

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.7.2016

Delivered on : 28.07.2016

CORAM

THE HONOURABLE MR.JUSTICE A.SELVAM

and

THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

Appeal Suit No.899 of 2012

& CMP No.5949 of 2016

P.R.Gunasekaran

... Appellant/1st Defendant

Vs.

1. K.Balasubramani

2. S.Shanmugam

3. Bagyalakshmi

4. P.Gnanamurugan

5. D.Shanthi

6. P.Uthami

7. P.Chandrasekar

...Respondents 1 to 7/Plaintiffs
(respondents 1 to 7 are represented by
their duly constituted Power agent
P.Devaraj)

8. Kandasamy

...8th Respondent/2ndDefendants

Prayer:- Appeal suit filed under Section 96 of CPC
against the judgment and decree, dated 30.1.2012, passed by the
Fast Track Court No.I cum Additional District Judge, Erode in
O.S.No.291 of 2007.

For Appellant :Mr.V.Raghavachari

For Respondents :Mr.S.V.Jayaraman, Senior Counsel for
Mr.S.Chandrasekaran for R1 to R7
R8 - Given up

JUDGMENT

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

Challenge in this appeal suit is to the Judgment and
Decree dated 30.1.2012, passed in O.S.No.291 of 2007, by the
Additional District Court/Fast Track Court No.1, Erode.

2. The respondents 1 to 7 herein, as plaintiffs, have
instituted O.S.No.291 of 2007 on the file of the trial court,

praying to pass a money decree in their favour in pursuance of the sale agreement dated 6.9.1995, wherein the present appellant has been shown as first defendant.

3. The epitome of the plaint averments may be stated like thus:

The suit property is the absolute property of the first defendant. The first defendant has entered into a sale agreement with one C.Govindasamy and his wife Pavayammal on 3.5.1995, wherein it is stated that the agreement holders have agreed to purchase the property for a sum of Rs.24 Lakhs per Acre. The said Govindasamy and Pavayammal have assigned their rights to the plaintiffs by an agreement of sale dated 6.9.1995. The plaintiffs have agreed to purchase two acres of land. The plaintiffs have advanced a sum of Rs.18 Lakhs. Since the plaintiffs have obtained the sale agreement dated 6.9.1995 and as per sale agreement dated 3.5.1995, they are entitled to claim return of advance amount, within a period of 12 years. 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 first defendant, it is averred that the first defendant has entered into a sale agreement dated 3.5.1995 with one C.Govindasamy and his wife, wherein the agreement holders have agreed to purchase one Acre of land for a sum of Rs.24 Lakhs and they advanced a sum of Rs.24 Lakhs. In the agreement dated 3.5.1995, it is agreed to get a sale deed registered within the period mentioned therein. Since the agreement holders have failed to pay the balance sale consideration, the first defendant has cancelled the sale agreement by way of issuing a legal notice. It is false to aver that the said Govindasamy and Pavayammal have assigned the sale agreement dated 3.5.1995 by way of executing another sale agreement dated 6.9.1995. The first defendant has not admitted the genuineness of the Power of Attorney Deed. There is no merit in the plaint and the same deserves to be dismissed.

5. In the additional written statement filed on the side of the first defendant, it is averred that the Document No.2 filed on the side of the plaintiffs is not a Deed of Assignment and the same is nothing but a separate sale agreement entered into between the plaintiffs and original agreement holder. The suit is bad for non-joinder of parties and there is no merit in the suit and the same deserves to be dismissed.

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 available on record, 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 first defendant, as appellant.

7. The sum and substance of the case of the plaintiffs is that the first defendant is the absolute owner of the suit property and he entered into a sale agreement dated 3.5.1995 with one C.Govindasamy and his wife by name Pavayammal, thereby, agreed to sell one Acre of land for a sum of Rs.24 Lakhs. The said Govindasamy and Pavayammal have assigned the sale agreement dated 3.5.1995 by way of executing another sale agreement dated 6.9.1995 in favour of the plaintiffs. Under such circumstances, the plaintiffs have derived their rights and liabilities created in the sale agreement dated 3.5.1995 and due to various reasons, the plaintiffs have not been able to execute the sale agreement. Since the plaintiffs have advanced a sum of Rs.18 Lakhs to the original agreement holders, they are entitled to get back the same. Therefore, the present suit has been instituted for the relief sought therein.

8. The main defence taken on the side of the first defendant is that the first defendant has entered into a sale agreement dated 3.5.1995 with one C.Govindasamy and his wife Pavayammal. Since they have failed to perform their part of contract, the sale agreement dated 3.5.1995 has been cancelled by way of giving a legal notice. The Assignment Deed alleged to have been executed in favour of the plaintiffs by the original agreement holders is not at all an assignment and the same is nothing but a separate sale agreement entered into between the plaintiffs and the said Govindasamy and his wife. Since there is no privity of contract between the plaintiffs and first defendant, the relief sought in the present suit cannot be granted.

9. As adverted to earlier, the trial court has decreed the suit as prayed for.

10. The learned counsel appearing for the appellant/first defendant has strenuously raised the following points:

(i) The first defendant has entered into a sale agreement dated 3.5.1995 with one C.Govindasamy and his wife, viz., Pavayammal, wherein a specific time has been mentioned for getting a sale deed registered and since the agreement holders have failed to perform their obligations, the same has been cancelled by way of giving a legal notice and therefore, the first defendant is entitled to forfeit the advance amount of Rs.24 Lakhs and the trial court has failed to look into the same.

(ii) The plaintiffs have instituted the present suit only on the basis of the sale agreement dated 6.9.1995 by way of saying that the rights and liabilities created under sale

agreement dated 3.5.1995 in favour of original agreement holders have been assigned in favour of the plaintiffs, but in fact, the sale agreement dated 6.9.1995 is not at all a deed of assignment and therefore, no privity of contract has become emerged betwixt the plaintiffs and first defendant and the trial court has failed to look into the said legal aspect.

11. In order to controvert the contentions put forth on the side of the appellant/first defendant, the learned senior counsel appearing for the respondents 1 to 7/plaintiffs, without touching the factual aspects of the case, has argued that as per Section 15(b) of the Specific Relief Act, 1963, by virtue of the sale agreement dated 6.9.1995, the plaintiffs are legally entitled to maintain the present suit. Since the plaintiffs have advanced a sum of Rs.18 Lakhs through the sale agreement dated 6.9.1995 and since the first defendant has received an advance amount of Rs.24 Lakhs by virtue of sale agreement dated 3.5.1995, the plaintiffs are entitled to get an executable decree and the trial court, after considering the divergent pleadings and evidence available on record, has rightly decreed the suit and therefore, the judgment and decree passed by the trial court are not liable to be interfered with.

12. The learned counsel appearing for the appellant/first defendant has relied upon the following decisions:

(i) In (2009) 13 SCC 46 (Bharat Karsondas Thakkar vs. Kiran Construction Company and Others, at paragraph No.39, the Hon'ble Supreme Court has observed as follows:

"39. Admittedly, as pointed out by Mr Mukul Rohatgi and Mr Ranjit Kumar, learned Senior Advocates, there is no privity of contract between Kiran Construction Company and the Vaitys, its claim, is therefore, restricted to Modern Development Corporation alone and is also dependent upon the right of Modern Development Corporation to specific performance of its agreement with the Vaitys. In other words, until and unless Modern Development Corporation is also to establish a right over the suit properties, Kiran Construction Company can have no claim in respect thereof."

(ii) In (2004) 3 SCC 711, (Videocon Properties Ltd. vs. Dr.Bhalachandra Laboratories and others), at paragraph Nos.13 and 14, the Hon'ble Supreme Court has observed as follows:

"13. The buyer's charge engrafted in clause (b) of sub-section (6) of Section 55 of the Transfer of Property Act would extend and enure to the purchase money or earnest money paid before the title passes and property has been delivered by the seller to the purchaser, on the seller's interest in the property unless the purchaser has improperly declined to accept

delivery of property or when he properly declines to accept delivery - including for the interest on purchase money and costs awarded to the purchaser of a suit to compel specific performance of the contract or to obtain a decree for its rescission. The principle underlying the above provision is a trite principle of justice, equity and good conscience. The charge would last until the conveyance is executed by the seller and possession is also given to the purchaser and ceases only thereafter. The charge will not be lost by merely accepting delivery of possession alone. This charge is a statutory charge in favour of a buyer and is different from contractual charge to which the buyer may become entitled to under the terms of the contract, and in substance a converse to the charge created in favour of the seller under section 55(4) (b). Consequently, the buyer is entitled to enforce the said charge against the property and for that purpose trace the property even in the hands of third parties and even when the property is converted into another form by proceeding against the substituted security, since none claiming under the seller including a third-party purchaser can take advantage of any plea based even on want of notice of the charge. The said statutory charge gets attracted and attaches to the property for the benefit of the buyer the moment he pays any part of the purchase money and is only lost in case of the purchaser's own default or his improper refusal to accept delivery. So far as payment of interest is concerned, the section specifically envisages payment of interest upon the purchase money/price prepaid, though not so specifically on the earnest money deposit, apparently for the reason that an amount paid as earnest money deposit, apparently for the reason that an amount paid as earnest money simpliciter, as mere security for due performance does not become repayable till the contract or agreement gets terminated and it is shown that the purchaser has not failed to carry out his part of the contract, and the termination was brought about not due to his fault, the claim of the purchaser for refund of earnest money deposit will not arise for being asserted.

14. The further aspect that requires to be noticed is as to the nature and character of earnest money deposit and in that context the distinguishing features, which help to delineate the differences, if any. The matter is not, at any rate, res integra. In (Kunwar) Chiranjit Singh v. Har Swarup, it was held that the earnest money is part of the purchase

price when the transaction goes forward and it is forfeited when the transaction falls through, by reason of the fault or failure of the purchaser. This statement of law had the approval of this Court in *Maula Bux v. Union of India*. Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well, that have to be looked into and what may be called an advance may really be a deposit or earnest money and what is termed as "a deposit of earnest money" may ultimately turn out to be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part-payment of the purchase money and security for the performances of the contract by the party concerned, who paid it."

13. From a cumulative reading of the decisions referred to supra and also arguments advanced on the side of the appellant/first defendant, the Court can easily deduce that in a case of assignment, there must be a proper assignment deed and the same has to be proved by the concerned assignee and also for invoking Section 55 Sub Section (6) (b) of the Transfer of Property Act, the agreement holder must have possession of property in question.

14. The learned senior counsel appearing for the respondents 1 to 7/plaintiffs has relied upon the following decisions:

(i) (1993) (2) SCC 740 (*T.M.Balakrishna Mudaliar vs. M.Satyanarayana Rao and others*), wherein the Hon'ble Supreme Court has dealt with Sections 10 and 15 of the Specific Relief Act, 1963 and ultimately held that right to repurchase property is not a personal right and the same can be assigned.

(ii) In AIR 2004 SC 348, (*Shyam Singh v. Daryao Singh (dead) by L.Rs. and others*), at paragraph No.10, the Hon'ble Supreme Court has held that as per Section 15(b) of Specific Relief Act, 1963, a contract may be executed by any party thereto or their representative in interest. This expression clearly includes the transferees and assignees from the contracting party in whose favour the right exists.

15. From a conjoined reading of the decisions accited on the side of the respondents 1 to 7/plaintiffs, the Court can easily discern that a sale agreement can be assigned and as per section 15(5) of the Specific Relief Act, 1963, the expression "representative in interest" would include transferees or assignees.

16. With these legal backdrops, the Court has to further analyze as to whether the plaintiffs are the assignees of the original sale agreement dated 3.5.1995 by virtue of subsequent sale agreement dated 6.9.1995. The original sale agreement dated 3.5.1995 has been marked as Ex.A.1, wherein the first defendant has agreed to sell the property mentioned therein in favour of C.Govindasamy and his wife Pavayammal for a sum of Rs.24 Lakhs per Acre and on the date of execution of Ex.A.1, the first defendant has received an advance amount of Rs.24 Lakhs and the agreement holders have agreed to give balance sale consideration within the period mentioned therein.

17. The substratum of the case of the plaintiffs is the sale agreement dated 6.9.1995 and the same has been marked as Ex.A.2. Only on the basis of Ex.A.2, the plaintiffs have instituted the present suit. In fact, this Court has groped Ex.A.2 and ultimately found that Ex.A.2 is nothing but an independent sale agreement executed in between the plaintiffs and original agreement holders, viz., C.Govindasamy and his wife Pavayammal. Nowhere it is stated in Ex.A.2 that the rights and liabilities created in Ex.A.1 have been transferred/assigned in favour of the plaintiffs. Therefore, it is quite clear that Ex.A.2 is not a deed of assignment and the same is nothing but a separate sale agreement.

18. At this juncture, the Court has to look into the legal meaning of assignment. It is an avowed principle of law that an assignment is nothing but an act of transferring a legal right or liability or otherwise, it is a document effecting a legal transfer of rights or liabilities.

19. In the instant case, it has already been pointed out that Ex.A.2 is nothing but an independent sale agreement entered into between the plaintiffs and original agreement holders viz., C.Govindasamy and his wife Pavayammal. The rights and liabilities created in Ex.A.1 have not at all been transferred or assigned in favour of the plaintiffs by virtue of Ex.A.2. Therefore, by virtue of Ex.A.2, the plaintiffs have no locus standi to institute the present suit.

20. It is a humdrum that a person can sue or be sued only on the basis of rights and liabilities created by virtue of a document or by operation of law.

21. In the instant case, by virtue of Ex.A.2, nothing has been created in favour of the plaintiffs as against the first defendant and at the same time, by virtue of Ex.A.2, the plaintiffs can institute a legal proceeding only against the said C.Govindasamy and his wife Pavayammal. Since the plaintiffs have no locus standi to institute the present suit by virtue of Ex.A.2, the relief sought in the plaint cannot be

granted.

22. The learned counsel appearing for the appellant/first defendant has advanced his residual argument to the effect that the plaintiffs have instituted the present suit by their a Power of Attorney agent, viz., P.Devaraj and the Power of Attorney deed has been marked as Ex.A.3 and the same is nothing but a special power, wherein it has been clearly mentioned that the principals have authorized their power of attorney agent to institute a suit against C.Govindasamy and therefore, Power of Attorney agent has no locus standi to institute the present suit.

23. As rightly pointed out on the side of the appellant/first defendant, Ex.A.3 is nothing but a special power of attorney deed, wherein, P.Devaraj has been authorized to institute a suit only against C.Govindasamy and not against the first defendant. On that score also, the present suit is liable to be dismissed.

24. The trial court, without looking into rudimentary principle of law and also without knowing the real meaning of assignment, for the reasons best known to it, has erroneously decreed the suit. In view of the discussions made earlier, this Court is of the considered view that the judgment and decree passed by the trial court are nothing but absurd and the same are liable to be set aside and further, the arguments advanced by the learned counsel appearing for the appellant/first defendant are really having attractive force, whereas the argument advanced by the learned senior counsel appearing for respondents 1 to 7/plaintiffs is not suitable to the facts of the present case.

In fine, this appeal suit is allowed with cost. The judgment and decree dated 30.1.2012 passed in O.S.No.291 of 2007 by the Additional District Court/Fast Track Court No.1, Erode are set aside and O.S.No.291 of 2007 is dismissed with cost. Consequently, connected Civil Miscellaneous Petition is closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

ajr

To

1.Fast Track Court No.I cum
Additional District Judge, Erode

2.The Section Officer
VR Section High Court
Madras-104

+1 cc to Mr.V.Raghavachari Advocate sr 42611
+1 cc to Mr.S.Chandrasekharan Advocate sr 42796

Appeal Suit No.899 of 2012

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