

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.07.2015

CORAM:

THE HONOURABLE MS.JUSTICE R.MALA

Appeal Suit No.810 of 2008 and
M.P.No.1 of 2008
Appeal Suit No.179 of 2010
and M.P.No.2 of 2010

A.S.No.810 of 2008:

N.B.Uma Maheswari .. Appellant/Plaintiff

Vs

1.V.Ranganathan
2.Minor R.Madhuvandhi
(Minor represented by her natural
guardian/father V.Ranganathan) .. Respondents/Defendants

Prayer: This Appeal Suit has been preferred under Section 96 of C.P.C., against the judgment and decree dated 17.10.2007 in O.S.No.303 of 2005 on the file of the Additional District and Sessions Court (Fast Track Court No.II), Coimbatore.

For Appellant : Mr.S.Parthasarathy senior counsel
for Mr.J.Ramakrishnan

For Respondents : Mrs.Hema Sampath senior counsel
for Mr.M.Baskar

A.S.No.179 of 2010:

Uma Maheswari .. Appellant/2nd Defendant

Vs

1.Minor R.Madhuvandhi
2.Minor R.Mahalakshmi
(Minors 1 and 2 represented by
their mother/next friend Mrs.Chandragandhi)
.. 1 and 2 Respondents/Plaintiffs

3.K.V.Ranganathan .. 3rd Respondent/1st Defendant

Prayer: This Appeal Suit has been preferred under Order 41 Rule 1 of C.P.C. read with Section 96 of C.P.C., against the judgment and decree dated 04.12.2009 in O.S.No.40 of 2007 on the file of the Additional District Court (Fast Track Court No.I), Coimbatore.

For Appellant	: Mr.S.Parthasarathy senior counsel for Mr.J.Ramakrishnan
For R1 and R2	: Mrs.Hema Sampath senior counsel for Mr.M.Baskar
For R3	: Mr.V.Venkatasamy

COMMON JUDGMENT

A.S.No.810 of 2008 arises out of the judgment and decree dated 17.10.2007 in O.S.No.303 of 2005 on the file of the Additional District and Sessions Court (Fast Track Court No.II), Coimbatore.

2.A.S.No.179 of 2010 arises out of the judgment and decree dated 04.12.2009 in O.S.No.40 of 2007 on the file of the Additional District Court (Fast Track Court No.I), Coimbatore.

O.S.No.303 of 2005:

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

(i)The defendants 1 and 2 are the absolute owners of the suit property by virtue of partition deed dated 07.09.1993. Since the plaintiff has been residing in the above said locality for many years, she had an intention to construct factory in that locality itself. At this time, the first defendant approached the plaintiff and her husband to give the suit property for sale. Therefore, a sale agreement was entered into between the plaintiff and the first defendant on 03.06.2004. The defendants should obtain an encumbrance certificate for continuous period of 15 years and hand over the same to the plaintiff.

(ii)Since the defendants are not complied with the terms and conditions mentioned in the sale agreement and they are not ready and willing to perform their part of contract, the plaintiff has constrained to file the suit for a direction to the defendants 1 and 2 to execute the sale deed in favour of the plaintiff on receiving the balance sale consideration and in the event of his failure to do so, the Court may execute sale deed in favour of the plaintiff or in the alternative, direct the defendants 1 and 2 to refund the advance amount of Rs.2,00,000/- with interest thereon to the plaintiff. Therefore, she prayed for decree.

4.The gist and essence of the written statement filed by the defendants are as follows:

(i)Both the parties agreed and entered into an agreement for sale on 03.06.2004. The plaintiff has made many alterations in the agreement and filed the present suit. The time stipulated in the agreement is essence of contract. On the expiry of 80 days the agreement has been automatically cancelled. The defendant has not made any endorsement for extension of time. So the alleged endorsement made on the back side of the agreement is forgery. All the documents have been handed over to the plaintiff on the date of agreement itself. There was no pre suit notice. The telegram issued by the plaintiff dated 03.09.2004 was suitably replied by the defendant on 10.09.2004. So the plaintiff is not entitled to get a decree of specific performance. Therefore, they prayed for dismissal of the suit.

5.The gist and essence of the additional written statement filed by the first defendant, which is adopted by the second defendant are as follows:

(i)The plaintiff has filed a suit in O.S.No.3688 of 2004 for bare injunction without reserving her right to file suit for specific performance. Therefore, the above suit is hit by the provisions of Order 2 Rule 2 C.P.C. The plaintiff has not pressed the injunction suit without any reason and without seeking permission of the Court to file suit for specific performance. Hence, the above suit is hit by the provisions of Order 2 Rule 2 C.P.C. Therefore, they prayed for dismissal of the suit.

6.The trial Court, after considering the averments both in the plaint and the written statement and arguments of both the counsel, has framed five issues and considering the oral evidence of P.W.1, D.W.1 and Exs.A1 to A12, B1 and B2, dismissed the suit for specific performance, but granted alternative relief by directing the defendants to refund the advance amount of Rs.2,00,000/- with accrued interest to the plaintiff.

O.S.No.40 of 2007:

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

(i)The plaintiffs are the children of the first defendant. The suit property has been allotted to the first defendant as per the registered partition deed dated 07.09.1983 and the partition took place between the defendant, his father R.Venkitesalu Naidu and younger brother Soundararajan and sister Shyamala. The said property is the ancestral property of plaintiffs and first defendant and the plaintiffs are entitled to 2/3rd shares and they are in joint possession of the property.

(ii) Since the first defendant failed to take care of the plaintiffs, they demanded for the division of the properties into three equal shares. But the first defendant has colluded with the second defendant and created an sale agreement dated 31.06.2004 in respect of the suit property. The second defendant has filed a suit in O.S.No.303 of 2005 for specific performance and the same is pending before the Fast Track Court No.II, Coimbatore. The first defendant is hurriedly attempting to sell the property to the second defendant against the right and interest of the plaintiffs over the suit properties. Therefore, the plaintiffs constrained to file the suit for the following reliefs:

(a) for the division of the suit property into three equal shares and for the allotment of two such shares to the plaintiffs (2/3rd shares) by metes and bounds with reference to good and bad soil;

(b) for permanent injunction restraining the defendant, his men and agents from alienating or encumbering the suit property.

(c) directing the defendant to pay the costs of the suit;
Thus, they prayed for decree.

8.The gist and essence of the written statement filed by the second defendant are as follows:-

(i) The suit in O.S.No.303 of 2005 on the file of the Fast Track Court No.II, Coimbatore is for specific performance of the suit property filed by this defendant against the first plaintiff and 1st defendant came up for trial. At this juncture, to defeat the rights of this defendant to get a sale of the suit property, the present suit has been filed. The relief of specific performance was unfortunately not granted to this defendant, but only a decree for refund of advance amount has been granted to her by judgment and decree dated 17.10.2007.

(ii) The suit property is not the coparcenary property in the hands of the first defendant and therefore the plaintiffs cannot claim any right by birth in the same. At no time, the first plaintiff demanded partition. In fact she along with the 1st defendant jointly contested the suit of this defendant in O.S.No.303 of 2005 appearing by same counsel. Therefore, she prayed for dismissal of the suit.

9.The trial Court, after considering the averments both in the plaint and the written statement and arguments of both the counsel, has framed four issues and considering the oral evidence of P.W.1, D.W.1, D.W.2 and Exs.A1 to A4 and B1, decreed the suit stating that the suit property is hereby divided into three equal shares and to allot two such shares to the plaintiffs jointly and the defendants and their men are hereby directed from alienating or encumbering the shares of the plaintiffs over the suit property by means of permanent injunction.

10. In O.S.No.303 of 2005, the trial Court has declined to grant decree of specific performance, but granted alternative relief for refund of advance amount paid by the appellant. In O.S.No.40 of 2007, the trial Court has decreed the suit filed by the respondents 1 and 2. Aggrieved over the same, the present appeals have been preferred by the appellant.

11. Aggrieved over the judgment and decree passed by the trial Court in both the suits, the appellant herein has preferred the first appeals.

12. For the sake of convenience, the second defendant in O.S.No.40 of 2007 and plaintiff in O.S.No.303 of 2005 is referred to as 'appellant', the plaintiffs in O.S.No.40 of 2007 are referred to as 'respondents 1 and 2' and first defendant in O.S.No.40 of 2007 is referred to as 'third respondent'.

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

1. Whether the trial Court is right in dismissing the suit for specific performance?

2. Whether the trial Court is right in granting alternative relief for refund of advance amount paid by the appellant?

3. Whether the decree and judgment passed by the trial Court is sustainable?

4. To what relief, the appellant is entitled to?

5. Whether the decree and judgment granted by the trial Court in O.S.No.40 of 2007 is sustainable?

14. Though the decree and judgment in both the suits are passed by different Courts, as the parties and the subject matter of the suit property are one and the same, this Court has passed a common judgment.

15. Learned senior counsel appearing for the appellant has submitted that the appellant is always ready and willing to perform her part of contract. The respondents alone have not fulfilled the conditions mentioned in Ex.A2 sale agreement. Ex.A3 is the encumbrance certificate which shows that there was a sale agreement between one Karthikeyan and the third respondent, but it was not cancelled. It shows that the respondents are not willing to perform their part of contract. That factum was not considered by the trial Court. He fairly conceded that the appellant has filed a suit in O.S.No.3688 of 2004 for injunction not to encumber the suit property. But that suit was dismissed as withdrawn. Then only, the appellant has filed the suit in O.S.No.303 of 2005 for specific performance. He further submits that the suit is not hit by the provisions of Order 2 Rule 2 C.P.C. Since the trial Court has come to the conclusion that Ex.A2 sale agreement is true and genuine, it ought to have granted decree for specific performance instead of granting alternative

relief for refund of advance amount. Therefore, he prayed for allowing the appeals.

16. Resisting the same, learned senior counsel appearing for the respondents submits that appellant is not always ready and willing to perform her part of contract and time is essence of contract. As soon as she received reply for the telegram instead of filing suit for specific performance, she has filed a suit for injunction restraining the respondents not to encumber the suit property. So the plea of provisions of Order 2 Rule 2 C.P.C. has been raised, since she has not obtained permission from the Court to file a suit. Even though the trial Court held that suit is not hit by the provisions of Order 2 Rule 2 C.P.C., it has declined to grant the decree of specific performance, however granted alternative prayer for refunding advance amount to the appellant. Therefore, she prayed for dismissal of the appeals.

17. Considered the rival submissions made on both sides and perused the materials available on record.

Point No.1 and 2:

18. The appellant has filed a suit in O.S.No.303 of 2005 for specific performance on the basis of Ex.A2 sale agreement dated 03.06.2004 stating that the respondents are the owners of the suit property. The sale consideration was fixed at Rs.25,000/- per cent and the appellant has agreed to purchase 37.154 cents. She paid a sum of Rs.2,00,000/- as an advance and time for payment of balance sale consideration is 80 days. Subsequently, as per the endorsement made by the third respondent dated 20.08.2004, the time is extended to 13 days (i.e.) up to 04.09.2004. On 03.09.2004, the appellant has sent a telegram to the respondents to show her readiness and willingness to perform her part of contract. The third respondent sent a reply and the same was received by the appellant only on 10.09.2004. Since the respondents are not ready to execute the sale deed in favour of the appellant, the appellant has constrained to file the suit in O.S.No.303 of 2005 for specific performance.

19. Per contra, the respondents stated that time is essence of contract and the appellant is not ready and willing to perform her part of contract.

20. On perusal of the records, it reveals that in Ex.A2 sale agreement itself, there was a clause that the third respondent should obtain encumbrance certificate for 15 years and also to measure the property and hand over the possession to the appellant. But as per Ex.A3 encumbrance certificate, there was an agreement between one Karthikeyan and Ranganathan on 26.10.1998 and 27.10.1998. Furthermore, the appellant has issued Ex.A5 telegram to the third respondent only before the last date of payment of sale consideration (i.e.) on 03.09.2004. Ex.A6 reply has been issued by the third respondent on 10.09.2004, in which it was specifically stated that

the third respondent is ready and willing to perform his part of contract and he was standing in the Sub-Registrar's office up to 5.00 p.m. Admittedly, the appellant without filing the suit for specific performance filed the suit for injunction in O.S.No.3688 of 2004, which was evidenced by Ex.B2. Even though the trial Court held that the suit is not hit by the provisions of Order 2 Rule 2 C.P.C., against which, the respondents have not filed any cross objection.

21.On perusal of Ex.B2 shows that the appellant has filed the suit for injunction restraining the defendants from alienating, encumbering the suit property in any manner whatsoever by way of permanent injunction until the advance amount is re-paid by the defendants to the plaintiff with subsequent interest at the rate of 18% per annum and for awarding the costs of the suit. It shows that the appellant is very particular about refund of advance amount. That factum was rightly considered by the trial Court and it declined to grant decree of specific performance and granted refund of advance amount to the appellant.

22.On considering the judgment passed by the trial Court, I am of the view, the trial Court after considering all the aspects in proper perspective rightly granted the alternative prayer for refund of advance money to the appellant. So the appellant is not entitled to decree for specific performance. Thus, point Nos.1 and 2 are answered against the appellant.

Point Nos.3 and 4:

23.In view of the answers given to point Nos.1 and 2, the decree and judgment passed by the trial Court are sustainable. Accordingly, point Nos.3 and 4 are answered. So I do not find any infirmity or illegality in the judgment passed by the trial Court. Hence, A.S.No.810 of 2008 deserves to be dismissed and it is hereby dismissed with costs.

24.As already stated that the respondents 1 and 2, who are daughters of third respondent have filed a suit in O.S.No.40 of 2007 for partition and separate possession of 2/3rd shares in the suit property. Their father/third respondent was set exparte and the agreement holder/appellant alone has contested the suit. In this suit, preliminary decree of partition has been granted. The trial Court while granting the decree for refund of advance amount in O.S.No.303 of 2005 has negatived the decree for specific performance.

25.In view of the judgment passed in A.S.No.810 of 2008, the appellant is entitled only the decree for refund of advance amount of Rs.2,00,000/- which was paid by her. Furthermore, no title to the property has been transferred. Under such circumstances, the decree and judgment passed by the trial Court are hereby confirmed. So I do not find any merits in this appeal. Hence, A.S.No.179 of 2010 deserves to be dismissed and it is hereby dismissed with costs.

26.In fine,

- A.S.Nos.810 of 2008 and 179 of 2010 are dismissed with costs.
- The decree and judgment passed by the trial Court are hereby confirmed.
- Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

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To

1.The Additional District and Sessions Judge,
(Fast Track Court No.II), Coimbatore.

2.The Additional District Judge, Fast Track Court I, Coimbatore.

3.The Record Keeper
V.R. Section, High Court, Madras.

2 cc to Mr.J.Ramakrishnan, Advocate Sr.No.34476, 34475

1 cc to Mr..M.Baskar , Advocate Sr.No.34573

1 cc to Mr. V.Venkatasamy, Advocate Sr.No.34646

Appeal Suit No.810 of 2008 and
M.P.No.1 of 2008

Appeal Suit No.179 of 2010
and M.P.No.2 of 2010

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