
(2014) 09 MAD CK 0296
In the Madras High Court
Case No : Second Appeal No. 914 of 2006

Thangavel

APPELLANT

Vs

R. Maragatham

RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2014) 09 MAD CK 0296

Hon'ble Judges : Pushpa Sathyanarayana, J

Bench : Single Bench

Judgement

Pushpa Sathyanarayana, J.—The third defendant, in a suit for permanent injunction, has projected this instant Second Appeal against the judgment and decree dated 16.09.2005 passed by the learned Principal Subordinate Judge, Coimbatore, in A.S. No. 58 of 2005 wherein and by which the judgment and decree dated 07.01.2005 made in O.S. No. 301 of 2002 on the file of the Principal District Munsif, Coimbatore, was reversed allowing the First Appeal at the instance of the plaintiff.

2. The case of the plaintiff is that the suit property situate in S. No. 116/1B1 in Veerakeralam Village, along with the other properties, originally belonged to the first defendant. Defendants 2 and 4 are first defendant's daughters while the third defendant is the husband of the second defendant. It is stated that when the first defendant decided to sell the properties, she gave a Power of Attorney dated 09.8.1999 in favour of the second defendant, who, also on the strength of the same, sold the property on 28.8.2000 in favour of the plaintiff and put her in possession. It is further contended by the plaintiff that when the sale was effected, the boundaries were demarcated with boundary stones and possession was given to her. According to the plaintiff, the houses belonging to defendants are situate on the west and south of the suit properties and on the north of the suit property, there are three row shops constructed by the first defendant of which 2 were sold by her to third parties. The plaintiff's husband is carrying on

business in one of the shops having purchased the same from one Muthaiah, who earlier purchased from the first defendant and he has been using the suit property for stocking the cement bags. While so, on 05.3.2002, the defendants demanded the plaintiff to convey the property back to them and warned them of dire consequences. Apprehending danger to the life and the property, the plaintiff gave a police complaint and filed the suit.

3. Defendants 1, 2 and 4 remained ex parte and the third defendant alone filed written statement. According to the third defendant, who is the husband of the second defendant, the property in 116/1B1 of Veerakeralam Village, was of a larger extent, i.e., 1.56 Acres which belonged to one Ayammal, mother of his mother-in-law Sivagamiammal, who laid out the property and sold the same retaining 23 Cents and 66 Sq.ft. for herself. It is stated that of the above extent retained by Ayammal, 3512 Sq.ft. was sold in his favour and he has also been in possession of the property from the date of sale. After the death of Ayammal in 1983, the first defendant who became the only legal heir inherited the lands and sold in portions to third parties. The plaintiff is one such purchaser from the first defendant. The plaintiff purchased an extent of 1258 Sq.ft. on 29.8.2000 from the first defendant. The third defendant also disputed the extent and the boundaries mentioned in the sale deed in favour of the plaintiff and hence, prayed for dismissal of the suit.

4. Before the trial Court, the plaintiff examined herself as P.W. 1 and marked Exs. A. 1 to A. 5. On the side of the defendants, the third defendant examined himself as D.W. 1 and marked Exs. B. 1 and B. 2.

5. The trial Court, on an appreciation of oral and documentary evidence available on record, has come to a resultant conclusion that the plaintiff has not proved that she has been in enjoyment of the entire suit property and accordingly, dismissed the suit. Dissatisfied with the judgment and decree of the trial Court, the plaintiff preferred appeal in A.S. No. 58 of 2005 and the learned Principal Subordinate Judge, Coimbatore, after appreciating the facts, holding that the plaintiff is entitled to get the relief of permanent injunction, reversed the judgment of the trial Court and allowed the appeal. Feeling aggrieved, the third defendant has come up with this Appeal.

6. At the time of admission of this Second Appeal, the following substantial question of law was framed for consideration:-

(a) Whether the finding of the lower appellate court is correct that the D.W. 1 being attester of the power of attorney Ex. A. 1, is bound by the measurements of sale deed Ex. A. 2 which is not attested by him?

(b) Whether the mere attestation of the document would presume the attester D.W. 1, of the document, Ex. A. 1, must know the contents of the document and it binds his interest in the property as found by the lower appellate court is correct?

(c) Whether the first defendant could convey the property under Ex. A. 2 to plaintiff more than what she is entitled after the sale of the portion of the property to D.W. 1 under Ex. B. 2 in the year 1982?

(d) Whether the lower appellate court is correct in decreeing suit as against the ruling that the boundary prevails over the measurement in Ex. A. 2 the recital of which shows the northern boundary of the suit property is appellant/3rd defendant's property which was purchased long before the sale in favour of the first respondent/plaintiff?

7. Heard Mr. R. Kannan, learned counsel appearing for the appellant/third defendant and Mr. N. Manoharan, learned counsel for the first respondent/plaintiff and perused the records.

8. From the materials available on record, it is seen that the suit property to an extent of 1258 sq.ft. in S. No. 116/1B1, was purchased by the plaintiff from the Power of Attorney of the first defendant on 28.8.2000 for valid consideration and that she has been in possession of the same from the date of purchase. It is the contention of the learned counsel for the plaintiff/first respondent that of the three shops constructed by the defendants, one was purchased by one Muthaiah from whom the plaintiff's husband had purchased and doing chips business. As the defendants were jealous of the business done by the plaintiff's husband, they wanted to buy back the same from the plaintiff and when the plaintiff and her husband refused to part with the same, they removed the boundary stones to the property purchased by the plaintiff and attempted to trespass. Therefore, the plaintiff has given a police complaint and filed the suit. It is the further contention of the plaintiff that on the basis of the Power of Attorney given by the first defendant in favour of her daughter second respondent on 09.8.1999, Ex. A. 2 sale deed was executed. The sale deed executed by the second defendant under Ex. A. 2 in favour of the plaintiff as the Power of Attorney agent of the first defendant, is not disputed by the contesting defendant, viz., third defendant.

9. It is further seen that the suit itself is laid only for permanent injunction restraining the defendants from disturbing possession of the plaintiff. Therefore, the plaintiff has to prove only her possession. The trial Court dismissed the suit on the ground that the plaintiff had not established her case by appointing the Advocate Commissioner. Though the plaintiff had originally appointed a Commissioner to inspect the property, subsequently, it was dismissed as not pressed. It is not the case of the third defendant that Ex. A. 2 was obtained fraudulently by the plaintiff. Further, in the Power of Attorney dated 09.8.1999 marked as Ex. A. 1, the appellant herein who is the third defendant and husband of the second defendant, had attested.

10. It is the contention of the learned counsel for the plaintiff/first respondent that the third defendant having attested Ex. A. 1, is estopped from contesting the suit denying the title of the plaintiff. No doubt, the knowledge of the contents of the documents cannot be imputed to the attester. Therefore, despite

attestation in a document, the document is not binding on the person attesting. But in this case, the second defendant wife is the Power of Attorney in which the contesting third defendant husband had attested. The mother-in-law of the appellant had given the Power in favour of his wife. Therefore, though it may not be right to impute knowledge of the contents of the documents under Ex. A. 1, being the family member, especially when the Power of Attorney is the wife of the appellant, he cannot plead ignorance of the sale in favour of the plaintiff. Besides, the property of the third defendant is bounded on the west of the suit property. Being the neighbours, the appellant/third defendant cannot plead ignorance of the sale.

11. From the above facts, it is clear that the appellant had not disputed the execution of Ex. A. 2 dated 29.8.2000 under which the plaintiff is claiming title. However, the appellant/third defendant had raised an objection that the plaintiff ought to have sued for a declaration also as he had denied her title. It is also further contended that the plaintiff had not appointed the Commissioner to establish her case. No doubt, the Commissioner cannot be appointed to find out the factum of possession. As stated earlier, while admitting the execution of Ex. A. 2, the third defendant/appellant is disputing only the measurements of the same.

12. In this regard, learned counsel for the first respondent has pressed into service the decision in *Dina Malar Publications Vs. The Tiruchirapalli Municipality and Others*, wherein this Court in paragraph 9, has held as under:-

9. The property in question bears a subdivided town survey No. 371/2, with an extent of 2,400 sq.ft. The property in question is not an unsurveyed area or an area in respect of which the extent is in doubt. In laying down the principle that the boundaries should prevail over the extent, in the above decisions, the learned Judges have applied the following principles: (1) in case of doubtful or varying extents in the documents of title relating to the property, boundaries should be preferred to the extent; (2) Only in the absence of definite material to show the actual extent intended to be sold the boundaries should outweigh the doubtful extent mentioned in the document; (3) If the recitals in the documents and the circumstances of the case show that a lesser extent only was conveyed than the area covered by boundaries, and there is clear evidence as to the intention of the parties with reference to the extent conveyed, then the extent should prevail over the boundaries. Bearing in mind the above said principles, we will have to examine the facts of this case.

13. Learned counsel for the first respondent/plaintiff also pressed into service the following citations.

(i) *Mahalingam Vs. A.S. Narayanaswamy Iyer and Others*,

(ii) *State of Tamil Nadu Vs. Mohamed Nagib, Mohamed Nassar, Mohamed Illias, Mohamed Shafin, Sithi Samira, Sara Banu, M.K. Mohamed Hussain, Ummul Sahira Beevi, Sara Hawwa Banu, Fathimuthu Sahira, Mohamed Hussain, Benazir*

Nuzrath and Abu Huraira,

(iii) Kuppuswami Naidu Vs. Krishnasami Naidu,

(iii) R. Radhakrishnan Vs. R. Nagarajan, In all the above citations, the law laid down is that the boundaries would prevail over extent when the extent is in dispute.

14. Admittedly, in the instant case, the suit property originally belonged to the first defendant, the mother-in-law of the third defendant and she having sold the property to the plaintiff, the defendants cannot deny or dispute the same. If there is any discrepancy in the measurements, viz., extent or the boundaries, the defendants who are the vendors would be the best persons to establish the same. Curiously, in this case, the defendants 1, 2 and 4 remained ex parte. The appellant/third defendant, who had no manner of right or title to the property, cannot have any objection for a decree being granted. Further more, he has not raised any objection to Ex. A. 2 nor has he objected to the possession of the plaintiff. He is only disputing the extent and the boundaries. When it is admitted by the appellant/third defendant himself that the plaintiff is in possession, that too, pursuant to the sale deed in her favour, this Court is of the view that the Lower Appellate Court was right in decreeing the suit in favour of the plaintiff. The substantial questions of law are answered accordingly.

15. It is a settled principle that scope for interference with the finding of fact while exercising jurisdiction under Section 100 CPC is very limited. Since the Lower Appellate Court, being the final fact finding authority, has held that the plaintiff is entitled to the relief sought for, and this being a Second Appeal filed under Sec. 100 C.P.C. against the said judgment, no substantial question of law would arise for consideration. There are no error of jurisdiction or law or perversity on the face of the judgment of the Lower Appellate Court warranting interference of this Court.

In view of the above discussions relating to principles under Section 100 CPC, I have no hesitation to hold that no interference is warranted to the finding of the Lower Appellate Court and the same has to be upheld. For the foregoing reasons, the Second Appeal fails and the same stands dismissed confirming the judgment and decree of the Lower Appellate Court. However, in the circumstances of the case, there will be no order as to costs.