

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.03.2015
Delivered on : 09.06.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

A.S.No.922 of 2010

&

M.P.No.1 of 2010

Umamaheshwari ..Appellant/Plaintiff

-Vs-

Saroja (died)

1.Nagarajan
2.Akilandeswari
3.Muthu

..Respondents/Defendants

Appeal filed under Section 96 of the Civil Procedure Code and Order 41 Rules 1 and 2 of CPC against the judgement and decree of the Additional District Court (Fast Track Court No.2), Salem dated 31.08.2009 in O.S.No.80 of 2005.

For Appellant : Mr.P.Valliappan

For Respondents : Mr.R.Subramanian
M/s.D.Thirumoorthy for R1

Mr.C.Prabakaran for R2
Mr.B.T.Seshadri for R3

JUDGMENT

The plaintiff in the original suit is the appellant in the first appeal. She filed the suit O.S.No.80 of 2005 on the file of the District Court, Salem against late Saroja and the respondents herein praying for the relief of specific performance directing the said Saroja and respondents 1 and 2/defendants 2 and 3 to execute a sale deed in her favour in respect of their 2/3 rd share in the suit properties or in the alternative directing the said Saroja and respondents herein to refund the advance amount of Rs.5,00,000/- together with an interest at the rate of 12% per annum from the date of suit till realisation and for a permanent injunction restraining Saroja and the respondents 1 and 2 from in any way encumbering or alienating the suit properties by way of sale deed

or any other deed either in the name of the fourth defendant or his man or in any others name.

2. Saroja and the first respondent herein initially contested the suit based on the written statement filed by Saroja, which was adopted by the first respondent herein. The second respondent filed a written statement admitting the plaint averments. The real contesting party was third respondent/fourth defendant who contended that the agreement based on which the suit came to be filed was created for the purpose of defeating the claim of the third respondent/fourth defendant.

3. The learned trial Judge (The Additional District Judge, Fast Track Court No.II, Salem) decreed the suit granting the alternative relief of refund of advance amount directing Saroja and respondents 1 and 2/defendants 1 to 3 to refund a sum of Rs.5,00,000/- received by them towards advance and part sale consideration with interest at the rate of 12% per annum from the date of suit till the date of decree and thereafter at 6% per annum till realization. As against the disallowed portion of the claim, namely the main relief sought for by the appellant/plaintiff seeking a decree for specific performance directing Saroja and respondents 1 and 2/defendants 1 to 3 to execute a sale deed after obtaining the balance sale consideration, the present appeal has been filed under Section 96 of the Code of Civil Procedure on various grounds set out in the memorandum of grounds of appeal.

4. The plaint averments, in brief, are as follows:

i) Late Saroja, the first defendant was the mother of Umamaheshwari, the appellant / plaintiff and her brother Nagarajan, the first respondent/second defendant. Nagarajan is the brother cum son-in-law of the appellant/plaintiff since Akilandeswari, the second respondent/third defendant, the daughter of the appellant/plaintiff has been given in marriage to Nagarajan. The third respondent/4th respondent is said to be the holder of an agreement for sale, which, according to the appellant/plaintiff, was created to defeat the lawful claim of the appellant/plaintiff in respect of the first item of the suit properties described in the plaint schedule. The properties described in the plaint schedule were the separate properties of Venkatraman, the father of the appellant having purchased the same. As he died intestate, the same became the joint family properties of the appellant, Saroja, the first defendant and Nagarajan, the first respondent/second defendant and each one of them were entitled to 1/3rd share. Two adjacent properties were purchased by Venkatraman, the father of the appellant and his brothers Arunachalam and Krishnasamy in the name of their mother Nagammal on 19.01.1948 and 01.03.1948. But the said properties were jointly enjoyed by all the three brothers.

ii) One Rukmaniammal, sister of Nagammal, purchased a property in 1935. She and her husband died issue less and before her death, out of love and affection she settled the said property purchased by her in favour of Arunachalam, Venkatraman and Krishnasamy, the sons of Nagammal by way of a gift settlement deed in the year 1969.

In 1973, Arunachalam, Venkatraman and Krishnasamy orally partitioned the above said suit properties. 1/3rd share allotted to the share of Venkatraman in the properties purchased in his mother Nagammal's name on 19.01.1948 and 01.03.1948 is shown as Item No.1 of the suit properties. 1/3rd share allotted to Venkatraman in the property settled by Rukmaniammal is shown as the Item No.2 of the suit properties. Nagammal and Venkatraman died intestate in the years 1971 and 1975 respectively. The appellant/plaintiff, Saroja, the deceased first defendant and Nagarajan, the first respondent/second defendant were their legal heirs. Since certain disputes arose in respect of the enjoyment of the properties that stood in the name of Nagammal, Arunachalam and Krishnasamy (both paternal uncles of plaintiff) entered into a partition with Saroja, the deceased first defendant and Nagarajan, the first respondent/second defendant under a deed of partition dated 13.04.1984 reiterating the division made in 1973. Though the appellant/plaintiff was not made a party to the said document, Saroja and Nagarajan did not deny the appellant's right to a share in the properties that fell to the share of her father Venkatraman. She was getting her due share in the income derived from the suit properties.

iii) During the beginning of the year 2003, the appellant, deceased Saroja (first defendant) and Nagarajan (first respondent / second defendant) demolished the old building in the first item of the suit properties and started construction of a new building. But Saroja and the first respondent/second defendant were not able to mobilize funds for contributing towards their share of construction cost. The appellant gave considerable amount to them to meet out their share in the expenditure. At one stage, Saroja and Nagarajan expressed their inability to invest further and came forward to sell away their share in the suit properties to third parties. At that point of time, the appellant wanted to purchase the same and informed her desire to Saroja and the first respondent. A consensus was arrived at, as a result of which, an agreement for sale came to be executed for selling the 2/3rd share of Saroja and Nagarajan to the appellant for an agreed sale price, which is Rs.1,00,000/- over and above their share for construction cost. The second respondent/third defendant, being the wife of Nagarajan, was also made a party to the said sale agreement dated 01.06.2003. After the execution of the agreement for sale, Saroja, the first defendant and Nagarajan, the first respondent/second defendant developed hostile attitude towards the second respondent/third defendant and compelled her to get huge amount from her father. As the second respondent/third defendant refused to comply with their demand, they drove her away and Akilandeswari came to her mother's house.

iv) The settlement deed executed by Saroja on 19.09.2003 in favour of her son Nagarajan is not binding on the appellant and hence she chose to ignore the same. Though the appellant/plaintiff very often made the demand to Saroja and respondents 1 and 2/defendants 1 to 3 to fulfill their obligations under the agreement for sale dated 01.06.2003, without complying with the

demand, they clandestinely created a sale agreement in the name of the third respondent/4th defendant. However, they chose to execute a registered sale agreement in favour of the third respondent/fourth defendant on 10.02.2005 in respect of the entire first item of the suit properties. Knowing fully well that there was an agreement for sale dated 01.06.2003 executed in favour of the appellant and disregarding the fact that the appellant/plaintiff had already got 1/3rd share in the suit properties, the third respondent/4th defendant got the said agreement for sale dated 10.02.2005. Hence the appellant/plaintiff issued a legal notice dated 28.03.2005 demanding partition and fulfillment of the obligations of the defendants 1 to 3 under the agreement for sale dated 01.06.2003. The third respondent/fourth defendant was also informed of the same by marking a copy of the said notice to him. Though the appellant/plaintiff was ever ready and willing to perform his part of the agreement for sale, defendants 1 and 2 denied the right of the appellant/plaintiff by issuing a reply dated 04.04.2005. The third respondent/4th defendant did not reply. Hence, the appellant/plaintiff, besides filing a suit for partition claiming 1/3rd share by filing a suit on the file of the Sub-Judge, Mettur as O.S.No.38 of 2005, was constrained to file the present suit, namely O.S.No.80 of 2005 seeking specific performance or in the alternative, for refund of the advance amount and for injunction as indicated supra.

5. Saroja and Nagarajan contested the suit on the basis of the averments made in the written statement filed by Saroja which was adopted by the first respondent/second defendant. Besides making general denial of the plaint averments, they denied having received a sum of Rs.5,00,000/- as advance from the appellant/plaintiff. They have also narrated the actions and inactions on the part of the appellant/plaintiff when a partition was effected among Arunachalam, Krishnasamy, Saroja (deceased first defendant) and Nagarajan (the first respondent/second defendant) without making the appellant/plaintiff a party to the same on the ground that she had given in marriage on 18.05.1983 with Sreethanas and Seervarisai and taking into consideration the expenditure thus incurred for her marriage. Further plaint averment as if the appellant/plaintiff was receiving her due share in the income derived from the suit properties was also denied. The alleged execution of the agreement for sale was also disputed. They also contended that they did not receive a sum of Rs.5,00,000/- as advance and that Saroja executed a registered gift settlement deed on 19.09.2003 in favour of her son Nagarajan (the first respondent/second defendant) in respect of her share in the suit properties. It was also contended that the Power of Attorney executed in favour of the appellant herein/plaintiff and her daughter Akilandeswari, namely the second respondent/third defendant was also cancelled by a registered General Power Cancellation Deed bearing Document No.251 of 2003; the first respondent/second defendant conveyed the first item of the suit property in favour of the third respondent/fourth defendant by a registered document bearing Document No.2154 of 2005 in the office of Sub-Registrar, Omalur; that prior to the execution of the sale agreement between Nagarajan and Muthu, a deed extending

the time for performance had also been executed by the first respondent/second defendant in favour of the third respondent/fourth defendant and that with the mala fide intention of preventing the execution of sale deed, the suit sale agreement was created and fabricated. With the above said contentions, they had pleaded for dismissal of the suit in entirety, holding that the appellant/plaintiff was not entitled to either the main relief or the alternative relief.

6. The written statement of the third respondent/fourth defendant contains almost similar averments and based on the same, a prayer for dismissal of the suit with exemplary cost came to be made. However, the second respondent/third defendant filed a written statement supporting the claim of the appellant/plaintiff and contending that she had nothing to do with the suit properties and that she might be relieved from the suit as unnecessary party.

7. Based on the above said pleadings, the learned trial Judge framed 6 issues and two additional issues, which are as follows:
Issues:

- 1) Whether the suit sale agreement is a forged document?
- 2) Whether the gift settlement deed dated 19.09.2003 executed by Defendant No.1 in favour of Defendant No.2 is correct?
- 3) Whether the averment that the suit properties were orally partitioned in the year 1992 (Sic)1973 is correct?
- 4) Whether the plaintiff is entitled to get the relief of specific performance as prayed for?
- 5) Whether the plaintiff is entitled to the alternative relief of refund of the advance money?
- 6) To what relief, if any, the plaintiff is entitled?

Additional Issues:

- 1) Whether the plaintiff is entitled to get the refund of Rs.5 lakhs with 12% interest from the defendants?
- 2) Whether the plaintiff is having 1/3rd share in the suit properties?

8. The parties went for trial in which two witnesses were examined as Pws 1 and 2 and 25 documents were marked as Exs.A1 to A25 on the side of the appellant/plaintiff and six witnesses were examined as Dws 1 to 6 and 14 documents were marked as Exs.B1 to B14 on the side of the defendants.

9. At the conclusion of trial, the learned trial Judge, after hearing the arguments advanced on both sides, appreciated the evidence and rendered the following findings:

The appellant/plaintiff was entitled to 1/3rd share in the suit properties. The suit agreement dated 01.06.2003 marked as Ex.A13 was not a forged document and on the other hand, it was a genuine document. The appellant / plaintiff was not entitled to the relief of specific performance and on the other hand, she was entitled to the alternative relief of refund of the advance amount of

Rs.5,00,000/- together with interest at the rate of 12% per annum from the date of the suit till the date of disposal of the suit and thereafter, at the rate of 6% per annum till the date of realization.

10. Accordingly, by judgment and decree dated 31.08.2009, the suit was decreed in part, rejecting the prayer for the main relief of specific performance and granting the alternative relief of refund of advance amount against Saroja and respondents 1 and 2/ defendants 1 to 3.

11. The points that arise for consideration in the appeal are as follows:

1) Whether the oral partition of the year 1973 among Venkatraman, Arunachalam and Krishnasamy alleged by the appellant/plaintiff has been proved?

2) Whether Ex.B1 partition deed dated 13.04.1984 came to be executed for giving effect to the oral partition that took place in 1973? If it is intended to be an alternative oral partition, whether Ex.B1 partition deed shall be binding on the appellant/plaintiff?

3) Whether the gift settlement deed marked as Ex.B6 will in any way affect the share of the appellant/plaintiff?

4) Whether the agreement dated 01.06.2003 is genuine and whether the appellant/plaintiff is entitled to the relief of specific performance?

5) To what other relief the appellant/plaintiff shall be entitled?

Point No.1:-

12. Appellant Umamaheswari and the first respondent Nagarajan are respectively the daughter and son of Late Saroja, who figured as first defendant in the original suit. Akilandeswari, the second respondent is the daughter of appellant Umamaheswari and she is also the wife of first respondent Nagarajan. Thus, the first respondent Nagarajan is the brother cum son-in-law of the appellant Maheshwari. There are two items of suit properties. The suit was filed by the appellant for specific performance in respect of both the items of suit properties and in the alternative, for refund of advance amount with interest. Admittedly, both the items of suit properties were allotted to the share of Venkatraman, the father of the appellant and the first respondent, in a partition that took place orally among Venkatraman and his brothers Arunachalam and Krishnasamy in the year 1973. Though the plaint contains a clear averment to the said effect that the suit properties came to be allotted to the share of Venkatraman in the oral partition that took place among Venkatraman and his brothers, namely Arunachalam and Krishnasamy, the same was denied by Late Saroja, who figured as the first defendant and Nagarajan, the first respondent, who figured as the second defendant in the suit. The second respondent Akilandeswari, who figured as the third defendant in the suit sailed with her mother, namely the appellant/plaintiff. The third respondent, Muthu, who figured as fourth defendant in the suit,

pleaded absence of knowledge as to the said averment made by the appellant / plaintiff in paragraph 7 of the plaint. During the course of evidence, though the deceased first defendant Saroja stuck on to her stand taken in the written statement, Nagarajan, the first respondent/second defendant, who figured as DW2, during cross-examination, made a clear admission that his father Venkatraman and his paternal uncles Arunachalam and Krishnasamy effected an oral partition among themselves in 1973. But, during cross-examination, both DW1 and DW2 made a clear admission that Venkatraman and his brothers effected a oral partition and the suit properties were the properties allotted to the share of Venkatraman. It is also an admitted fact that two adjacent properties were purchased on 19.01.1948 and 01.03.1948 respectively by Venkatraman, father of appellant and his brothers Arunachalam and Krishnasamy in the name of their mother Nagammal due to love and affection and respect they had towards her and that though the same were purchased in the name of Nagammal, her three sons alone jointly enjoyed the same. The said sale deeds have been produced as Exs.A1 and A2.

13. Nagammal, w/o.Venkatraman admittedly died in the year 1971 during the life time of Venkatraman. Though a sister of Venkatraman by name Karpagavalli filed a suit claiming a share in the said property on the premise that the property belonged to Nagammal and on her death, she also became entitled to a share along with her brothers, the suit came to be dismissed. The same is obvious from Exs.A8 to A12, namely the plaint copy, copy of written statement, copy of additional written statement, decree and judgment in the said suit O.S.No.525 of 1986 on the file of District Munsif Court, Mettur. The said suit came to be dismissed by a decree dated 22.11.1993. In the said case it was held that Venkatraman and his brothers were the actual purchasers and they were the actual owners of the said property purchased in the name of their mother and that Nagammal was not the owner of the said property. In fact, Karpagavalli, the plaintiff in the said suit, also admitted the said fact and on the basis of such admission, the suit came to be dismissed. Therefore, the fact that the properties purchased under Exs.A1 and A2 were the self acquisitions of Venkatraman and his brothers is one already upheld by a competent court and also admitted by the parties to the dispute.

14. Even otherwise, assuming that the property had been the separate property of Nagammal, having been purchased under Exs.A1 and A2, on her death in the year 1971, under the rule of succession under the Hindu Succession Act, her property would have devolved upon her sons and daughter. Since the claim of the daughter of Nagammal had been negatived and she had, in fact, given up her claim by making an admission as found in Ex.A12, the said property became the absolute properties of Venkatraman, Arunachalam and Krishnasamy. Similarly, another property, of which the second item forms part, was purchased by one Rukmaniammal by a sale deed dated 09.05.1935 registered as document No.1018 of 1935 on the file of the Sub-Registrar, Omalur. A certified copy of the said sale deed has been produced as Ex.A3. The said Rukmaniammal was none other

than the sister of Nagammal, the mother of Venkatraman. Admittedly, Rukmaniammal's husband predeceased her and Rukmaniammal had no issues. Hence, out of love and affection, she settled the said property on the sons of Nagammal, namely Venkatraman, Arunachalam and Krishnasamy under a registered gift settlement deed dated 30.06.1969. Thus, Venkatraman and his brothers, namely Arunachalam and Krishnasamy became joint owners of the said property as their self-acquisition.

15. The contention of Late Saroja w/o. Venkatraman, the first defendant in the suit that Rukmaniammal settled the said property on her and her sons, has not been substantiated and on the other hand the same stands falsified by the settlement deed, registered as document No.2028 of 1969 in the office of the Sub-Registrar, Omalur, a certified copy of which has been marked as Ex.A4. Thus, Venkatraman, Arunachalam and Krishnasamy became the absolute owners of both the properties, of which items 1 and 2 shown in the plaint schedule formed part. Though the contention of the appellant/plaintiff that an oral partition took place among Venkatraman, Arunachalam and Krishnasamy in the year 1973 and the suit properties were the properties allotted to the 1/3rd share of Venkatraman was not admitted, but denied in the written statements of the first and second defendants, during the course of trial, the said defendants, who figured as Dws 1 and 2, made a clear admission regarding the correctness of the said averment made in the plaint. The second respondent/third defendant sailed with the plaintiff, whereas the third respondent/fourth defendant did not deny the said averment. On the other hand, the third respondent/fourth defendant pleaded ignorance. Hence, the plaint averments that in an oral partition that was effected among Venkatraman, Arunachalam and Krishnasamy and the properties allotted to the 1/3rd share of Venkatraman are the properties shown as Items 1 and 2 in the plaint schedule stands substantiated.

Point No.2:-

16. Venkatraman died intestate in the year 1975 leaving behind him, his wife Saroja (first defendant), son Nagarajan (second defendant) and daughter Umamaheshwari (plaintiff) as his legal heirs. DW2 admitted in clear terms that his parents had one son and one daughter and they are himself and his sister Umamaheshwari. Since it is admitted that Venkatraman died intestate in the year 1975, as per the rule of succession provided in Section 8 of the Hindu Succession Act, his wife, son and daughter (defendants 1 and 2 and the plaintiff) would have got equal shares as legal heirs of Venkatraman. Thus, the case of the appellant/plaintiff that she is a co-owner having 1/3rd share in the suit properties stands substantiated. However, the deceased first defendant Saroja and the first respondent Nagarajan (second defendant) took a stand that since the appellant/plaintiff had been married off with Sreethanas and Seervarisai, the defendants 1 and 2 alone chose to enter into a partition in respect of the property which stood in the name of Nagammal, of which the first item of the suit property forms part, by excluding the appellant/plaintiff under a registered deed of partition dated 13.04.1984; that the appellant/plaintiff thereafter

never claimed any share in the said property and she kept quite till the filing of the suit and that by such conduct, she recognized the title of her mother Saroja and brother Nagarajan to the suit properties. A certified copy of the said partition deed dated 13.04.1984 has been marked as Ex.B1. As the appellant/plaintiff was not made a party to the said partition deed, the same shall not be binding upon her and it will not take away her right to a share in the first item of the suit properties as a legal heir of her father Venkatraman.

17. It is not the case of the contesting respondents that they ousted the appellant/plaintiff from the suit properties and thereby defeated her title by their adverse possession. Moreover, it is the clear case of the appellant/plaintiff that the registered partition deed came to be executed only to confirm the oral partition that took place in 1973 and that though she was not made a signatory to the said document, she was all along getting her due share from the income derived from the said property. In this regard, DW1 clearly admitted during cross-examination that her husband and others effected an oral partition in the year 1973. In the additional written statement filed by her in O.S.No.525 of 1986 filed by Karpagavalli on the file of District Munsif Court, Mettur, she had made a clear admission that there was a oral partition among Venkatraman and her brothers which took place on 25.03.1973 and again a partition deed was executed in the year 1984. It was also admitted therein that assessment had been made separately in the name of each one of the three brothers, namely Venkatraman, Arunachalam and Krishnasamy.

18. The first respondent / second defendant, while deposing as DW1, made a clear admission that the suit filed by Karpagavalli was resisted by himself, his mother and his sister (plaintiff). It is also his admission that there was an oral partition among Venkatraman and his brothers in the year 1973 and the original of Ex.A7 registered partition deed came to be executed on the basis of the earlier oral partition. It is also a clear admission made by DW2 that his sister, namely the appellant/plaintiff did have 1/3rd share in the suit properties. Ex.A14 is the certified copy of the registered gift settlement deed dated 19.09.2003 executed by Saroja (deceased first defendant) in favour of Nagarajan, the first respondent/second defendant. Though she had purported to claim that she was having ½ share in the suit properties and she was settling the same on her son Nagarajan, the said Nagarajan while deposing as DW1, clearly made an admission that his mother settled her undivided 1/3rd share in the suit property on him under the original of Ex.A14 (Original has been produced as Ex.B6). On a proper consideration and evaluation of evidence, the learned trial Judge came to a correct conclusion that the appellant / plaintiff was entitled to 1/3rd share in the suit properties.

19. Though a specific issue was framed as Issue No.2 regarding the correctness of the settlement made under Ex.B6, the learned trial Judge failed to render a specific finding as to whether such a settlement would affect the share of the appellant/plaintiff or whether the said settlement would be binding on the appellant/plaintiff so far as her 1/3rd share is concerned. It is obvious from records that the parties have led evidence in full regarding all the issues. Even though such specific finding was given by the trial Court, this Court on re-appreciation of evidence, especially the admission made by DW2, comes to the conclusion that the settlement deed executed by the deceased first defendant Saroja purporting to gift ½ share in the suit properties will not either take away or abridge the entitlement of the appellant/plaintiff to 1/3rd share in the suit properties and that to that extent the said settlement will not be binding on the appellant/plaintiff. In fact, the case of the appellant / plaintiff is that defendants 1 to 3 executed a sale agreement in her favour agreeing to sell 2/3rd share of the defendants 1 and 2 to the appellant/plaintiff. The said sale agreement dated 01.06.2003 has been marked as Ex.A13. Though the execution of the said agreement was denied and disputed in the written statements of the defendants 1 and 2, the second defendant, while deposing as DW2, during cross examination, admitted the execution of the said agreement for sale in favour of the appellant/plaintiff by himself and his mother. The relevant portion in his (DW2's) testimony in vernacular is extracted hereunder:

“அந்த வீட்டை ரிப்பேர் செய்வதற்கு முன்னர் பணம் இல்லாத காரணத்தினால் இந்த வீட்டை விற்க கூடமுயற்சி செய்தோம், அப்போதுதான் அந்த வீட்டின் மதிப்பு 9 லட்சம் இருக்கும். அதில் என் சகோதரி 1/3 பாகம் பாத்தியமுண்டு. அதனால் சொத்துக்களை வெளியே விற்பதற்குபதிலாக நானும் என் தாயாரும் என் சகோதரிக்கு ஒரு அக்ரிமெண்ட் எழுதிக் கொடுத்தோம், அதில் நான் கையெழுத்தும் ரேகைய ம் போட்டுள்ளேன். அதில் என்ன எழுதியிருக்கிறது என்று தெரிந்துதான் கையெழுத்து போட்டுள்ளேன், அதில் என்ன எழுதியிருக்கிறது என்று என் அம்மாவக்கு தெரியும் அம்மா கையெழுத்து போடும்போது நான் கூடவேதான் இருந்தேன்.”

The execution of Ex.A1 agreement, by which the defendants 1 and 2 agreed to sell their 2/3rd shares to the appellant/plaintiff, has been admitted. The same will go to show that they have admitted that the appellant/plaintiff got 1/3rd share in the suit properties. It is also held that the settlement made by the first defendant Saroja in favour of the first respondent/2nd defendant Nagarajan shall not affect the share of the appellant/plaintiff.

Point No.4 & 5:-

20. The above said answers given to the point Nos.1 to 3 are only preliminary. The main point of controversy to be resolved in this case is whether the suit agreement for sale dated 01.06.2003 is genuine and valid and whether the same is supported by consideration and whether the appellant/plaintiff is entitled to

[https://hcservices.ecourts.gov.in/hcservices/said agreement by seeking the relief of specific](https://hcservices.ecourts.gov.in/hcservices/said%20agreement%20by%20seeking%20the%20relief%20of%20specific)

performance. Even though the defendants 1 and 2 initially denied and disputed the execution of Ex.A13 agreement, subsequently the second defendant while deposing as DW2, made a clear admission that the said agreement was genuine and he and his mother executed the same in favour of the appellant/plaintiff. However, the said agreement is an unregistered agreement dated 01.06.2003. The stamp paper used for the same had been issued by the Government in the year 2001 and it was purchased from the stamp vendor on 13.01.2003. The case of the appellant/plaintiff is that the house that was in existence in suit Item No.1 was demolished and reconstructed; that while putting up a new construction, the defendants 1 and 2 were not able to pay their contribution towards the construction cost; that hence they wanted to sell their undivided 2/3rd share to third parties; that at that point of time, the appellant/plaintiff herself volunteered to purchase the same; that the share of the defendants 1 and 2 in the expenditure which was borne by the appellant/plaintiff was taken as advance and it was agreed that on payment of a further sum of Rs.1,00,000/- within two years from 01.06.2003, the defendants 1 and 2 should execute a sale deed in favour of the appellant/plaintiff in respect of their 2/3rd share.

21. In this regard, it is quite obvious that the plaint does not contain an averment as to how much amount was treated as share of the defendants 1 and 2 towards advance in the expenditure and how much was paid in cash towards advance in the relevant paragraph, namely paragraph No.8 of the plaint. However, in paragraph 12, the figure has been noted as Rs.5 lakhs. How such 5 lakhs rupees was paid has not been elaborated in the plaint. However, in the agreement, the account for the advance amount of Rs.5,00,000/- has been furnished as follows:

The amount already borrowed from
the appellant/plaintiff towards expenditure
for construction - Rs.2,00,000/-

The amount received in cash on
the date of execution of agreement - Rs.3,00,000/-

Total - Rs.5,00,000/-

22. The agreement states that the value of the 2/3rd share of the defendants 1 and 2 was fixed at Rs.6,00,000/- and that the balance sale consideration to be paid within 2 years was Rs.1,00,000/-. In this regard, the evidence of PW1 in chief in the form of proof affidavit reflects the reproduction of the contents of Ex.A13 agreement for sale. But the same was not dealt with in the cross examination. The second defendant, who vehemently contested the case at the initial stage, shifted his stand during the course of trial, especially during cross examination and admitted the execution of Ex.A13 agreement and also passing of consideration. However, there is a discrepancy in his evidence regarding the passing of consideration. According to his version, a sum of Rs.3,00,000/- was payable towards their contribution for

the construction charges and another sum of Rs.3,00,000/- was received by him in cash on the date of agreement. This is quite contrary to the contents of Ex.A13 agreement and the evidence of PW1. He was not cross examined on that point to elicit clarification. What inference can be made from the discrepancy is the question that arise for consideration.

23. Before answering the question, it shall be of immense help to consider the circumstances under which the dispute has arisen. It is a dispute between the appellant and her brother and a third party, namely the third respondent/fourth defendant. The third respondent/fourth defendant has got a sale deed in respect of the first item of the suit properties. Admittedly, the first respondent / second defendant Nagarajan executed an agreement for sale in favour of the third respondent/4th defendant Muthu on 10.02.2005. It is a registered agreement and the original and a certified copy of the same have been produced as Ex.B7 and Ex.A15 respectively. Based on Ex.B1 partition deed and Ex.A14 settlement deed, the first respondent/second defendant, claimed to be the absolute owner of the first item of the suit properties. He agreed to sell entire first item of suit properties to the third respondent / fourth defendant Muthu. Within 6 months thereafter, on 01.06.2005, the second defendant executed a sale deed in respect of the first item of the suit properties. The said sale deed has been marked as Ex.B9. The suit came to be filed on 27.04.2005 within 2 ½ months from the date of Ex.B7 agreement for sale executed in favour of the third respondent/fourth defendant. The written statements came to be filed after the execution of Ex.B9 sale deed in favour of the third respondent/fourth defendant. An overall consideration of the said facts and circumstances will give raise to a preposition that Ex.A14 settlement deed and B7 agreement could have been executed in order to defeat the claim of the appellant/plaintiff. The admission made by second defendant as DW2 that during the pendency of the suit, the relationship was patched up and he was having good terms with his sister, will make it probable that the agreement Ex.A13 could have been created antedated to defeat the claim of the third respondent/fourth defendant.

24. In any event, since the finding of the court below to the effect that Ex.A1 agreement for sale was genuine and a sum of Rs.5,00,000/- had been paid by way of adjustment of the contribution towards construction charge and cash payment, this Court need not go into the said question in the absence of any challenge to the decree of the trial Court granting the alternative relief of refund of advance amount made by any of the defendants. Hence, the only question that has got to be resolved is whether the appellant/plaintiff shall be entitled to the main relief of specific performance.

25. The trial Court cannot be found fault with for holding that the appellant/plaintiff was not entitled to the discretionary

relief of specific performance and the exercise of the discretion in this regard against the appellant/plaintiff can be justified as a proper exercise of judicial discretion. The discretion contemplated under Section 20 of the Specific Relief Act can be exercised not to decreeing specific performance when the circumstances show that there is an element of collusion and circumstances giving raise to a suspicion regarding the intention of the parties. The summary of the circumstances narrated above will make it clear that it is a fit case in which the discretion of the Court can be properly exercised not to grant the decree of specific performance. On the other hand, equity has been worked out by directing deceased Saroja and respondents 1 and 2 / defendants 1 to 3 to refund the advance amount with an interest at the rate of 12% per annum from the date of plaint till the date of decree passed by the trial Court and a post decree interest at the rate of 6% per annum.

26. This Court does not find any defect or infirmity in the judgment of the trial Court granting only the alternative relief of refund of advance amount with interest and declining the relief of specific performance. There is no merit in the appeal and the same deserves dismissal. Considering the relationship of the parties, this Court is of the view that no order need to be passed regarding payment of cost.

27. In the result, the appeal is dismissed. The decree of the trial Court dated 31.08.2009 made in O.S.No.80 of 2005 shall stand confirmed in all respects. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

gpa
To

1. The Additional District Judge
(Fast Tract Court No.2)
Salem.

2.The Section Officer, VR. Section, High Court, Madras.

+1cc to Mr.P. Valliappan, Advocate, S.R.No.27857
+1cc to Mr.B.T. Seshadri, Advocate, S.R.No.27682

TS(CO)
EU(07/07/2015)

in A.S.No.922 of 2010 &
M.P.No.1 of 2010