

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 02.02.2017

Date of Verdict : 13.02.2017

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

S.A.No. 242 of 1999

V.Rajagopal

....Appellant/Respondent/
Plaintiff

Vs.

1. A.Viswanathan
2. Rukmani
3. Saravanan
4. Lakshmi

...Respondents/Appellants/
Defendants

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 16.04.1997 made in A.S.No.20 of 1997 on the file of the learned Principal Subordinate Judge, Salem reversing the judgment and decree dated 31.01.1996 made in O.S.No.1688 of 1997 on the file of the Additional District Munsif, Salem.

For Appellant : Mr.T.Murugamanickam

For Respondents : Mr.A.Kandasami
for Mrs.V.Ambika

JUDGMENT

The suit for specific performance and preliminary possession filed by the appellant herein was allowed by the trial Court but reversed by the first appellate Court. Hence this second appeal has been filed by raising the following substantial question of law :-

1. When there is no evidence to disprove the existence of the power of attorney executed in favour of the first defendant by one Nagappa Udayar, whether the lower appellate Court can go against the provisions of Section 85 of the Indian Evidence Act?
2. When an agreement for sale has been proved to be valid, whether the lower appellate Court was justified in refusing to grant of relief

contemplated under Section 20 of the Specific Relief Act?

3. Whether the lower appellate Court was justified in holding that the suit was barred by limitation, when the plea was not raised as an issue in the trial Court?

2. The factual matrix of the case is that :- The case property originally belongs to one Nagappa Udayar who executed a sale agreement on 24.11.1985 as manager of the joint family property for himself and on behalf of his son to the first defendant by name A.Vishwanathan. Later he has also executed a registered Power of Attorney in favour of Vishwanathan on 05.09.1986. The said Vishwanathan entered into a sale agreement with one Rajagopal, the plaintiff herein, in respect of the suit property and received advance of Rs.4,000/- on 13.03.1987 as power agent of Nagappa Udayar. Since Vishwanathan has not come forward to receive the balance sale consideration and execute the sale agreement dated 13.03.1987, the present suit has been filed by the plaintiff/agreement holder.

3. The first defendant/Power agent as well as the second and third defendants who are the legal representatives of the deceased Nagappa Udayar contested the suit on the ground that the alleged Power of Attorney deed executed by Nagappa Udayar is neither genuine nor valid. The alleged sale agreement by the first defendant/Power agent in favour of the plaintiff is not true and valid and it has no enforceability.

4. The trial Court based on the pleadings framed nine issues and examined P.Ws. 1&2 and D.W.1 and admitted six documents on behalf of the plaintiff. On considering the evidence the Trial Court held that the Power of Attorney executed by Nagappa Udayar in favour of Vishwanathan on 05.09.1986 marked as Ex.A.3 is valid and the sale agreement in turn executed by the Power agent in favour of the plaintiff on 13.03.1987 marked as Ex.A.1 is also valid. Since the plaintiff has proved his ready and willingness to perform his part and deposited a sum of Rs.10,040/- in a Nationalised Bank, the Trial Court held that the plaintiff is entitled to get for specific performance as against the defendants and allowed the suit.

5. Aggrieved by the said judgment of the trial Court, the defendants preferred the appeal in A.S.No.20 of 1997, wherein the first appellate Court reversed the trial Court judgment on the ground that Ex.A.1, sale agreement nothing is mentioned about the Power of Attorney dated 05.09.1986 and the plaintiff admittedly not aware of the Power of Attorney alleged to be executed by Nagappa Udayar for himself and on behalf of his children. That being so, the agreement which is sought to be enforced through decree of

specific performance is only based on an earlier sale agreement between Nagappa Udayar and first defendant Vishwanathan entered on 24.11.1985. The said document is only an agreement to sell and it cannot be a source of title for the first defendant to enter upon an agreement to sell with the plaintiff. In the absence the document alleged to have been executed by Nagappa Udayar on 24.11.1985 and in absence of evidence to show that the alleged Power of Attorney, Ex.A-3 was acted upon and possession was given to the first defendant, Ex.A.1 cannot be a valid agreement which can be enforced through decree of specific performance.

6. In the course of the judgment the lower Appellate Court has also gone into the issue of limitation though no issue was framed by the trial Court and held that the plaintiff who claimed his right on the strength of Power of Attorney executed in favour of the first defendant by Nagappa Udayar on behalf of himself and on behalf of his minor children, failed to implead them within the period of limitation which disentitle him to get any relief against them. For the above reasons, the first appellant Court reversed the finding of the trial Court and dismissed the suit with costs.

7. Under the said circumstances, this present appeal has been preferred and this Court has formulated the questions of law which has been mentioned earlier.

8. The learned counsel for the appellant submitted that the plaintiff entered into the sale agreement Ex.A.1 on 13.03.1987 with the first defendant on the specific terms that the subject property belongs to Vishwanathan, the first defendant as per the agreement dated 24.11.1985 and pursuant to that he has agreed to sell the same to the plaintiff for the consideration of Rs.9 per Sq.ft. and fixed the total sale consideration of Rs.14,040/- and paid a sum of Rs. 4,000/- as advance and agree to pay the balance within a period of three months. Ex.A.2 is the plan of suit property. Since the first defendant failed to come forward for the registration of the document, the appellant issue notice Ex.A.4 on 10.07.1987 which was acknowledged by the first defendant on 13.07.1987. Despite receipt of notice defendant was not ready to complete his part of contract. Therefore on 12.06.1987 the plaintiff to show his readiness deposited a sum of Rs.10,000/- in a Nationalised bank and that is also marked as Ex.A.6. The learned counsel for the appellant submitted that having entered into an agreement with the first defendant who is Power of Attorney of the original owner, he is entitled for enforcing the contract. The lower Appellate Court failed to consider the evidence and reversed the trial Court finding erroneously.

9. Per contra the learned counsel for the respondent submitted that in the sale agreement does not refer the Power

of Attorney at all and how the vendor of the appellant have right to enter upon the sale agreement, it is an invalid document since it was an agreement to sale by a person who had no right or title over the suit property on the date of its execution. Since, Nagappa Udayar is the original owner of the suit property he should have been arrayed as a defendant in the suit. The plaintiff originally laid the suit only against the first defendant and later impleaded the legal heirs of Nagappa Udayar belately. By the time, the agreement itself has become barred by limitation. Further, it was contended that the suit property as described in the plaint schedule is not identifiable on the field. It could be seen from pleadings and through evidence that the suit property is an agricultural land and not a residential plots for the plaintiff to enforce the execution of sale agreement in respect of plot No.18 in survey No.327/2C, 327/3C, 316/1 and 316/2.

10. This Court on careful perusal of the evidence and the findings of the Courts below, finds that the suit agreement is not based on the Power of Attorney executed by Nagappa Udayar on 05.09.1986, but based on the sale agreement executed by Nagappa Udayar in favour of first defendant on 24.11.1985 which is much prior to the Power of Attorney marked as Ex.A.3. If the parties accept that the Power of Attorney was executed by Nagappa Udayar on 05.09.1986 in favour of the first defendant, it impliedly means that the agreement dated 24.11.1985 has been abandoned by the parties concerned. That is why the suit agreement dated 24.11.1985 could not be produced before the Court. While so, there cannot be specific performance suit based on an abandoned agreement. If the plaintiff wants to claim his right of enforcing agreement Ex.A.1 based on the Power of Attorney Ex.A.3 then the prime duty of the plaintiff is to establish that the Power of Attorney was in force on 13.03.1987. By impleading the legal representatives of Nagappa Udayar it is evident that the principal who executed the Power of Attorney died. The plaintiff has not placed any evidence to show that Nagappa Udayar was alive when the Ex.A.1 was executed and he caused notice to the Power of Attorney namely the first defendant as well as the principal Nagappa Udayar for enforcing the contract.

11. When the plaintiff himself has not relied upon the Power of Attorney but only relied upon the previous agreement dated 24.11.1985. In the above facts, it is incorrect to plead that the lower appellate Court has gone against the Section 85 of the Indian Evidence Act. The subject agreement dated 13.03.1987 in favour of the plaintiff is by a person who had no title or right. By no sketch of imagination such agreement can be enforced under Section 20 of the Specific Relief Act and the lower appellate Court has rightly pointed out this infirmity in this case and dismissed the suit.

12. Incidentally, the lower appellate Court has also pointed out that necessary parties namely the title holder of the suit property where not made as a parties to the proceedings within a period of limitation, but much lately. Therefore the question of law raised by the appellate has no merits to enforce the findings of the first appellate Court, accordingly the second appeal is dismissed.

13. In the result, the judgment and decree of the lower appellate Court is confirmed. No order as to costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

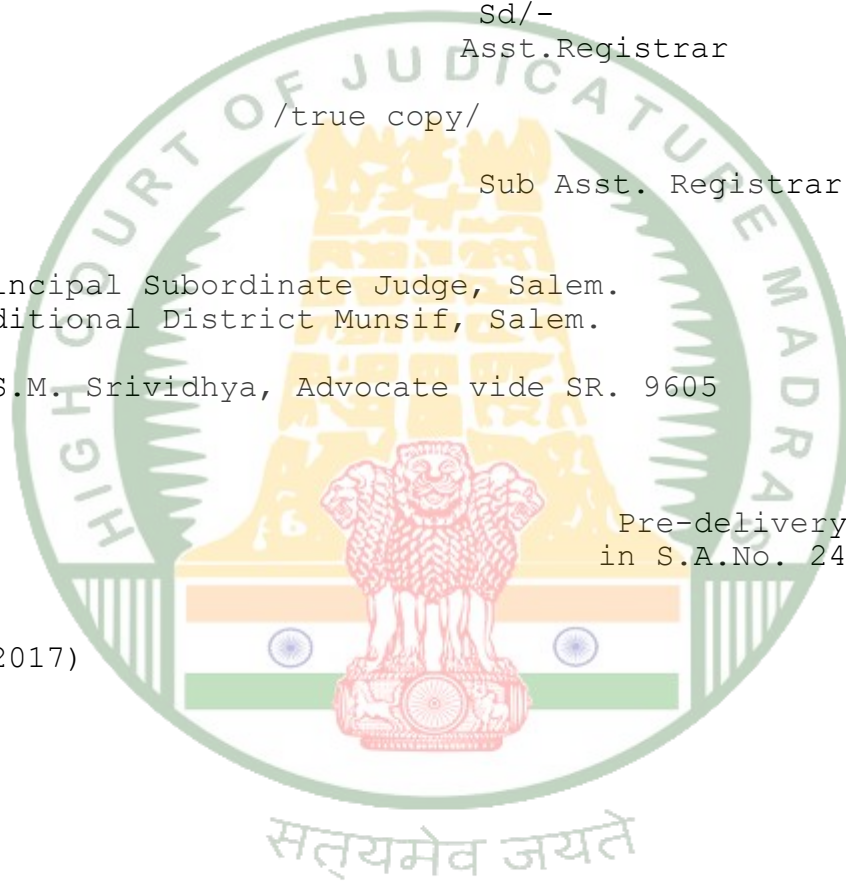
To

1. The Principal Subordinate Judge, Salem.
2. The Additional District Munsif, Salem.

+1cc to MS.M. Srividhya, Advocate vide SR. 9605

Pre-delivery Judgment
in S.A.No. 242 of 1999

GJ(CO)
VR(28/02/2017)



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