IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.06.2015

CORAM

THE HON'BLE MS. JUSTICE R. MALA

A.S.No.688 of 2009

Date of Reserving the Judgment	Date of Pronouncing the Judgment
22.06.2015	30.06.2015

R.Boopathy ...Appellant/Plaintiff

-Vs-

1.R.Palanisamy Gounder

2.P.Arun Kumar

3.P.Thenmozhi

4.Duraisamy

5.A.Natraj ...Respondents/Defendants

Prayer:
First Appeal filed under Section 96 of the C.P.C., against the judgment and decree dated 31.12.2008 made in O.S.No.201 of 2005 on the file of the I Additional District Court, Coimbatore.

For Appellant : Mr.S.Venkatesh

For Respondents : Mr.A.Sundaravadhanan, for R1
Mr.B.Dyaneswaran, for R2 and R3
Mr.S.Parthasarathy, Senior Counsel for Mr.S.Dhanasekaran, for R4 and R5

J U D G M E N T

The first appeal arises out of the judgment and decree dated 31.12.2008 made in O.S.No.201 of 2005 on the file of the I Additional District Court, Coimbatore.

2.The averments made in the plaint are as follows:

(a) The appellant herein as plaintiff has filed the suit for specific performance stating that the suit property is an ancestral property belonging to the family of the defendants 1 to 3 with an extent of 1 acre 75 cents. The first defendant is the kartha of the family and he entered into a Ex.A.1/Sale Agreement, dated 25.11.1994 fixing the price at Rs.7,00,000/- per acre. So, the total sale consideration is Rs.12,25,000/-. On the date of execution of Ex.A.1/Sale Agreement, the plaintiff paid a sum of Rs.2,00,000/- and subsequently on various dates he paid the balance sale consideration of Rs.10,25,000/-. Even after the receipt of the entire sale consideration, when the first respondent was not able to release the original document from his creditors, Ex.A.2/Sale Agreement was executed on 09.02.1998, wherein the first respondent had acknowledged that he had received the entire sale consideration and has also stated that he is ready to execute the sale at any point of time.

(b) While so, on 13.01.2005, the defendants 1 to 3 had executed Ex.B.3/Sale Deed in favour of the defendants 4 and 5. As soon as the plaintiff came to know about the execution of Ex.B.2/Sale Deed, he issued Ex.A.4/Notice dated 28.02.2005 for which the first defendant issued a reply dated 15.03.2005 under Ex.A.5 and the defendants 2 and 3 issued a reply dated 21.03.2005 under Ex.A.6 and the defendant 4 and 5 issued a reply dated 12.03.2005 under Ex.A.7. Thereafter, the present suit was filed.

3.The gist and essence of the written statement filed by the first defendant are as follows:

The first defendant never executed any sale agreement with the plaintiff in respect of the suit scheduled property on 25.11.1994 and that the price of the land was not fixed at Rs.7,00,000/- per acre and the total sale consideration was also not fixed at Rs.12,25,000/-. The first defendant had also not received any amount from the plaintiff towards the advance. The defendants 1 to 3 had only executed the Sale Deed in favour of the defendants 4 and 5 in respect of the suit properties on 13.01.2005. The first defendant had only borrowed a sum of Rs.2,00,000/- from the plaintiff on 25.11.1994 and agreed to return the said sum with interest at 18% per annum. During the said transaction, the plaintiff had only obtained the signatures of the this defendant as security. Further, the first defendant had repaid a sum of Rs.1,50,000/- towards principle along with interest. However, he was unable to pay the remaining amount and hence, he gave another 4 numbers of signed and unfilled 5 rupees stamp papers to the plaintiff as security. But the plaintiff by fabricating those documents had come forward with the suit and hence, the first defendant prays for dismissal of the suit.

4. The defendants 2 and 3 had also filed the written statement wherein it was stated as follows:

The first defendant never executed any sale agreement in favour of the plaintiff in respect of the suit scheduled properties as alleged by the plaintiff. The suit property is an ancestral property belonging to the defendants 1 to 3 and the first defendant had only 1/3rd share in the suit property. Even if there is any contract as alleged by the plaintiff, the defendants 2 and 3 are not obliged and the defendants 1 to 3 had already sold the suit property to the defendants 4 and 5 for a valuable consideration. Thus, the defendants 2 and 3 prayed for the dismissal of the suit.

5. The defendants 4 and 5 had also filed the written statement wherein it was stated as follows:

The suit property was the ancestral joint family property of the defendants 1 to 3 and the defendants 4 and 5 had purchased the same for a valuable consideration of Rs.3,00,000/- by virtue of a registered Sale Deed, dated 03.02.2005. On the date of execution of sale deed itself, the defendants 4 and 5 were put in possession and enjoyment of the suit property. They are bonafide purchasers for consideration and they are not aware of the alleged sale agreement between the plaintiff and first defendant. Thus, the defendants 4 and 5 prayed for dismissal of the suit.

6. The trial Court, after considering the averments both in the plaint and the written statements and arguments of both the counsel, framed five issues and considering the oral evidence of P.W.1, P.W.2, D.W.1 to D.W.3 and the documentary evidences viz., Exs.A.1 to A.8 and Exs.B1 to B4, ordered for return of the sale consideration to the plaintiff with interest, against which the present first appeal has been preferred by the appellant/plaintiff.

7. After hearing the arguments of both sides counsel, the following points for determination are framed:

1.Whether the plaintiff is entitled to the relief of decree of specific performance ?

2. Once the Trial Court has held that Ex.A.1/Sale Agreement is true and genuine, whether the decree for return of advance amount is

sustainable ?

3. When the plaintiff is always ready and willing to perform his part of contract, whether the Trial Court has committed an error in negativing the relief of specific performance ?

4. Whether the judgment and decree of the Trial Court is sustainable ?

5. And for what relief the appellant is entitled to ?

8. Heard the learned counsel for the appellant as well as the learned counsels for the respondents and perused the materials available on record.

Point Nos.1, 2 and 3

9. The learned counsel for the appellant would submit that the respondents 1 to 3 are the owners of the suit scheduled property and he entered into an sale agreement with the appellant/plaintiff under Ex.A.1/Sale Agreement, dated 25.11.1994 for a total sale consideration of Rs.12,25,000/- fixing the price at Rs.7,00,000/- per acre. The total extent of suit land is 1 acre and 75 cents. On the date of execution of Ex.A.1/Sale Agreement, Rs.2,00,000/- was paid as advance and subsequently, on several dates viz., 19.09.1995, 10.10.1995, 08.11.1995, 21.03.1996, 27.06.1996, 29.10.1996, 01.10.1997, 27.03.1997, 05.04.1997, 09.02.1998, the balance sale consideration of Rs.10,25,000/- was paid as could be evidenced by Ex.A.2. While so, on 13.01.2005, the defendants 1 to 3/respondents 1 to 3 sold the suit property to the defendants 3 and 4/respondents 3 and 4. Hence, the appellant/plaintiff issued Ex.A.4/Notice dated 28.02.2005 for which the first defendant issued a reply dated 15.03.2005 under Ex.A.5 and the defendants 2 and 3 issued a reply dated 21.03.2005 under Ex.A.6 and the defendant 4 and 5 issued a reply dated 12.03.2005 under Ex.A.7. Even though the first defendant had raised the plea that he had borrowed Rs.2,00,000/- from the appellant/plaintiff but had not executed any sale agreement, the Trial Court had held that the first defendant had received the entire sale consideration of Rs.12,25,000/- and ordered for return of the amount with interest and created charge over 1/3rd of the suit property which is an ancestral property, since the defendants 2 and 3 are the sons of the first defendant and they had not joined hands with their father in executing the Ex.A.1/Sale Agreement. The learned counsel would further submit that once the Court comes to the conclusion that the entire sale consideration has been paid on 09.02.1998 and that the plaintiff was only waiting for the first defendant to receive the original document from the bank in which he had availed loan and when the plaintiff is ready to execute the sale deed at any point of time, the Trial Court ought to have decreed the suit and granted the relief of specific performance instead of

ordering return of sale consideration with interest. Hence, the learned counsel for the appellant prayed for allowing the appeal.

10. Resisting the same, the learned counsel appearing for the first respondent would submit that the suit property is an ancestral property and the Ex.A.1/Sale Agreement alleged to have been entered into between the plaintiff and the first defendant on 25.11.1994 is not true and genuine because the stamp papers in Ex.A.2 were purchased only on 09.02.1998. The said factum was not properly considered by the Trial Court. The learned counsel would further submit that the suit property is an ancestral property and hence, the defendants 2 and 3 are also having right over the said property. Hence, he would contend that the appeal is devoid of merits and prayed for dismissal.

11. On the other hand, Mr.S.Parthasarathy, learned Senior Counsel appearing for the respondents 4 and 5 would submit that they are bonafide purchasers for value without notice of the sale agreement. Further, the Trial Court has committed an error in creating charge over 1/3rd of the suit property. The learned Senior Counsel also relied on the decision reported in 2015-2-L.W.30, Pemmada Prabhakar and others v. Youngmens Vysya Association and others and submits that once an agreement of sale was entered between a party and some of the co-sharers who do not have absolute title, the suit for specific performance in respect of other sharers are unenforceable. The learned Senior Counsel further taken me through Section 55B of Transfer of Property Act and submits that the charge created in respect of 1/3rd share in the suit property is unsustainable and hence, he prayed for dismissal.

12. Considered the rival submissions made by both sides and perused the material records, oral and documentary evidences.

13. It is an admitted fact that the suit property which is an ancestral property belongs to the respondents 1 to 3/defendants 1 to 3 and the 1st defendant/1st respondent herein entered into an Sale Agreement (Ex.A.1) with the appellant/plaintiff on 25.11.1994. The total extent of suit property is 1 acre 75 cents and the total sale consideration was fixed at Rs.12,25,000/- at the rate of Rs.7,00,000/- per acre. On the date of execution of Ex.A.1/Sale Agreement, Rs.2,00,000/- was paid as advance and subsequently, on several dates the balance sale consideration of Rs.10,25,000/- was paid as could be evidenced by Ex.A.2, dated 09.02.1998. In Ex.A.2, it was specifically stated by the first defendant that the entire sale consideration was received and he would execute the sale deed on the date fixed by the plaintiff. While so, when the appellant/plaintiff

was waiting for the first defendant/first respondent to get back the original documents from the Bank, the defendants 1 to 3/respondents 1 to 3 executed Ex.B.3/Sale Deed, dated 13.01.2005 in favour of the defendants 4 and 5/respondents 4 and 5. When the appellant/plaintiff came to know of the said transaction, the issued Ex.A.4/Notice dated 28.02.2005 for which the first defendant issued a reply dated 15.03.2005 under Ex.A.5 and the defendants 2 and 3 issued a reply dated 21.03.2005 under Ex.A.6 and the defendant 4 and 5 issued a reply dated 12.03.2005 under Ex.A.7. The defendants 2 and 3 had raised the plea that since the suit property is an ancestral property and that they had not borrowed any money from the appellant/plaintiff, the Ex.A.1/Sale Agreement entered into between the plaintiff and the first defendant will not bind on their share. Thus, taking into consideration of all those aspects, the Trial Court had granted the alternative relief of refund of sale consideration with interest. But admittedly, the respondents herein has not filed any cross appeal in respect of the finding of the Trial Court.

14. At this juncture, it is appropriate to consider the decision of the Hon'ble Apex Court relied on by the learned Senior Counsel appearing for the respondents 4 and 5 reported in 2015-2-L.W.30, Pemmada Prabhakar and others v. Youngmens Vysya Association and others, wherein it was held that the sale agreement in respect of other co-sharers who was not a party to the sale agreement will not bind on them and the said agreement of sale is not enforceable in law in view of Section 17 of the Specific Relief Act. It is appropriate to incorporate the relevant portion in paragraph 30 of the said decision:

> "30. Even assuming for the sake of argument that the agreement is valid, the names of three sons are mentioned in Agreement of Sale, out of whom the agreement is executed by defendant Nos.1 and 2 and they assured that they would get the signatures of the 3rd brother namely, Srinivasa Rao and also the remaining 3 sisters. At the time of execution of this agreement signatures were not obtained. Therefore, the agreement is not executed by all the co-sharers of the property which fact is evident from the recitals of the document itself. Hence, the plantiffs are not entitled for specific performance decree. ..."

15. Considering the facts of the present case in the light of the above decision of the Hon'ble Apex Court, the Ex.A.1/Sale Agreement entered into between the appellant/plaintiff and the 1st defendant/1st respondent in respect of the suit property will not bind on the defendants 2 and 3/respondents 2 and 3 who were not a party to the said Sale Agreement. Furthermore, Ex.A.1 is an unregistered

document. Even though the respondents 1 to 5 has taken the plea that the Ex.A.1/Sale Agreement is a fabricated document and that the appellant/plaintiff had taken the signatures of the first respondent/first defendant in various papers when he borrowed Rs.2,00,000/-, the Trial Court had disbelieved the same. Against the finding of the Trial Court, no cross appeal has been preferred. So, the finding of the Trial Court that Ex.A.1 and Ex.A.2/Sale Agreements are true and genuine is correct.

16. Further, since the suit property is an ancestral property and the respondents 1 to 3 are the co-sharers, the respondents 2 and 3 who are not a party to the Sale Agreement cannot be forced to execute the sale deed in favour of the plaintiff. Furthermore, they had already executed Ex.B.3/Sale Deed, dated 13.01.2005 in favour of the respondents 4 and 5.

17. At this juncture, the learned counsel for the appellant would submit that the Ex.B.2/Sale Deed had been executed only for a sum of Rs.3,00,000/- whereas the appellant/plaintiff had entered into a sale agreement for Rs.12,25,000/. However, D.W.1/Palanisamy Gounder in his evidence has deposed that he had sold the property for Rs.14,00,000/-. In such circumstances, the sale consideration is immaterial. Furthermore, though the appellant/plaintiff had paid the entire sale consideration as early as 09.02.1998, he kept quiet all along without getting the sale deed executed and after coming to know about the execution of Ex.B.3/Sale Deed, in favour of the respondents 4 and 5, he issued Ex.A.4/Notice, dated 28.02.2005. Furthermore, the appellant has not stated as to why he has not taken any steps to get the sale deed registered for such a long time. In such circumstances, the Trial Court has considered the evidence of P.W.1/Boopathi, P.W.2/Ganesan, D.W.1/Palanisamy Gounder, D.W.2/Arunkumar and D.W.3/Nataraj had come to the conclusion that the appellant/plaintiff is entitled to refund of sale consideration with interest and that he is not entitled for the decree of specific performance because Ex.B.3/Sale Deed, dated 13.01.2005 had been executed by all the sharers and the defendants 4 and 5/respondents 4 and 5 are bonafide purchasers for value without notice.

18. The learned counsel for the respondent had taken me through Section 55(6)(b) of the Transfer of Property Act and submits that no charge can be created in respect of 1/3rd share of the first respondent/first defendant. It is appropriate to incorporate the relevant provision:

> "55. Rights and liabilities of buyer and seller. - In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to

the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:—
(1) ...
(2) ...
(3) ...
(4) ...
(5) ...
(6) The buyer is entitled —
(a) ...

(b) : unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, 2[* * *] to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission. An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent."

However, the said provision is irrelevant to the facts of the present case because in the instant case the dispute is not between the buyer and the seller. Furthermore, without filing any cross-objection in respect the charge created, the respondent is not entitled to raise such a plea. In the above said circumstances, I am of the view that the argument advanced by the learned counsel for the respondent does not merit acceptance.

19. As stated supra, even though Ex.A.1 is a true and genuine document and the appellant/plaintiff had paid the entire sale consideration, since the respondents 2 and 3/defendants 2 and 3 are having share in the suit property, as per the dictum of the Hon'ble Apex Court reported in 2015-2-L.W.30, Pemmada Prabhakar and others v. Youngmens Vysya Association and others, the sale agreement entered into with the 1st respondent/1st defendant in respect of the suit will not bind on the respondents 2 and 3/defendants 2 and 3. Furthermore, the suit property was already sold to the respondents 4 and 5 even before the issuance of notice and the respondents 4 and 5 are the bonafide purchasers for value with notice. In such circumstances, I am of the view that the appellant is entitled only for the return of advance amount with interest and the Trial Court is correctly

negatived the prayer for specific performance and granted alternative relief of return of advance amount with interest and created charge over 1/3rd share belonging to the first respondent. The point nos.1 to 3 are answered accordingly.

Point No.4 and 5

20. In view of the answer given to point nos.1 to 3, the judgment and decree passed by the Trial Court is well-reasoned and sustainable and it does not warrant interference by this Court. Consequently, the first appeal is dismissed without costs.

21. In fine,

(a) The first appeal is dismissed without costs.

(b) The decree and judgment passed by the Trial Court is hereby confirmed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1.The I Additional District Court,
Coimbatore.

2.The Record Keeper,
V.R.Section, High Court, Chennai.

1 CC to Mr.S.Venkatesh, Advocate SR.No. 32209

1 CC to Mr.S.Dhanasekaran, Advocate, SR.No. 32121

A.S.No.688 of 2009

TEJ (CO)
PSI (23.07.2015)