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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.01.2022
PRONOUNCED ON : 08.02.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.317 of 2010

1. S.Vijayalakshmi
2. S.Karpaga Devi
3. S. Srilakshmi Kalyani ... Appellants/Defendants

Vs.

Gayathri Devi ... Respondent/Plaintiff

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 30.06.2008 made in A.S.No.291 of 2007, on the file of the learned Additional District Judge (FTC-V), Chennai, reversing the judgment and decree dated 31.07.2006 made in O.S.No.972 of 1998 on the file of the learned XIII Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.K.Sivasubramanian
for T.M.Hariharan

For Respondent : Mr.K.Bijai Sundar

J U D G M E N T

The Second Appeal is focused as against the judgment and decree dated 30.06.2008 made in A.S.No.291 of 2007, on the file of the learned Additional District Judge (FTC-V), Chennai, reversing the judgment and decree dated 31.07.2006 made in O.S.No.972 of 1998 on the file of the learned XIII Assistant Judge, City Civil Court, Chennai. The suit is for partition.

2. For the sake of convenience, hereinafter the parties are referred to, as per their litigative status before the trial Court.

3. The laconic averments made in the plaint, are as follows:
(i) The plaintiff is the daughter of the 1st defendant and the sister of defendants 2 and 3. The late C.S.Saravanelu was



the owner of the property consisting of land and single storey building situated in the West Madras Neighbourhood Scheme bearing Plot No.3736, Door No.Q19, 17th Street, Anna Nagar, Madras - 600 040. The said C.S.Saravanelu purchased the land from Tamilnadu Housing Board by sale deed dated 18.07.1985. Subsequent to the purchase late C.S.Saravanelu constructed a ground floor building on the land. Thereafter by sale deed dated 28.03.1990, an undivided 1/3 share in the said land was sold to the plaintiff. In terms of the said sale deed, the plaintiff was given with the right to construct the first floor over the roof of the ground floor constructed on the land.

(ii) After constructing the first floor portion, the late C.S.Saravanelu constructed the second floor in the premises. The said C.S.Saravanelu, died intestate on 28.10.1994 at Madras leaving behind the plaintiff and the defendants as his only legal heirs. As on the date of death, C.S.Saravanelu was the owner of the undivided 2/3rd share in the land, together with the constructions made in the ground floor and second floor.

(iii) The plaintiff inherited 1/4th share in the plaint schedule property. In respect to same, she demanded partition. In spite of repeated demands, the defendants have not come to an amicable settlement for partitioning the property. Hence, the plaintiff issued a the legal notice dated 28.03.1996, through her Advocate demanding partition of the properties by metes and bounds. The plaintiff has also sent a rejoinder on 07.06.1996.

(iv) During the life time of C.S.Saravanelu, 1/3rd undivided share in the land forming part of the schedule property was mortgaged by depositing the title deeds with Indian Bank, Thirumangalam Branch, Madras - 40. The mortgagee has already filed OS No.14579 of 1996 on the file of the XVIII Assistant City Civil Judge, Madras, for recovery of dues under the equitable mortgage. The said Bank is not made a party to the suit, since the mortgagee has already taken steps for recovery of dues. Hence, the suit.

4. The averments found in the written statement filed by the 1st defendant and adopted by 2nd and 3rd defendants, are as follows:

(i) The sale deed dated 28.03.1990 had been executed at the instance of the plaintiff. Only in order to get a housing loan at a lesser rate, the said sale deed was executed. The said sale deed is only sham and nominal and not to be acted upon. The sole intention of the said C.S.Saravanelu was to give each one flat to each of his three daughters after the loans are re-wiped off and that was the reason the plaintiff has permitted her father to collect the rent till the loans are wiped off. The plaintiff has conceded as not the absolute owner of the



property and this has been reiterated in the family arrangement and a decree has been obtained in O.S.No.15936 of 1996 by the defendants by filing the suit.

(ii) The sale deed dated 28.03.1990 executed by C.S.Saravanelu, husband of the 1st defendant and father of the plaintiff, was only for raising funds and for availing the housing loan at a lesser rate of interest. He executed a sale deed in favour of the plaintiff, since the plaintiff, who is the bank employee, was eligible to get a housing loan at lesser rate of interest.

(iii) Demand for partition cannot be sustained either in law or on facts and borne out in recorded evidence from the sale deed dated 26.03.1990, which is sham and nominal and to be acted upon and the very recital in the sale deed denies the plaintiff's claim for partition. Accordingly, the suit filed by the plaintiff is liable for dismissal.

5. Based on the above said averments, the trial Court framed necessary issues and tried the suit. On the side of the plaintiff, PW1 was examined and three documents were marked as Ex.A1 to Ex.A3. Similarly, on the side of the defendants, DW1 and DW2 were examined and forty documents were marked as Ex.B1 to Ex.B40.

6. Having considered the materials placed before him, the learned XIII Assistant Judge, City Civil Court, Chennai, came to the conclusion that the plaintiff has not proved her case and ultimately dismissed the suit.

7. In the appeal filed by the plaintiff in A.S.No.291 of 2007, the learned Additional District Judge (FTC-V), Chennai, reversed the findings arrived at by the trial Court and granted a decree in favour of the plaintiff.

8. Feeling aggrieved over the findings arrived at by the lower appellate Court, the defendants have filed the present Second Appeal. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.

"1. Whether Ex.B4 is the sham and nominal transaction?

2. Whether the suit is bad for partial partition?"

9. Heard Mr.K.Sivasubramanian, the learned counsel appearing on behalf of the appellants/defendants and Mr.K.Bijai Sundar, the learned Counsel appearing on behalf of the



respondent/plaintiff and perused the materials available on record.

10. The 1st defendant Vijayalakshmi is the mother of the plaintiff. The 2nd and 3rd defendants are the sisters of the plaintiff. Originally, the suit schedule property, is the absolute property of one C.S.Saravana Velu, who is the father of the plaintiff. Vide Ex.B4, sale deed dated 28.03.1990, he sold the undivided 1/3rd share to the plaintiff. The property sold to the plaintiff was mentioned in Schedule B and Schedule C as follows:

Schedule 'B'

1/3rd undivided share in the 'A' scheduled property together with right of ownership to construct First Floor on the existing ground floor building, as per the sanctioned plan without deviation. The Vendor retains the right to construct superstructure in the second floor, if any with him.

Market value of the 1/3rd undivided share is Rs.1,25,000/- (Rupees One Lakh and twenty five thousand only)

Schedule 'C'

Right to use the stair-case in the existing ground floor and in the first and second floors to be constructed in future by the purchaser and the vendor herein, right to use the common-space in the land (without construction) around the existing ground floor, right to use the drainage sewerage cannal and the watter supplied by the Madras Metropolitan Water and Sewerage Board."

11. Afterwards, the plaintiff made a construction, in the first floor. Similarly, her father constructed the second floor. Now, the present suit has been filed for partition, after excluding the 1/3rd share sold to the plaintiff. It is not in dispute, the suit schedule property originally belongs to the father of the plaintiff. It is also not in dispute that he died intestate without made any arrangement in respect to the suit schedule property. Therefore, being the reason that the plaintiff and defendants 1 to 3 are the Class-I heirs of the said C.S.Saravanavelu, the plaintiff is entitled to 1/4th share in the Ground Floor and Second Floor of the suit schedule property.



12. In this occasion, it is the case of the defendants that the sale deed alleged to be executed by C.S.Saravanelu dated 28.03.1990 is sham and nominal and the said sale cannot give any right to the plaintiff and thereby, non-inclusion of the 1/3rd share which is alleged to be purchased by the plaintiff is fatal to the case of the plaintiff.

13. Therefore, in view of the above, it would be necessary to find out whether the 1/3rd share conveyed in favour of the plaintiff vide sale deed dated 28.03.1990 is sham and nominal one.

14. Since the plea that the sale deed under dispute is sham and nominal, has been taken by the defendants, a heavy burden of proof lay upon the defendants to show that the transaction was a sham one. It was not a case, where the parties did not intend to enter into any transaction at all. Admittedly, a transaction had taken place. Only the nature of transaction was in issue. A distinction must be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of law at all and the nature and character of a transaction is reflected in a deed of conveyance. The construction of the deed clearly shows that it was a deed of sale.

15. In this regard, primarily, if the defendants claim that the alleged sale deed dated 28.03.1990, is sham and nominal, they have to file a suit for setting aside the sale within a period of three years. But here it is a case, the suit has been preferred after 17 years from the date of sale. On that score alone, the defendants are not having any right to challenge the said sale deed as sham and nominal.

16. It is the case, though it was contended on the side of the defendants that the sale deed was executed for the purpose of availing loan, in Indian Bank, wherein the plaintiff was working as a staff, in the recital found in page No.4 of the sale deed viz., Ex.B4, it was mentioned as follows:

"And whereas, the vendor in order to meet the expenses for getting building plan approved, for removing the weathering coat over the ground floor building so as to enable the purchaser to put up construction on the first floor, and to put up construction on the second floor out of the sale consideration of Rs.1,00,000/- has decided to sell the 1/3rd undivided share in the 'A' schedule property which is morefully described in the 'B' schedule property hereunder."

17. The said recital is quite clear and would prove the case of the plaintiff that the sale consideration passed in respect



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to Ex.B4, sale deed is utilised for the purpose of constructing second floor in the suit schedule property. In otherwise, while at the time of giving evidence as DW1, the 1st defendant has admitted that the loan availed by the plaintiff for constructing first floor was repaid by deducting the monthly instalments from her salary. Thereby, from the above, the plaintiff proved the sale consideration and that the construction charges could have been borne by the plaintiff alone.

18. On the other hand, on the side of the defendants, number of documents were produced as Ex.B8 to B35 to show that the construction made in the suit schedule property is only by the husband of the 1st defendant.

19. Now, on going through the said documents, it would appear that the said letters and the transactions are all related to the construction of the second floor and not in respect to the first floor. Though, the permission for construction of the first floor has been given in the name of the husband of the 1st defendant, in the sale deed dated 28.03.1990, the same was mentioned and the right was given to the plaintiff for constructing the first floor.

20. Therefore, in all, the defendants have not discharged their burden and failed in their duty to prove the sale deed Ex.B4, executed by the husband of the 1st defendant, as sham and nominal. Accordingly, it is held that the first floor constructed in the suit schedule property is the absolute property of the plaintiff.

21. On the other hand, the present suit has been filed for partitioning the remaining property i.e. ground floor and second floor of the suit schedule property. Therefore, it cannot be said that the suit is bad for partial partition. The **(*)Lower Appellate Court** has traversed in the same lines and passed a preliminary decree for partition. Therefore, the said findings arrived at by the **(*)Lower Appellate Court** cannot be disturbed and the same is confirmed. The substantial questions of law framed, are answered as above.

22. In the result, the second appeal fails and the same is dismissed. No Costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar



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To

1. The Additional District Judge (FTC-V),
Chennai.

2. The XIII Assistant Judge,
City Civil Court,
Chennai.

Copy to

The Section Officer,
VR Section,
High Court, Madras - 104.

+2ccs to Mr.K.Bijai Sundar, Advocate, S.R.No.7958,13415

+1cc to T.M.Hariharan, Advocate, S.R.No.8191

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RSI[co]
NSK 22/03/2022