

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.07.2020

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THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.No.412 of 2014

1.Pavayee

W/o late Kalianna Gounder

..Appellants/Appellants/Petitioners

2.Devarajan

S/o. Late Kalianna Gounder

-vs-

Pappathi

W/o Subramaniam

..Respondent/Respondent/Respondent

Memorandum of Grounds of Civil Miscellaneous Appeal filed under Order XLIII, Rule 1(t) of the Civil Procedure Code, against the fair and decretal order dated 15.02.2013 made in I.A.No.150 of 2011 in A.S.No.25 of 2010 on the file of the learned Subordinate Judge, Tiruchengode.

For Appellant :: Mr.P.Valliappan

For Respondent :: Mr.Sam Jayaraj Houstin for
M/s Sarvabhauman Associates

JUDGMENT

Heard learned counsel for the parties through video conferencing due to the Covid-19 pandemic.

2. This civil miscellaneous appeal has been directed against the order dated 15.2.2013 passed in I.A.No.150 of 2011 in A.S.No.25 of 2010 by the learned Subordinate Judge, Tiruchengode, in and by which the petition filed by the appellant for restoration of A.S.No.25 of 2010 was dismissed with costs holding that the same is not maintainable and also for the reason that the appellant has not come to the Court with clean hands and true facts. Moreover, there is one more reason given therein that the appellant made an attempt not only to suppress the material facts, but also suppressed that she had no interest in the property.

3. Mr.P.Valliappan, learned counsel appearing for the appellant/defendant submitted that when the suit for declaration and injunction not to interfere with the suit property was decreed by the trial Court, the appellant filed an appeal in A.S.No.25 of 2010 before the learned Subordinate Judge, Tiruchengode. But it was dismissed for default on 26.11.2010. Aggrieved thereby, the appellant/defendant filed I.A.No.150 of 2011 to restore the appeal and that application was filed within 11 days on 7.12.2010. Whereas the respondent/plaintiff filed a counter statement alleging that the appellant/defendant had lost the title, because she has alienated the property, therefore, she had no right whatsoever to pursue the matter. Secondly, she has also suppressed the factum of alienation of the property. Thirdly, it was contended before the lower appellate Court that although the defendants have taken a ground that the second defendant was suffering from fever and body pain from 14.10.2010 to 24.10.2010, indeed, they were busy in executing the sale deed before the Sub Registrar's office and therefore, that statement is also incorrect and false. But, accepting the claim of the respondent/plaintiff, the application filed by the appellant/defendant seeking restoration within 11 days of the dismissal for default, has not been taken on record and it was dismissed.

4. Mr.P.Valliappan, learned counsel appearing for the appellant, assailing the impugned decretal order, further stated that the lower appellate Court has erred in discarding the citation relied on behalf of the appellant in Thomson Press (India) Limited v. Nanak Builders and Investors Pvt.Ltd., 2013 (2) CTC 104 (SC) holding that the owner, who has sold away the property, is entitled to contest the proceedings. But this has been completely overlooked by the lower appellate Court. Moreover, when the appeal was dismissed for default on 26.11.2010 and the application to restore the appeal was filed on 7.12.2010 within a period of 11 days, the lower appellate Court ought to have seen that there was no delay on the part of the appellant seeking for restoration of the appeal, which was dismissed for default. Even if it is assumed that the defendants had sold away the suit property, it is incumbent upon them to protect the interest of their purchasers by diligently pursuing the litigation for which the appellant cannot be made to suffer.

5. But I do not find any merit on the said submissions. The reason being that the appeal filed by the appellant was dismissed for default on 26.11.2010. No doubt, an application under Order 41, Rule 19 read with Section 151 of the Civil Procedure Code was filed to restore the appeal on 7.12.2010 within a period of 11 days. In the affidavit filed in support of that application, it has been pleaded that the second defendant

suffered from fever and body pain from 14.10.2010 to 24.10.2010, therefore, they were unable to move the Court. Whereas the averments made in the counter affidavit filed by the respondent that have been extracted by the lower appellate Court, clearly show that even on 15.11.2010, the appellant and second defendant sold away the property to third party. Suppressing the same, they have filed the interlocutory application, therefore, they had no legal right at all over the property on the date of filing the said application. Moreover, when they were busy in the process of registration of the sale deed dated 15.11.2010, the appellant ought not to have stated in the affidavit as if the second defendant was unwell and therefore they did not attend the appeal. Hence, the lower appellate Court has rightly come to the conclusion that when the appellant had appeared before the Sub Registrar's office and executed the documents in Exs.R1 & R2 by selling away the suit property, suppressing the same, she has come to the Court with unclean hands. However, when the suit was decreed as prayed for, the judgment cited by the appellant that they have got a duty to safeguard the interest of their purchaser, no doubt, shows some sense thereon. But at the same time, when the suit was decreed directing the defendants therein not to interfere with the suit property, executing the sale deed on 15.11.2010 clearly shows that the appellant had clearly interfered with the judgment and decree passed by the trial Court. Therefore, this Court, accepting the finding given by the lower appellate Court that the appellant has not come to the Court with clean hands, is not inclined to interfere with the impugned order. Accordingly, the civil miscellaneous appeal fails and it is dismissed. No costs.

s/d-

Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

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To

1. The Subordinate Judge
Tiruchengode

C.M.A.No.412 of 2014

VBA (CO)
SP(11/11/2020)