

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.11.2017

PRONOUNCED ON : 28.11.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.141 of 2001
and
C.M.P.No.19367 of 2017

O.A.A.Ananthapadmanabhan Chettiar ... Appellant

Vs.

1. V.Gangusamy

2. Sri.Venkatesa Mills Ltd., ... Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 08.02.2000 made in A.S.No.89 of 1998 on the file of the Sub Court, Udumalpet, confirming the judgment and decree dated 13.11.1998 made in O.S.No.669/1992 on the file of the District Munsif Court, Udumalpet.

For Appellant : Mr.S.Gunalan

For Respondent : Mr.N.Thiagarajan

No.1

JUDGMENT

This second appeal is directed against the Judgment and decree dated 08.02.2000 made in A.S.No.89 of 1998 on the file of the Sub Court, Udumalpet, confirming the judgment and decree dated 13.11.1998 made in O.S.No.669/1992 on the file of the District Munsif Court, Udumalpet.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for permanent injunction.

4. The case of the plaintiff, in brief, is that the plaintiff and the first defendant were Directors of the second defendant and the first defendant's father late AR.Adaikappa Chettiar was also holding shares with the second defendant and after his death, the first defendant was entitled to the same as his heir. On the rationalisation and reorganisation scheme, the management structure of the second defendant was changed and accordingly, a wholly owned Subsidiary Company named as Sri Seetha Venkatesh Mills Private Limited was formed and as a part of the above scheme, the plaintiff and the first defendant arrived at a written agreement on 03.09.1987 in respect of 46,235 equity shares in second defendant mentioned in the schedule of the plaint, which the first defendant is to obtain as the legatee of his father and as per the above said agreement, the first defendant, inter alia, has agreed to transfer 46,235 fully paid up equity shares to the plaintiff or his nominees at the rate of Rs.10/- per share, which may come to the possession and ownership of the first defendant, after obtaining orders of competent Court as the legal heir and legatee of his father and the plaintiff has to exercise his option within three

months of notice from the first defendant to him and the "B" schedule shares of the agreement do not form part of the subject matter of the suit as they had already been transferred. As per the agreement, the first defendant has received a sum of Rs.100/- paid by the plaintiff and accordingly, he is also under the obligation to transfer the shares to the plaintiff as stipulated in the agreement and the plaintiff till date has not been informed as to whether orders had been obtained by the first defendant from the competent Court and he has also not received any notice from the first defendant and the plaintiff is always ready and willing to purchase the shares as per the terms of the agreement and while so, the plaintiff reliably understands from enquiry that the first defendant has requested the second defendant to transfer the shares in the name of the third parties and the second defendant is also taking further steps in that regard and however, the first defendant has no right to transfer the shares in the name of the third parties in breach of the agreement entered into with the plaintiff and he has not raised any dispute regarding the terms of the agreement, as such, the plaintiff has laid the suit for permanent injunction against the first defendant to injunct him from selling or transferring shares to the third parties instead of the plaintiff as per the terms of the agreement.

5. The case of the first defendant, in brief, is that the suit is not maintainable either in law or on facts and the Hon'ble Court has no jurisdiction to entertain the suit and only the company Court would have the jurisdiction for deciding the issues, if at all, involved in the matter. Further, the parties are covered by Arbitration clause in the agreement and hence, the Civil Court's jurisdiction had been ousted by the agreement itself and the plaintiff cannot maintain the suit for permanent injunction and further if at all, the plaintiff has any grievance as per the terms of the agreement, he can lay a suit only for specific performance and the case of the plaintiff that the first defendant is entitled to obtain the shares of his father on his death as detailed in the plaint is not fully correct and the first defendant's father did not hold 46,235 equity shares nor the first defendant was a legatee of the above said shares and the plaint is not in conformity with the terms of the agreement and the plaintiff has assumed that the entire 46,235 shares belonged to the first defendant's father and that, the first defendant may come into possession of the shares as his heir and legatee and as on the date of the agreement, the first defendant had no right in praesenti to the alleged shares and he had the possibility of occurring the right only to hold the shares only after the competent

Court grants such right, thus the agreement itself being vague, uncertain and incapable of performance and unenforceable, the plaintiff is not thus entitled to maintain the suit. The plaintiff cannot compel the first defendant to transfer the shares to him by the agreement and time was the essence of the contract entered into between the parties and as the plaintiff never made any demand from 03.09.1987 till the filing of the suit and thereafter, having laid the suit 5 years after the date fixed in the agreement, the suit is barred by limitation and the relief of injunction against the first defendant without impleading all the members who has the right against the first defendant is bad for non -joinder of proper parties and there is no valid consideration for the agreement and the agreement hence fails and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, no oral evidence has been adduced and Ex.A1 has been marked. On the side of the defendants' also, no oral evidence has been adduced and only Ex.B1 has been marked.

7. On a consideration of the documentary evidence adduced by the respective parties and the submissions made, the Courts below

were pleased to decree the suit as prayed for. Aggrieved over the same, the present second appeal has been preferred by the first defendant.

8. At the time of admission of the second appeal, the following substantial question of law was formulated for consideration:

" Whether the Court below is right in treating the agreement dated 3.9.1987 as a valid agreement in spite of the fact that the plaintiff is entitled to enforce the contingent and void contract, which is not specific?"

9. The suit has been laid by the plaintiff for permanent injunction restraining the first defendant from selling or transferring the shares described in the plaint to the third parties except the plaintiff as per the terms of the agreement entered into between the plaintiff and the defendant on 03.09.1987 and the above said agreement has come to be marked as Ex.A1. It is seen that the first defendant has not disputed the execution of such an agreement marked as Ex.A1 between the plaintiff and him in respect of the shares of the second defendant. It is thus found that the first defendant, as such, has not denied the execution of the agreement Ex.A1 or the terms contained

therein and also the obligations stipulated therein to be performed by the first defendant as agreed to between the parties. Therefore, it is seen that as per the terms of the agreement Ex.A1, the first defendant is liable to transfer the equity shares described in the plaint, which would come into his possession and ownership pursuant to the orders of the competent Court as the legal heir and legatee of his father, to the plaintiff or his nominees at the rate of Rs.10/- per equity share. The agreement also provides that option with reference to the same shall be exercised by the plaintiff within three months on notice from the first defendant as regards the sale of such shares to the plaintiff. It is thus found that as per the terms above narrated, on the first defendant getting the ownership of the shares described therein and also obtaining necessary orders of the competent Court with reference to the same, it is seen that the first defendant is bound to transfer the said shares to the plaintiff at the agreed rate as stated above and it is further seen that the first defendant should send a notice to the plaintiff with reference to the same on complying with the above said stipulations and the plaintiff, thereafter within 3 months from the date of the notice, should exercise his option as regards the sale of such shares to him. It is thus found that when Ex.A1 agreement has been not controverted by the first defendant, as rightly put forth, he is liable

to obey and follow the terms stipulated therein.

10. Now, according to the plaintiff, inasmuch as he had reliably understood from the enquiry and also believed the same to be true and came to know that the first defendant had made arrangements with the second defendant to transfer the shares covered in Ex.A1 agreement to the third parties and the second defendant is also making attempts with reference to the same and hence, according to the plaintiff, inasmuch as the first defendant is not entitled to violate the terms of Ex.A1 agreement and only sell the shares to the plaintiff, after complying with the conditions stipulated therein, as the first defendant is attempting to alienate the same to the third parties, according to the plaintiff, he has been necessitated to lay the suit for permanent injunction against the first defendant.

11. At the outset, it has to be stated that as rightly argued by the plaintiff's counsel, there is no specific denial of the above said averments of the plaint by the first defendant in his written statement. That apart, the first defendant has also not entered into the witness box and denied the above said specific averments contained in the plaint or the above said case of the plaintiff, which had necessitated or constituted the cause of action for the plaintiff to institute the suit

against the plaintiff. In such view of the matter, it is seen that as per Order 8 Rule 5(1) CPC every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. Therefore, by invoking the above said provisions of law, it is seen that inasmuch as the first defendant has not denied either impliedly or specifically the above said averments or the basis of the cause of action for the plaintiff to institute the suit against the defendant, it is seen that the first defendant has admitted the same and it is thus found that the plaintiff has a valid cause of action as averred above against the first defendant, inasmuch as the first defendant had taken steps to transfer the shares to the third parties in breach of the terms of the agreement Ex.A1.

12. Based on the above footing, it is seen that the plaintiff has laid the suit. The first defendant has filed the written statement and firstly contended that the civil Court has no jurisdiction to entertain the suit and only the company Court as such would have the jurisdiction to try the suit. However, as seen from the judgment of the Courts below, it is seen that as regards the jurisdiction of the Civil Court is

concerned, it is seen that the said issue has already been determined by the Courts below and the Courts below have held that the civil Court has the jurisdiction to entertain the suit and it found that the said issue went up to the High Court and that, the High Court has also held that the civil Court has the jurisdiction to entertain the suit laid by the plaintiff. This aspect of the matter has not been controverted by the first defendant's counsel during the course of arguments put forth at the time of hearing of the second appeal. It is thus found that the first defendant cannot be allowed to raise the plea of jurisdiction once again as regards the entitlement of the civil Court to try the suit.

13. The second defence taken by the first defendant is that inasmuch as Ex.A1 agreement contained the Arbitration Clause and in such view of the matter, when any dispute arises between the parties as regards the agreement, the parties should only refer the dispute to the Arbitrator named therein and in such view of the matter, according to the first defendant, the plaintiff instead of referring the dispute to the Arbitrator, would not be entitled to lay the suit before the civil Court and hence, on that ground, it is contended that the civil Court is not having jurisdiction to try the suit. It is no doubt seen that Ex.A1 agreement contained an Arbitration clause and the said fact is not

disputed. However, according to the plaintiff, the relief of permanent injunction sought for by him against the defendant does not pertain to the substance or the merits of the terms of the agreement Ex.A1 and also does not touch upon the subject matter as such contained in the agreement and hence, according to the plaintiff, the suit for permanent injunction, on the footing that the first defendant is trying to alienate the shares to the third parties in violation of the terms of the agreement, is maintainable. As rightly put forth by the plaintiff, it is seen that the relief sought for by the plaintiff is not touching upon or related to the subject matter of the agreement as such and in such view of the matter, it is seen that the relief of permanent injunction claimed in the suit by the plaintiff does not in any manner require to be referred to the Arbitrator as stipulated in the agreement Ex.A1.

14. That apart, the procedures are mandated as to how the dispute between the parties to an Arbitration agreement should be referred to the Arbitrator under Section 8 of The Arbitration and Conciliation Act, 1996. It is seen that as per Section 8 of the said Act, when a party to the Arbitration Act approaches the civil Forum or a Judicial Forum with reference to the subject matter of the agreement and if the other party finds that the civil Court's jurisdiction is not

tenable, it is seen that the contesting party to the civil action should move the concerned Court for referring the parties to the Arbitration before he submits the first statement on the substance of the dispute. This is mandated as per Section 8 (1) of the Arbitration and Conciliation Act, 1996. It is admitted by the first defendant that before filing the written statement in this lis, he has not availed or resorted to the procedure contemplated under Section 8 (1) of the above Act and it is thus seen that the first defendant, despite having knowledge of the Arbitration clause contained in Ex.A1, had not chosen to move necessary application before the concerned Court for referring the parties to arbitral jurisdiction as contained in Ex.A1 before filing his written statement. It is thus seen that as the first defendant is aware that the relief sought for by the plaintiff does not touch upon or relate to the subject matter of the Arbitration agreement Ex.A1 and knowing well that the relief sought for falls outside the scope of Ex.A1 agreement and accordingly, did not evince interest to make necessary application under the above provisions of law for referring the parties to arbitral jurisdiction in the concerned Court. In such view of the matter, on the failure of the first defendant to follow the required mandated procedures as regards the same, the present contention raised by the first defendant's counsel as well as before the Courts

below that inasmuch as Ex.A1 agreement contains the Arbitration clause, the civil Court should not have determined the issues involved in this suit cannot be accepted. As rightly argued, it is further seen that the civil Court would not be competent or empowered to refer the parties to Arbitration if mandatory and procedural requirements contemplated under Section 8 of the Act are not complied with. In such view of the matter, the decision relied upon by the first defendant's counsel as regards the necessity of referring the parties to the Arbitral jurisdiction under Section 8 of the Arbitration and Conciliation Act, 1996 reported in **2010 -2-L.W.982 (The Branch Manager, M/s.Magma Leasing & Finance Limited & Anr Vs. Potluri Madhavalata & Anr)**, as rightly put forth, does not apply to the facts and circumstance of the case as the necessary requirements mandated with reference to the same had not been complied with by the first defendant and that apart, the relief sought for by the plaintiff in the suit does not relate to the subject matter of the agreement concerned and hence, it is seen that Civil Court has the jurisdiction to entertain the suit.

15. In the light of the above position, it is seen that the present argument put forth by the first defendant's counsel that the civil Court

has no jurisdiction as such to determine the issues and the parties should have been referred to Arbitral jurisdiction by the civil Court as such cannot be accepted in any manner and accordingly, it is seen that the Courts below have also rightly negated the above said contention put forth by the first defendant on proper reasonings and grounds.

16. It is thirdly contended by the first defendant that the plaintiff's suit is premature or in other words, it is contended that the plaintiff has no cause of action to institute the suit as per the terms of the agreement Ex.A1 and in this connection, it is argued that only if the defendant obtained the orders of the competent Court, the question of alienation of the shares concerned would arise and inasmuch as the competent Court has not passed any such order till date, hence, it is argued that the plaintiff has no cause of action to institute the suit and hence, the suit should fail. In other words, it is argued that if at all the plaintiff seeks to enforce the agreement Ex.A1, he cannot seek the relief of permanent injunction and at the most, he could only lay the suit for specific performance of Ex.A1 and in such view of the matter, it is contended that the suit laid by the plaintiff is not maintainable. However, as rightly put forth by the plaintiff's counsel, the terms of agreement Ex.A1 stipulated that the first

defendant should obtain the order of the competent Court for selling the shares and only thereafter, the first defendant should issue notice to the plaintiff calling upon him to purchase his shares and only after the receipt of the notice, the plaintiff should exercise his option with reference to the same within 3 months thereafter. In such view of the matter, when the present suit is based upon the cause of action that the first defendant is attempting to alienate the shares to the third parties in disobedience to the terms of the agreement Ex.A1 and the same is not touching upon the subject matter of the agreement as such, it is seen that the above contention put forth by the first defendant's counsel for non-suiting the plaintiff cannot be countenanced in any manner. Equally, it is found that the contention put forth that the plaintiff can seek his remedy only by laying the suit for specific performance for enforcing the agreement and not by way of present suit as such also cannot be accepted in any manner. As seen above, the plaintiff has not laid the suit for enforcing the terms of the agreement Ex.A1 in this suit. All that the plaintiff seeks in this suit is the first defendant should be enjoined from selling the shares to the third parties contrary to the terms of the agreement and in such view of the claim of the plaintiff, the civil Court has the jurisdiction and accordingly, it is seen that the plaintiff has the necessary and valid

cause of action to institute the suit against the defendant.

17. Fourthly, it is put forth on the side of the first defendant that in support of the plaintiff's case, neither the plaintiff nor any one has been examined other than marking Ex.A1 and the plaintiff has not substantiated his case with proper and acceptable evidence and in such view of the matter, it is contended that on the above sole ground, the plaintiff's suit should fail. In this connection, the decision reported in **CDJ 1999 SC 1017 (Vidhyadhar Vs. Manikrao & another)** is relied upon. The principles of law adumbrated in the above said decision is not disputed by the plaintiff's counsel. However, it is seen that as rightly argued by the plaintiff's counsel, in so far as this case is concerned, considering the facts and circumstances of the case, there is no need for the plaintiff to adduce any oral evidence in support of his case. According to the plaintiff, the first defendant has admitted the cause of action pleaded in the plaint i.e. in violation of the terms of the agreement he is making attempts to sell the shares covered under the agreement in favour of the third parties and not to the plaintiff and accordingly, the plaintiff has also filed the agreement in support of his case, which has come to be marked as Ex.A1 and as seen above, the first defendant has not disputed the execution of Ex.A1 agreement and also the terms contained therein. It is thus found that the first

defendant has admitted the truth and validity of Ex.A1 agreement, that apart, it is seen that the various defences put forth have also proceeded mainly upon the terms contained in the said agreement as seen above. Therefore, it is found that when the first defendant has not disputed the execution of Ex.A1 agreement and the terms contained therein, there is no need for the plaintiff to adduce any further evidence to strengthen his case. That apart, as seen above, the plaintiff has averred certain facts as the basis or constituting the cause of action for filing the suit against the defendant as stated supra and the said facts had not been denied in any manner by the first defendant in the written statement. Accordingly, it was found that when there is no specific denial of the averments contained in the plaint as per Order 8 Rule 5 CPC, the said facts are to be taken to be admitted and in such view of the matter, when the averments or the pleas made by the plaintiff in the plaint as the base for the cause of action and when the said facts have not been repudiated by the first defendant in the written statement or at least controverted the same by entering into the witness box, it is seen that in toto, the first defendant has admitted the plaintiff's case and accordingly, it is seen that there is no necessity at all on the part of the plaintiff to adduce even oral evidence to strengthen his case other than marking Ex.A1.

In such view of the matter, it is seen that the above contention put forth by the first defendant's counsel and also the petition preferred by the first defendant in the second appeal seeking permission to raise the above ground as additional substantial question of law does not merit any acceptance. When the specific averments put forth in the plaint, which form the basis for the cause of action for the plaintiff to lay the suit against the defendant and as the first defendant had admitted the same as mentioned supra, it is seen that as per Section 58 of The Indian Evidence Act, 1872 also, facts, which are admitted need not be proved and it is seen from the above said provision of law that no fact need to be proved in any proceeding, which the parties thereto or their agents agree to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings. Accordingly, it is seen that Order 8 Rule 5 CPC read in conjunction with Section 58 of the Indian Evidence Act would go to show that on the failure of the first defendant to deny specifically or impliedly or deny at all the averments put forth by the plaintiff in the plaint i.e. the necessary averments constituting the cause of action for the plaintiff to institute the suit against the defendant, it is seen that the said facts need not be proved by the

plaintiff by adducing further oral evidence and in such view of the matter, the contention of the first defendant that the plaintiff's suit should fail on his failure to adduce oral evidence as such cannot be countenanced in any manner. In such view of the above position, as rightly put forth by the plaintiff's counsel, the above decision referred and to relied upon by the first defendant's counsel, on the facts and circumstances of the present case, would not apply as such.

18. Fifthly, it is argued that the suit laid by the plaintiff is barred by limitation. The above defence is taken on the premise that the plaintiff has not evinced any interest to perform his part of the contract by sending any notice from the date of the agreement for purchasing the shares involved in this matter and he has come forward for the suit 5 years after the date of the agreement, thus accordingly, it is stated that the suit is barred by limitation. However, the above argument does not merit acceptance. This is not a suit for specific performance with regard to the obligations on the part of the first defendant or the entitlement of the plaintiff to exercise the option to purchase the shares involved in this matter. In such view of the matter, when the cause of action for the same would arise only after the first defendant send the notice to the plaintiff with reference to the same on obtaining

the necessary orders from the competent Court as stipulated in the agreement and when the said situation has so far not arisen, it is seen that the plaintiff is not necessitated to lay the suit or take action for enforcing the terms of the agreement as such and in such view of the matter, the contention that the plaintiff has not been ready and willing to perform his part of the agreement and the laches in filing the suit belatedly i.e. 5 years after Ex.A1 and therefore, hit by the law of limitation, are all pleas which have to be rejected in limine as not maintainable.

19. In the light of the above discussions, it is seen that when the execution of Ex.A1 agreement has not been disputed and when it is not the case of the first defendant that Ex.A1 is not a valid agreement or cannot be enforced at all and when it is seen that the first defendant is bound to alienate the shares involved in the subject matter to the plaintiff on obtaining the order of the competent Court as stipulated under the agreement, it is seen that the contention that the terms of the agreement are unenforceable as such and therefore, the argument put forth that Ex.A1 agreement is a void agreement and therefore, cannot be enforced as such cannot be countenanced and it is further seen that the first defendant has not taken a plea in specific

that Ex.A1 agreement is a void agreement in his written pleas and thereby not enforceable. In the light of the above position, the substantial question of law formulated for consideration in this second appeal is to be answered only against the first defendant and in favour of the plaintiff by holding that Ex.A1 agreement is a valid and enforceable agreement and the first defendant is bound by the terms of the agreement.

20. In conclusion, the second appeal fails and is, accordingly, dismissed with costs. Consequently, connected C.M.P.No.19367 of 2017 is dismissed and the other miscellaneous petition, if any, is closed.

28.11.2017

Index : Yes/No

Internet : Yes/No

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To

1. The Sub Court, Udumalpet.

2. The District Munsif Court, Udumalpet.

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T.RAVINDRAN,J.

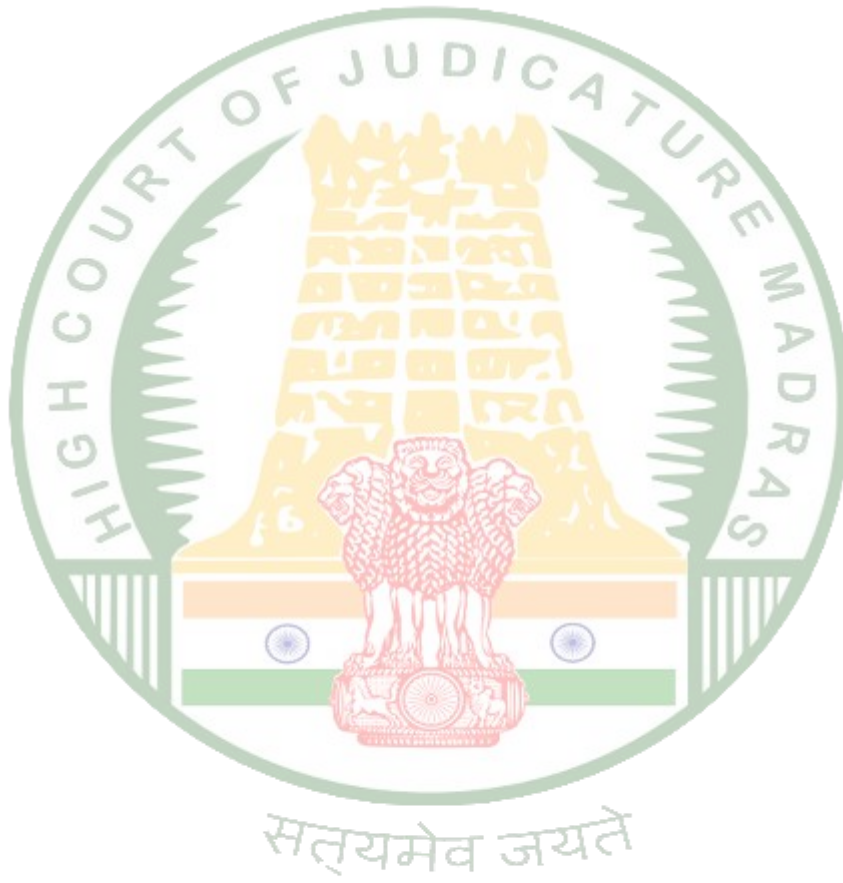
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