

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 21.08.2017
CORAM :
THE HONOURABLE MR. JUSTICE R. SUBRAMANIAN
A.S.No. 1254 of 2015
and
M.P.Nos. 1 and 2 of 2015

K.Kalimuthu ... Appellant/Plaintiff
Vs.

1. Maarikanu alias Amutha,
W/o. Late K.Moorthi
2. Minor Nithyasri
D/o. Late K.Moorthi
3. Minor Dharanivel
D/o. Late K.Moorthi ... Respondents/
Defendants 1 to 3 in
- 4.R.Balasubramanian
(R2 & R3 minor respondents
are rep by their mother
and next friend 1st defendant Maarikannu)

Prayer : Appeal filed under Section 96 read with Order 41 Rule 1 of Civil Procedure Code, to prefer the above Memorandum of first appeal as against the Judgment and decree dated 04.07.2015 made in O.S. No. 551/2010 on the file of 1st Additional District Court & Sessions Judge, Tiruppur.

For Appellant : Mr. P.Bagyalakshmi

For Respondents : Mr.M.Easan (For R1 to R3)

सतयमेव जयते
O R D E R

The plaintiff in O.S. No. 551 of 2010 on the file of the 1st Additional District Judge & Sessions Judge, Tiruppur is the appellant. The said suit was instituted by him seeking a relief for specific performance of the alleged agreement of sale dated 26.11.2009 entered into between the plaintiff and the 4th defendant as Power Agent of one K.Moorthi.

2. According to the plaintiff the said K.Moorthi had obtained the property under a Will dated 14.12.2001 and had executed a registered Power of Attorney in favour of the 4th defendant on 13.09.2007 authorising him to deal with the suit property. By virtue of the power conferred on him, the 4th

defendant have entered into an agreement dated 26.11.2009 with the plaintiff for agreeing to sell the property for a total sale consideration of Rs.11,00,000/- (Rupees Eleven Lakhs Only). On the date of the agreement itself, a sum of Rs.10,00,000/- (Rupees Ten Lakhs Only) has been paid as advance to the 4th defendant, a period of 7 months was fixed for payment of the balance sale consideration and for the execution of the sale deed.

3. It is also claimed that the 4th defendant had entered into another registered agreement of sale dated 29.10.2007 with one Kamalam for agreeing to sell the property for a sum of Rs.3,00,000/- (Rupee Three lakhs only) and had obtained an advance of amount Rs.30,000/- (Rupees Thirty Thousands Only). On the date of the suit agreement, i.e. 26.11.2009, the agreement with the said Kamalam was cancelled and the advance paid by the said Kamalam i.e. the sum of Rs.30,000/- (Rupees Thirty Thousand Only) was returned to her and she signed as a witness to the agreement dated 26.11.2009.

4. It is also contended that Mr.Moorthi, the owner of the property died on 20.02.2009 leaving behind defendants 1 to 3 as legal representatives. In view of the death of the said Moorthi, the plaintiff was forced to seek execution of the sale deed by defendants 1 to 3, who are the legal representatives of the said Moorthi. Since defendants 1 to 3 did not come forward to execute the sale deed despite oral demands, the plaintiff was constrained to issue a legal notice on 11.03.2010, for which, defendants 1 to 3 sent a reply on 29.03.2010 denying the Agreement of Sale dated 26.11.2009 as well as the Power of Attorney dated 13.09.2007 said to have been executed by Moorthi. The 4th defendant, however, managed to return the notice, hence, the plaintiff was forced to file the above said suit seeking for specific performance.

5.The defendants 1 to 3 filed a written statement contending that the Power of Attorney itself is not valid and the said agreement of sale is created in collusion with the 4th defendant and the said Kamalam. They also contended that the measurement of the suit property has not been properly given in the documents viz., the Power of Attorney and the suit sale agreement. The capacity of the plaintiff to part with a huge sum of Rs.10,00,000/- (Rupees Ten Lakhs Only) was also denied by the defendants 1 to 3. It is also contended by defendants 1 to 3 that the husband of the first defendant, Moorthi, was addicted to Alcohol and the Power of Attorney has been obtained by the 4th defendant utilizing his addiction. Defendants 1 to 3 would also claim that the suit sale agreement is a creation of a scheme hatched by the plaintiff along with the 4th defendant and the said Kamalam to snatch the property of defendants 1 to 3.

6. The 4th defendant filed a separate written statement wherein he would substantially admit the case of the plaintiff. He would only contend that the plaintiff required him to get the Power of Attorney rectified before execution of sale deed. According to the 4th defendant before he could take steps to get the Power of Attorney rectification the executant viz., Moorthi died and hence, he could not proceed with the ratification of the Power of Attorney and execution of the sale deed. The 4th defendant admitted the receipt of the advance of Rs.10,00,000/- (Rupees Ten Lakhs Only).

7. On the above pleadings the learned Trial Judge framed the following issues for determination.: -

1. Whether the sale agreement (Power of Attorney) deed dated 29.10.2007 is kept alive, true and genuine as contended by plaintiff?
2. Whether the sale agreement deed dated 26.11.2009 is genuine, true and valid?
3. Whether the plaintiff has to prove the advance sale transactions as mentioned in the Sale agreement deed dated 26.11.2009?
4. Whether the plaintiff is entitled to get the relief of specific performance?
5. Whether the plaintiff is entitled for permanent injunction as prayed for?
6. Whether the plaintiff is entitled for recovery of advance amount, as alternative prayer, if so, who has to pay the amount?
7. To what other relief?

8. During the trial PW1 and PW2 were examined on the side of the plaintiff and Exs. A1 to A7 were marked. DW1 and DW2 were examined on the side of the Defendants and Exs. B1 to B6 were marked.

9. The Learned District Judge, after consideration on the evidence of record, came to the conclusion that the execution of the Power of Attorney by the deceased K.Moorthi itself is doubtful. She also pointed out that there are also certain interpolations made in the document which are not properly initialled. The evidence of DW2, who claims to be the attestor of the said power of attorney was considered and it was found that the execution of the Power of Attorney was shrouded in mystery.

10. The learned District Judge also took note of the difference in the extent of the property covered by the Power of Attorney and the Agreement of Sale, which were marked as A2 and A1 respectively. The evidence of PW2, who claims to be the attestor of the agreement of sale dated 26.11.2009 according to the learned District Judge was replete with contradictions. On the aforesaid findings, the learned District Judge disbelieved

the Power of Attorney as well as the agreement of sale. The learned District Judge, however, concluded that the 4th defendant who has admitted the receipt of a sum of Rs.10,00,000/- (Rupees Ten Lakhs Only) from the plaintiff is bound to repay the same with interest at 9% p.a., from the date of sale agreement till the date of the suit and 6% p.a., thereafter till the date of realisation. Aggrieved by the order of the trial Court, the plaintiff is in appeal.

11. I have heard Mrs.Bagyalakshmi, learned counsel appearing for the appellant and Mr.M.Easan, learned counsel appearing for respondents 1 to 3. The 4th defendant, though served, has not chosen to appear before the Court either in person or through counsel.

12. The learned counsel appearing for the appellant would strenuously contend that the trial Court was wrong in rejecting the claim of specific performance, more so, when the execution of the sale agreement was admitted by the 4th defendant. She would further contend that the evidence of PW2 and DW2 would go to show that the Power of Attorney dated 13.09.2007 and the agreement of sale dated 26.11.2009 were true and genuine.

13. The learned counsel would further point out that the Power of Attorney which is a registered instrument, contained photograph of the executant K.Moorthi along with his identity card viz., the Voter identification card of the executant issued by the Election Commission of India. The Execution of the said power of attorney has been spoken to by DW2, who is an attesting witness to the said document. Therefore, the learned counsel would contend that the trial Court was in error in disbelieving the execution of Exhibit A2 Power of Attorney and Exhibit A1 the Agreement of Sale.

14. Per contra Mr.M.Easan learned counsel appearing for defendants 1 to 3 would contend that there is substantial difference in the extent of property between the Power of Attorney and the agreement of sale. While the power of attorney gives measurement of the property as 20 feet north south both sides, and 21 feet east west both sides, the agreement of sale would cover a larger extent of property viz., 21 feet east west both sides and 40 feet north south both sides. Since the said discrepancy is within the knowledge of the plaintiffs, the learned counsel would contend that the very execution of the Power of Attorney and agreement of sale could not be accepted.

15. The learned counsel would also invite my attention to the evidence of PW2 in cross-examination wherein she had claimed ignorance about the persons who have attested the sale agreement, Exhibit A1. Though she would depose that the 4th defendant, the plaintiff and another person were present at the

time of execution of the sale agreement, at a later part of cross-examination, she would depose that she does not know who have signed as attesting witnesses. Pointing out the above said evidence, Mr.M.Easan, learned counsel appearing for respondents 1 to 3 contends that the execution of the sale agreement has not been proved properly. He has also pointed out that the Power of Attorney which is a registered instrument, contains certain corrections and interpolations, which have not been duly counter-signed. Thus, the said document is unsafe to be relied upon. The learned counsel would further contend that the trial Court had appreciated and considered the evidence of witnesses and found that it would be unsafe to exercise the discretion for granting the relief of specific performance and granted the relief of refund of advance only.

16. Therefore, the learned counsel would submit that the appellate Court should not interfere with such discretion when the evidence on record was properly appreciated by the trial Court.

17. The following points are raised for determination in this appeal.

1. Whether the plaintiff has established the truth and genuineness of Ex. A2 Power of Attorney dated 13.09.2007 and Ex.A1 Agreement of Sale dated 26.11.2009 ?
2. Whether the trial Court was right in exercising its discretion to refuse the relief of specific performance ?

18. The claim of the plaintiff is that the deceased Moorthi has executed a registered Power of Attorney dated 13.09.2007 in favour of the 4th defendant and on the basis of the said Power of Attorney the 4th defendant had entered into an agreement with PW2 Kamalam on 29.10.2007. It is a specific case of the parties that the agreement dated 29.10.2007 is a registered agreement. It is also contended that Kamalam had paid an advance of Rs.30,000/- (Rupees Thirty Thousand Only). According to the plaintiff, the agreement with Kamalam was rescinded and a sum of Rs.30,000/- (Rupees Thirty Thousand Only) paid by her as advance was returned on the date of the suit sale agreement i.e. 26.11.2009.

19. PW2 Kamalam has also deposed that the agreement dated 29.10.2007 with the 4th defendant is a registered instrument. The said document has not been produced. A perusal of the Power of Attorney dated 13.09.2007 shows that it contains corrections and insertions with reference to the date of death of Kandasamypillai viz., father of Moorthi. A blank that was left in order to fill up the date has been filled up as follows:-

" Rkhh; 1 tUlj;jpw;F Kd;G "

In page no.3 of the said document an insertion is found which reads as follows:-

P " ehd; K.Moorthi vd Mq;fpyj;jpy; ifnaOj;J nra;tJ tof;fk;"

20. These two insertions have not been counter-signed by the executant of the document. Further, the extent of the property in the Power of Attorney is shown as 21 feet East west on both sides and 20 feet North south on both sides. DW2, who claims to be an attesting witness, has been examined as a witness on the said of the 4th defendant. He would claim that he was present at the time when the document was written and signed, but he was not present when the document was registered. Two other persons have signed as identifying witnesses before the Sub Registrar. DW1, wife of Moorthi, has denied that the photograph which is affixed in the document is not her husband's photograph. She has also deposed that the ID and other photographs of her husband got destroyed in a fire accident and she does not possess them. The plaintiff has not taken any steps to have the document summoned from the Sub Registrar's office to establish the identification of the person and the photograph affixed in the Power of Attorney. Therefore, the trial Court was justified in concluding that the execution of the power of attorney cannot be believed. Yet another fact which would point out the nexus between the plaintiff and the 4th defendant is that the original Power of Attorney has been produced by the plaintiff. The agreement of sale Ex.A1 does not recite that the original Power of Attorney has been handed over to the plaintiff.

21. In so far as Ex.A1, the agreement of sale, is concerned, it relates to a larger extent of the property. PW2 who was the attestator to the document, had, at one point of time, in the cross-examination, stated that does not know who are the attesting witnesses for the said document. The evidence of PW1 and PW2, particularly their admissions in cross-examination, create a reasonable apprehension in the mind of the Court that all is not well versed with the execution of the A1 agreement.

Point no.1 is answered against the appellant to the effect that the plaintiff has miserably failed to prove the truth and genuineness of both the Power of Attorney marked as A2 and the sale agreement marked as Ex. A1.

22. Even though the 4th defendant in his written statement and PW2 in her evidence have claimed that the agreement dated 29.10.2007 is a registered agreement neither the 4th defendant nor the PW2 have chosen to produce the said agreement. The Encumbrance Certificate relating to the property for the period from 01.01.1987 to 12.08.2014 has been produced and marked as Ex. A6. The alleged sale agreement dated 26.11.2009 is not reflected in the said Encumbrance Certificate. It is also

elicited from PW2 that both PW2 and 4th defendant (D4) are residing in the same address. PW2 had admitted that the 4th defendant is her sister's son in law. Considering all these aspects, the trial Court has rightly concluded that the entire execution of Ex A1 and A2 revolves around the plaintiff, PW2 and 4th defendant. In the light of the contradictions in the evidence of PW1 and PW2, as well as the evidence of DW2 the trial Court rightly disbelieved the document. I do not think such a discretion could be interfered with by this court sitting in appeal. Therefore, the second question is also answered against the appellant.

23. Mrs.Bagyalakshmi, learned counsel appearing for the appellant would lastly contend that the power to reject the relief of specific performance even though it is a discretionary relief should be exercised reasonably in accordance with judicial principles. In support of her submission she would rely upon the Judgment of Hon'ble Supreme Court in K.Nanjappa (Dead) by Legal Representatives Vs. R.A.Hameed Alias Ameerasab (Dead) by Legal Representatives and another reported in (2016) 1 SCC 762, wherein the Hon'ble Supreme Court of India with regard to the exercise of discretion, has observed as follows:-

"21. There is no dispute that even a decree for specific performance can be granted on the basis of oral contract. Lord Du Parc in a case observed, while deciding a suit for specific performance, that an oral contract is valid, binding and enforceable. A decree for specific performance could be passed on the basis of oral agreement. This view of a Privy Council was followed by this Court in Kollipara Sriramulu v. T.Aswatha Narayana and held that an oral agreement with a reference to a future formal contract will not prevent a binding bargain between the parties.

22. However, in a case where the plaintiff comes forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement or a written contract, heavy burden lies on the plaintiff to prove that there was consensus ad-idem between the parties for the concluded agreement for sale of immovable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties.

23. In a suit for specific performance of a

contract, the court has to keep in mind Section 20 of the Specific Relief Act, 1963. This Section preserves judicial discretion to grant decree for specific performance. However, the court is not bound to grant specific performance merely because it is lawful to do so. The court should meticulously consider all facts and circumstances of the case and to see that it is not used as an instrument of oppression to have an unfair advantage not only to the plaintiff but also to the defendant.

24. The above said legal principles only support the case of defendants 1 to 3 in the case on hand. The trial court has analysed the evidence meticulously and had come to a conclusion that it will not be just and proper to exercise the discretion in granting the relief of specific performance in favour of the plaintiff. The Court has however, in order to mitigate the loss caused to the plaintiff, directed the 4th defendant to refund the advance. Therefore, no infirmity is found in the discretion exercised by the trial Court.

25. Mrs. P.Bagyalakshmi, learned counsel would contend that the interest granted by the trial court is on the lower side, i.e. 9% p.a. till the date of the suit and thereafter, as 6% p.a. till the date of realisation. Admittedly, the 4th defendant has had the benefit of the money, he is not even the owner of the property and he was only a Power Agent and therefore, I find that the submission of the learned counsel regarding the rate of interest is justified.

26. Therefore, I feel that in the circumstances of the case that the 4th defendant had acted on behalf of the plaintiff and he had the unfair advantage of the sum of Rs.10,00,000/- paid by the plaintiff. It is just and proper to modify the judgment and decree of the trial Court and grant interest 9 % p.a. from the date of sale agreement, till the date of realisation. To that limited extent, the appeal is allowed partly.

27. The judgment and decree of the trial Court is modified as follows:-

The suit is hereby decreed directing the 4th defendant to pay a sum of Rs.10,00,000/- with interest at 9% per annum from the date of sale agreement i.e. 26.11.2009 till the date of

realisation. In other respects, the suit stands dismissed. There shall be no order as to costs in this appeal. Consequently, connected Mps are closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

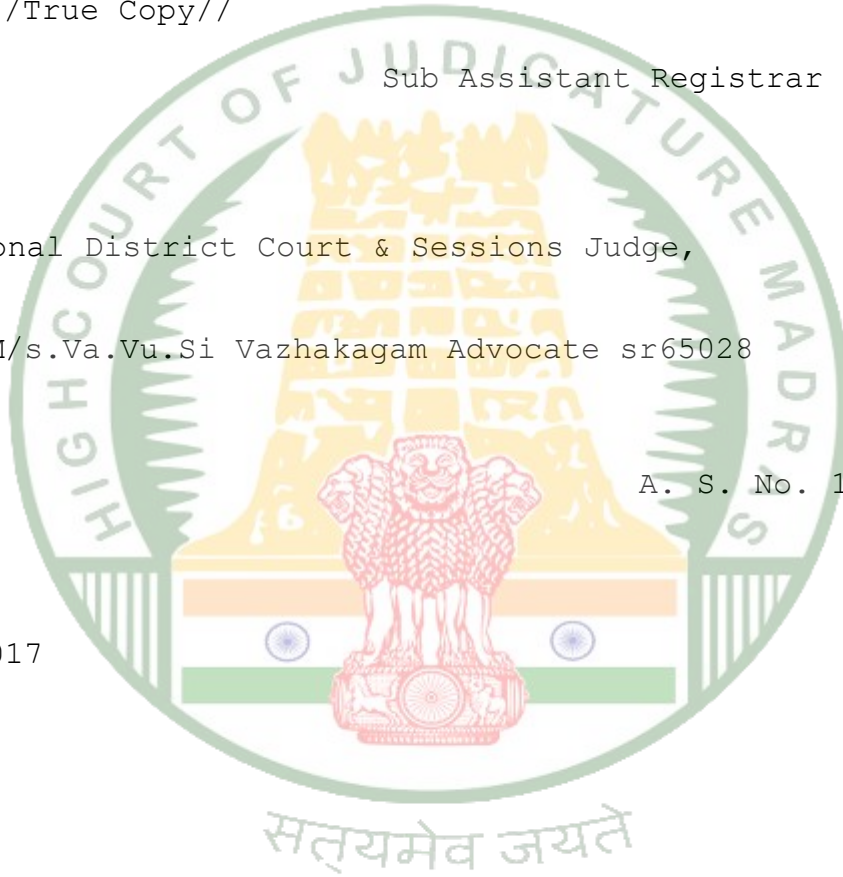
To

1st Additional District Court & Sessions Judge,
Tiruppur.

+1 cc to M/s.Va.Vu.Si Vazhakagam Advocate sr65028

A. S. No. 1254 of 2015

vd(co)
aa10/10/2017



WEB COPY