

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:15.02.2017

Pronounced on:28.02.2017

Coram

The Hon'ble Dr.Justice G.Jayachandran

**Second Appeal Nos.52 and 53 of 2008
and
M.P.Nos.1 and 1, 2 and 2 of 2008**

1.Seetha raman

2.Parijatha Kannan(Deceased)

3.Karthikeyan
(appellants are represented by
their power Agent G.Devanathan)

4.Mrs.P.Elamathy

5.Minor of P.Rathinavel

6.Minor of P.Ragaventhiran
(Appellants 5 and 6 rep.by natural
guardian and mother P.Elamathy)
(Appellants 4 to 6 brought on record
as LRS of the deceased 2nd appellant
vide order of Court dated 03.09.12
made in M.P.Nos.1 and 2/12 in
S.A.No.52 of 2008)

.. Appellants in
both the appeals

/versus/

1.Kannapiran
2.Pushpam
3.Suresh Kumar
4.Premalatha
5.Sowmiya

6.Anitha

.. Respondents in both
appeals

Prayer in S.A.No.52 of 2008: Second Appeal filed under Section 100 of the Civil Procedure Code against the decree and judgment dated 30.08.2007 made in A.S.No.110 of 2006 on the file of the Sub Court, Chidambaram, reversing the judgment and decree dated 31.07.2006 in O.S.No.227 of 1998 on the file of the Principal District Munsif Court, Chidambaram.

Prayer in S.A.No.53 of 2008: Second Appeal filed under Section 100 of the Civil Procedure Code against the decree and judgment dated 30.08.2007 made in A.S.No.115 of 2006 on the file of the Sub Court, Chidambaram, reversing the judgment and decree dated 31.07.2006 in O.S.No.99 of 2004 on the file of the Principal District Munsif Court, Chidambaram.

For Appellants
(in both appeals)

:Mr.N.R.Chandran, Senior Counsel
for Mr. R.Kannan

For Respondents
(in both appeals)

:Mr.R.Muralidharan
for R2 to R6
R1-No appearance

COMMON JUDGMENT

The above two second appeals are directed against the judgements of the Lower Appellate Court, one reversing the judgments passed in the suit for declaration of title and recovery of possession and two dismissing the suit filed for specific performance.

2. The appellants are the plaintiffs in O.S.No.227 of 1998 suit filed for declaration and possession and the defendants 1 to 3 in O.S.No.99 of 2004 the suit filed for specific performance.

3. The subject suits is in respect of 4 acres 52 cents of dry land in R.S.No.54/1 in Killai Village, Parangipettai Sub-Registrar District, Chidambaram Registration District.

4. The case of the appellants is that, the suits property was purchased from one Maragatha ammal on 23.09.1985 by the appellants Seetharaman, his minor brothers Parijathakannan and Karthikeyan, vide Ex B-4 sale deed. The management of the property was left to one Kannapiran the junior paternal uncle of the appellants. The said Kannapiran, without their consent and knowledge, delivered the possession of the property to one Ganeshamoorthy in December 1994 through an oral bogiyam, which the appellants came to know only in the year 1998. Kannapiran the manager of the property has no right to create any bogiyam. Any such bogiyam even if effected is not valid in law and will not bind the appellants. Hence, suit in O.S.No.227/1998 filed for declaration of title, delivery of possession and mense profit against the manager Kannapiran and Ganeshamoorthy. Pending suit, Ganeshamoorthy died. Hence, his legal representatives were brought on record as

defendants 3 to 7.

5. Pending O.S.No.227/1998, Ganeshamoorthy during his life time filed O.S.No.99/2004 for specific performance against appellants herein alleging that, the suit property is the joint family property of Seetha raman, Parijathakannan and Karthikeyan, who are the appellants in S.A.Nos.52 and 53/1998. Appellants father Venugopal Pillai died long time back. Logu @ Loganayaki is the appellants mother and Selvi is the appellants sister. For performing the marriage of their sister Selvi, for family maintenance and to clear debts the appellants along with their Junior paternal uncle Kannapiran, his wife and one Loganatha Nadar came to the plaintiffs house on 11.11.1987 and offered to sell the suit land. The price was fixed at Rs 10,000/- per kani and advance of Rupees 2,500/- was received by the appellants on that day to meet out the Nichaiyatharam (bedrothal) ceremony of Selvi. It was agreed by the plaintiffs to pay Rs.17,500/- before the marriage of Selvi. It was further agreed that the balance sale consideration will be paid at the time of registration. It was an oral agreement and no time was fixed for performance of that contract. The title deed of the property and possession of the property was handed over to them on the same day. After taking possession of the property, the plaintiffs have improved the barren land and made it worth cultivable by spending a sum of Rs.30,000/- and paying kist from 1987.

6. On 24.11.1987 the appellants along with their mother and junior paternal uncle and his wife came to the plaintiffs house and received Rs. 17,500/- towards part sale consideration. In view of good relationship prevailing at that time, the plaintiffs did not get receipt for the payment of this money. He was informed by the appellants and his family members that, they have nominated Kannapiran as their authorised agent and the plaintiffs can pay the balance money to him and get the sale deed registered. Accordingly, the plaintiffs paid to Kannapiran various sum of money and five bags of paddy worth of Rs.650/- altogether Rs.31,420/- including Rs.20,000/- paid in cash to the appellants and their mother. The receipts of the money on behalf of the appellants are acknowledged by Kannapiran through his letter dated 23.3.1990 and 6.4.1990. The balance sale consideration is only Rs. 2565/- and the plaintiffs are always ready and willing to pay this balance amount and get the sale deed executed and registered.

7. The first appellant Seetharaman was working abroad and when he visited the suit village in the year 1994 he promised to execute the sale deed, when he returns back to India in the year 1996. On or about June 1996, the first appellant returned to India, on 28.07.1998 the plaintiffs demanded him to execute the sale deed and receive the balance

sale price, the first appellant made an unreasonable demand for higher price at the rate of Rs.21,000/- per kani. In fact, earlier in the year 1996, there was a panchayat in this regard but the appellants refused to accept the agreed sale price and insisted for higher price. After exchange of notice, the appellants have filed O.S.No.227/98 denying the sale agreement. Hence the suit for specific performance to enforce the oral agreement dated 11.11.1987.

8. Both the suits were tried together by the trial court. In the common judgement, the trial court held that the alleged oral agreement of sale of immovable property is not legally valid. The landlords have not permitted Kannapiran to enter into agreement or authorised to deliver possession of the property. Therefore the appellants herein are entitle for declaration, possession and mense profits.

9. On appeal, the first appellate court, reversed the finding of the trial court observing that the trial court failed to appreciate the evidence subsequent to the oral agreement. The kist receipts paid by Pushpam, wife of Ganeshamoorthy after taking possession of the property have not been considered by the trial court. PW-2 Loganathan an independent witness and PW-3 Kannapiran who is the junior paternal uncle of the appellants have corroborated the respondents. The trial court

erroneously disbelieved their deposition. His evidence and the evidence of PW-2 Loganathan supports the case of the respondents. With these observations, the lower appellate court held that, the plaintiffs in the specific performance suit have proved payment of Rs.20,000/- only and there is no proof for further payment of cash and kind. Therefore, directed the plaintiffs to pay the balance sale consideration of Rs.13,985/- within a period of 3 months and get the sale deed executed and registered as his cost.

10. Aggrieved by the lower appellant court judgment, the present appeals are filed. ***The following common Substantial Question of Law*** raised in these two appeals; -

“1.Whether the appellate Court is correct in relying on the alleged oral agreement for sale of the suit land in the absence of any registered document for transfer of the same regarding the title?

2.Whether the appellate court is correct in its conclusion that only because the title deed of the suit property is with the respondents 2 to 7 herein, that they are entitled for the relief of specific performance based on the allegation of oral agreement, which is impermissible under the transfer of property Act?

3.Whether the deposition made by PW1

namely, Seetha raman can be ignored as it is with contradictions as observed by the appellate Court?"

11. The learned Senior Counsel appearing for the appellants submitted that, the Lower Appellate Court failed to see that Exs.B-2 and B-3-Letters purported to be written by Kannapiran to Ganeshamoorthy no way go to show that there was a concluded contract to sell the property. The suit property is not mentioned in that letter. When the actual owners of the property are the appellants, the locus of Kannapiran to deal with the property has not been tested. Even assuming that there was an oral agreement to sell the property, by Exs.B-2 and B-3 as well as the own admission of the respondents establishes that the sale price was not accepted by the vendors and they refused to execute sale deed demanding higher price.

12. It is the admitted case of the respondents that panchayat was convened on 17.08.1996 and 13.11.1996 but the appellants refused to execute sale deed and demanded more price. When the refusal to execute the sale deed is made know to the respondents, as early as 13.11.1996, the suit for specific performance is filed only on 14.12.1998. In between there were exchange of notices through lawyers, wherein the appellants have categorically placed on record that there was no oral agreement and Kannapiran was never authorised by the appellants to

enter into any sort of agreement with third parties on their behalf. Exs.B-2 and B-3 letters written by non owner of the property will no way prove the case of oral agreement.

13. Even if one accept the judgments of the lower Court, it is proved before the lower appellate Court that the balance sale consideration was Rs.13,985/- and not Rs.2,565/- as contented by the respondents. Therefore, what they were ready and willing to pay was only lesser sale consideration and not the actual balance. Since the respondents have come to court with unclean hands, they are not entitled for the equitable relief.

14. In support of his submission, he relied upon the judgment of the Hon'ble Supreme Court reported in ***State of Gujarat v. Kothari and Associates [2016 (1) CTC 109]*** wherein para 6 reads as under:

"6. Section 3 of the Limitation Act explicitly states that "every Suit instituted, Appeal preferred, and Application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence". It is, thus, incumbent upon the Court to satisfy itself that the Suit is not barred by limitation, regardless of whether such a plea has been raised by the parties. In Union of India v. British India Corporation Ltd., 2003(9) SCC 505, it has been opined that the question of limitation is a mandate to the forum and, irrespective of the fact whether it was raised or not, the forum must consider and apply it, if there is no dispute on facts. "It is, thus, irrelevant that the Appellant-State had not raised the issue of limitation before the Trial Court. A duty was cast on the Court to consider this aspect of law, even on its own initiative, and since it

failed to do so, the appellate-State was competent to raise this legal question in Appeal or indeed even in any successive Appeal. Close to a century ago, in *Lachhmi Sewak Sahu v. Ram Rup Sahu*, AIR 1994 Privy Council 24, it has been held that the point of limitation is available to be urged even in the Court of last resort."

15. Per contra, the learned counsel for the respondents submitted that, the delivery of possession and title deed to the defendants as part performance is suffice to prove the oral agreement.

16. In support of his submission, he relied upon the judgment of the Madurai Bench of Madras High Court reported in ***V.Arumugam and others v. R.Chandrasekaran and another***[2016-4-L.W. 649], wherein para 29 reads as under:

"29. The First Appellate Court on the basis of limitation, held that the suit was within time, as the period of limitation of three years would be the date from which the plaintiff noticed the refusal of performance of contract by the first defendant. Section 54 of the Limitation Act, 1963, states that the limitation starts from the date fixed for the performance or if no such date is fixed, the limitation starts from the date when the plaintiff got notice that the performance of contract was refused. Thus, in this case, though agreement is proved through the evidences of PW2 and PW3, it is also clear from the evidence that there written statement no time limit fixed for execution of sale deed. In such circumstances, as per Section 54 of the Limitation Act, 1963, for filing a suit for specific performance, in the facts and circumstances of this case, starts from the date when the plaintiff got notice about the refusal or performance of contract by the first defendant....."

17. In this case, there is no formal agreement reduced into

writting. The documents relied by the respondents to show a semblance of agreement to sell are Exs.B-2 and B-3. Admittedly, those letters are not emanated from the title holder but, through there junior paternal uncle. A close reading of these letters does not indicate that it is related to the suit property. Even assuming that it relates to the suit property, the recitals only reveals that there was some money transaction between Kannapiran and Ganeshamoorthy. Quoting the transactions took place in the neighbourhood, Ganeshamoorthy has expressed his desire to fix the price accordingly. All the receipts referred in those letters not by the appellants but by Kannapiran. Further, mere negotiation for price by third party cannot be a proof for willingness by the owner of the property and much so, it cannot be proof for oral agreement. That apart, admittedly, in the year 1985, at the time of purchase of the property, the 2nd and 3rd appellants were 14 and 10 years old minors. How come Kannapiran enter into an agreement of sale on behalf of minors ?

18. Unfortunately, the lower appellate Court has omitted to see the legal impediment in the so called oral agreement. Similarly, regarding possession the admitted case of both the parties is that possession was given to Ganeshamoorthy by Kannapiran. The respondents' case is that they got possession on 11.11.1987, when the appellants agreed to sell their property. Therefore, it is only a permissive occupation even if one go

by the respondents version. Whereas the appellants' case is that, Kannapiran handed over the possession to Ganeshamoorthy by creating a Bogiyam, without their consent and knowledge.

19. The very rudimentary principle of contract is the existence of a valid agreement which has the element of offer and acceptance. The said agreement must be between the parties not only competent to enter into such agreement but also, willing to complete the contract, as per the terms of the agreement. Relief of specific performance arise, when one of the party earlier willing to perform his part of agreement but, fails or refuses to perform. Provided the other party is willing and ready to perform his part of agreement.

20. Though property right is a right protected under the constitution and no person shall be deprived of his property right without due process of law, the relief of specific performance is permitted, because (i) the party at default had already promised to part away with his property and based on the said promise, the other party would have paid the money in part or full or acted upon the agreement or invested upon the property. Thus, the party at default would have enriched himself, which will be an unjust enrichment, if the agreement is not enforced by law. That apart, (ii) the party at default having promised to part away his

property and made the other party to act upon the promise is estopped from going back from his promise. Only on the edifice of these two broad principles namely, unjust enrichment and estoppel, the equitable relief of specific performance withstands the test of constitutional validity.

21. At this juncture it is relevant to extract ***Section 2 of the Indian Contract Act, 1872:-***

"Section 2-Interpretation-clause: In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

(a)When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b)When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

(c)The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee";

(d)When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

(e)Every promise and every set of promises, forming the consideration for each other, is an agreement;

(f)Promises which form the consideration or part of the consideration for each other, are called reciprocal promises;

(g)An agreement not enforceable by law is said to be void;

(h)An agreement enforceable by law is a contract."

22. Even assuming Kannapiran was authorised to act on behalf of appellants, the above interpretation makes clear that Exs.B2 and B3 is only a proposal, demanding higher price. There is no evidence placed by the respondents to indicate he accepted the proposal. Further, there is no evidence to show that subsequent to these two letters of the year 1990, the price was finalised later and agreement arrived. Contrarily, the respondents themselves admit that panchayat convened in the year 1996 failed. The exhibits show there was exchange of notices in the year 1997 but only in the month of December 1998, the suit for specific performance filed. Thus, looking at any angle, the case of the respondents has no legs to stand.

23. This Court, after analysing the pleadings, documents relied by the respective parties and the law governing specific performance suit, concludes that the alleged oral agreement and payment of part consideration are fake and made belief statements orchestrated by Ganeshamoorthy and Kannapiran. No proof to establish the fact that the appellants offered to sell their land or received money from Ganeshamoorthy towards part sale consideration. Above all, the suit filed for specific performance in the year 1998 is based on oral agreement of the year 1987, while admittedly the appellants were consistently denying

the existence of oral agreement, the suit is hopelessly barred by limitation.

24. Regarding declaration and possession, Patta is still in the name of the original owner Maragatham ammal. Payment of kist in the name of Pushpam, wife of Ganeshamoorthy is not a proof for oral agreement. The minors property had been given by Kannapiran to Ganeshamoorthy, without knowledge of the true owner. Therefore, the appellants have every right to seek declaration and recovery of possession and also mense profits from the respondents, who are enjoying the property by taking possession of the property collusively from the manager of the true title holders.

25 . For the above said reasons, ***these two Second Appeals are allowed.*** The Lower Appellate Court's judgements are set aside. Trial Court's judgments are restored. No order as to costs. Consequently, connected Miscellaneous Petitions are closed.

28.02.2017

Index:Yes/No
Internet:Yes/No

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To

- 1.The Subordinte Court, Chidambaram.
- 2.The Principal District Munsif Court, Chidambaram

Dr.G.Jayachandran,J.

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**Pre-delivery judgment made
in S.A.Nos.52 and 53 of 2008**

28.02.2017

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