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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.318 of 2010

S.Vijayalakshmi ...Appellant / 1<sup>st</sup> defendant

Vs.

1. Gayathri Devi ... Respondent/Plaintiff

2. Sidhartha Variar ... Respondent/2<sup>nd</sup> defendant

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.292 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.1472 of 1998 on the file of the learned XIII Assistant Judge, City Civil Court, Chennai.

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

For Respondents : Mr.K.Bijai Sundar (for R1)  
No appearance (for R2)

#### 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.292 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.1472 of 1998 on the file of the learned XIII Assistant Judge, City Civil Court, Chennai. The suit is for recovery of possession.

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 absolute owner of an undivided 1/3<sup>rd</sup> share of the land situated in the sanctioned plan of West Madras Neighbourhood Scheme bearing Plot No.3736, Door No.Q19, 17<sup>th</sup> Street, Anna Nagar, Madras - 600 040. The plaintiff has acquired the same through the sale deed dated 28.03.1990 executed by C.S.Saravanelu, who is the husband of the 1<sup>st</sup> defendant and the father of the plaintiff. The terms of the said sale deed permitted the plaintiff to construct a first floor over the roof of the existing ground floor of the building constructed on the land. The plaintiff being the employee of the Indian Bank availed a housing loan and had put up the first floor over the roof of the ground floor of the said building. The undivided 1/3<sup>rd</sup> share in land, together with the first floor constructed by the plaintiff are morefully described.

(ii) The plaintiff had let out the first floor to one Murali Kothari, and in turn he is occupying the said floor as a tenant under the plaintiff and was paying the monthly rent to the plaintiff. The said tenant vacated the premises in March 1995 and thereafter, the premises was kept under lock and key by the plaintiff. The 1<sup>st</sup> defendant, was occupying the first floor, in a high handed manner. The plaintiff hence requested the 1<sup>st</sup> defendant to hand over the possession of the scheduled property peacefully.

(iii) Whilst so, the plaintiff states that the 1<sup>st</sup> defendant had leased out the scheduled property in and around July 1995 to the 2<sup>nd</sup> defendant on a monthly rent of Rs.3,500/-. The 2<sup>nd</sup> defendant has been paying the said rent to the 1<sup>st</sup> defendant. In spite of repeated demands made by the plaintiff, the defendants refused to deliver the vacant possession of the suit property. Hence, a legal notice dated 25.03.1996 was issued to both defendants. The defendant sent a reply on 15.05.1996. The plaintiff sent a suitable rejoinder dated 17.07.1996. Thereafter, there has been no response from the defendants. Hence, the suit.

4. The averments found in the written statement filed by the 1<sup>st</sup> defendant, are as follows:

(i) The plaintiff is not the absolute owner to the undivided 1/3<sup>rd</sup> share as alleged. It is false to say that the plaintiff have acquired the same through a sale deed dated 28.03.1990 executed by C.S.Saravanelu, husband of the 1<sup>st</sup> defendant and father of the plaintiff. The terms of the sale deed did not permit the plaintiff to construct the first floor over the roof of the existing ground floor. The father of the plaintiff intended to construct additional two floors over the ground floor roofing and give one floor to each of the 3 daughters.



(ii) In the sale deed referred by the plaintiff, it was stated that the premises at present consists of the ground floor, first floor and second floor, to deal with them as separate entries, which clearly clinches the issue that the plaintiff is not the absolute owner of the 1/3<sup>rd</sup> share of the land. She never constructed the first floor out of her own funds and she was not given possession in pursuance of the said nominal sale deed which was brought into existence at the insistence of Bank Lawyer for facilitating to get housing loan from Indian Bank.

(iii) The plaintiff never let out the 1<sup>st</sup> floor to Shri Murali Kothari, who was occupying the said floor as a tenant. The first floor was let out by the father of the plaintiff and not by the 1<sup>st</sup> defendant. At the time when the tenant vacated the house, since the plaintiff's father expired, the 1<sup>st</sup> defendant only returned the advance amount to the tenant, from the advance received from the incoming tenant Sri Siddarath Warrior, viz., the 2<sup>nd</sup> defendant herein. The 2<sup>nd</sup> defendant was inducted as a tenant by the 1<sup>st</sup> defendant alone. The advance amount given by him was taken by the 1<sup>st</sup> defendant. The advance amount of Rs.20,000/- received from Sri Murali Kothari was returned out of the advance received from the 2<sup>nd</sup> defendant.

(iv) This defendant is acting as per the instructions of her husband and in pursuance with the Family Arrangement-cum-Settlement wherein his desire was vividly and acted upon. There was no cause of action. Hence, suit filed by the plaintiff is devoid of merits and is liable for dismissal.

5. The averments found in the written statement filed by the 2<sup>nd</sup> defendant, are as follows:

(i) The 1<sup>st</sup> defendant never broke open the lock and inducted this defendant as a tenant in April 1995 and the 1<sup>st</sup> defendant alone received the advance out of which only the caution deposit of erstwhile tenant was repaid, who had vacated on March 1995. Hence, the 2<sup>nd</sup> defendant is a tenant under the 1<sup>st</sup> defendant only and obtained the first floor portion's main door key and paying monthly rent to her regularly. This defendant has nothing to do with the plaintiff with regard to the tenancy. Hence, he sought for dismissal of the suit.

6. 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 five documents were marked as Ex.A1 to Ex.A5. Similarly, on the side of the defendants, DW1 and DW2 were examined and twenty-five documents were marked as Ex.B1 to Ex.B25.



7. 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.

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8. In the appeal filed by the plaintiff in A.S.No.292 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.

9. Feeling aggrieved over the findings arrived at by the lower appellate Court, the 1<sup>st</sup> defendant has 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.A5 is the sham and nominal transaction?

2. Whether the respondent/plaintiff is entitled to file a suit for recovery of possession without seeking a relief for partition?

3. Whether the suit is hit by Order 2 Rule 2 of Civil Procedure Code?"

10. Heard Mr.K.Sivasubramanian, the learned counsel appearing on behalf of the appellant/1<sup>st</sup> defendant and Mr.K.Bijai Sundar, the learned Counsel appearing on behalf of the 1<sup>st</sup> respondent/plaintiff and perused the materials available on record.

11. The 1<sup>st</sup> defendant in the suit is the mother of the plaintiff. The 2<sup>nd</sup> defendant is the tenant in the first floor. It is the case of the plaintiff that vide registered sale deed dated 28.03.1990, i.e. Ex.A5 [copy of same is marked as Ex.A1], she has purchased undivided 1/3<sup>rd</sup> share with right to construct first floor as per the building plan obtained by the vendor in Ex.A5. Now, after made construction in the first floor, second floor was also constructed by her father and as of now, her father is no more. Only in the said circumstances the plaintiff filed this suit for recovery of undivided 1/3<sup>rd</sup> share in the suit schedule property. Though, the trial Court decided the issue against the plaintiff, in the appeal, the learned Additional District Judge [FTC-V], Chennai, granted a decree as plaintiff is entitled to the relief of recovery of possession.

12. Now, the Substantial Questions of Law are all in respect to the sale deed dated 28.03.1990, stands in favour of the plaintiff, which is executed by her father.



13. The learned counsel appearing for the appellant/1<sup>st</sup> defendant would contend that the plaintiff being a bank employee, in order to avail housing loan for constructing 1<sup>st</sup> and 2<sup>nd</sup> floors, in the name of the plaintiff, the said sale deed was executed in her favour. Hence, in the said circumstances, it should be concluded that the sale deed dated 28.03.1990, is sham and nominal.

14. Since the plea that the sale deed under dispute is sham and nominal, has been taken by the 1<sup>st</sup> defendant, a heavy burden of proof lay upon the 1<sup>st</sup> defendant 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. Though, it was contended on the side of the 1<sup>st</sup> defendant that no consideration has been passed for the sale, it was the evidence given by the 1<sup>st</sup> defendant as DW1 that during the relevant point of time, the plaintiff availed a loan of Rs.1.5 lacs from her bank and handed over the same for construction. Further, she has stated that the loan amount was repaid in instalments, by deducting the same from the salary of plaintiff. Further she has specifically given evidence as both the first and second floors were simultaneously constructed and afterwards, the Corporation Tax, Metro Tax, Electricity Bill etc., are all levied in the name of the plaintiff.

16. It is the specific evidence given by the 1<sup>st</sup> defendant that only after the receipt of notice issued by the plaintiff for handing over the possession, she claimed as the sale deed dated 28.03.1990 stands in the name of the plaintiff, is sham and nominal. Therefore, the said evidence given by DW1 establish the case of the plaintiff that only after claiming the right in the suit schedule property by virtue of the sale deed dated 28.03.1990, the defendant took a stand that the sale deed stands in the name of the plaintiff, is sham and nominal.

17. In this occasion, being the reason that the vendor and the plaintiff are the father and daughter, if the document is created for the purpose of availing the loan, it is not necessary for them to execute a sale deed. Only a settlement deed is enough for availing the loan.

18. Though in Ex.B2, it is stated that the husband of the 1<sup>st</sup> defendant was given permission for constructing a house, in



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Ex.A5, Sale deed, in page No.4, it is mentioned that the property was sold to the plaintiff with right to construct the first floor, as per the plan obtained by the vendor. The said circumstances is in support of the case of the plaintiff that the right of construction also was sold vide Ex.A5.

19. On the side of the defendant, several documents are exhibited as Ex.B8 to B21 to show that the husband of the 1<sup>st</sup> defendant availed the loan for constructing his house. Now, on going through the said documents, those documents are all pertains to the loans availed by the husband of the 1<sup>st</sup> defendant through which he mortgaged the ground and second floor for availing the loan. From the documents marked as above, it is quite clear that the deceased C.S.Saravanelu, never claimed right over the first floor of the suit property, after the execution of the sale deed. The documents marked on the side of the defendants would reveal the fact that in respect to the first floor, nobody made any claim. Therefore, it is apparent that the evidence given by DW1 that the sale deed stands in the name of the plaintiff is sham and nominal, is nothing but against the recitals found in Ex.A5. Therefore, under Section 91 of the Indian Evidence Act, the evidence given by DW1 may not be relevant for deciding the Substantial Question of Law in favour of the appellant/1<sup>st</sup> defendant.

20. In the said circumstances, after upholding the right having by the plaintiff in the first floor, filing the suit for recovery of possession, is sufficient. Since the entire building was demarcated as Ground Floor, First Floor and Second Floor, asking the relief of partitioning not at all be necessary.

21. Further, the entire case of the plaintiff reveals the fact that as of now, the 2<sup>nd</sup> defendant being the tenant is in the occupation of the first floor. The adornment of tenancy and the receipt of rent by the 1<sup>st</sup> defendant was admitted by the 1<sup>st</sup> defendant. Accordingly, the 2<sup>nd</sup> defendant was inducted as a tenant only by the 1<sup>st</sup> defendant and thereby, the 1<sup>st</sup> defendant alone received the rent. Only in the said circumstances, the present suit has been filed for the relief of recovery of possession and for mense profits. Being the reason that the right having by the plaintiff is conferred vide Ex.A5, it cannot be said the present suit is filed not for the whole claim. Therefore, in this aspect also, the case of the defendant fails.

22. In this case, there is no proof that any contract to the contrary was entered into. An attempt has been made by the appellant/1<sup>st</sup> defendant to show that there was an oral contract, to the effect that the plaintiff must avail the loan for the construction of first and second floors. As already observed,



the documents relied on by the plaintiff are all establish the case of the 1<sup>st</sup> defendant that in respect to the second floor, the father of the plaintiff alone availed the loan and discharged the same. In otherwise, the title deed pertains to the first floor, tax receipts issued by various authorities all stands in the name of the plaintiff. Being the reason that the alleged sale deed is not agitated, in earlier immediately after the completion of construction, it cannot be said that the said sale deed, executed by the father of the plaintiff is sham and nominal.

23. More than that only after the completion of construction, the father of the plaintiff, who is the husband of the 1<sup>st</sup> defendant passed away. Till his life time, he has not attempted to challenge the same. Therefore, the inaction on the part of the husband of the 1<sup>st</sup> defendant also is in support of the plaintiff that the alleged sale deed stands in the name of the plaintiff was executed by the husband of the 1<sup>st</sup> defendant for proper consideration.

24. So, in all aspects, the 1<sup>st</sup> defendant fails in her attempt to prove the case that the sale deed stands in the name of the plaintiff dated 28.03.1990, is sham and nominal. The lower appellate Court has also traversed in the same line and after considering the evidence given by DW1, came to the conclusion that the relief sought by the plaintiff is viable and therefore, she is entitled for the relief claimed in the plaint. Therefore, the judgment and decree passed by the first appellate Court, do not warrant any interference and the same is confirmed. The substantial questions of law framed, are answered as above.

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

Sd/-  
Assistant Registrar(CCC)

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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.

+lcc to Mr.K.Bijai Sundar , Advocate, S.R.No.8193

+lcc to T.M.Hariharan, Advocate, S.R.No.7959

S.A.No.318 of 2010

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NSK 22/03/2022