

Pandian ..Appellant/Appellant/Plaintiff

Vs.
Ambika Ammal ..Respondent/Respondent/Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree passed in AS No.17 of 2013 dated 24.03.2014 on the file of Sub Court, Chidambaram confirming the judgment and decree passed in O.S.No.1 of 2007 dated 06.09.2012 on the file of the District Munsiff-cum-Judicial Magistrate Court, Portonovo.

For Appellant : Mr.M.Sivaprakash for
M/s.P.T.Rama Devi &
A.Sundaravadhanan

For Respondent : Mrs.P.Sreevidhya
for M/s.A.Muthukumar

J U D G M E N T

The plaintiff in OS No.1 of 2007 whose suit for declaration of title and recovery of possession was dismissed by the Trial Court, upon its affirmation by the Lower Appellate Court, has come with this Second Appeal.

2. The plaintiff laid the suit seeking the aforesaid reliefs contending that the suit properties originally belonged to one Arunachala Padayachi, grandfather of the plaintiff, who had three sons, viz. Veerappan, Arumugam and Gnanasambandamurthy. The plaintiff is the son of the first of the sons of Arunachala Padayachi, viz. Veerappan. He would claim that he is the only descendant of Arunachala Padayachi. The plaintiff would claim that Arunachala Padayachi has conditionally sold the property to one Kannammal on 27.05.1965, with an option to repurchase within a period of seven years. It

is also the plaintiff's claim that the sum of Rs.1,500/- was repaid within three years, from the date of the borrowing. However, Kannamal sold the property to the defendant in the year 1978 under a Sale Deed dated 17.09.1978. The plaintiff would further add that there was a Panchayat in the year 1990 in which the defendant handed over possession to the plaintiff and the plaintiff was enjoyment of the property for almost 14 years. Complaining that the defendant has trespassed into the property on 20.10.2004, the plaintiff has come up with the suit for declaration and recovery of possession.

3. The suit was resisted by the defendant contending that the Sale dated 27.05.1965 evidenced by Ex.B1 was an absolute sale and there was no agreement to repurchase. It was also contended that the so called repurchase agreement dated 27.05.1965 produced as Ex.A3 was not executed by Kannammal. The defendant would further contend that Kannammal had created an usufructuary mortgage of the property in favour of one Neelavathi on 17.09.1974 and had also discharged the same. It is the further case of the defendant that the defendant had purchased the property from Kannammal on 17.09.1978 and she has been possession of the property throughout from the date of her purchase. Claiming that the suit itself is a vexatious suit and it is only an attempt to grab the property of the defendant, the defendant sought for dismissal of the suit.

4. At trial, the plaintiff was examined as P.W.1 and Exhibits A1 to A4 were marked. The defendant was examined as D.W.1 and Exhibits B1 to B7 were marked.

5. On appreciation of the evidence on record, the Trial Court found that the Sale Deed dated 27.05.1965 marked as Ex.B1 was neither a conditional sale with an option to repurchase or a mortgage by conditional sale, it was an absolute sale. No doubt, the plaintiff claimed that Kannammal, the purchaser under Ex.B1 dated 27.05.1965 had on the same day executed Ex.A3 an agreement for repurchase. The defendant would deny the execution of the said agreement by the said Kannammal on 27.05.1965. Though the said agreement marked as Ex.A3 is a registered instrument, since its execution was denied it was incumbent upon the plaintiff to prove execution of Ex.A3 by examining either the attestors or any person who knows the signature of the attestors and the executant of the document, in view of the provisions of Sections 68 and 69 of the Evidence Act.

6. The Trial Court found that the plaintiff has miserably failed to prove the execution of Ex.A3 agreement by Kannammal,

the purchaser under Ex.B1. The Trial Court also found that after the purchase, Kannammal had dealt with the property by way of usufructuary mortgage on 17.09.1974 and the same has also been discharged by Kannammal. On the aforesaid findings, the Trial Court concluded that the plaintiff has not established that he is entitled to possession as per the re-conveyance agreement viz. Ex.A3 dated 27.05.1965.

7. The Trial Court also adverted the recitals of Ex.A3, which go to show that, if the vendor does not repay the sum of Rs.1,500/- which was paid as sale consideration of Ex.B1, within a period of seven years and take a Sale Deed, he would loose the right to repurchase the property. In view of the same, the Trial Court concluded that the claim of the plaintiff has to necessarily fail and it accordingly dismissed the suit, filed for declaration and injunction. Aggrieved, the plaintiff preferred an Appeal in AS No.17 of 2013 on the file of the Sub Court, Chidambaram.

8. The learned Subordinate Judge upon a reconsideration of evidence on record concurred with the findings of the trial Court and dismissed the Appeal. Aggrieved the plaintiff has come up with this Second Appeal.

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

1. Whether the Courts below are right in dismissing the suit without considering Ex.B7 notice dated 2.6.1973, which was not disputed by the vendor of the defendant and is clearly established the repayment of entire sale consideration as per the terms of the agreement?

2. Whether the respondent/defendant is not estopped from raising objections regarding Ex.A3 agreement as well as the repayment of the sale consideration, when her vendor did not deny the same?

10. I have heard Mr.M.Sivaprakash, learned counsel appearing for the appellant and Mrs.P.Sreevidhya, learned counsel appearing for M/s.A.Muthukumar, learned counsel appearing for the respondent.

11. Elaborating on the questions of law, Mr.M.Sivaprakash,

learned counsel appearing for the appellant would contend that the Courts below committed an error in dismissing the suit without considering Ex.B7 notice dated 02.06.1970, the contents of which were not disputed by the vendor of the defendant. He would also submit that once the sale under Ex.B1 is found to be a conditional sale with an option to repurchase and it is shown that the predecessor in interest of the plaintiff had repaid the amount borrowed, the Courts below should not have held that the plaintiff would not be entitled to a decree because he has not proved Ex.A3 in accordance with law.

12. It is the further contention of the learned counsel that the defendant, who is the purchaser from Kannammal cannot dispute the execution of Ex.A3 by Kannammal, since Ex.A3 is a registered instrument and the non examination of the attestors will not be fatal to the case of the plaintiff.

13. Contending contra, Mrs.P.Sreevidhya, learned counsel appearing for the respondent would contend that there is nothing to show that Ex.B7 was actually served on Kannammal. It does not even show that it is an office copy of the notice issued by the counsel. Even assuming Ex.B7 had been issued, the same has not been followed with the suit for performance of the reconveyance agreement dated 27.05.1965. Referring to the contents of the reconveyance agreement, she would contend that if Arunachala Padayachi or his descendants do not repay the sum of Rs.1,500/- within seven years, they would loose their right to purchase the property. She would also point out that even though the sons of Arunachala Padayachi has threatened a suit even in the year 1971, they have not chosen to lay a suit seeking performance of the reconveyance agreement dated 27.05.1965.

14. As regards proof of Ex.A3, the learned counsel would contend that if execution of Ex.A3 by Kanammal is denied, it is incumbent upon the plaintiff to prove the same by examining the attesting witnesses or any person acquainted with the signatures of the executant and the attesting witnesses. The proviso to Section 68 cannot exempt a person from the requirement of examining the attesting witness, if the denial is not made by a person, who is a party to the document. Admittedly, the agreement is of the year 1965 and the plaintiff sues for declaration of title and recovery of possession in the year 2007. Therefore, it is for the plaintiff to establish that he is entitled to the property by unimpeachable evidence. While such evidence is totally absent on the side of the plaintiff, the defendant has produced documents to show that her vendor has been continuously exercising the right of ownership over the property the Courts below cannot be faulted for denying the

relief to the plaintiff.

16. A Usufructuary Mortgage dated 17.09.1974 has been created and the same has been redeemed and the property has been sold to the defendant on 17.09.1978. The plaintiff who claims that he was put in possession in 1990 has not produced even a scrap of paper to show his possession.

17. In the light of the above, neither the trial Court nor the Lower Appellate Court can be faulted for coming to the conclusion that the plaintiff has not proved his claim that Arunachala Padayachi, actually repaid the consideration amount of Rs.1,500/- within the period stipulated under Ex.A3 even assuming that Ex.A3 is valid.

18. In the light of the factual findings of the Courts below, I do not think that the questions of law could be answered in favour of the appellant. Therefore, I am constrained to answer the questions of law against the appellant. In view of the answers to the questions of law as above, the Appeal fails and it is dismissed. There shall be no orders as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(ADI MDU)

//True copy//

Sub Assistant Registrar

jv

To

1. The Subordinate Judge, Chidambaram.
2. The District Munsiff-cum-Judicial Magistrate, Portonovo.
3. The Section Officer, V.R.Section, Madras High Court.

+1cc to Mr.A.Muthukumar, Advocate SR.No.21964

+1cc to Mr.P.T.Ramadevi, Advocate SR.No.23093

S.A.No.946 of 2014
and MP No.1 of 2014

NRL (CO)
GMY (25/08/2020)