

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 24.04.2017

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

SA.No.295/2017 & CMP.No.6928/2017

1.N.Parameshwari
2.P.Suresh Kumar
3.P.Lakshmikanthan ..Appellants /Defendants

Versus

D.Subramanian ..Respondent /Plaintiff

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree dated 12.12.2016 passed by the first appellate court namely the Learned I Additional District Judge, Erode District in A.S.No.87 of 2015 reversing th Decree and Judgment dated 11.08.2015 in OS No.168/2013 on the file of the Sub-Judge, Perundurai.

For Appellants : Mr.G.Magesh Kumar
For Respondent : Mr.R.Karthikeyan

JUDGMENT

The defendants who lost before the Courts below are the appellants herein.

2 The facts leading to the filing of this Second Appeal, briefly narrated, are as follows:-

[a] The respondent herein filed a suit in OS.No.168/2013 on the file of the Court of Subordinate Judge, Perundurai, Erode District, against the appellants herein praying for the specific performance of the Agreement of Sale dated 05.11.2012 (Ex.A5) and other consequential relief or in the alternate, to direct the defendants to pay a sum of Rs.2,34,300/- with subsequent interest on Rs.2,00,000/- till the date of payment and also for permanent injunction, restraining the defendants or their agents, men or servants from alienating or encumbering the property.

[b] The respondent/plaintiff would further aver among other things that the suit property was originally belong to one P.Palanisamy-father of the appellants herein/defendants and on 05.11.2012, he entered into a written Agreement of Sale and executed the Sale Agreement in his own handwriting in respect of the suit property and also handed over the possession of suit property as well as the original Sale Deed dated 17.08.1961 (Ex.A6).

[c] The terms of the agreement are that, the sale consideration was fixed at Rs.4,62,000/- and out of the same, a sum of Rs.2,00,000/- was paid by way of advance as a part of sale consideration and the remaining balance of Rs.2,62,000/- is to be paid by the respondent/plaintiff to [[late]] Palanisamy and to obtain the registered Sale Deed in his favour within the period of 90 days from the date of agreement.

[d] The respondent/plaintiff would further aver that Palanisamy passed away on 06.01.2013 and as a consequence, the plaintiff could not obtain the sale deed within the stipulated time and in spite of the request made to the legal heirs of [[late]] Palanisamy-defendants, they did not accede to the said request and in this regard, the plaintiff has also sent a Lawyer's Notice dated 03.09.2013 (Ex.A7), for which the appellants/defendants sent the response dated 19.09.2013 (Ex.A9), making false and untenable allegations. The plaintiff would plead that though he is ready and willing to perform his part of obligation, the legal representatives of [late] Palanisamy namely the appellants/defendants did not come forward to fulfill their part of obligation and hence, filed the suit.

[e] The defendants filed the written statement denying the allegations and would aver that the suit agreement is not a legally valid one and not duly stamped and is an unilateral one and therefore, no relief can be granted under the guise of the said agreement. It is further contended by the defendants that as per Sale Agreement, 77 cents of land were agreed to be conveyed and the said property is the subject matter of sale Deed dated 24.02.2012 (Ex.A1) executed by their father-[late] Palanisamy in favour of plaintiff and therefore, in respect of the very same property, another Agreement of Sale dated 05.11.2012 cannot be executed. It is also contended by the defendants that their father, namely, [late] Palanisamy, has no right to convey the ancestral and joint family properties, in which they are having share, in favour of respondent/plaintiff and prays for dismissal of the suit.

[f] The Trial Court on a consideration of pleadings, has framed the following issues:

(a) Whether the sale agreement produced by the plaintiff is true, genuine, valid and enforceable?

(B) Whether the plaintiff was ready and willing to perform his part of contract as recognized by law?

(c) Whether the plaintiff is entitled to get the relief of specific performance of contract?

(d) Whether the plaintiff is entitled to get alternative relief?

(e) To what other relief, the parties are entitled to?

[g] During the course of trial, the plaintiff examined himself as P.W.1 and also examined one of the attestors as P.W.2 and marked Exs.A1 to A10. The 2nd defendant examined himself as DW1 and marked Exs.B1 to B3.

[h] The Trial Court, on a consideration of pleadings and appreciation of oral and documentary evidences, has granted only an alternate relief of refund of the advance amount and dismissed the suit in other aspects vide judgment and decree dated 11.08.2015.

[i] The plaintiff as well as the defendants, aggrieved by the said judgment and decree, filed AS.Nos.87 and 91/2015 respectively.

[j] The Lower Appellate Court, on a consideration of the Memorandum of Grounds, had formulated the following points for determination:-

- Whether the appellant/plaintiff in OS.No.168/2013 is entitled for the relief of specific performance of the contract?
- Whether the appeal in AS.No.87/2015 can be allowed?
- Whether the appeal in AS.No.91/2015 can be allowed?

[k] The Lower Appellate Court found that Ex.A5-Sale Agreement, was written by the father of the defendants/appellants, viz., Palanisamy, in his own handwriting and the execution of the same has also been proved through the testimony of one of the attestors through P.W.2 and therefore, it is a valid agreement as well as a bilateral one and bind both parties together. The Lower Appellate Court has also considered the primordial submission made on behalf of the appellants / defendants that the plaintiff/respondent had already purchased 77 cents under Ex.A1 - Sale Deed and in respect of the very same property, under Agreement of Sale under Ex.A5, cannot be

executed and further found that as per the revenue records and title deeds, the father of the appellants / defendants is entitled to 77 cents of land and therefore, he has conveyed the same and negatived the contention that he had only 54 cents of land ; but sold 77 cents of land, i.e., 23 ½ cents more than his holding.

[l] The Lower Appellate Court further found that the respondent / plaintiff was always ready and willing to perform his part of obligation and therefore, citing the said reasons, has reversed the judgment and decree passed by the Trial Court insofar as negating the relief of specific performance and allowed the appeal in AS.No.87/2015 as prayed for and thereby decreed the suit and dismissed in appeal in AS.No.91/2015 vide impugned common judgment and decree dated 12.12.2016.

[m] The defendants, aggrieved by the concurrent findings recorded by the Courts below as to the truth, validity and genuineness of Ex.A5-Agreement of Sale dated 05.11.2012 and granting of relief of specific performance by the Lower Appellate Court in favour of the respondent / plaintiff, had filed the Second Appeal.

[n] In the Memorandum of Grounds of Second Appeal, the following substantial questions of law arise for consideration:-

[a] Whether the first appellate court as well as trial court considere the issue that the suit is needless as the relief sought in for has been granted already?

[b] Whether the sale agreement in question namely Ex.A5 is an evidence in view of bar in Sec.17 of the Transfer of Propety Act?

[c] Whether the suit property becomes absolute property of the first appellant herein in view of Sec14 of the Hindu Succession Act?

[d] Whether sale agreement is void one as it is uncertain in view of Sec.29 of the Indian Contract Act?

3 The learned counsel for the appellants / defendants would contend that under Ex.A1-Sale Deed dated 24.02.2012, their father [late] Palanisamy said to have conveyed 77 cents of land with half share in the well and invited the attention of this Court to Ex.A5-Agreement of Sale and would submit that once again, 77 cents of land in the very same survey number sought to be conveyed. It is the further submission of the learned counsel for the appellants that if really Ex.A1 came into being, then in one of the boundaries, it should have been shown that the land belongs to the plaintiff and admittedly, the very same boundaries have been shown and therefore, the case

projected by the appellants / defendants is wholly sustainable. It is the further submission of the learned counsel that even as per Ex.A1, their father [late] Palanisamy acquired 40 cents of land by way of Self Acquisition under a registered Sale Deed dated 17.08.1961 [Ex.A6], he got 1.34 cents of land he has no right to convey the properties which came to be by way of partition as the defendants are having share as co-parceners and on that ground also, the decree granted by the Lower Appellate Court is liable to set aside.

4 The learned counsel for the appellants / defendants has also drawn the attention of this Court to Exs.A1, A4 as well as the testimony of P.W.2 and would contend that the Courts below without appreciating the oral and documentary evidences in proper perspective, had erroneously arrived at a finding that the said agreement is valid and the Lower Appellate Court went one step further and allowed the appeal in toto and thereby, decreed the suit as prayed for and since the findings came to be rendered based upon "no evidence" and the perversity is also attached to the said findings, prays for interference.

5 This Court paid its anxious consideration and paid its best attention to the submissions made by the learned counsel appearing for the appellants / defendants and also perused the typed set of documents.

6 Ex.A5-Agreement of Sale dated 05.11.2012, is in the handwriting of the appellants / defendants' father, viz., [late] Palanisamy and to sustain the said agreement, the plaintiff, apart from examining himself as P.W.1, had also examined one of the attestors as P.W.2 and their testimonies corroborate with each other of all material particulars.

7 It is the primordial submission of the learned counsel appearing for the appellants / defendants that since 77 cents of land had already been conveyed under Ex.A1-Sale Deed, Ex.A5-Agreement of Sale, in respect of the same property in the very same survey number, has become redundant and the Courts below has totally failed to advert to the said aspect. In the considered opinion of the Court, the said submission lacks merit and substance for the reason that admittedly, the father of the appellants / defendants [late] Palanisamy was the owner of 40 cents of land by way of self acquisition and 1.34 cents of land which came by way of partition and out of 164 cents, he had conveyed 77 cents under Ex.A1 and out of the remaining extent, he has entered into a written Agreement of Sale in his own handwriting with the respondent / plaintiff for 77 cents of land and about 10 cents of lands are yet to be conveyed.

8 It is pertinent to point out at this juncture that as no person of prudence with average intelligence, can enter into an Agreement of Sale in respect of very same property he has purchased under a Sale Deed and in the case on hand, the respondent / plaintiff, out of 164 cents of land, has already purchased 77 cents of land and under Ex.A5, had also agreed to purchase another 77 cents of land.

9 No tenable evidence has been adduced by the appellants / defendants that the extent of land which was the subject matter of Ex.A1 - Sale Deed, is the same land which is also the subject matter of Ex.A5-Agreement of Sale. As already pointed out, the genuineness or otherwise of Ex.A5-Agreement of Sale, has been proved by P.W.1 through the testimony of one of the attestors, viz., P.W.2.

10 P.W.1 was subjected to cross examination and he has deposed that after purchasing 79 ½ cents of land which includes 77 cents in R.S.No.527/3 and 2 ½ cents inclusive of well and a common pathway in RS.No.527/3 under Ex.A1, the balance extent of land, i.e., 83 ½ cents, is available and as per Ex.A5, only 77 cents of land were agreed to be conveyed and therefore, it is to be construed that out of 83 ½ cents, the father of the appellants / defendants had agreed to convey 77 cents of land, leaving the balance extent of around 6 ½ cents.

11 The said findings reached by the Courts below are based upon thorough and proper consideration of oral and documentary evidences and therefore, the findings cannot be said to be perverse or based upon "no evidence". Hence, the substantial questions of law 1 and 2 raised by the appellants / defendants in the Memorandum of Grounds of Second Appeal are answered in negative.

12 Insofar as the 3rd substantial question of law is concerned, after filing of the present suit by the plaintiff / respondent, the appellants / defendants had instituted OS.No.5/2015 on the file of the Court of the Subordinate Judge, at Perundurai, Erode District and the respondent / plaintiff is also one of the defendants.

13 It is for the appellants / defendants by letting in quality evidence to probablise their case in the above said pending suit for partition and therefore, this Court is not expressing any opinion in that regard.

14 The Trial Court has also incidentally gone into

the question as to the right of [late] Palanisamy, to convey a part of the property which came into his hands by way of partition and recorded the finding that as a Kartha, he is entitled to convey the said property. The said finding, in the considered opinion of the Court, cannot operate as res judicata for the reason that no specific issue has been framed by the Trial Court and no point of determination has been framed by the Lower Appellate Court and therefore, the said finding at best, can said to be only incidental and as already pointed out, it is for the appellants / defendants to probablise their case in the above said pending suit for partition.

15 Therefore, the substantial question of law No.3 raised in the Memorandum of Grounds of Appeal, is answered in negative against the appellants / defendants.

16 The learned counsel for the appellants / defendants also advanced arguments that the Agreement of Sale is uncertain in view of Section 29 of the Indian Contract Act and in the considered opinion of the Court, the said submission lack merit and substance for the reason that Ex.A5 is in the own handwriting of the father of the appellants / defendants wherein the Survey Number has been stated and it is already extracted through the testimonies of P.Ws.1 and 2 that after conveying 77 cents of land along with a share in the well as well as in the common pathway, the balance extent of land, i.e, 83 ½ cents, is available and the Agreement under Ex.A5 denotes 77 cents of land out of the balance extent of 83 ½ cents of land.

17 This Court in the earlier paragraphs has recorded the finding that no person of prudent and ordinary intelligence is willing to purchase the very same property which is the subject matter of the Sale Deed [Ex.A1] and therefore, the property agreed to be conveyed is also certain. Hence, the substantial question of law No.4 raised in the Memorandum of Grounds of Appeal is also answered in negative.

18 The Trial Court though answered the issues in favour of the respondent / plaintiff without assigning any proper reasons, has granted alternate relief of refund of the advance amount and from the evidence available, the respondent / plaintiff had established that he was always ready and willing to perform his part of contract and before doing so, the father of the appellants died and thereafter, he approached the legal heirs, viz., the appellants / defendants herein to perform their part of obligation and since they refused to do so, has filed the suit in OS.No.168/2013 for specific performance. The respondent / plaintiff was always ready and willing to perform

his part of obligation and taking into consideration of the same only, the Lower Appellate Court reversed the said findings rendered by the Trial Court and allowed the appeal filed by the respondent / plaintiff in toto and granted the decree as prayed for. The findings rendered by the Courts below cannot said to be perverse or without application of mind to the evidence made available.

19 There are no substantial questions of law arise for consideration in the Second Appeal and whatever points urged by the appellants/defendants have been answered by the Courts below.

20 In the result, the Second Appeal is dismissed at the admission stage itself, confirming the impugned common judgment and decree dated 12.12.2016 rendered by the Lower Appellate Court, viz., the learned I Additional District Judge, Erode District in A.S.No.87/2015. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

AP

To

1.The I Additional District Judge
Erode.

2.The Sub Judge, Perundurai.

+1cc to Mr.G.Magesh kumar, Advocate, S.R.No.25416

+1cc to Mr.Karthikeyan, Advocate, S.R.No.24705

SA.No.295/2017

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RS(10/05/2017)

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