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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04.08.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.553 of 2021

S.Mohammed Esha

... Appellant/Appellant/Plaintiff

Vs.

- 1.Kumar Babu
- 2.Esther
- 3.Francis Xavier
- 4.Amalraj
- 5.Catherine Pen
- 6.John Paul
- 7.Jones Paul

(Since R4 to R7 were remained exparte
in the Court below, notice may be dispensed
for them)

... Respondents/Respondents 1 & 3 to 8/
Defendants 1, 3 & Nil

PRAYER: Second Appeal filed under section 100 of the Civil Procedure Code against the Judgement and Decree passed in A.No.25 of 2018 and dated 15.06.2020 on the file of the court of Principal District Judge, Cuddalore in confirming the judgment and decree passed in O.S.No.237 of 2010 dated 04.01.2018 on the file of the Court of II Additional Subordinate Judge, Cuddalore.

For Appellant : Mr. A.Muthukumar

JUDGMENT

The plaintiff who is unsuccessful before the Courts below, has filed this Second Appeal challenging the judgment and decree in A.S.No.25 of 2018 of the District Judge, Cuddalore, confirming the judgment and decree of the II Additional Subordinate Judge, Cuddalore in O.S.No.237 of 2010.

2. The facts in brief necessary for disposing of the above Second Appeal are herein below narrated and the parties are referred to in the same array as before the trial Court.



3. The plaintiff has filed a suit in O.S.No.137 of 2010 to declare his title to the suit property and direct the defendants to deliver possession of the same to the plaintiff. The case of the plaintiff was that on 10.06.2006, the first defendant had granted a power of attorney to the second defendant in respect of the suit property which he had acquired by way of a partition amongst his family members on 13.09.2004. A partition deed of the said date was registered on the file of the Sub Registrar, Vadalur. Pursuant to the power of attorney executed in his favour, the second defendant had sold the suit property to the plaintiff for a sale consideration of Rs.1,50,000/- on 31.12.2007. The sale deed was registered before the Sub Registrar, Vadalur. The entire consideration was also paid to the second defendant. The plaintiff would submit that though physical possession was not handed over on the date of execution of the sale deed, however, the second defendant assured him that he would hand over possession at the earliest and therefore, the recital in the sale deed mentioned that possession was already handed over to the plaintiff though it was not so done.

4. The first defendant was residing in the suit property at the time of the sale. The plaintiff had repeatedly requested him to vacate the same and hand over the possession to him. However, the defendants were very evasive about the same. Since the possession was not handed over to him, the plaintiff had issued a legal notice dated 27.01.2010 to the defendant, which was returned with an endorsement 'left India'. The second defendant had however received the notice. During the pendency of the suit, the third defendant had filed an application to implead herself stating that the suit property had been settled on her by the first defendant on 08.02.2006. The plaintiff would contend that this settlement deed was a collusive one and brought about to defeat the right of the plaintiff. He therefore was constrained to file the suit.

5. The first defendant had filed a written statement inter alia denying the execution of the general power of attorney in favour of the second defendant. The first defendant would further submit that he had executed a settlement deed in favour of the third defendant his wife on 08.02.2006 and therefore, on the date of the alleged power of attorney, the property did not belong to him. The defendant would submit that the sale deed in favour of the plaintiff has been created out of a forged and fabricated document which had been obtained when the first defendant was under the influence of alcohol. The first defendant would therefore contend that there is no cause of action for the suit. Therefore, the suit should be dismissed.



6. The third defendant after being impleaded as a defendant in the suit had filed a written statement stating that she was a absolute owner of the suit property and in possession of the same. The property had come to her under gift settlement deed executed by her husband, the first defendant on 08.02.2006. The third defendant would submit that the second defendant had no right or title to execute any document particularly a sale deed in respect of the suit property. Any document created was a fabricated and concocted one and would not bind the third defendant. The third defendant would submit that she is in possession of the suit property and the suit has been filed only on account of the collusion between the plaintiff and the second defendant.

7. The plaintiff had filed a reply statement to the written statement stating that the settlement deed was not true and valid document and this is obvious from the fact that the Encumbrance Certificate taken out by the plaintiff did not disclose the same. The third defendant had filed an additional written statement in which she would contend that she had already obtained a decree against the first defendant in O.S.No.359 of 2006 on the file of the Principal District Munsif Court, Cuddalore, in which, she had been declared as the absolute owner of the property.

8. The II Additional Subordinate Judge, Cuddalore, had perusing the pleadings originally framed two questions of law which are as follows:

1. Whether the plaintiff is entitled to the relief of the declaration and possession?
2. What relief the plaintiff is entitled to?

Thereafter, an additional issue was framed on 03.06.2014 which was "whether the suit was barred by limitation". Additional issues were once again framed on 30.10.2014 and ultimately, all the issues were recast as follows:

- (1) Whether the suit is barred by limitation?
- (2) Is it true the first defendant executed the settlement deed on 08.02.2006 in favour of the third defendant.
- (3) Whether the third defendant took possession of the suit property.
- (4) Whether the plaintiff is entitled to the relief of declaration and possession?
- (5) To what relief the plaintiff is entitled to?

The plaintiff examined himself as PW1 and one Ranganathan as PW2, Thangarasu as PW3, Rajendran as PW4, and Indira as PW5.



9. The learned Judge on an extensive consideration of the pleadings as well as evidence, dismissed the suit. Aggrieved by the same, the plaintiff had filed A.S.No.25 of 2018 before the District Court, Cuddalore along with the appeal, the appellant/plaintiff had filed an interlocutory application in I.A.N.103 of 2017 to receive the original partition deed dated 31.10.2018 between Maniammal and others (Ex.A1), and the original general power of attorney (Ex.A2) executed by the first defendant in favour of the second defendant as additional evidence. The plaintiff would contend that these two documents were missing. The appellate Court had allowed the IA but however dismissed the appeal and confirmed the judgment and decree of the II Additional Principal Sub Court, Cuddalore in O.S.No.237 of 2010. Challenging the said judgment and decree, the appellant has come forward with the above second appeal.

11. Heard the learned counsel and perused the records.

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Certificate cannot be held against the third defendant and does not persuade me to hold that the Settlement deed is a fraudulent document. As on the date of execution of the power of attorney, the first defendant was not the owner of the property and therefore, no rights flow under the power of attorney which has been marked as Ex.A2.

13. The Courts below have rightly considered the above the fact and also the fact that the possession has always been only with the first and third defendant. That apart, the third defendant had obtained a decree against the first defendant in a suit in O.S.No.359 of 2006 on the file of the Principal District Munsif, Cuddalore, in respect of the very same property. Therefore, I do not find any reason to interfere with the judgment and decree of the Courts below. Considering the fact that no substantial questions of law has been made out in the second appeal, and accordingly, the Second Appeal is dismissed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Principal District Judge,
Cuddalore.

2.The II Additional Subordinate Judge,
Cuddalore.

+1cc to Mr.A.Muthukumar, Advocate SR.No.38251

S.A.No.553 of 2021

GPL (CO)
CB(24/11/2021)