

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On :24.01.2017
Pronounced On :01.02.2017

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No.273 of 1999
and
C.M.P.No.3822 of 1999

Mr.K.Neelamegam ..Appellant/3rd Defendant

/versus/

1.Smt.S.Chandra ..1st Respondent/Plaintiff
2.Mr.V.Mani
3.Mrs.Hazeera Beevi ..Respondents 2 & 3/
Defendants 1 & 2

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the learned VI Additional Judge, City Civil Court, Madras dated 03.03.1998 and passed in A.S.No.149 of 1996 reversing the judgment and decree of the learned trial Judge, XI Assistant City Civil Court, Madras, dated 27.07.1994 and passed in O.S.No.1866 of 1985.

For Appellant :Mr.B.Kalathinathan
For Respondents:No appearance

J U D G M E N T

This second appeal arises from the suit for specific performance. The third defendant, who is the subsequent purchaser of the property, pending suit, is the appellant herein. The suit was dismissed by the trial Court, whereas the first appellate Court reversed the trial Court judgment and allowed the appeal. Hence, the second appeal is directed against the judgement of the first appellate Court.

2. For the sake of convenience, the parties are described as per their rank and status shown in the original suit.

3. On 15.09.1984, Tmt. Chandra, the plaintiff in the suit entered into an agreement for sale of the suit property to an extent of 1/2 share in 744 sq.ft measuring 372 sq.ft with one Mani the first defendant for a price of Rs.2,750/- and advanced Rs.330/-. On the same day, agreement was also executed. On 6.10.1984, a further sum of Rs.50/- was paid to the vendor towards part sale consideration.

4. The case of the plaintiff is that, though she was ready to complete the sale, the vendor, after agreeing to sell the suit property and received advance, failed to fulfil the obligation. When the plaintiff came to know that the first defendant is attempting to alienate the property to the third party, she issued notice expressing her desire and readiness to fulfil her part of the obligation and called upon the vendor to execute the sale deed. The first defendant failed to execute the sale deed. Hence, the suit for specific performance to enforce the agreement of sale.

5. The first defendant contested the suit on the ground that he does not know the plaintiff. He borrowed a sum of Rs.250/- from one Sundaram, who happens to be the husband of the plaintiff, for which he signed in a unwritten 3/- rupees stamp paper. He never agreed to sell his share in the suit property to the plaintiff or her husband. The property is joint property of four brothers. The first defendant, who is one among the four, has no exclusive right to alienate the property. The alleged agreement dated 15.09.1984 is a fabricated document. He never received any notice from the plaintiff. He and his brothers have already sold the property to one Hazeera Beevi on 8.3.1985 and handed over the possession of the property. After purchase, Hazeera Beevi has put up superstructure. Since the title over the suit property has been validly transferred to her, the suit is not maintainable and the prayer has become infructuous. There was no agreement to sell and no contract between him and the plaintiff. Hence, the suit for specific performance is to be dismissed.

6. After, the written statement of the first defendant, the plaintiff has impleaded Hazeera Beevi as the second defendant. Pending suit, the appellant herein has purchased the property from the second defendant. He in his written statement has contended that, the suit property belongs to one Vellai @ Vellaiswamy. His legal heirs are V.Thoppasamy, V.Vijayarangam, V.Mani (first defendant) and V.Thamilselvan. They all joined together and sold the property to one Hazeera Beevi on 4.03.1985 vide a registered document No. 509/1985. From Hazeera Beevi, he purchased the property on 23.2.1987 vide sale deed No.467/1987

and had improved the property and in peaceful possession of it.

7. The trial Court considering the pleadings and evidence of the respective parties dismissed the suit for the reason that the plaintiff has not mounted the witness box to substantiate her case. The suit agreement Ex A-1 does not contain the correct description of the property. The name of the plaintiff is not found in receipt Ex A-2. The first defendant is entitled to only 1/4th share in the suit property, which is 186 sq.ft of land. Whereas, the agreement Ex A-1 is for 372 sq.ft. which makes the agreement un-enforceable.

8. On appeal, the first appellate Court, reversed the judgment of the trial Court and held that, the first defendant has not denied his signature in Ex A-2-receipt. Therefore, the absence of plaintiff name in that document is immaterial. The ocular evidence of PW-1 and PW-2 is suffice to hold that the agreement is valid. Non-examination of the agreement holder is not essential. Regarding the ready and willingness, the first appellate Court has observed that the plaintiff has issued objection notice to the the Sub-Registrar, Virugambakkam not to accept any sale deed for registration of the suit property, since she holds agreement with the first defendant. This is sufficient to prove the ready and willingness.

9. Aggrieved by the judgment of the first appellate Court, the second appeal is filed. This Court, after considering the judgment of the first appellate Court, has formulated the following Substantial Questions of Law for consideration:-

1) Whether the Lower appellate Court is right in not considering the question that the plaintiff is not entitled for the equitable relief of specific performance, since the suit property differs in all particulars from the property conveyed under Ex.B-1 as contemplated by Section 9 of the Specific Relief Act ?

2) Whether the lower appellate Court is right in not considering the question that the sale deed Ex.B-2, dated 04.03.1985 by the first Defendant in favour of the second defendant, which came into existence before the inception of the suit is not affected by lis pendens, and subsequently Ex.B-1 sale deed. dated 23.01.1987 is also not affected by 'lis pendens' ?

3) Whether the Lower Appellate Court is right in not considering the well known principle of law that the plaintiff has not proved her readiness and willingness from the date of Agreement Ex A-1 dated 15.09.1984 to the date of the trial of the suit ?

10. Learned counsel appearing for the appellant/third defendant submitted that, Ex.A-1 agreement, dated 15.09.1984 is not true and valid. The description of the property, either in the agreement (or) in the suit schedule, is properly given. The vendor of the plaintiff had only 1/4 share in the property, whereas, in Ex A-1, it appears the plaintiff has conveyed 1/2 share, which per se not legal and renders the agreement void. The plaintiff failed to prove the said agreement in the manner know to law. Neither the payment of sale consideration nor the readiness and willingness was proved by the plaintiff to sustain the relief of specific performance. The plaintiff did not issue any notice to the first defendant expressing her readiness and willingness to complete the contract. The suit property was sold to the second defendant before the institution of the suit. Hence, the sale agreement Ex.A-1, even if it is true, has been frustrated by subsequent sale vide Ex.B-2 and the plaintiff, without challenging Ex.B-2, cannot sustain the suit for specific performance. The trial Court, after proper appreciation of the above facts and law, had rightly dismissed the suit. However, the first appellate Court has erroneously reversed the well considered judgment of the trial Court.

11. To appreciate the dispute between the parties, it is relevant to note down the sequence of the dates and events involved in the appeal. On 15.09.1984, sale agreement marked as Ex.A1 was entered between the first defendant Mani and the plaintiff Chandra. On 04.03.1985, the first defendant Mani has sold the property to the second defendant Hazeera Beevi and got the deed registered on the same day. On 05.03.1985, the suit has been filed by Chandra the plaintiff against Mani the first defendant for specific performance based on her agreement, dated 15.09.1984 and subsequent part payment on 06.10.1984. Though in the cause of action portion, the plaintiff claims that on 26.02.1985, she caused notice to the first defendant and called upon him to fulfil his part of obligation, there is no documentary evidence produced to that effect. In fact, on 27.02.1985, the plaintiff caused notice through her counsel only to the Sub Registrar, Virugambakkam, not to the first defendant. So, on the basis of the records, it is evidently clear that on the date of filing the suit, the plaintiff has not demanded specific performance in writing and on the date of presenting

the suit, the property was already sold by the first defendant to the second defendant. When this fact was brought to the notice of the plaintiff by the first defendant through his written statement, the plaintiff has chosen to implead the second defendant by filing an Interlocutory Application bearing I.A.No.24124 of 1986. However, she has not chosen to declare the sale deed registered in favour of the second defendant as null and void, in view of her previous agreement. Therefore, by no stretch of imagination the transaction held between the first defendant and the second defendant transferring the suit property to the second defendant, can be termed as transfer of property *lis pendens*.

12. It is strange to note that after purchase of the property by the third defendant, who is the appellant before this Court, the plaintiff has caused notice to the third defendant on 15.04.1988, whereas, the third defendant has purchased the property vide Ex.B1 on 23.02.1987. It is also pertinent to point that mere reference to readiness and willingness to perform her part of contract in the pleading is not sufficient, but, the conduct of the party to infer such readiness and willingness is essential. In this case, nowhere in the pleadings (or) in the evidence, this Court finds an iota of readiness or willingness on the part of the plaintiff. However, the first Appellate Court relying Ex.A3-lawyer notice issued to Sub Registrar, Virugambakkam, presumed that the plaintiff was ready and willing to perform her part of contract. The first defendant consistently has resisted the suit on the ground that the alleged agreement itself is a fraudulent document and there was no consensus to sell the property. It was only a concocted document prepared on the blank stamp paper obtained from him for the loan advanced by the plaintiff's husband and the further case of the first defendant is that, the description of the property found in the agreement marked as Ex.A1 and the recital of the said document clearly show that not all the parties to the document are signatory to it.

13. The recital of the agreement-Ex.A1 indicates that there was an oral partition among the first defendant Mani and Vijayarangam, who is the brother of the first defendant and by virtue of the said oral partition, the first defendant has agreed to sell his share of 372 sq.ft. out of 744 sq.ft. allotted to him and his brother Vijayarangam for a sum of Rs.989/- and the receipt of Rs.200/- on 15.09.1984 which is instantly the date of the agreement. There is also reference of receipt of Rs.330/- jointly by the first defendant and his

mother. If all these are taken into account and if the sale price of the property is Rs.2750/-, then the plaintiff should have given credit to Rs.989/- received by Vijayarangam and Rs.200/- received by the first defendant, apart from Rs.330/- received by the first defendant and his mother. Without any reference to other two payments and transactions, the plaintiff has pleaded and let in evidence only in respect of Rs.330/- advanced on the date of agreement and Rs.50/- received vide receipt marked as Ex.A2. No witness has spoken about the left out payments found place in Ex.A1. Hence, Ex.A1 is highly doubtful.

14. Further, it is pointed out by the learned counsel appearing for the appellant that neither the description of the property nor the parties to the documents are clear and if the payments were made to Vijayarangam and also the mother of the first defendant Bupathiammal, then, both must have been signatories to these documents Ex.A1 and Ex.A2. Since they are not signatory to the documents, the case of the first defendant that he received loan of Rs.250/- from the plaintiff's husband and he signed in the blank papers, gets more probablized, than, the case put forth by the plaintiff.

15. The above conclusion is strengthened by the recital found in Ex.A2. This is executed by the first defendant on 06.10.1984. It refers about the share of elder brother of the first defendant Thoppasamy, also refers the land to an extent of 62x12 and the receipt of Rs.50/-. This document has no reference about Ex.A1 or the property described in Ex.A1. This document not even refers about the sale agreement dated 15.09.1984, but only refers about the land of Thoppasamy extending 62x12 and receipt of Rs.50/-.

16. In this case as pointed out earlier, when there is no relevance between Ex.A1 and Ex.A2 and when the plaintiff was not able to prove the genuineness of Ex.A1, the first appellate Court has allowed the appeal reversing the judgment of the trial Court, without appreciating the evidence in a proper perspective.

17. It is unfortunate that the first appellate Court instead of considering the genuineness and validity of the agreement sought to be enforced, it has shifted its attention to the subsequent transaction held between the second defendant and the third defendant pending litigation and has confirmed the finding of the trial Court. In a suit for specific performance, it is not the subsequent conduct of the parties is relevant, it is the conduct of the party from the date of the alleged agreement till the date of filing the suit is the relevant issue, which the Court should have taken note. If that aspect is taken note, there can be no second opinion but, to dismiss the suit on the ground that the plaintiff has not adequately described the property which sought to be sold in her favour by way of a specific performance. The plaintiff has failed to establish her readiness and willingness to perform her part of contract and the plaintiff has failed to come before this Court with clean hands to seek the equitable relief.

18. In addition, the plaintiff, after knowing the transfer of the suit property in favour of the second defendant prior to filing of the suit for specific performance, ought to have amended her prayer to declare the transaction held prior to the suit as void. Failure to do so renders her reliefless.

19. Yet another question of Law to be addressed is Section 9 of Specific Relief Act, 1963, which enables the defendants to resist the suit for specific performance of any contract to plead by way of defence any ground, which is available to him under any law relating to the contract. The provisions of the Indian Contract Act, 1872 mandates that any offer and acceptance will become a valid contract, only if it is not vitiated by any of the conditions such as coercion, undue influence, fraud, misrepresentation, mistake subject to Sections 20, 21 and 22. Any one of these factors may lead to an inference that there was no valid consent for the contract. In this case, the first defendant has pleaded misrepresentation and fraud of misusing the blank signed stamp paper executed by him for receipt of loan of Rs.250/-, even if such plea is not given due consideration, the recital of Ex.A1 and the description of the property referring all the owners of the property namely, Thoppasamy, Vijayarangam and Bupathiammal along with the first defendant Mani, but only the first defendant being the signatory in Exs.A1 and A2 makes these two documents unbelievable and unreliable. The preponderance of probabilities is more in favour of the first defendant than the plaintiff. For all the above said

reasons, this Court hold that the Substantial Questions of Law formulated by this Court is in favour of the appellant.

20. In the result, the second appeal is allowed and the judgment and decree of the first appellante Court in A.S.No.149 of 1996 dated 03.03.1998 is reversed and the judgment and decree of the trial Court in O.S.No.1866 of 1985 dated 27.07.1994 is restored. No costs. Consequently, connected Miscellaneous Petition is also closed.

-s/d-
Assistant Registrar

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Sub-Assistant Registrar

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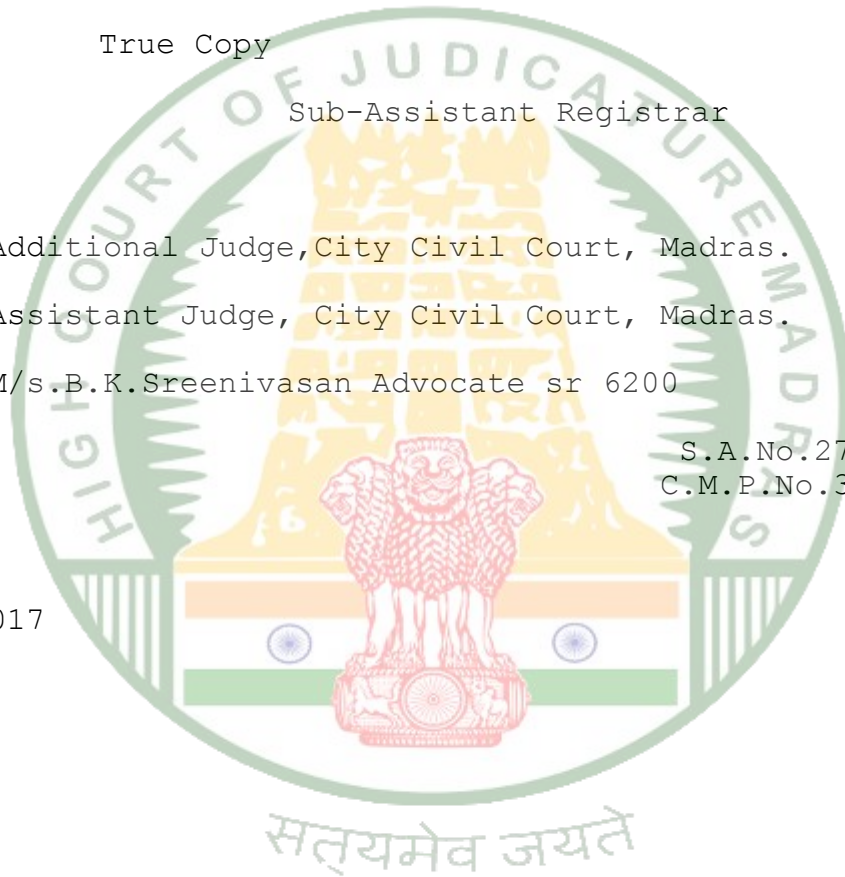
1.The VI Additional Judge, City Civil Court, Madras.

2.The XI Assistant Judge, City Civil Court, Madras.

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