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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.02.2021

CORAM

THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

S.A.NO.627 OF 2020

AND

CMP NO.13088 OF 2020

Subramania Mudaliyar

represented by his Power Agent
S. Vasantha Kumar
S/o.V.Subramanian
Plot No.15, New No.47,
V.N.Perumal Street,
KMV Nagar,
Little Kanchipuram
Kanchipuram Taluk and District

.... Appellant/Plaintiff

Vs

1.R.Shanmugam

2.Kanimozhi

... Respondents/Defendants

Second Appeal filed under Section 100 read with Order XLII Rule 1 of Civil Procedure Code against the judgment and decree dated 19.12.2019 in A.S.No.8 of 2017 on the file of Additional Sub Court, Kanchipuram, confirming the judgment and decree dated 01.12.2016 in O.S.No.515/2010 before the District Munsif Court, Kanchipuram.

For Appellant : Mr.T.Sathiyamoorthy

For Respondents : Mr.M.Thamizhavel



JUDGMENT

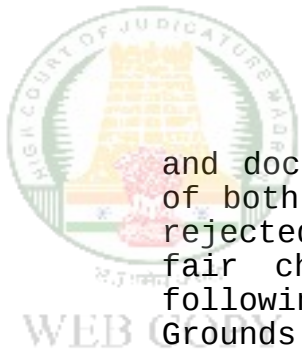
Challenging the judgment and decree passed by the Additional Sub Court, Kanchipuram in A.S.No.8 of 2017 dated 19.12.2019 confirming the judgment and decree passed by District Munsif, Kanchipuram dated 01.12.2016 in O.S.No.515 of 2010, the plaintiff has filed the present Second Appeal.

2. Learned counsel for the appellant submits that the plaintiff, first defendant and one Mr.Ananda Mudaliar (was not a party, since deceased) entered into partnership to convert their lands into housing plots. Partnership Firm was formed in the name and style of " KMV Nagar Real Estate". After forming the said partnership firm, all the parties, who are all owners of adjacent lands, i.e., plaintiff who owns 1.55 cents, first defendant and Mr.Anandha Mudaliyar, who own 2.50 cents and 1.96 cents respectively, decided to merge all the properties into one parcel to formulate a housing layout and for that purpose they have obtained DTP approval from Kanchipuram Municipality.

3. Accordingly, Ex.A.2 Gift Deed dated 29.03.1989 was executed to the extent of 11519 sq.ft by all the partners in favour of Kanchipuram Municipality for laying of road in KMV Nagar and subsequently by virtue of Ex.A.3 Gift deed dated 1.4.1989 to an extent of 18539 sq.ft was gifted to Kanchipuram Municipality for open space. The above gift was made to fulfill one of the conditions for grant of approval. Subsequently, Kanchipuram Municipality issued Ex.A.8 Notice dated 10.03.1989 demanding the partners to hand over the lands for forming road and they have paid the requisite fees, for which, receipt was issued vide Ex.A.9.

4. Learned counsel further contended that though the first defendant sold the property to the son of the plaintiff, P.W.1, nowhere in the said deposition, stated that there was no partnership. Rather P.W.1 has stated in his deposition that KMV Nagar layout was formed jointly by all the three persons. In such circumstances, the plaintiff has paid fees for formation of road for himself and also on behalf of the other partners.

5. Learned counsel further submits that the Courts below has rejected the suit on yet another ground stating that the principal plaintiff has not deposed, instead, only the power of attorney has deposed. The conclusion arrived at by the first appellate court that the power of attorney is not a competent person to depose and that the plaintiff is the only competent person to depose since he only knows the dealings and transactions, is not proper. The main contention of the appellant is that all these aspects have not been considered cumulatively and due to reason of failure to consider both oral



and documentary evidence in a proper perspective, the judgment of both the Courts below are vitiated and they are liable to be rejected per se and therefore, the appellant prays there is a fair chance for allowing the appeal and has suggested the following substantial questions of law in the Memorandum of Grounds of Appeal:

a) Whether the Judgment and Decree of the Appellate Court rendered

(i) without considering any of the documentary evidence, oral evidence of PW2 produced by the Plaintiff and

(ii) without recording and considering any of the arguments of parties before the court, is not vitiated for non-compliance of provisions of Order 41 Rule 31 of C.P.C?

b) Whether the Judgment and Decree of the Trial Court is vitiated for not framing an issue as to the existence of oral partnership between the parties, when the pleadings of the Plaintiff and Defendant clearly show that the said issue is the Fundamental fact in issue between the parties?

c) Whether the Judgment and Decree of the Trial Court holding that plaintiff has no right over the suit properties is not perverse one having been rendered without considering Ex.A2 and Ex.A3, oral evidence of PW2 proving the existence of partnership between the Plaintiff and 1st respondent/1st defendant and consequentially the suit property being part of the layout developed after putting together the properties of all the partners and the 1st respondent/1st defendant does not hold absolute right to gift the property to the prejudice of the interest of the other partners?

6. This Court, at this juncture, feels that it would be appropriate to extract the relevant portion of the findings of the first appellate court:-

" Point Nos.1 and 2:-

The plea of the plaintiff that the property in Town S.No.1637/2 to an extent of 31 cents, S.No.1637/5 to an extent of 34 cents, S.No.1637/6 to an extent of 90 cents in totally acres 1.55 cents belong to plaintiff Subramani Mudaliar, the property in Town Survey No.1639/2 to an extent of acre 1.50 cents, S.No.1639/3A to an extent of acre 1.00 cents belonged to 1st defendant, the property in town survey No.1637/3 to an extent of acre 1.86 cents, S.No.1637/4 to an extent of 10 cents in total acre 1.96 cents belong to Ananda Mudaliar is an admitted fact.

Ex.A.1 Will Ex.B.3 sale deed, Ex.B.4 sale deed prove the



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title of plaintiff, 1st defendant and Ananda Mudaliar to their respective above mentioned properties. The plea that above owners joint together to get a DTP approval for housing layout and the fact that owners jointly executed gift deed in favour of the Municipality Kancheepuram is also admitted among the litigants.

According to the 1st defendant the joint activity is only for getting DTP approval in single application. Sine DTP approval was obtained jointly in single application the owners are constrained to execute gift deeds Ex.A.2 and Ex.A.3 jointly together. The defendant specifically denied the plea of oral partnership among the owners to merge all the properties together to sell and to share 1/3rd shares equally from the sale proceeds of plots. While there was a specific denial regarding oral partnership and sharing of the sale proceeds equally the burden is upon the plaintiff who seek the suit relief to prove the same. No single piece of evidence was produced by the plaintiff before this Court to prove the plea of oral partnership. Mere pleading will not help the plaintiff's case. The same has to be substantially proved. The plaintiff Subramania Mudaliar had failed to appear before Court to depose evidence. The effect of a party in not appearing in the witness box offering himself to be cross examined has been held to be a case of adverse inference to be drawn against him as per Sec.114 of Evidence Act. Non appearance of plaintiff to depose evidence cause adverse inference upon the plaintiff pleadings. Admittedly power agent will not be a competent person to depose evidence regarding the personal knowledge of the principal. Hence this Court determine that the P.W.1 is not a fit person to depose evidence on behalf of his principal with regard to oral partnership which the principal alone has knowledge. Therefore the evidence of PW1 could not be considered.

Further P.W.1 in his evidence categorically admitted that the plaintiff had sold his respective plots to the third parties individually. P.W.1 further deposed that there was no evidence placed before the Court to prove that the plaintiff Subramani Mudaliar had conveyed the shares of other owners jointly. While plaintiff had not contributed any shares out of the sale proceeds to other owners, then the plaintiff cannot seek share from the other owners. There was no substantial or corroborative evidence to prove the alleged oral partnership. The sale deed Ex.B.2 executed by the 1st defendant was also attested by the plaintiff power agent Vasanthakumar. It is also admitted by the P.W.1 Vasanthakumar that he had also purchased Plot No.15 from the 1st defendant. It was not an evidence from the P.W.1 that in sale of Plot No.15 sale proceed was equally shared among the owners. Ex.A.1 to A.9 relied by the plaintiff does not prove the plea of oral partnership and equal share of sale proceeds. While the plaintiff had not contributed his share to other owners the



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plaintiff is also estopped from claiming equal share from the other owners particularly the 1st defendant herein. The trial court had decided the issue in appropriate manner. The memorandum of grounds is a reiteration of plaint pleadings. The memorandum of ground does not contain any valid ground for reappreciation. For said reason itself above appeal is liable to be dismissed. The title of the 1st defendant to schedule mentioned property is proved through Ex.B.4 sale deed. The 1st defendant has every right to settle the same to any person. Therefore, the alleged settlement deed dated 04.11.2010 is deemed to be a valid transaction. Ex.A.5 settlement deed executed by 1st defendant in favour of 2nd defendant is deemed to be a valid document. The plaintiff is not entitled for the suit relief. Accordingly, above points are decided against the appellant/plaintiff.

Point No:3

From the above decided points it is decided that the 1st defendant had valid title to the suit property. The settlement dated 04.11.2010 executed by the 1st defendant in favour of 2nd defendant is valid. The plaintiff had failed to prove the alleged oral partnership between the owners. Therefore the claim of plaintiff regarding of 1/3rd share in sale proceeds of the plots is not maintainable. The plaintiff is not entitled to any of the suit claim. The trial court had decided the issues in appropriate manner. The judgment and decree of the trial court dated 01.12.2016 in O.S.No.515/2010 on the file of Principal District Munsif at Kancheepuram does not require any interference. The judgment and decree of the trial court dated 01.12.2016 in O.S.No.515/2010 on the file of Principal District Munsif at Kancheepuram is hereby confirmed."

7. Heard both sides and perused the documents of the trial Court and other documents available on record.

8. It is an admitted fact that during the year 1989, the plaintiff, first defendant and one Mr.Anandha Mudaliar (was not a party since deceased) joined together and submitted an application to the Kanchipuram Municipality in the name and style of "KMV Nagar Real Estate" for the purpose of getting approval to convert their lands into housing plots. All the three are adjacent owners. It appears that they have jointly contributed their lands in the following manner:-

Plaintiff		1.55 cents;
First defendant		2.50 cents and
Mr.Anandha Mudaliyar		1.96 cents,

and they have gifted their lands for laying road as well as for open space by virtue of Ex.A.2 and Ex.A.3 Gift Deeds. It was the



contention of the plaintiff that they have joined together and carried on partnership business by way of an oral agreement.

9. However, the respondents strongly opposed the said contentions and submits that only for the purpose of getting the approval, they joined together and submitted the application and contributed their lands, but sold the properties independently.

10. In order to prove the case of the plaintiff, plaintiff was examined as P.W.1 and marked Exs.A.1 To A.9. On the side of the defendants first defendant was examined as D.W.1 and Exs.B.1 to B.6 were marked.

11. A perusal of the document would show that all the parties to the suit have contributed their lands in the manner stated above and thereafter submitted an application in the name and style of "KMV Nagar Real Estate" and necessary fees was also paid, for which, receipts were issued. Subsequent to the above transaction, from the year 1990 to till the date of filing of the suit, the appellant has not produced any document in order to substantiate their contention that the business was carried on by virtue of partnership. If at all they carried on their business in the name and style of "KMV Nagar Real Estate", they should have prepared balance sheet and filed before the appropriate authorities and they should have opened bank account. It appears that no bank account has been opened and maintained in the name of the partnership firm and the parties have not produced any bank account. If at all profits were shared they should have shown in the accounts. No Balance Sheets were produced. On other hand, the appellant fairly admitted that they have not filed any Balance Sheet and also not operated any bank account in the name of "KMV Nagar Real Estate" or otherwise.

12. Under these circumstances, both the Court below have rightly come to the conclusion that the plaintiff has not produced any sufficient material evidence to establish the case. Therefore, this Court do not find any perversity in the judgment and decree passed by the Court below.

13. Even in the case of oral partition, the same has to be reduced into writing and it should be registered. As per Section 69 of Partnership Act, 1932, only if the partnership firm is registered, the partners can sue on behalf of other partners and on their own, otherwise it was expressly prohibited. On the contrary mere reliance on the joint execution of Ex.A.2 and Ex.A.3 will not be sufficient to prove the formation or existence of partnership firm. Therefore the partnership is not proved either by documentary evidence or by the conduct of the parties, more particularly by the plaintiff/appellant.



14. One more contention raised was that with regard to the right of power of attorney to depose on behalf of principal Plaintiff.

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15. Both the Court below have found that since oral partition was made, it was within the knowledge of the principal plaintiff and the plaintiff alone knows about the said facts and there was no chance of his power of attorney being in the knowledge of the facts involved and this aspect has also been discussed by both the trial Court and the first appellate Court. Both the Courts below have rendered a well reasoned judgment, which need not be interfered with.

16. Therefore, I find that no question of law much less substantial question of law arises for consideration in this case. Both the courts below have rightly rejected the case of the plaintiff, with which, I find no infirmity or irregularity, more particularly, in the absence of any substantial question of law arising for consideration, I do not find any case for interference. Accordingly, the Second Appeal does not have any merit and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-VII)

// True Copy //

Sub Assistant Registrar

sr

To

1. The Additional Subordinate Judge, Kanchipuram.
2. The Principal District Munsif, Kanchipuram.

Copy To

The Section Officer,
V.R. Section,
High Court, Madras - 104.

+1cc to Mr.T.Sathiyamoorthy, Advocate, S.R.No.6729

S.A.No.627 of 2020

EV(CO)
RLP(08/09/2021)