

(2010) 01 MAD CK 0179

In the Madras High Court

Case No : Second Appeal No. 1469 of 1995

Souriraj and Azhagis represented by his guardian Antoni
Udayar

APPELLANT

Vs

Rasu Udayar

RESPONDENT

Date of Decision : 01-01-2010

Acts Referred:

Evidence Act, 1872 — Section 72, 92
Registration Act, 1908 — Section 69
Registration Rules, 1908 — Rule 55
Transfer of Property Act, 1882 — Section 54, 55(4), 68

Citation : (2010) 5 LW 346

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Advocate : V.K. Vijayaraghavan, for the Appellant; N. Maninarayanan, for the Respondent

Final Decision : Allowed

Judgement

R. Mala, J.—This Second appeal has been filed to set aside the judgment and decree dated 19.07.1995 made in A.S. No. 135 of 1993 on the file of the Subordinate Judge, Thanjavur reversing the judgment and decree dated 27.11.1992 made in O.S. No. 529 of 1986 on the file of the District Munsif, Thanjavur.

2. The Appellants as Plaintiffs have filed a suit for declaration of title and injunction restraining the Defendant/Respondent from interfering their peaceful possession and enjoyment of the suit property stating that originally, the suit property is originally belonged to one Pappu @ Savarimuthu Udayar, who is the paternal grandfather of the 1st Plaintiff and he has executed the registered settlement deed in favour of the Appellant/Plaintiff on 25.09.1982 which was duly executed, accepted and acted upon. In pursuance of the settlement, he is in possession and enjoyment. There are three shops, one shop has been in the occupation of the Defendant and the other two shops are under the other two

tenants. Now, the Defendant, who is the tenant has claiming title under one sale deed dated 03.11.1982, alleged to be executed by Pappu alias Savarimuthu Udayar in favour of the Plaintiff and he claimed for compulsory registration of the alleged deed in his favour. The said the document is not true and genuine. The Defendant has kidnapped the said Pappu @ Savarimuthu Udayar on 02.11.1982 and detained in a lodge at Tanjore and he got the sale deed to be executed. Hence, the Appellant has given a complaint and then only he was secured and there is no need or necessity for executing the sale deed. The vendor of the Defendant died during the proceedings of compulsory registration of the alleged sale deed and he document in favour of the Defendant had been ordered to be registered. Since at that time, the Plaintiffs were not bring on record as Legal Representative of the deceased grandfather in the said proceedings, the order of compulsory registration is not binding the Plaintiffs/Appellants. Since the Defendant is disputing their title to the property, they have come forward with the suit for declaration of title and injunction.

3. The Defendant/Respondent herein resisting the suit stating that the suit properties are belonging to one Pappu @ Savarimuthu Udayar. He executed the sale deed in favour of the Respondent in respect of 13 cents where, he is doing his tea shop and he disputed that he has got the documents in fraud and coercion. Since Pappu @ Savarimuthu Udayar has refused to register the deed, the Defendant had claimed compulsory registration and after enquiry, the registration has been effected. So it relied back to the date of execution of the sale deed and hence, he is the owner of the suit property. After the date of execution of the sale deed only, the settlement deed came into existence and hence the Plaintiffs have no right over the property and thus he prayed for the dismissal of the suit.

4. The learned trial Judge, after considering the averments both in the plaint and written statement and considering the arguments advanced by both the counsel, framed necessary issues and considering the oral evidence of P.Ws.1 to 3 and D.Ws.1 and 2, Exs. A1 to 19 and Exs.B 1 and 2 and decreed the suit. Aggrieved over against the said judgment and decree, the Respondent/Defendant preferred an appeal in A.S. No. 135 of 1993 before the Subordinate Judge, Thanjavur, where the same was allowed and set aside the judgment and decree of the trial Court and dismissed the suit, against which the Plaintiffs have preferred this present second appeal.

5. At the time of admission, this Court framed the following substantial question of law:

1. Whether the lower appellate court misread or omitted to consider the oral and documentary evidence on record in reversing the judgment and decree of the trial Court?

2. Whether the lower appellate Court was right in holding that the settlement deed Ex. A1 is not valid or that its due execution has not been proved in

accordance with law?

6. The learned Counsel appearing for the Appellants would contend the settlement deed was executed by the Plaintiffs' grand father in favour of the Plaintiffs on 25.09.1982 which was registered on 05.11.1982 and so it relied back to 25.09.1982 and the same is earlier point of time. He would further submit even though the Respondent has stated that they purchased the property on 03.11.1982, which has been registered after the death of Pappu @ Savarimuthu Udayar, as per the order of the compulsory registration, even it was relied back to 03.11.82, the date of execution of the sale deed. As per the settlement deed and as per the evidence of D.W. 1, the sale consideration has not been paid and hence no title is transferred in favour of the Defendant/ Respondent. As per the evidence of D.Ws.1 and 2 since Pappu @ Savarimuthu Udayar missed, a police complaint has been given, in pursuant of which, D.W.I absconded from the jurisdiction and the document has also been executed at Tanjore, where the property situated in the jurisdiction of Vallam Sub Registrar Office. In the complaint, the Appellants stated in what circumstances, the document came into existence. In such circumstances, it is the duty of the Respondent to prove that Ex. B1 sale deed is a true and genuine. To prove the same, the attestor were not examined and the Defendant has only examined D.W.2, who is scribe, but the scribe is not the competent person to depose about the validity of the sale deed. The trial Court has considered all the aspects in proper perspective, whereas, the 1st Appellant Court has not considered the same. To substantiate his case, he relied upon the decisions of the Apex Court and this Court and hence, he prayed for the allowing of the appeal.

7. Per contra, the learned Counsel appearing for the Respondent would contend that Ex. A1 settlement deed is not true and genuine. To defeat the title of the Respondent, after execution of the sale deed on 03.11.1982, the said document has been created with ante date as if it was executed on 25.09.1982 which was registered only on 05.11.1982. The document has come into existence only on 05.11.82. He further submitted the property is in his possession and the suit is barred by limitation. The suit is filed on 01.08.1986, but the Plaintiffs ought to have filed the suit within 3 years. He relied upon the decisions reported in Vidhyadhar Vs. Manikrao and Another, mere non payment of the sale consideration is not vitiate the sale deed and the only remedy available to the Pappu @ Savarimuthu Udayar is to file a suit for recovery of unpaid purchase money and hence he prayed for the dismissal of the appeal.

8. Admittedly, the suit property and other properties are originally owned by one Pappu @ Savarimuthu Udayar, who is the paternal grand father of the Appellant herein. The Appellant as Plaintiff claimed title over the property under Ex. A1 settlement deed. So, it is the duty of this Court to decide as to who is the owner of the property and whether the Appellant as a Plaintiff has proved title to the suit property. Ex. A1 dated 25.09.1982, which was registered on 05.11.1982. Ex B1 is alleged to be executed on 03.11.1982, which was presented for compulsory

registration and after enquiry it was registered on 08.07.1986, after the death of Pappu @ Savarimuthu Udayar, the executant.

9. The learned Counsel appearing for the Appellants would submit that the grand father has executed Ex. A1 settlement, which is in an earlier point of time and the same has been registered on 05.11.1982, so it relied back to the date of execution of Ex. A1. The settlement deed was validly attested and to prove the attestation, P.W.2 has been examined. Hence, as per Ex. A1, the Appellants have taken possession and since at the time, the 1st Appellant was a minor, his father, the 2nd Appellant has taken the possession and enjoy the same.

10. He further submitted that Ex. B1 has not executed during the life time of the Pappu @ Savarimuthu Udayar and he has given Ex.A9, notice dated 15.12.1982 to the Defendant, wherein, he has stated that on 03.11.1982, he was forcibly abducted by the Respondent and gave some liquor and has obtained his signature when he was in intoxicated mood and his son searched for him and later he filed a complaint to the police at Vallam police station and during the investigation, he was secured and the Respondent has absconded. In such circumstances, it is relevant to consider the evidence of D.Ws.1 and 2. D.W.I, in his cross examination has clearly conceded that a criminal complaint has been registered against him for abducting the Savarimuthu Udayar and he was searched by the police, but he was absconded. The relevant portion is as follows:

The said fact has clearly proved that Ex. B1 was alleged to be executed on 03.11.1982 and the complaint has been given on 04.11.1982 morning, he was searched by the police and hence the document has come into existence under the suspicious circumstances. Ex.A9 has been issued by the Pappu @ Savarimuthu Udayar, which reflects the intention of the seller that not to transfer the title to the Respondent/Defendant.

11. Furthermore, one another circumstances is that he has alleged to be purchased 13 cents, which contains superstructure also. On a perusal of Ex. B1 would reveal that he has not mentioned the superstructure and value of the property. In his cross examination, he has also fairly conceded that there are three shops, one was in possession of Manicka Udayar and another was in possession of another person and the rent is Rs. 85/- and Rs. 75/- respectively and the electricity connection is also in the name of Pappu @ Savarimuthu Udayar, the property have been assessed and the same was in the name of Pappu @ Savarimuthu Udayar and he alone paid the tax. In his document, he has not mentioned about the three sheds and not given the measurement and value of the sheds.

12. At this juncture, it is appropriate to consider the evidence of D.W.2, who is the scribe. He also stated that page No. 7 of Ex.B1 was missing and he further stated that he has assessed the value for the shed separately. In cross examination, he has stated that on the night of the date of execution of Ex. B1 itself, the police came and seized the copy of Ex.B 1 from him. After 5 days, he

gone to Vallam Police Station and he has also fairly conceded that Pappu @ Savarimuthu Udayar has not signed in the paper freely. He has also fairly conceded that the original title deeds of the suit property were not given by Pappu @ Savarimuthu Udayar, when Ex. B1 has been written and he denied that Ex. B1 is a concocted one. The relevant portion is as follows:

Considering the oral evidence of D.Ws.1 and 2 has clearly proved that Ex.B1 has come into existence under suspicious circumstances. Because, Pappu @ Savarimuthu Udayar has been abducted by the Respondent and immediately the Appellants gave the complaint and on the night itself, copy of Ex.B1 has been seized from D.W.2. D.W.I has also fairly conceded that when he came to know that he was searched by police, he was absconded for one month and after obtaining anticipatory bail only, he has surrendered before the Court considering the circumstances Ex. B1 has come into existence under the suspicious circumstances. Furthermore, it is pertinent to note that even during the life time of Pappu @ Savarimuthu Udayar, he has issued Ex.A9 notice stating that in what circumstances Ex. B1 has come into existence.

13. Besides this, it is one more circumstances that D.W.I himself has admitted that the entire sale consideration of ex.B 1 has not been paid to Pappu @ Savarimuthu Udayar. In such circumstances it is the duty of the Respondent/Defendant, who lay the claim on the basis of Ex. B1, to prove that Ex. B1 is a true and genuine one. But, considering the evidence of D.Ws.1 and 2, it has clearly proved that Ex. B1 was not executed by the Pappu @ Savarimuthu Udayar out of his own free will. It is also pertinent to note that the document has been registered only after the compulsory registration and after the death of Pappu @ Savarimuthu Udayar, wherein, all the heirs of the Pappu @ Savarimuthu Udayar has not been impleaded.

14. At this juncture, it is appropriate to consider the decisions relied upon by the learned Counsel appearing for the Appellants in M. Gopinathan and 3 Ors. v. The Sub Registrar, Gudalur, Nilgris District and Anr. 2004 (3) L.W. 185, wherein, this Court has held as follows:

Para 7. Moreover, the registering authorities are not concerned with the consequences of a particular transaction. This is apparent from Rule 55 of the Registration Rules framed u/s 69 of the Registration Act. Rule 55 is to the following effect:

55. It forms no part of registering officer's duty to enquire into the validity of a document brought to him for registration or to attend to any written or verbal protest against the registration of a document based on the ground that the executing party had no right to execute the document; but he is bound to consider objections raised on any of the grounds stated below:

(a) that the parties appearing or about to appear before him are not the persons they profess to be;

- (b) that the document is forged;
- (c) that the person appearing as a representative, assign or agent, has no right to appear in that capacity;
- (d) that the executing party is not really dead, as alleged by the party applying for registration; or
- (e) that the executing party is a minor or an idiot or a lunatic.

Considering the above, it is very clear that merely because the document has been registered in a compulsory registration, it will not confer any right as per Rule 55 of the Registration rules that it is not the part of the Registration officer's duty to enquire into the matter into the validity of the document brought to him for registration or to attend to any written or verbal protest against the registration of a document based on the ground that the executing party had no right to execute the document.

15. Furthermore, the decision relied upon by the learned Counsel appearing for the Appellants in Rajagopal and Another Vs. Kaliaperumal, which was confirmed by the Apex Court in Kaliaperumal Vs. Rajagopal and Another, Even though the document has been registered, the sale consideration has not passed. Under such circumstances, there is no effective transfer of ownership until the said payment is made. The relevant portion is as follows:

In order to decide whether the execution and the registration of a sale deed have actually passed the title to the vendee, the real question would be whether the vendor really intended to transfer the ownership by mere execution and registration of the sale deed or it was agreed upon to do so, only after the receipt of the consideration as a prior condition would depend upon the terms of the contract between the parties. If the sale deed clearly stipulates, as in the instant case, that the title to and the ownership of the property would vest in the vendee only after the payment of the balance of consideration, the reasonable and possible inference under such situation, would be that until the said payment is made, mere no effective transfer of ownership.

The said decision of this Court has been confirmed by the Supreme Court reported in Kaliaperumal Vs. Rajagopal and Another, wherein, the Apex Court has held as follows:

16. Sale is defined as being a transfer of ownership for a price. In a sale there is an absolute transfer of all rights in the properties sold. No rights are left in the transferor. The price is fixed by the contract antecedent to the conveyance. Price is the essence of a contract of sale. There is only one mode of transfer by sale in regard to immovable property of the value of Rs. 100 or more and that is by a registered instrument.

17. It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of the

Transfer of Property Act, 1882 ("the Act", for short) defines "sale" as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised". If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, u/s 55(4) (b) of the Act.

18. Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property.

19. The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of the Evidence Act.

20. In this case, the execution of the sale deed on 26-6-1983 is not in dispute. The said instrument was presented for registration on 21-10-1983 and registered on 26-10-1983, as the first Respondent vendor appeared before the Sub-Registrar and admitted that the vendors had executed the documents, but refused to make an endorsement to that effect on the deed as the vendors had not received the balance consideration of Rs. 40,000.

21. Applying the above mentioned principles to the facts of this case, we find that the parties intended that ownership of the property would be transferred to the Appellant only after receipt of the entire consideration by the vendors, as a condition precedent. The operative portion of the sale deed clearly states that the vendors have agreed to receive Rs. 40,000 in the presence of the Sub-Registrar on the date of the registration of the sale deed and that in consideration of payment to be so made, the property was being conveyed to the purchaser. This makes it clear that the title was intended to pass only on the payment of balance consideration of Rs. 40,000 in the presence of the Sub-Registrar. This is also supported by the evidence of DW 1 to DW 4. The Sub-Registrar has also clearly recorded that no amount was tendered or paid by the purchaser to the vendors in his presence. Therefore title in fact did not pass either on execution or registration of the sale deed.

A perusal of the said decision would show that the sale is defined a transfer of ownership for a price. In a sale, there is an absolute transfer of all rights in the properties sold. No rights are left in the transferor. The price is fixed by the contract antecedent to the conveyance. Price is the essence of a contract of sale. But, here, admittedly, the portion of the sale consideration has not been paid by D.W.I. In his cross examination, he has fairly conceded the same. In such circumstances, as per the decision relied upon by the learned Counsel that the intention of the party is necessary. Here, even though Ex. B1 was alleged to be executed on 03.11.1982, notice under Ex.A9 has been sent to the Defendant, wherein Pappu @ Savarimuthu Udayar has stated that in what circumstances, Ex. B1 has come into existence, which shows that the transferrer having no intention to transfer the property in favour of the Defendant/Respondent herein/ transferee. Furthermore, the property is not yet handed over to him. Admittedly, as per the version of D.W.I, the suit property contains 3 shed, one is in occupation of D.W.I even prior to Ex. B1 as a tenant under Pappu @ Savarimuthu Udayar and other two sheds are in possession and enjoyment of other tenants and the rent amount has not been received by the Respondent herein. In such circumstances, as per the decision, I am of the considered view that the Respondent herein has not conferred any title under Ex.B1.

16. The transferrer has only right to file suit for recovery of unpaid properties money. There is no quarrel over the proposition. But the decision reported in Kaliaperumal Vs. Rajagopal and Another, "wherein, it has been stated that the intention of the transferrer is vital to decide whether the non payment of sale consideration has conferred title to the transferee. If both transferee and transferrer have intention to transfer the property in the name of transferee and hand over the possession, then the transferrer having right only to file a suit for recovery of unpaid purchase money. But, in the present case, Pappu @ Savarimuthu Udayar had no intention to transfer the property to the Defendant/ Respondent herein, which was also reflected under Ex.A9 and after his death only document Ex. B1 has been registered without giving notice to all the heirs of the deceased Pappu @ Savarimuthu Udayar/transferer. So nothing has been revealed that he has intention to transfer the title to the transferee. So the argument advanced by the learned Counsel appearing for the Respondent that the Appellants are having only right to file a suit for recovery of unpaid purchase money does not merit acceptance.

17. The learned Counsel appearing for the Appellants would submit that even though the Appellants disputed Ex. B1 and also they pleaded that in what circumstances Ex.B1 has come into existence, there is no specific denial. Further, to prove the genuineness of the document, except the scribe/D.W.2, no attesor has been examined. Scribe/D.W.2 is not the attesor. Hence, the Appellants pleaded that evidence of D.W.2 is not to be taken as a supporting evidence of D.W.I. In such circumstances, the learned Counsel appearing for the Respondent would culled out some portion of law of evidence and submit that an instrument not required by law to be attested, in such cases Section 72 of the Evidence Act

applies and not Section 68 of the Act and the document may be proved by any evidence.

18. It is pertinent to note that Except D.Ws.1 and 2, no other witnesses have been examined on the side of the Defendant. D.W.2 in his evidence, has admitted that on the date of execution of the document itself, the police came and received the copy of the sale deed/Ex.B1, which shows that the document has been created under the suspicious circumstances. If Ex.B1 goes, even the court is come to the conclusion that Ex. A1 was executed only on 05.11.1982, it is true and genuine document. To prove the attestation, P.Ws. 2 and 3 were examined and they proved that Ex. A1 is a true and genuine document and attestation is also proved in accordance with law. It was accepted and acted upon by way of changing patta in the name of the Appellants and paying kist. In such circumstances, the trial Court has considered all the aspects in a proper perspective and come to the correct conclusion, whereas, the 1st appellate Court has not considered this aspect in a proper perspective and he has suspicion on the document Ex. A1 since the stamp papers have been purchased on same day from different persons. While perusing Ex. A1, it has been purchased on 06.06.1980 from one Vendor Meenakshi and page No. 2 has been purchased on the same day from one Vendor G.K. Srinivasan. At the worst, this Court has accepted that the documents have been ante dated, that has been executed only on 05.11.1982 and registered on the same day, not on 25.11.1982. Since as already stated, the Respondent herein has not proved that he purchased the property and paid the sale consideration and in pursuance of that, he is in possession and if B1 goes, no right of title of the property has been conferred to the Respondent and hence Pappu @ Savarimuthu Udayar is the owner of the property as on the date of execution of Ex. A1 and in pursuance of which, the Appellants herein have conferred the title, which was accepted and acted upon and thus the Appellants are entitled for declaration in respect of the property mentioned in Ex. A1.

19. The 1st appellate Court has also given a finding that the non examination of the father of the Appellant is fatal to the case. Before the trial Court, the 1st Plaintiff himself deposed that merely because the father of the Plaintiff was not examined, no adverse inference can be drawn. Furthermore, it is the duty of the Plaintiffs/Appellants to prove their case, but, the Plaintiffs/Appellants have proved their case by way of examining the attestors of document as P.Ws.2 and 3. In such circumstances, the findings of the 1st appellate Court is not sound.

20. As discussed in earlier paragraphs, admittedly, the sale consideration of Ex.B1 has not fully paid and as per the decision of the Apex Court, the intention of the transferrer is material to consider as to whether there is intention to transfer the title to the transferee. But, here during the life time of Pappu @ Savarimuthu Udayar, he himself issued notice under Ex.A9 and disputed the execution of the deed and hence, the circumstances have clearly proved that Ex. A1 has came into existence under the suspicious circumstances.

21. The sale deed alleged to be executed is on 03.11.1982 and the suit has been filed on 01.08.1986. But, Ex. B1, sale deed has been registered only on 30.06.1986, even though the sale has been relied back to the date of execution. During the life time of Pappu @ Savarimuthu Udayar, he has issued notice Ex.A9 dated 15.12.1982, after his death only, the document was registered under compulsory registration. In such circumstances, I do not find any merits in the argument made by the learned Counsel appearing for the Respondent that the suit is barred by limitation and hence, the argument advanced by the learned Counsel appearing for the Respondent that the suit is barred by limitation does not merit acceptance and I am of the considered view that the findings of the 1st appellate court is liable to be set aside and the Appellants are entitled for declaration of title and recovery of possession.

22. In the result, the second appeal is allowed and judgment and decree dated 19.07.1995 made in A.S. No. 135 of 1993 on the file of the Subordinate Judge, Thanjavur is set aside and the judgment and decree dated 27.11.1992 made in O.S. No. 529 of 1986 on the file of the District Munsif, Thanjavur is hereby restored. Three months time is granted for hand over the possession. No costs.