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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26 / 04 / 2022

CORAM

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

SA NO.733 OF 2017

AND CMP NOS.18494 OF 2017 AND 16913 OF 2021

S.Jaganathan

...Appellant/Plaintiff

VS.

1.Jamal Kajamohideen

2.K.N.Krishnan

3.The Tahsildar

Mambalam - Guindy Taluk Office
Chennai.

4.The Sub-Registrar Office

(District Registrar Cadre)

T. Nagar, Chennai.

...Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, 1908, against the judgment and decree dated 23.06.2017 passed in A.S.No.52 of 2015 on the file of the II Additional City Civil Judge at Chennai, confirming the judgment and decree dated 07.01.2015 in O.S.No.8128 of 2010 on the file of the XII Assistant City Civil Judge at Chennai.

For Appellant : Mr.G.Mohanakrishnan

For Respondent-1: Mr.N.Sivaprakash

J U D G M E N T

Aggrieved over the concurrent findings of the Courts below, the plaintiff has preferred the above Second Appeal.

2.For the sake of convenience, the parties are called as per the litigative status before the Trial Court.



3.The Suit property originally was owned and possessed by one Late M.Rajagopal, who acquired the same by virtue of a Deed of Sale dated 12.11.1922, Document No.2955/1922. After the death of the said M.Rajagopal, his legal heirs viz., S.R.Srinivasan, S.R.Suriyanarayanan, S.R.Parthasarathy and Tmt.Santhammal inherited 1/4th share each in the property. Through them, the plaintiff purchased 17/24th share from S.R.Suriyanarayanan, S.R.Parthasarathy and Tmt.Santhammal. The eldest son of M.Rajagopal by name S.R.Srinivasan filed a Suit for partition in O.S.No.2196 of 1968 and it was dismissed for default on 18.11.1974 and the Interlocutory Application filed in I.A.No.1919 of 1975 to set aside the order of dismissal was also dismissed for default on 21.08.1975.

4.In the meanwhile, the said S.R.Srinivasan mortgaged the property by way of a deed of simple mortgage dated 01.03.1974 registered as Document No.330/1974 in favour of one Smt.Parvathy Krishnan in order to discharge some other mortgage loan. Since the mortgage was not cleared, the said Parvathy Krishnan brought the property for sale in public auction on 31.03.1979. One K.N.Duraisamy, became the successful bidder and took the property in public auction and the sale deed was registered in favour of K.N.Duraisamy. Thereafter, he filed a Suit for partition in O.S.No.10168 of 1992 and obtained a preliminary decree on 15.11.1999 allotting 1/3rd share in his favour. He also filed an interlocutory application in I.A.No.18337 of 2000 for passing a final decree. As such, during the pendency of the final decree application, K.N.Duraisamy entered into one agreement with the first defendant on 07.03.2001 agreeing to convey the 1/3rd share in the schedule property. Thereafter, on 30.06.2006, the final decree came to be passed.

5.Since the said K.N.Duraisamy did not come forward to execute the sale deed, the first defendant filed a suit in O.S.No.800 of 2008 on the file of IV Additional Judge, City Civil Court, Chennai, for specific performance and the same was decreed on 22.07.2008. Thereafter, by virtue of E.P.No.7 of 2009, the sale deed was executed in favour of the first defendant by the Execution Court viz., IX Assistant Judge, City Civil Court, Chennai, on 16.11.2009 through registered Document No.2483/2009. The said sale deed is sought to be declared as null and void by the plaintiff.

6.The defendant filed an elaborate written statement, denying all the allegations and also the genealogy of S.M.Rajagopal Naidu. According to him, the legal heirs of



S.M.Rajagopal Naidu died and they were survived by various legal heirs and it should be divided among themselves. The daughter Late S.M.Rajagopal Naidu namely, Tmt.Santhammal was not mentioned even as a co-sharer and she does not have a share in the property. Even assuming that she has a share, she had lost all her rights, in the suit property by way of ousted as her alleged rights were omitted by the three sons of Late S.M.Rajagopal Naidu since 1968. Very particularly, when the mortgage deed was executed by one of the sons mortgaging his 1/3rd undivided share in favour of the said Smt.Parvathy Krishnan. Therefore, the conveyance of 17 / 24th share in favour of the plaintiff is not feasible, that too, by the fourth vendor, who is said to have derived the property through a WILL executed by Tmt.Santhammal. Therefore, Tmt.Santhammal herself has no right and as such, the fourth vendor namely, Sulochana cannot have any right on the alleged WILL said to have been executed by the said Tmt.Santhammal. Therefore, at the most, the plaintiff could have purchased only 16/24th undivided share i.e., 2/3rd undivided share in the plaint schedule property from the sons of S.M.Rajagopal Naidu.

7.Further, the said K.N.Duraisamy was very much alive throughout the legal proceedings in O.S.No.10168 of 1992. The plaintiff ought to have impleaded the legal heirs of K.N.Duraisamy, who is the owner of 1/3rd undivided share of the property, as early as on 27.05.2001 that on the date on which the plaintiff claims that the said K.N.Duraisamy died. The sale deed was executed by the IX Assistant Judge, City Civil Court, Chennai, in favour of the first defendant during the lifetime of K.N.Duraisamy and it cannot be declared as null and void. On the other hand, the first defendant would make a counter claim to declare the sale deed dated 31.03.2008 registered as Document No.703 of 2008 on the file of Sub Registrar, T.Nagar as null and void, sham and nominal and not binding upon this defendant and for permanent injunction.

8.The Trial Court framed appropriate issues and dismissed the Suit and the same was confirmed by the First Appellate Court. Aggrieved over the same, the plaintiff preferred the above Second Appeal and it was admitted on 13.12.2021 on the following substantial questions of law:-

"1.Whether the decree passed against the death person is valid in law?

2.Whether the trial Court and the Appellate Court erred in law in ignoring the fact that under Ex.A1, the suit property was purchased



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by father Rajagopal Naidu and as such the suit property is the absolute property of Rajagopal Naidu?

3. Whether the trial Court and the Appellate Court erred in law in ignoring the fact that Rajagopal died intestate and after his life time his children namely, Srinivasan, Suryanaryanan, Parthasarathy and Santhammal succeeded the property by way of succession and as such are in Joint Possession of the suit property as evidenced under Ex. All Mortgage deed executed by all four of them in favour of Co-Operative Society mortgaging the entire schedule property?

4. Whether the trial Court and the Appellate Court erred in law in ignoring that under Ex. A2 fact that the plaintiff purchased the shares of Suryanarayanan and Parthasarathy and Santhammal from the respective legal heirs and his claim 17/24 th share in the entire suit property constitutes lesser than 3/4 th share in the suit property and as such he is not claiming any right over the 1/4 th share of Srinivasan?

5. Whether the trial Court and the Appellate Court erred in law in ignoring that all the heirs of Suryanarayanan, Parthasarathy, being the co-sharers has acknowledged the title S.A.No.733 of 2017 and joint possession of Santhammal as Co-sharer in the suit property and put their signature in the Ex. A2 Sale Deed and as such there is no dispute among the three sets of heirs of Rajagopal namely Suryanarayanan, Parthasarathy and Santhammal with respect to entitlement of share by Sarathammal?

6. Whether the trial Court and the Appellate Court erred in law in ignoring the fact that the first defendant claiming lawful title under Srinivasan is claiming 1/3rd share though in law the said Srinivasan is having title only for 1/4th are in the suit property?

7. Whether the trial Court and the Appellate Court erred in law in not considering the right of Srinivasan in Executing the Ex. B1 mortgage deed dated 01.03.1974 for over the above 1/4th share the said Srinivasan is entitled?

8. Whether the trial Court and the Appellate Court erred in law in not considering



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that Ex.B1 mortgage deed is simple mortgage and as such the possession of the property was not parted with to the mortgagee?

9. Whether the trial Court and the Appellate court erred in law in not considering that Ex.B2 sale deed executed by mortgage by way of auction sale and as such no steps were taken by the purchaser under Ex.B2 in taking physical possession of the property till date?

10. Whether the trial Court and the Appellate Court erred in law in ignoring to take that the first defendant having claimed lawful title over 1/3rd share in the suit property as against Santhammal is not permitted in raising the Plea of Ouster as against the said Santhammal?

11. Whether the trial Court and the Appellate Court erred in law, in presuming that the theory of Ouster has worked out as against said Santhammal of her undivided 1/4th share in the property, in the absence of pleadings and the proof in accordance to Section 65 of the Limitation Act?

12. Whether the trial Court and the Appellate Court erred in law in refusing to invoke the presumption as to public document namely Ex.A3 - Death Certificate of K.N.Duraiswamy registered on 29.05.2001 evidencing the death of K.N.Duraiswamy on 27.05.2001 in violation of Section 79 of the Indian Evidence Act, 1872?

13. Whether the trial Court and the Appellate Court erred in law in holding that the Ex.B1 mortgage deed executed by Srinivasan is genuine without going in to the validity of the said Mortgage deed as far as the share of Santhammal is concerned in accordance to Section 23 of the Indian Contract Act?

14. The appellant is reversing his right to raise any other grounds at the time of final arguments of this appeal. "

9. Heard the submissions made on either side and perused the materials available on record.

10. The first question of law is that whether the decree passed against a dead person is valid in law. It is the



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case of the plaintiff that the said vendor of the first defendant namely, K.N.Duraisamy died on 27.05.2001 and the death certificate dated 17.04.2008 was marked as Ex.A3. The first defendant in his written statement would state that the said K.N.Duraisamy was very well alive during 27.05.2001 that is during the pendency of the entire legal proceedings in O.S.No.10168 of 1992 which was filed for partition against the plaintiff's vendor. The suit was decreed on 15.11.1999. Thereafter, the said K.N.Duraisamy filed an interlocutory application in I.A.No.18337 of 2000 for passing of final decree. In that application for final decree, he filed another application in I.A.No.11670 of 2004 for appointment of Advocate Commissioner for inspecting the property and to effect partition.

11.As there had been some breach of peace created by the defendants in that Suit, a Memo was filed on 26.09.2005 by the Advocate Commissioner before the Court seeking permission to take assistance of the police till the execution of the warrant of commission. When the Memo came up before the Court on 14.10.2005, the learned counsel for K.N.Duraisamy made an endorsement of "no objection" and accordingly, the memo was allowed. It is relevant to note that the said K.N.Duraisamy said to have died on 27.05.2001. But an endorsement was made on behalf of him by the counsel on 14.10.2005.

12.Further, during cross examination P.W.1, specific questions were addressed with regard to Ex.A3 death certificate of Duraisamy. It is categorically stated that he went and enquired at K.N.Duraisamy's house. The inmates of the house informed that the said K.N.Duraisamy expired. Thereafter, they obtained the death certificate of K.N.Duraisamy. Thereafter, when he applied for encumbrance certificate, he found out that K.N.Duraisamy has purchased the suit property. In further cross examination, it was deposed by him that the factum of death of K.N.Duraisamy was informed by an employee of K.N.Duraisamy's house at Cenotaph Road. When he enquired, it was informed that K.N.Duraisamy died long back that is seven or eight year before. The first defendant has purchased the property only in the year 2010 and denied the suggestion that the said K.N.Duraisamy was alive till the completion of O.S.No.800 of 2008 and that he did not die on 27.05.2001.

13.The evidence of P.W.1 would assert that the said K.N.Duraisamy died on 27.05.2001, which is corroborated by Ex.A3 death certificate. The first defendant, who examined himself as D.W.1 would simply deny that Ex.A3 is a false



document and that he has not taken any steps to prove that the said K.N.Duraisamy was very much alive during the institution of the suit for specific performance filed by him in O.S.No.800 of 2008. During cross examination, he would state that he was not aware that he was set exparte throughout. He would admit that after the sale agreement entered with K.N.Duraisamy on 07.03.2001, he filed the Suit for specific performance only after a period of seven years and obtained decree. He would deny the suggestion that it was a collusive decree. But he has not taken any steps to prove that K.N.Duraisamy was alive after entering into the sale agreement with the first defendant and that he filed a Suit for specific performance against K.N.Duraisamy during his lifetime.

14. Therefore, in the absence of any evidence that K.N.Duraisamy was very much alive during the institution of the suit for specific performance, the evidence of P.W.1 is considered to be credible and supported by documentary evidence. No official witness to disprove the document marked as Ex.A3 was also examined by the first defendant. In that circumstances, it has to be held that the Suit filed against a dead person and the decree obtained against a dead person and the sale deed executed on behalf of a dead person is null and void.

15. The judgments relied on by the learned counsel for the appellant in STATE TRADING CORPORATION OF INDIA LTD., VS. K.S.VAIDYALINGAM AND OTHERS [AIR 1978 MAD 294], AMBA BAI AND OTHERS VS. GOPAL AND OTHERS [AIR 2001 SC 2003], T.GNANAVEL AND OTHERS VS. T.S.KANAGARAJ AND OTHERS [2007 (4) CTC 650], M.DHANDAPANI VS. P.K.RAMAKRISHNAN [2013 (3) LW 659] are applicable to the case on hand for the proposition that decree against a dead person is null and void.

16. In view of the finding that the purchase of the suit property by the first defendant through Court against a dead person, who was set ex-parte throughout is null and void and he has no legal right to question the purchase made by the plaintiff from the legal heirs of the original owner. Therefore, the counter claim to declare the sale deed executed by the legal heirs of said Late S.M.Rajagopal Naidu in favour of the plaintiff, as null and void, cannot be granted. The validity of the sale can be questioned only by the legal heirs of K.N.Duraisamy and none else. In view of the findings, in respect of the first question of law, all the other substantial questions of law raised by the appellant / plaintiff does not require any consideration.



17. Accordingly, the suit in O.S.No. 8128 of 2010 on the file of XII Assistant Judge, City Civil Court, Chennai is decreed and the judgment and decree dated 23.06.2017 passed in A.S.No.52 of 2015 by the learned II Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 07.01.2015 passed in O.S.No.8128 of 2010 by the learned XII Assistant Judge, City Civil Court, Chennai, stands set aside.

18. In fine, the Second Appeal is allowed. No costs. Consequently, connected Civil Miscellaneous Petitions are closed.

s/d-
Assistant Registrar

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Sub-Assistant Registrar

TK
To

1. The II Additional Judge
City Civil Court
Chennai.

2. The XII Assistant Judge
City Civil Court
Chennai.

+2 Ccs to Mr.G.Mohanakrishnan, advocate sr 29499
+1 CC to Mr.N.Sivaprakash, Advocate sr 28785.

SA NO.733 OF 2017

SS(CO)
SP(31/05/2022)