

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 03.01.2017

CORAM

THE HONOURABLE DR. JUSTICE S.VIMALA

C.M.A.No.2822 of 2016
and C.M.P.No.20441 of 2016

V.Chandrasekaran

.. Appellant/claimant

versus

Saran Bibi (died)
Abdhul Kareem (died)

1.A.K.Azeem

2.A.K.Musthafa

3.Mubeen Sulthana

4.Fathima Beebi

... R1 to R4/legal heirs of
deceased Abdhul Kareem

5.S.Vijaya

... 5th respondent/defendant

Appeal filed under Order XLIII Rule 1 of Civil Procedure Code, 1908 against the Fair and Decreetal order passed by the learned III Additional District Court, Vellore at Tiruppattur in R.E.A.No.17 of 2013 in R.E.P.No.26 of 2011 in O.S.No.11 of 2005 dated 26.10.2006.

For Appellant : Mr.Jayakumar

For Respondents : Mr.S.Balasubramanian

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the Claimant/Appellant against the order dated 26.10.2006, dismissing his application filed under Order 21 Rule 58 C.P.C and Section 151 of C.P.C. in R.E.A.No.17 of 2013 in R.E.P.No.26 of 2011 in O.S.No.11 of 2005 on the file of the III Additional District Court, Vellore, Tirupattur.

2. The respondents 1 to 4 herein along with two others, viz., Sarab Bibi and Abdul Kareem now dead, filed O.S.No.11 of 2005 on the file of Additional District Court (FTC) at Triupattur against the 5th respondent herein, for specific performance of the agreement of Sale dated 17.12.1998, entered between them. The suit was dismissed and on appeal, the same was allowed by the Appellate Court on 08.03.2011 in A.S.No.709 of 2008. As per the decree of the Court, the balance sale consideration was deposited and the sale deed has been executed on 30.08.2013 in favour of the decree holders/respondents 1 to 4 in E.P.No.26 of 2011 by the Executing Court. While EP is

pending for delivery of possession of the suit property, the appellant has filed the petition under Order XXI Rule 58 C.P.C. and Section 151 of C.P.C. in R.E.A.No.17 of 2013.

3. The appellant herein has filed the R.E.A.No.17 of 2013 alleging that on the basis of an agreement of sale executed by the 5th respondent herein on 17.08.1998, he is going to file a suit against the 5th respondent for specific performance on the file of Sub Court, Tirupattur and the respondents have colluded together and obtained a decree for specific performance regarding the property and as he is in possession of the property, his objection may be recorded and relief may be granted to him.

4. In the counter filed by the respondents 1 to 4, it has been stated about the earlier proceedings and also about the finality of the decree granted by the Court as the appeal to the Supreme Court by the 5th respondent had been dismissed. The agreement now set up by the appellant was false and created belatedly by the appellant and the 5th respondent. It is pointed out that the agreement has been executed on stamp papers purchased by one N.Murugaperumal of Ooty on 05.05.1998 and it is not in the name of the appellant or in the name of the 5th respondent. Further it has been stated that the provisions of Order XXI Rule 97 is not applicable to the facts of this case and there is no need to stay the execution proceedings.

5. The learned counsel appearing for the appellant would submit that the claim of the intervenor/objector/appellant has not been considered by the Executing Court and that the Executing Court did not consider the documents and evidence produced on the side of the appellant. In order to appreciate this contention, it is necessary to find out the details of documents filed and witnesses examined.

6. The appellant examined himself as PW1 and marked Ex.P1 to Ex.P3. The copy of the sale agreement dated 17.08.1998 has been marked as Ex.P.1, certified copy of Judgement dated 08.11.2013 in O.S.No.56 of 2013 on the file of Sub Court, Tirupattur is Ex.P.2 and the decree is Ex.P.3.

7. On behalf of the respondents 1 to 4, the first respondent was examined as R.W.1 and Exs.R1 to R6 are marked. Exs.R1 to R3 are the same as Ex.P.1 to Ex.P.3 and Ex.R4 is the decree copy in O.S.No.11 of 2005. Ex.R5 is the copy of the Judgment dated 08.03.2011 of this Court in A.S.No.108 of 2008 and Ex.R6 is the original sale deed dated 30.08.2013 executed in favour of the defendants 1 to 4.

8. A perusal of the record would go to show that in O.S.No.56 of 2013, the appellant and the fifth respondent are the plaintiff and defendant respectively. The copy of the judgment in O.S.No.11 of 2005 is not filed. In the evidence of Chandrasekaran, the appellant, during cross examination, he has admitted that he did not know as to who is in possession of the

petition mentioned property and that he is not in possession of the suit property. A suggestion put to him is that the alleged sale agreement has been fabricated between himself and Vijaya and that he is not entitled to any relief. He has further admitted that Vijaya is his relative. It is contended by the learned counsel for the appellant that the mere existence of relationship would not lead to the automatic conclusion that the transaction should be a collusive one. This contention is correct and the Court can consider the relationship as one of the factors along with attendant circumstances and not exclusively. Therefore, it is necessary to look into the order passed by the learned District Judge.

8.1. The learned Additional District Judge dismissed the petition after coming to the conclusion that the appellant and the 5th respondent have colluded together and created the document and therefore, they are not entitled to the relief. The learned Additional District Judge has noted that in the suit filed by the appellant in O.S.No.56 of 2012, the respondents 1 to 4 are not parties and also noted that in the affidavit, it has been averred that a suit is going to be filed. Added to this, the learned Additional District Judge noted in the evidence that the appellant has stated that possession of the property is not with him and he is not aware of anything regarding the present possession of the property and he has not filed any suit against the 5th respondent and after considering all these circumstances only, the petition has been dismissed.

9. The claim petition under Order XXI Rule 58 C.P.C. is not maintainable and also under Order XXI Rule 97 C.P.C. The appeal itself is not maintainable as the claim petition has been filed under Order XXI Rule 58 C.P.C. and it is not an appealable order. In any case Sale Deed has been executed to the respondents 1 to 4 on 30.08.2013 pursuant to the decree passed by this Court on 08.03.2011 in A.S.No.709 of 2008 and the ex parte decree obtained by the appellant on 08.11.2013 in his suit against the 5th respondent is not binding on the respondents 1 to 4.

10. The appellant suffered dismissal on account of his own admission made in his evidence and also his own conduct in relying upon the sale agreement, which did not inspire confidence. Though the sale agreement is dated 17.08.1998, the appellant has not obtained the sale deed from the 5th respondent, even though allegedly entire sale consideration has been paid on the date of agreement itself. Even though the agreement recites that the possession has been handed over to the appellant, but, the appellant himself admits that possession is not with him. All these circumstances considered cumulatively would justify the dismissal of the claim petition by the learned District Judge.

11. The appeal has no merits and hence, the appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CCC)

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Sub Asst. Registrar

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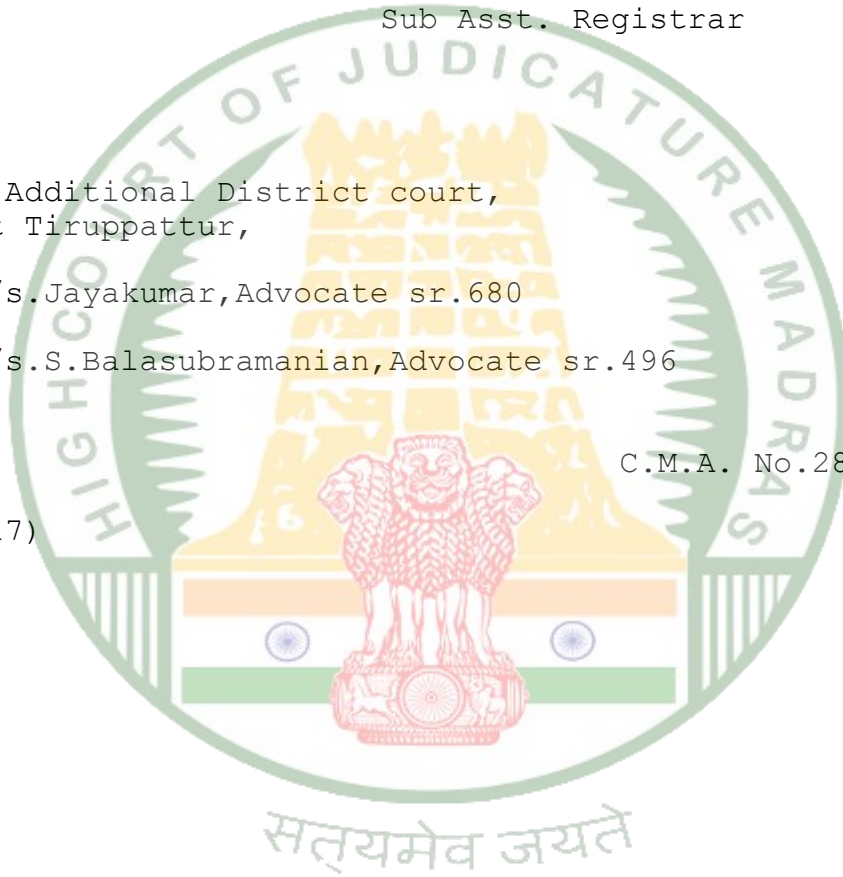
1.The III Additional District court,
Vellore at Tiruppattur,

+1cc to M/s.Jayakumar,Advocate sr.680

+1cc to M/s.S.Balasubramanian,Advocate sr.496

rsk(co)
ss(7/4/2017)

C.M.A. No.2822 of 2016



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