

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.11.2016

CORAM

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

Appeal Suit No.583 of 2012
& MP No.1 of 2012

1. G.Karunagaran
2. G.Sivanesan
3. Sudhakar ... Appellants/Defendants 1 to 3

Vs

1. Kumar
2. G.Kumar ... Respondents/Petitioners
4th Defendant

Prayer:- Appeal suit filed under Section 96 of CPC against the judgment and decree, dated 20.1.2012, passed in O.S.No.37 of 2009 by the Additional District Court, Krishnagiri.

For Appellants : Mr.D.Shivakumaran

For Respondents : Mr.V.Raghavachari for R1
No appearance for R2

JUDGMENT

(Judgment of the Court was delivered by A.SELVAM,J.)

Challenge in this appeal suit is to the judgment and decree dated 20.1.2012, passed in O.S.No.37 of 2009, by the Additional District Court, Krishnagiri.

2. The first respondent herein, as plaintiff, has instituted O.S.No.37 of 2009 on the file of the trial court, praying to pass a decree of specific performance in pursuance of the sale agreement dated 26.4.2006, wherein the present appellants and second respondent have been shown as defendants.

3. The averments made in the plaint are that the suit property and some other properties are jointly owned by the defendants and others and amongst them, an oral partition has been effected, wherein the suit property has been allotted to share of defendants 1 to 3. The defendants 1 to 3 have agreed to sell the same for a sum of Rs.19,00,000/- to the plaintiff.

Since a Settlement Deed stands in the name of the fourth defendant, all the defendants have joined together and executed the suit sale agreement dated 26.4.2006. On the date of the execution of sale agreement, a sum of Rs.6 Lakhs has been paid as an advance and subsequently, one of the brothers of the defendants, by name Asaithambi has instituted a suit in O.S.No.66 of 2006 for the relief of partition, wherein all the alleged sharers have been impleaded. Due to pendency of the same, the period mentioned in the suit sale agreement has been extended 8 times. Even though the period has been extended for 8 times, the defendants 1 to 3 have not come forward to execute a sale deed in favour of the plaintiff. Under the said circumstances, the present suit has been instituted for the relief sought therein.

4. In the written statement filed on the side of the defendants 1 to 3, it is averred that the defendants 1 to 3 are not the owners of the suit property. The suit property has been allotted to the share of the fourth defendant. The suit sale agreement is nothing but a sham and nominal. Since the suit sale agreement is a sham and nominal, discretionary relief of specific performance cannot be granted in favour of the plaintiff and therefore, the present suit deserves to be dismissed.

5. In the written statement filed on the side of the fourth defendant, it is averred that the fourth defendant is not having any objection for decreeing the suit as prayed for.

6. On the basis of the rival pleadings raised on either side, the trial court has framed necessary issues and after analyzing both the oral and documentary evidence, has decreed the suit as prayed for. Against the judgment and decree passed by the trial court, the present appeal suit has been preferred at the instance of the defendants 1 to 3, as appellants.

7. The sum and substance of the case of the plaintiff is that the suit property has been allotted to the share of the defendants 1 to 3 in an oral partition, which has taken place amongst the defendants 1 to 4 and other brothers. The defendants 1 to 3 have expressed their desire to sell the suit property in favour of the plaintiff and accordingly all the defendants have jointly executed a suit sale agreement dated 26.4.2006 in favour of the plaintiff and thereby agreed to sell the same for a sum of Rs.19,00,000/- and on the date of execution of sale agreement, a sum of Rs.6,00,000/- has been given as an advance. During subsistence of the suit sale agreement, one Asaithambi, as plaintiff, has instituted O.S.No.66 of 2006 for the relief of partition including the suit property, wherein the defendants 1 to 3 have filed a written statement to the effect that they are not having semblance of right over the suit property. Under the said circumstances, the period mentioned in the suit sale

agreement has been extended for 8 times and after disposal of O.S.No.66 of 2006, the defendants have not come forward to execute a sale deed in favour of the plaintiff. Under the said circumstances, the present suit has been instituted for the relief sought therein.

8. The main defence put forth on the side of the defendants 1 to 3 is that in the alleged oral partition, the suit property has not been allotted to their share, whereas the suit property has been allotted to the share of the fourth defendant and suit sale agreement is nothing but a sham and nominal and the same cannot be executed.

9. The trial court, after considering the rival evidence available on record, has decreed the suit as prayed for.

10. The only point that comes up for consideration in the present appeal suit is as to whether the first respondent/plaintiff is entitled to discretionary relief of specific performance in pursuance of the suit sale agreement dated 26.4.2006.

11. The suit sale agreement has been marked as Ex.A.1 and a copy of the plaint filed in O.S.No.66 of 2006 has been marked as Ex.A.2. The Partition Deed dated 24.2.2010 has been marked as Ex.A.3 and a Gift Deed dated 24.2.2010 has been marked as Ex.A.4.

12. The learned counsel appearing for the appellants/defendants 1 to 3 has contended to the effect that the suit sale agreement has come into existence on 26.4.2006, wherein total sale consideration is mentioned as Rs.19,00,000/-. The period for execution of a Sale Deed is mentioned as 3 months and on the date of execution of Ex.A.1, suit sale agreement, an amount of Rs.6,00,000/- has been given as advance and subsequently, the period mentioned in Ex.A.1 has been extended for 8 times and out of 8 times, five times have been extended only at the request of the plaintiff and even prior to institution of the suit, no demand notice has been issued by the plaintiff. Under the said circumstances, the plaintiff has not shown his readiness and willingness to perform his part of the contract and therefore, the plaintiff is not entitled to get discretionary relief of specific performance and the trial court, without considering the vital lapses committed by the plaintiff, has erroneously decreed the suit and therefore, the judgment and decree passed by the trial court are liable to be interfered with.

13. In support of the contentions put forth on the side of the appellants/defendants 1 to 3, the following decisions are relied upon:

(i) In CDJ 2016 MHC 3542 (V.Krishnan vs. M.S.Dhananjayan and others), this Court has held that as per Section 16

(c) of the Specific Relief Act, 1963, it is the duty of the plaintiff to prove his/her readiness and willingness in a suit for specific performance.

(ii) In CDJ 2009 MHC 3990, (Kalash Properties Pvt.Ltd., rep.by its Chairman and Managing Director G.Kaliasundaram vs. Lilly Pushpam and others), this Court has held that prior to institution of the suit, there must be a demand from the plaintiff for getting a sale deed from the concerned defendant.

14. In order to resile the arguments put forth on the side of the appellants/defendants 1 to 3, the learned counsel appearing for the first respondent/plaintiff has also equally contended that Ex.A.1 has come into existence on 26.4.2006 and one Asaithambi, brother of the defendants, as plaintiff, has instituted O.S.No.66 of 2006 on 14.6.2006, wherein the present defendants 1 and 2 have filed a written statement to the effect that they are not the owners of the suit property and on 18.2.2010, O.S.No.66 of 2006 has been dismissed as not pressed. During the interregnum period and also due to the specific plea taken by the defendants 1 and 2, the period mentioned in Ex.A.1 has been periodically extended and sale consideration has been fixed for Rs.19,00,000/- and on the date of execution of Ex.A.1 sale agreement, Rs.6,00,000/- has been given as an advance and subsequently on various dates, various amounts have been given and in aggregation, the plaintiff has paid Rs.12,40,000/-. Under the said circumstances, the plaintiff has always shown his readiness and willingness to perform his part of the contract. Since the defendants 1 and 2 have taken a different plea with regard to ownership in O.S.No.66 of 2006, the plaintiff has not been able to file a suit for specific performance as early as possible and further, even in the written statement filed in the present suit, the specific stand taken by the defendants 1 to 3 is that they are not the owners of the suit property. Under such circumstances, the conduct of the defendants must also be looked into and the trial court, after considering the overall evidence available on record, has rightly decreed the suit and therefore, the judgment and decree passed by the trial court do not warrant interference.

15. In support of the contentions put forth on the side of the first appellant/plaintiff, a decision reported in (2008) 11 SCC 45 (Silvey and others vs. Arun Varghese and another) is relied upon, wherein the Hon'ble Supreme Court has specifically held that in a suit for specific performance, conduct of the defendants must also be taken into consideration.

16. As adverted to earlier, the sale agreement has been marked as Ex.A.1. The specific averment made in the written statement filed on the side of the defendants 1 to 3 is that they are not owners of the suit property and the same has not

been allotted to their share in an oral partition, which is said to have taken place amongst the brothers. The specific stand taken by the fourth respondent is that he is not having any objection for decreeing the suit as prayed for.

17. At this juncture, the Court has to look into the evidence given by D.W.1 and D.W.2. Both of them have admitted in their evidence to the effect that in an oral partition alleged to have taken place amongst brothers, the suit property has been allotted to the share of the defendants 1 to 3. Therefore, it is quite clear that the averments made in the written statement filed by the defendants 1 to 3 are belied by the evidence given by D.Ws.1 and 2. On the basis of evidence given by them, there is no incertitude in coming to a conclusion that in an oral partition, the suit property has been allotted to the share of the defendants 1 to 3.

18. It is seen from the records that Ex.A.1 has been executed by all the defendants. It is an admitted fact that with regard to suit property, a Settlement Deed has come into existence in favour of the fourth defendant. The fourth defendant has also joined along with the defendants 1 to 3. Under such circumstances, the Court can very well come to a conclusion that Ex.A.1 is a valid sale agreement.

19. The main contention put forth on the side of the appellants/defendants 1 to 3 is that only due to lapses on the part of the plaintiff, the period fixed in Ex.A.1 has been unnecessarily extended for 5 times. In fact, this Court has perused the entire averments made in Ex.A.1, wherein it has been clinchingly stated that even at the request of the defendants, the time has been extended on several occasions.

20. On the side of the plaintiff, Ex.A.2 has been filed. Ex.A.2 is nothing but a copy of the plaint filed in O.S.No.66 of 2006 and the same has been instituted by one Asaithambi, who is none other than the brother of the defendants, for the relief of partition and separate possession of his share, wherein the present suit property has also been included. In O.S.No.66 of 2006, the present defendants 1 and 2 have filed a written statement to the effect that they are not having semblance of right over the suit property. Further, O.S.No.66 of 2006 has been instituted on 14.6.2006, after execution of Ex.A.1. Since after execution of Ex.A.1, O.S.No.66 of 2006 has been filed for the relief of partition, wherein suit property has also been included as one of the properties and further defendants 1 and 2 have taken a definite stand to the effect that they are not owners of the suit property and subsequently, the time mentioned in Ex.A.1 has been periodically extended in the said circumstances, the Court cannot come to a conclusion that only at the instance of the plaintiff, the time has been extended for 5 times or 8 times.

21. The learned counsel appearing for the appellants/defendants 1 to 3 has advanced another limb of argument to the effect that even prior to institution of the suit, no demand notice has been issued.

22. In the plaint, it has been specifically mentioned that the plaintiff has always been ready and willing to perform his part of the contract. Further, the period fixed in Ex.A.1 has been extended for 8 times. During subsistence of Ex.A.1, O.S.No.66 of 2006 has been instituted for the relief of partition, wherein the defendants 1 and 2 have taken a stand to the effect that they are not owners of the suit property. Therefore, on the basis of documents filed on either side and also on the basis of the stand taken by the defendants 1 and 2, the Court can unflinchingly come to a conclusion that the plaintiff has always shown his readiness and willingness to perform his part of the contract. It is true that prior to institution of the suit, pre-suit notice has not been issued on the side of the plaintiff. Simply because on the side of the plaintiff, pre-suit notice has not been issued, the Court cannot reject discretionary relief of specific performance on the basis of circumstances available in the present case. Further, as taunted earlier, the defendants 1 and 2 have taken a different stand even in O.S.No.66 of 2006, for the purpose of defeating the right of the plaintiff created in Ex.A.1. Therefore, it goes without saying that even from inception of Ex.A.1, the defendants 1 to 3 have taken a different stand so as to defeat the rights of the plaintiff.

23. It has already been pointed out that the total sale consideration is fixed at Rs.19,00,000/- and on the date of execution of Ex.A.1, a sum of Rs.6,00,000/- has been paid and subsequently, the plaintiff has paid some amounts and in aggregation, he has paid Rs.12,40,000/- and that itself would go to show that the plaintiff has always been ready and willing to perform his part of the contract.

24. As per Section 16(c) of the Specific Relief Act, 1963, the plaintiff must plead and prove his readiness and willingness. In the instant case, on the side of the plaintiff, abundant evidence is available. From the inception of Ex.A.1, the plaintiff has shown his readiness and willingness to perform his part of the contract. But the defendants 1 to 3 have taken a different stand from inception of Ex.A.1 so as to defeat the rights of the plaintiff. Under such circumstances, the plaintiff is entitled to get discretionary relief of specific performance.

25. The trial court, after considering the overall evidence available on record, has rightly decreed the suit. In view of the discussions made earlier, this Court has not found any force in the contention put forth on the side of the

appellants/defendants 1 to 3 and therefore, the present appeal suit deserves to be dismissed.

In fine, this appeal suit is dismissed with cost. The judgment and decree dated 20.1.2012, passed in O.S.No.37 of 2009, by the Additional District Court, Krishnagiri are confirmed. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

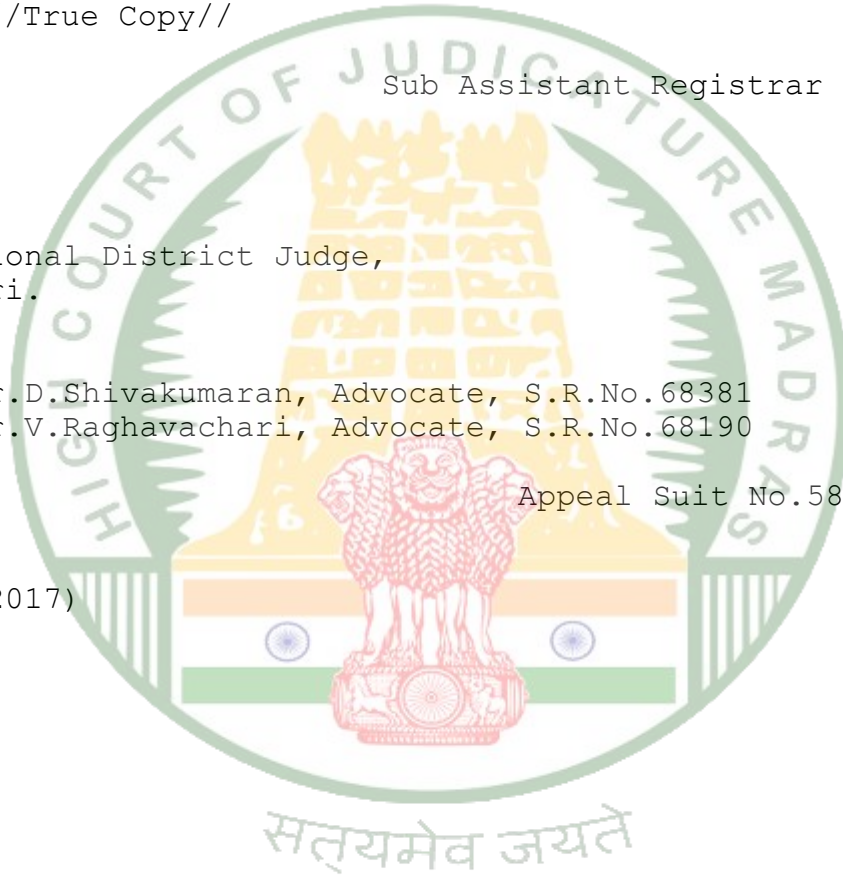
The Additional District Judge,
Krishnagiri.

+1cc to Mr.D.Shivakumaran, Advocate, S.R.No.68381

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.68190

Appeal Suit No.583 of 2012

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