

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.Nos.938 and 939 of 2004

N.Periyasamy

... Appellant/Plaintiff
in both the Appeals

Vs

1.Gnanasoundari

2.Janaki

3.Santhi @ Kousalya

4.Minor Manickam

5.Minor Abirami

(Respondents 4 & 5 rep. by their

mother & guardian Santhi @ Kousalya)

... Respondents 1 to 5/
Defendants 2 to 6
in both the Appeals

These appeals are filed under Section 96 of C.P.C. against the judgement and decree made in O.S.Nos.13 and 14 of 2002 on the file of the Additional District Judge, Fast Track Court No.I, Erode respectively dated 27.04.2004.

For Appellant : Mr.D.Viiay
for Mr.S.Dharmakkan

For Respondents : Mr.V.Ragavachari
3 to 5

J U D G E M E N T

The plaintiff whose suits for specific performance were dismissed by the Trial Court is the appellant.

2. The plaintiff filed two suits namely, O.S.Nos.13 and 14 of 2002 on the file of the Additional District Judge, Fast Track Court No.1, Erode. Both the suits were originally filed before the Sub Court Erode and upon transfer they have been renumbered as O.S.Nos.13 and 14 of 2002 on the file of the Additional District Judge, Fast Track Court No.1, Erode.

3. The parties in both the suits are the same. The suits have been filed for specific performance of two agreements dated 19.10.2000 said to have been entered into between the plaintiff and the 1st defendant. According to the plaintiff, the 1st

defendant, the father-in-law of the plaintiff, had agreed to sell two properties belonging to him under the agreements marked as Exs.A1 and A5. Under Ex.A1, the 1st defendant had agreed to sell the properties situated at old G.S.No.68/3, New R.S.No.786/4 in Perundurai Taluk for a consideration of Rs.7,50,000/- and on the date of agreements, the plaintiff paid an advance of Rs.6,00,000/-. A period of four months was fixed for performance of the agreements. Since the 1st defendant did not come forward to execute the sale deed, the plaintiff has been forced to issue legal notice on 17.02.2001, on receipt of which, the 1st defendant sent a reply dated 21.02.2001 denying the agreement. This necessitated the plaintiff to file the above suit.

4. The 1st defendant died pending suit. The 1st defendant had filed written statement contending that the suit agreements itself have been brought about by the plaintiff, who is none other than his son-in-law .

5. According to the 1st defendant, he had lost both sons and the plaintiff being the son-in-law took advantage of the said position, brought up the two agreements. It was also contended that the sale price reflected in the agreements is palpably low and a prudent person would not agree to convey such a valuable property at such a low price. The payment of advance Rs.6,00,000/- was also denied by the 1st defendant. The defendants 4 to 6 had filed a separate written statement, wherein, the pleas taken by the 1st defendant were reiterated, apart from contending that the 1st defendant had executed a registered settlement deed in favour of the 5th defendant on 05.09.2001 and the 5th defendant is the owner of the suit property.

6. The plaint averments in O.S.No.14 of 2002 are substantially the same except the fact that the sale price fixed under Ex.A5 agreement is Rs.3,00,000/- and the advance said to have been paid is Rs.2,50,000/-. The properties agreed to be conveyed of an extent of 11 acres and 5 cents in S.No.698/1, 699/1, 699/2, 700/1, 700/2 and 700/3.

7. Since the parties are the same both the suits were tried together and the evidence was recorded in O.S.No.13 of 2002. The learned Additional District Judge, Fast Track Court No.1, Erode, who tried the suit framed the following issues for determination in both the suits.

1. Whether the plaintiff is entitled to the suits for specific performance?

2. Whether the plaintiff is entitled to alternative relief of refund of advance amount?

3. To what other reliefs, the plaintiff is

entitled to?

8. The plaintiff was examined as PW1. One Periyasamy, who is said to be the attester of both the agreements, namely Exs.A1 and A5 and one Gopalakrishnan, who is the scribe of Ex.A1 and A5, were examined as PW2 and PW3. The 3rd defendant was examined as DW1, one Shanmugam and Chandrasami were examined as DW2 and DW3. Exs.A1 to A8 were marked by the plaintiff. Exs.B1 to B6 were marked on the side of the defendants.

9. Upon the consideration of both oral and documentary evidence, the learned Additional District Judge, Fast Track Court No.1, Erode found that the plaintiff has not established the truth and validity of the agreements namely, Exs.A1 and A5. Taking note of the fact that in 3rd page of Ex.A1, typing has been done only half of the page and the remaining half of the page left blank and the schedule of properties has been typed in the next sheet which has also been numbered as page No.3, the Trial Judge has suspected the very execution of the documents by the deceased 1st defendant. The learned Additional District Judge, Fast Track Court No.1, Erode, disbelieved the evidence of PW2. The learned Additional District Judge, Fast Track Court No.1, Erode also found that the plaintiff has not proved the payment of advance Rs.6,00,000/- made on the date of agreement i.e. on 19.10.2000.

10. Though the plaintiff claimed that he has borrowed a sum of Rs.4,50,000/- from certain named individuals for payment of advance in his evidence he has not examined any of them. The claim of the plaintiff that he had not executed any document for the said borrowings created a doubt in the mind of the court regarding the said payment. It was also found that the case of the plaintiff that he was put in possession, pursuant to the agreement was false.

11. On the aforesaid findings, the learned Additional District Judge, Fast Track Court No.1, Erode dismissed the suit in its entirety. Aggrieved by the said judgement and decree, the plaintiff has come forward with this appeal.

12. I have heard Mr.D.Vijay, learned counsel appearing for the appellant and Mr.V.Raghavachari, learned counsel appearing for the respondents 3 to 5. Though respondents 1 and 2 have been served, they have not appeared either in person or through their counsel duly instructed.

13. The learned counsel appearing for the appellant would contend that the Trial Court has come to the wrong conclusion that the plaintiff is not entitled to the claim of specific performance. According to him, once the 1st defendant had

admitted his signature in the document and the plaintiff having examined the attesting witness, it is for the defendants to prove that the signature found in the document is not that of the 1st defendant. The learned counsel would take me to the evidence of PW1 and PW2 and submit that there is nothing incriminating in the evidence so as to disbelieve the execution of the agreements.

14. On the other hand, Mr.V.Raghavachari, learned counsel appearing for the respondents 3 to 5 would contend that the agreements namely, Exs.A1 and A5 have been created. The evidence of plaintiff regarding the payment of advance is relied upon by the learned counsel would show that the said evidence is unnatural and it cannot be believed. The following points arise for determination in the appeal.

1.Whether the plaintiff has proved the due execution of Exs.A1 and A5 by the 1st defendant?

2.Whether the plaintiff is entitled to specific performance or alternative relief of refund of advance?

15. As seen from the pleadings, the case of the defendants is one of total denial. Therefore, the burden of proof of the agreements is on the plaintiff. No doubt, the plaintiff has examined the attester as PW2 and the scribe as PW3. Considering the manner in which, the agreements have been typed and the oral evidence of P.Ws.1 to 3, I find the execution of the agreements by the 1st defendant is highly doubtful. The stamp papers for the agreement was purchased on 04.09.2000 at Erode in the name of the 1st defendant. Exs.A1 contains four sheets. In the 3rd sheet, the typed contents of the instrument is only up to half page. The schedule of the property has been given in separate sheet. The page number given in the separate sheet containing schedule of the property is also three. This by itself creates doubts in my mind regrading the truth and genuineness of the agreements.

16. The properties covered by both agreements belonged to one and same person. The purchaser is also same person. The necessity of entering into two agreements puzzles me and no explanation has been given by the plaintiff for entering into two agreements. The plaintiff claims to have paid a sum of Rs.8,50,000/- as advance on the same day. He claims to be an income tax assessee. The plea of payment of advance Rs.8,50,000/- has been questioned by the defendants. The plaintiff would claim that he has borrowed money from four named friends. But he has not chosen to examine them as witnesses. The plaintiff has not produced any document evidencing the said borrowings. His claim that there are no documents evidencing the borrowing is unbelievable.

17. In his pleadings, the plaintiff would claim that he was put in possession of the property. There is no documentary evidence to show that he is in possession of the property. It is contended by the defendants that the subject matter of Ex.A1 is under the occupation of the tenants and the subject matter of Ex.A2 is possession and enjoyment of the defendants. Therefore, it is very clear that the plaintiff has come to the court with unclean hands. Learned counsel for appellant realizing the difficulty in sustaining the claim for specific performance would plead that the Trial Court should have granted the relief of refund of advance amount. As the Court found that the agreements are not true and valid, the question of refund of advance does not arise. I have already found that the plaintiff has not proved the execution of the agreement and payment of Rs.8,50,000/- as advance. That be so, I am unable to countenance the argument of the learned counsel appearing for the appellant that the plaintiff is entitled to refund of advance amount.

18. In the result, for the foregoing discussion, the points raised for determination are answered against the appellant.

19. Both the appeals stand dismissed confirming the judgement and decree dated 27.04.2004 made in O.S.Nos.13 and 14 of 2002 on the file of the Additional District Judge, Fast Track Court No.I, Erode. However, considering the relationship between the parties, I make no order as to costs. Consequently the connected CMP.Nos.13655 and 13656 of 2009 are also dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vk

To

The Additional District Judge,
Fast Track Court No.1,
Erode.

+2cc's to Mr.S.Dharmakkan, Advocate, S.R.Nos.2559 & 2560
+2cc's to Mr.V.Raghavachari, Advocate, S.R.Nos.2555 & 2556

A.S.Nos.938 & 939 of 2004

VD(CO)
CA(07/02/2017)