

(2014) 10 MAD CK 0332

In the Madras High Court

Case No : Second Appeal No. 1016 of 2014 and M.P. No. 1 of 2014

N. Ramachandran

APPELLANT

Vs

M. Janaki

RESPONDENT

Date of Decision : 30-10-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 41 Rule 27, Order 41 Rule 29

Citation : (2014) 10 MAD CK 0332

Hon'ble Judges : B. Rajendran, J

Bench : Single Bench

Judgement

B. Rajendran, J.—This second appeal is listed today for admission and I heard the learned counsel appearing for the appellant.

2. The appellant, who has lost his case before both the Courts below, has come forward with this second appeal. The appellant has filed E.A. No. 4243 of 2007 in E.P. No. 3044 of 2006 in Tr. O.S. No. 249 of 1996 before the trial Court under Order XXI Rule 58 of CPC praying to adjudicate his claim, as a third party in the suit, to release the suit property bearing Door No. 42/7, Old No. 29, II Floor, Thambiah Reddy Street, West Mambalam, Chennai comprised in T.S. No. 11 from the purview of attachment made in E.P. No. 3044 of 2006 and also to set aside the sale deed 22.03.2005 executed by the Registrar, City Civil Court, Chennai in favour of the third respondent in this appeal. For the sake of convenience, this property shall hereinafter be referred to as the property in this appeal.

3. According to the appellant, the second respondent herein is the original owner of the property. It is the case of the appellant that the second respondent herein has executed a promissory note on 01.04.1994 and borrowed a sum of Rs. 1,50,000/- from him agreeing to pay interest on the loan amount. At the time of borrowing the amount, the second respondent deposited the original title deeds in respect of the property with an intention to create mortgage over the same. Further, on 12.03.1995, the second respondent executed a general power of

attorney in favour of the appellant authorising him to deal with the property and also to clear the dues payable by him to Rajeswari Constructions. In and by the said power of attorney deed dated 12.03.1995, the second respondent has also authorised the appellant to alienate the property for a valuable sale consideration to third parties. According to the appellant, the second respondent also assured and undertook to dispose of the property in his favour, if he is unable to repay the loan amount borrowed on 01.04.1994. It is the further contention of the appellant that on behalf of the second respondent, he has paid Rs. 2,38,700/-, Rs. 35,000/- on 08.04.1995 and Rs. 13,700/- on 11.04.1995 to Rajeswari Construction. While so, the second respondent himself requested the appellant to purchase the property for Rs. 5,00,000/- and this sum shall be adjusted towards the amount payable by the second respondent. The second respondent also permitted the appellant to let out the property to tenants and to realise the rentals received therefrom. On the basis of such oral arrangement, the appellant also let out the property to tenants and is in possession of the property by paying all the taxes and charges thereto. The appellant, as a mortgagee, is having all the title deeds, property tax receipts and other documents to assert his right and title over the property. In those circumstances, the appellant came to know that the property has been attached by the trial court in E.P. No. 3044 of 2006 in the suit filed by the first respondent herein in O.S. No. 249 of 1996 in which the third respondent herein has purchased the property in an auction sale conducted by the Court. Therefore, the appellant has filed the aforesaid E.A. No. 4243 of 2007 for the relief claimed therein.

4. The appellant would allege that the second respondent, in collusion with the plaintiff/first respondent herein, has earlier filed O.S. No. 249 of 1986 on the file of Subordinate Judge, Trichy for recovery of a meagre amount of Rs. 34,740/- allegedly due and payable by the second respondent herein. In the said suit, an ex-parte decree was passed by the Sub Court, Trichy on 10.01.1997. For execution of the decree, the suit was transmitted in E.A. No. 284 of 1987 in O.S. No. 249 of 1986. After transmission, an order of attachment was passed on 09.01.2001 and it came to be effected on 10.06.2002. Subsequently, the property itself was sold to the third respondent in the Court auction conducted on 23.03.2005 for a paltry sum of Rs. 5,25,000/- even without the title deeds. According to the appellant, the sale made in favour of the third respondent has deprived his right and interest over the property as a mortgagee. The property was purchased by the third respondent in collusion with the first respondent. The second respondent did not participate in the execution proceedings and thereby fraud has been committed on Court. Therefore, according to the appellant, the sale deed executed by the Court in favour of the third respondent has to be set aside and the property right has to be restored to him.

5. The application filed by the appellant was contested by the third respondent/ auction purchaser. According to the third respondent, the amount alleged to have been borrowed by the second respondent from the appellant has not been recovered by the appellant even after lapse of 13 years and after execution of

the sale deed in his favour, the appellant is claiming a right over the property. The sale was made by the Court after following all the procedures prescribed under law. The appellant is making a false claim on the basis of an alleged promissory note and power of attorney without any basis. The appellant was never in possession of the property as alleged. The application filed by the appellant to set aside the sale is not maintainable besides being frivolous. There is no explanation offered by the appellant as to what prevented him to assert his right at the earliest point of time on the basis of the alleged promissory note or the power of attorney executed in his favour. The claim of the appellant that the liability of the second respondent is over and above the sale value of the property cannot borne out of truth. Pursuant to the valid sale deed executed in his favour, the third respondent has been in peaceful possession and enjoyment of the same by asserting his right as an absolute owner thereof. Therefore, the third respondent prayed for dismissal of the application filed by the appellant.

6. The trial court, by order dated 30.01.2012, dismissed E.A. No. 4243 of 2007 in E.P. No. 3044 of 2006 in Tr. O.S. No. 249 of 1996 filed by the appellant under Order XXI Rule 58 of CPC. The trial court held that the appellant has not produced any documentary evidence to substantiate his claim that the second respondent has borrowed money and executed a promissory note. The appellant also failed to produce any document to show that he had paid certain amount to Rajeswari Construction on behalf of the second respondent. The appellant also did not produce any document to show that he was authorised to deal with the property by the second respondent or he is in possession of the property. The trial court also held that the sale made in favour of the third respondent by the Court on 23.03.2005 is valid and therefore, the claim of the appellant to adjudicate his claim in respect of the property does not arise.

7. Aggrieved by the order dated 30.01.2012 passed by the trial court, the appellant has filed an appeal in A.S. No. 66 of 2012 before the learned Principal Judge, City Civil Court, Chennai. The appellant Court, after considering the contentions urged on behalf of both sides and the materials made available on record, dismissed the appeal by a judgment dated 30.06.2014. As against the same, the instant appeal has been filed by the appellant.

8. The learned counsel for the appellant vehemently contended that the trial court summarily rejected the application filed by the appellant under Order XXI Rule 58 of CPC and refused to adjudicate his claim without any basis. According to the counsel for the appellant, the appellant has filed as many as 10 documents along with E.A. No. 4243 of 2007 to substantiate his claim, but the trial court failed to properly appreciate the same or given any findings as to the relevancy of those documents to the dispute. Even along with the first appeal, the appellant has filed CMP No. 721 of 2012 under Order 41 Rule 27 and 29 of CPC to permit him to mark 10 documents such as sale deed in favour of second respondent, promissory note, general power of attorney and letter issued by Rajeswari Construction acknowledging the receipt of payments. However, the

first appellate Court erroneously dismissed the application thereby denied him an opportunity to substantiate his case. According to the learned counsel for the appellant, the auction sale has taken place on 23.03.2005 and it was confirmed on 07.06.2005. Thus, it is evident that the Execution Petition has been filed beyond the period of one year and therefore, the Execution Petition itself is barred by period of limitation. Therefore, the learned counsel for the appellant would contend that the courts below erred in dismissing the application filed under Order 21 Rule 58 of CPC and prayed for allowing the second appeal.

9. At the outset, I prima facie find that the appellant has unsuccessfully attempted to establish his right over the property in question. I also find that this is a frivolous litigation engineered at the instance of the appellant to unsettle the settled dispute. The suit was filed by the first respondent herein before the Sub Court, Trichy in O.S. No. 249 of 1986 as against the second respondent herein for recovery of a sum of Rs. 34,740/-. The said suit was decreed ex-parte on 10.01.1987. At the instance of the plaintiff/first respondent herein, the suit was transmitted for the purpose of execution in E.A. No. 284 of 1987 in O.S. No. 249 of 1986 to the City Civil Court, Madras. After such transmission, an order of attachment was passed on 09.01.2001 which came to be effected on 10.06.2002. Thereafter, a court auction was conducted in which the property itself was sold to the third respondent herein on 23.03.2005 for a sum of Rs. 5,25,000/-. It is this sale which is sought to be set aside by the appellant. For this purpose, the appellant has filed E.A. No. 4243 of 2007 under Order 21 Rule 58 of CPC inter alia to adjudicate his right over the property in question. According to the appellant, the second respondent herein, in collusion with the first respondent, left the suit to be decreed ex-parte and he also did not participate in the court auction sale and this had adversely affected his right and interest in the property in question. According to the appellant, the second respondent owes money to him and in lieu thereof, the second respondent orally permitted him to occupy the property in question. The appellant also alleged to have obtained a general power of attorney deed in his favour by which the second respondent authorised him to deal with the property in question. While so, according to the appellant, the sale in favour of the third respondent is illegal and non-est in the eye of law.

10. In this background, it has to be seen whether the appellant has substantiated his claim over the property in question. Along with the application in E.A. No. 4243 of 2007, the appellant has filed 10 documents, however, the appellant has not let in oral evidence. The counsel for the appellant has argued the case before the trial court and on the basis of such argument, the trial court found that the relief sought for in the application cannot be granted. The court below also pointed out that the appellant has not substantiated his right by filing any documentary evidence or let in oral evidence. Similarly, along with the appeal, the appellant has filed C.M.P. No. 721 of 2012 under Order 41 Rule 27 and 29 of CPC to permit him to mark 10 documents at the appellate stage. The first appellate Court has found that when the appellant has not chosen to step in to

the witness box and to adduce oral evidence, the documents sought to be marked will have no evidentiary value. It was also stated that nothing prevented the appellant from marking the documents or letting in evidence in the original application itself. Inasmuch as the appellant failed to discharge his duty and did not utilise the opportunities granted to him by the trial court, it was held that he is not entitled to mark the documents in the appellate stage.

11. It is true that under Order 21 Rule 58 of CPC, the Court is empowered to adjudicate upon a claim or entertain an objection with respect to attachment or sale of the property. However, such adjudication shall be made only on the basis of material evidence adduced by the applicant. In the present case, for the reasons best known, the appellant did not step in to the witness box and examined himself as a witness. The documents sought to be marked by the appellant were also not marked in a manner known to law. In the absence of any oral evidence, the evidentiary value of the documents sought to be marked by the appellant cannot be gone into by the courts below. Therefore, I hold that both the courts below are correct in refusing to adjudicate the claim raised by the appellant and I do not find any reason to interfere with the same.

12. The appellant alleges that the second respondent herein has handed over possession of the property and also the title deeds relating to the same long back. It is also alleged that the second respondent offered to sell the property to the appellant. However, it is not known as to why the appellant did not take any steps to assert his right over the property for a long time when the second respondent himself has allegedly given a power of attorney in his favour for sale of the property. The protracted silence on the part of the appellant in not asserting his right at the earliest point of time vitiates his claim especially when the property itself has been sold in court auction in favour of the third respondent.

13. It is seen from the records that the third respondent herein has filed Execution Petition for execution of the sale deed. Challenging the same, the appellant herein has filed C.R.P. No. 850 of 2012 before this Court and that was also dismissed by this Court on 19.03.2012.

14. As regards the period of limitation canvassed by the counsel for the appellant, the learned counsel for the appellant fairly states that the question of limitation will not arise in this case. It is noteworthy to mention that the sale was effected on 10.06.2002 and sale in favour of the third respondent was confirmed on 23.03.2005 in the auction sale. Thereafter, for delivery of possession, E.P. No. 3044 of 2006 was filed by the third respondent herein on 11.09.2005, within a period of six months itself and therefore, it cannot be said that the Execution Petition is time barred.

15. It is seen from the records that the Execution Petition was originally filed during the year 2001 i.e., E.P. No. 682 of 2001 for execution of the ex-parte decree, after transmission. During the pendency of the same, for about 6 1/2

years, the appellant has not taken any steps to set aside the ex-parte decree. The appellant has filed the instant application in E.A. No. 4243 of 2007 in E.P. No. 3044 of 2006 in Tr. O.S. No. 249 of 1996 only during the year 2007. Even in that application, the appellant has not stepped in to the witness box or marked documents in support of his claim. Therefore, he is estopped from contending that the first and second respondents, in collusion with the third respondent, has committed fraud on the Court and taken delivery of the property. In fact the application itself was pending for about 4 = years, but the appellant has not taken any steps to let in evidence before the trial court or to mark the documents. This is nothing but a rus to deprive the respondents, particularly the third respondent, from enjoying the fruits of the decree, which was obtained long back. Even though the appellant claimed himself as a power of attorney holder or mortgagee in respect of the property, he has not filed any documentary evidence to substantiate such claim. The appellant has not made out any case for interference. The appellant has remained silent for a long time without asserting his right, if any. If really the appellant is in possession of the property, as alleged, he might have taken some steps to object to the execution of the decree at the earliest point of time, but he failed to do so. The sale was confirmed in favour of the third respondent after following all the due process of law and I do not find any reason to interfere with the same.

16. The learned counsel appearing for the appellant relied on the decisions of the Honourable Supreme Court in the case of (i) Balakrishnan Vs. Malaiyandi Konar, and (ii) Pattam Khader Khan Vs. Pattam Sardar Khan and Another, . Both these decisions have been relied on by the counsel for appellant to contend that there was delay in filing the Execution Petition for delivery of the property by the third respondent. In fact, during the course of argument, the counsel for the appellant himself concedes that the question of limitation does not arise in this case. Even otherwise, as mentioned above, the Execution Petition for delivery of the property has been filed by the third respondent within a year and therefore, the question of limitation does not arise in this case.

17. The learned counsel for the appellant has also relied on the decision of this Court in the case of K.V. Ramasamy Vs. K.V. Rahgavan, K.V. Sridharan, Lalitha Viswanathan and Jeyalakshmi Sridharan, to contend that even if sufficient reasons have not been assigned for admission of additional evidence, the Courts shall not dwell upon technicalities and admit the evidence as the ultimate goal of the Court is to render justice and the Court can admit necessary piece of evidence even at the appellate Stage. No doubt, the Courts have got power to entertain any evidence at the appellate Stage as has been contemplated under Order 41 Rule 27 of the Code of Civil Procedure. However, it cannot be automatic and it is subject to proof of existence of material evidence to the satisfaction of the Court. In the present case, as mentioned above, the appellant did not choose to step in to the witness box and remained silent for a substantial length of time to assert his right and title. There is no material produced by the appellant to the satisfaction of the Court to adjudicate upon his rights. Therefore, the ratio laid

down in the above decision cannot be made applicable to the facts of this case.

18. The learned counsel for the appellant also relied on the decision of the Full Bench of the Andhra Pradesh High Court in the case of Pallamreddy Masthan Reddy and others Vs. Nellore Finance Corporation and others, to contend that the Court is empowered to adjudicate upon the claim in a comprehensive manner covering the questions relating to right, title or interest over the property attached. It was further held that the scope of enquiry under Rule 58 of CPC has been amplified so as to cover the questions of right and title to the property. No doubt it is true that the claim made by the appellant can be adjudicated without driving him to file a separate suit. However, in the present case, as mentioned above, the appellant had slept over his right for a considerable length of time. The appellant has merely stated that he has an assertable right over the property, without substantiating it with documentary evidence. Therefore, this decision of the Full Bench of the Andhra Pradesh High Court also cannot be made applicable to the facts of this case.

19. For all the reasons mentioned above, I do not find any reason to interfere with the reasoned orders passed by the courts below and the second appeal deserves to be dismissed. There is no question of law, much less a substantial question of law arise for consideration of this Court in this appeal. Accordingly, the order passed by the Courts below are confirmed. The second appeal is dismissed in limine. No costs. Consequently, connected miscellaneous petition is closed.