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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.07.2018

Pronounced on : 10-10-2018

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and

THE HONOURABLE MR. JUSTICE C. SARAVANAN

Appeal Suit No. 1121 of 2015

and

M.P. No. 1 of 2015

1. Mannu Mudaliar
2. Magesh
3. Narayanan
4. Baskar

.. Appellants/Defendants 1 to 4

Versus

1. S.M.Sundaram
S.M.Kanagasabai (died)
2. Thirupurasundari
3. S.K.Vinayagam
4. S.K.Ravi
5. Varalakshmi
6. Mangayarkarasi

.. Respondents 1 to 6/Plaintiffs

7. State Bank of India
Vellore Town Branch
represented by its Chief Manager
Vellore

.. 7th Respondents/5th Defendants

Appeal filed under Order 41-A, Rule 1 and 2 read with Section 96 of Code of Civil Procedure against the Judgment and Decree dated 30.04.2015 passed in O.S. No. 14 of 2010 on the file of the II Additional District and Sessions Judge, Vellore @ Ranipet, Vellore District.

For Appellants :Mr. N.C. Ramesh, Senior Advocate
for Mr. K. Govindan

For Respondents :Mr. G. Masilamani, Senior Advocate
for Mr. V.P. Sengottuvel for RR1 to 6

No appearance for R7



JUDGMENT

R. SUBBIAH, J

The defendants 1 to 4 in O.S. No. 14 of 2010 on the file of the II Additional District and Sessions Judge, Vellore @ Ranipet, Vellore District, are the appellants in this appeal. The said suit in O.S. No. 14 of 2010 was instituted by the respondents herein for the following relief:-

"The Plaintiffs therefore pray for a judgment and decree against the defendants:

(a) Directing the defendants to execute and register a sale deed in favour of the plaintiffs thereby conveying the suit schedule mentioned properties to the plaintiffs for a sum of Rs.1,08,21,160/- at the costs and expenses of the plaintiffs on receipt of the balance of the sale price amount of Rs.55,21,150/- by a decree of specific performance of the contract and to direct the defendants to deliver the possession of the suit properties to the plaintiffs

(b) To grant a permanent injunction restraining the defendants from alienating the suit properties to any third party

(c) To direct the defendants to pay the costs of the suit

(d) Such other suitable order as this Honourable Court deems fit and proper may be passed and justice rendered.

2. The trial Court, by the Judgment dated 30.04.2015 decreed the suit as prayed for with costs and directed the defendants 1 to 4 to execute the sale deed in favour of the plaintiffs after receiving the balance sale consideration of Rs.55,21,150/- and further directed the plaintiffs to pay the sale consideration within a period of two months from the date of decree. A further direction was issued to the defendants 1 to 4 to execute the sale deed in favour of the plaintiffs within a period of one month from the date of receipt of the balance sale consideration, failing which the plaintiffs are entitled to get the sale deed executed in their favour through the process of Court. The trial Court also granted a decree for permanent injunction restraining the defendants 1 to 4 from alienating or encumbering the suit properties in favour any third parties. Challenging the said Judgment and Decree of the trial Court, the defendants 1 to 4 are before this Court with this Appeal Suit.

3. For the sake of convenience, the parties to the appeal shall be referred to as Plaintiffs and Defendants, as has been arrayed in the suit.



4. Originally, the Plaintiffs 1 and 2 namely (i) S.M. Sundaram and (ii) S.M. Kanagasabai (since died) have filed the suit. Pending suit, the second plaintiff namely S.M. Kanagasabai died and therefore, his legal heirs were brought on record as plaintiffs 3 to 7 as per the order passed by the trial Court on 11.04.2012 in I.A. No. 1 of 2012 and on the basis of such order, the plaint was suitably amended as per the order dated 28.09.2012 passed in I.A. No. 14 of 2012.

5. The brief averments made in the plaint are that the defendants 1 to 4 are the absolute owners of the suit property measuring 7 acres and 78.5 cents and they have agreed to sell the same to the plaintiffs for a total sum of Rs.1,08,21,150/- at the rate of Rs.13,900/- per cent. The Plaintiffs have also agreed to purchase the suit property for the said price by accepting the offer made by the defendants 1 to 4. After deliberation and discussion, the plaintiffs and the defendants 1 to 4 have entered into an agreement of sale dated 03.02.2007 and on the date of execution of the agreement, the plaintiffs have paid to the defendants 1 to 4 a sum of Rs.25 lakhs in cash and Rs.5,00,000/- by way of a cheque dated 03.02.2007. Thus, on the date of agreement of sale dated 03.02.2007, a total sum of Rs.30 lakhs was paid by the plaintiffs to the defendants 1 to 4. The defendants 1 to 4 have also agreed to receive the balance sale price amount and also to execute and register the sale deed in favour of the plaintiffs or their nominees, at their own costs and expenses within a period of six months. According to the plaintiffs, even though time limit of six months was mentioned in the agreement of sale dated 03.02.2007, it was not the essence of the contract or it was not intended to be the essence of the contract between the parties. Further, the defendants 1 to 4 have also agreed to measure the property and to receive the sale price as per the actual measurement prevailing at the time of registration of the sale deed. It is the specific case of the plaintiffs that pursuant to the agreement of sale entered into with the defendants 1 to 4, the defendants have permitted the plaintiffs to level the suit property and to put up fencing with boundary stones. The defendants 1 to 4 have also agreed to deposit the title deeds of the suit property at the time of registration of the sale deed. While so, on 28.02.2007, as requested by the defendants 1 to 4, the plaintiffs have paid a further sum of Rs.20,00,000/- towards advance sale consideration and on receipt of the said amount, the defendants 1 to 4 have also made necessary endorsement on the reverse of the agreement of sale and signed thereof in the presence of witnesses. Further, a sum of Rs.3 lakhs was paid by the plaintiffs on 25.04.2008 through the first defendant and for having received the said sum, necessary endorsement was made by the first defendant, on his own behalf and on behalf of the defendants 2 to 4, and also executed a receipt acknowledging the sum of Rs.3



lakhs in which the second defendant signed as a witness. In all, the plaintiffs have paid a total sum of Rs.53,00,000/- as advance towards the sale consideration out of the total sale amount of Rs.1,08,21,150/- and as such they are only liable to pay a sum of Rs.55,21,150/-. According to the plaintiffs, they were always ready and willing to pay the balance sale consideration and to get the sale deed executed in their favour. When the plaintiffs requested the defendants 1 to 4 to execute the sale deed in their favour, they have evaded and postponed the execution of the sale deed for one reason or the other. On 27.01.2009, the plaintiffs made a final demand to execute and register the sale deed in their favour, but the defendants 1 to 4 failed and neglected to perform their part of the contract. While so, the plaintiffs came to know that the defendants 1 to 4 are taking steps to alienate and encumber the suit property in favour of the third parties. In such circumstances, the plaintiffs have filed the suit for the relief of specific performance and consequential permanent injunction, as aforesaid.

6. Resisting the plaint averments, the first defendant has filed a written statement contending inter alia that the suit, as filed by the plaintiffs, is not maintainable. The case of the defendants 1 to 4, as culled out from the written statement filed by the first defendant and the deposition made before the trial court are as follows.

7. It was contended by the first defendant that item Nos. 8 to 20 of the plaint schedule mentioned property belong to one Mr. Dilli Mudaliyar, who is the brother-in-law of first defendant herein, which was also known to the plaintiffs. The Plaintiffs also knew that the said Dilli Mudaliyar had died however, for the reasons best known, the Plaintiffs did not choose to implead the legal heirs of Dilli Mudaliyar as party defendants to the suit and therefore, the suit is liable to be dismissed for non-joinder of necessary and proper parties. According to the first defendant, the agreement of sale dated 03.02.2007 is a sham and nominal document and it will not bind the defendants 1 to 4 in any manner. In effect, the first defendant has denied the execution of the agreement of sale dated 03.02.2007 to convey 7 acre and 78 1/2 cents of land for a total sum of Rs.1,08,21,150/- at the rate of Rs.13,900/- per cent. The first defendant also denied the receipt of a total sum of Rs.53 lakhs as advance sale consideration. According to the first defendant, there is no intention on their part to sell the schedule mentioned properties in favour of the plaintiffs at all. The first defendant further contended that the sale agreement dated 03.02.2007 is a fictitious document created by the plaintiffs with collusive help of the defendants in order to eschew some pre-existing agreements and liabilities created by the defendants. Further, the agreement of sale dated 03.02.2007



is unenforceable for the reason that a pre-existing agreement has been created in favour of third party on behalf of Dilli Mudaliar and the agreement of sale dated 03.02.2007 was entered into between the plaintiffs and defendants 1 to 4 with full knowledge as to the pre-existing liabilities and with a view to bring about a settlement between third parties and themselves. Therefore, according to the first defendant, the agreement of sale was intended only as an impediment for the enforcement of earlier contracts and that it was created with the covert help and assistance of the plaintiffs. It was further contended that the agreement of sale is sham and nominal and no consideration has been passed thereof and therefore, it will not bind the defendants 1 to 4 in any manner. Therefore, the first defendant prayed for dismissal of the suit.

8. The fifth defendant namely State Bank of India, Vellore has filed a written statement contending that the defendants 1 to 4 along with some other persons approached the fifth defendant bank for loan facilities and obtained loan of Rs.2,40,000/- on 15.10.1996 and subsequently enhanced the loan amount to Rs.11,56,000/- by executing deposit of title deeds with an intention to create equitable mortgage and also confirmed the same in their letter dated 12.11.1996. Subsequently, the defendants 1 to 4, along with some of their family members, approached the fifth defendant bank for another loan facilities in the name of M/s. Sree Krishna Agencies and the fifth defendant Bank also sanctioned the loan amount. As the borrowers failed to repay the amount, Civil suit has been filed against the borrowers before the Sub Court, Ranipet in which a preliminary decree was passed and thereafter, a final decree was also passed. Even after passing of the final decree, the defendants 1 to 4 and others did not repay the loan amount, hence, the Bank has filed O.A. No. 324 of 2007 and O.A. No. 175 of 2008 before the Debts Recovery Tribunal-III, Chennai and obtained orders for recovery of the loan amount. The Tribunal has also issued sale Certificate in O.A. No. 324 of 2007 to recover a sum of Rs.22,31,348.14 and another Recovery Certificate in O.A. No. 175 of 2018 to recover the sum of Rs.14,47,166/- from the defendants, totalling a sum of Rs.36,78,512/-. According to the fifth defendant, the defendants 1 to 4 have entered into a sale agreement with the plaintiffs only after the loan was obtained from the defendant bank by depositing the title deeds. Hence, the fifth defendant bank is not aware of the agreement of sale entered into between the plaintiffs and defendants 1 to 4. Therefore, according to the fifth defendant bank, they are unnecessary party to the suit and the fifth defendant Bank is taking expeditious steps to recover the loan amount as per the Recovery Certificate issued by the Debts Recovery Tribunal-II, Chennai. The fifth defendant therefore prayed for dismissal of the suit.



9. Before the trial Court, on behalf of the plaintiffs, the first plaintiff examined himself as PW1 and one S. Ganesan, attesting witness to the agreement of sale dated 03.02.2007, Ex.A-1 was examined as PW2 and Exs. A1 to A13 were marked. On behalf of the defendants 1 to 4, the defendants 1 and 2 examined themselves as DW1 and DW2 and Exs. B1 to B5 were marked. The trial Court, upon considering the oral and documentary evidence adduced before it, framed the following questions for consideration, namely

- (i) Whether the sale agreement is true and valid
- (ii) Whether the plaintiffs are entitled for specific performance of contract as prayed for?
- (iii) Whether the plaintiffs are entitled to permanent injunction as prayed for?
- (iv) Whether the suit is bad for non-joinder of necessary and proper parties?
- (v) To what other relief the plaintiffs are entitled?

10. It was pointed out by the defendants 1 to 4 before the trial court that item Nos. 8 to 20 of the plaint schedule mentioned property belonged to Dilli Mudaliar, who has executed power of attorney Ex.B5, on 30.09.2003 in favour of the second defendant. Further, the death of Dilli Mudaliar was known to the plaintiffs but they have not chosen to implead his legal heirs as parties to the suit. On the death of Dilli Mudaliar, the power of attorney deed dated 30.09.2003, Ex.B5 is unenforceable under law and the same shall stand cancelled automatically and consequently, the sale agreement entered into by the second defendant, as power of attorney agent of Dilli Mudaliyar in respect of item Nos. 8 to 20 also shall stand cancelled. The trial Court however rejected the said contention on the ground that Ex.A1, agreement of sale dated 03.02.2007 has been executed by the defendants 1 to 4 in their individual capacity and not in the capacity of power of attorney agent of Dilli Mudaliar and therefore, it is not necessary to implead the legal heirs of Dilli Mudaliar as a party to the suit. The trial Court also rendered a finding that the properties covered in the agreement of sale, Ex.A1 were purchased by wife of the first defendant and mother of the defendants 2 to 4 namely Mrs. Bhavani Ammal from one Mrs. Manickammal by a registered sale deed dated 19.10.1977. The trial Court further rendered a finding that the defendants 1 to 4 are in possession and right over the plaint schedule mentioned property and therefore, they have agreed to sell the property in favour of the plaintiffs. Even otherwise, the defendants 1 to 4 have not furnished the date of death of the said Dilli Mudaliar in the written statement but merely stated that Dilli Mudaliar is no more. Though the defendants 1



to 4 have taken summons to one of the legal heirs of Dilli Mudaliar to depose before the Court viz., D. Ananda Padmanabhan, he did not turn up to depose in support of the defendants 1 to 4. The Trial court also found that the defendants 1 to 4 have received a sum of Rs.30,00,000/- by cheque towards advance sale consideration. Further, the defendants 1 to 4 have received a sum of Rs.20,00,000/- from the plaintiffs and made an endorsement under Ex.A2 dated 28.02.2007 on the reverse of the agreement of sale, Ex.A1. The endorsement so made under Ex.A2 was also admitted by DW1 in his cross-examination. Further, the first defendant, on his own behalf and on behalf of the defendants 2 to 4, executed the receipt on 25.04.2008, Ex.A3 for having received a sum of Rs.3,00,000/- towards further sale advance. Therefore, the trial Court concluded that the defendants 1 to 4 have received the amount towards advance sale consideration and having received the same, they are estopped from contending that the amount was not received at all. Further, DW1 admitted that the entire amount payable to the State Bank of India to the tune of Rs.30,00,000/- was paid by availing an One Time Settlement with the Bank, after receipt of the advance sale amount from the plaintiffs. The trial Court, therefore, accept the plea of the plaintiffs and decreed the suit as prayed for by them.

11. Assailing the decree and judgment passed by the trial Court, the learned Senior counsel appearing for the appellants/defendants 1 to 4 would contend that the trial Court failed to take note of the fact that item Nos. 8 to 20 of the agreement of sale dated 03.02.2007, Ex.A1 is owned by Dilli Mudaliar. Therefore, the agreement of sale dated 03.02.2007, in so far as it relates to item Nos. 8 to 20, will not bind the legal heirs of late. Dilli Mudaliar. The said Dilli Mudaliar has executed a power of attorney deed dated 30.09.2003 appointing the second appellant/second defendant as his power of attorney agent not only to deal with item Nos. 8 to 20 covered under Ex.A1, agreement of sale dated 03.02.2007 but also some other properties which belonged to him. Even in the agreement of sale dated 03.02.2007, reference was made to the effect that the second appellant herein is the power of attorney agent of Dilli Mudaliyar and in his capacity as power of attorney agent, he executed the agreement of sale in favour of the respondents/plaintiffs. If really the properties in item Nos. 8 to 20 do not belong to Dilli Mudaliar, there is no need to refer the second appellant/second defendant as power of attorney agent of Dilli Mudaliar in the agreement of sale dated 03.02.2007. Therefore, the respondents/plaintiffs are not entitled for a decree of specific performance in respect of item Nos. 8 to 20 of the plaint schedule. Further, the said Dilli Mudaliar had expired on 24.09.2008 and on his death, the power of attorney executed in favour of the second appellant/second defendant



shall stand cancelled automatically and it is unenforceable under law. While so, at the time of filing the suit, the plaintiffs ought to have impleaded the legal heirs of Dilli Mudaliar, but they have failed to do so. Therefore, the suit as filed by the plaintiffs is not maintainable and it is liable to be dismissed for non-joinder of necessary parties. Even otherwise, on the failure of the respondents/plaintiffs to implead the legal heirs of the deceased Dilli Mudaliar as party respondents to the suit, the appellants/ defendants 1 to 4 have filed an application in I.A. No. 13 of 2014 under Order I Rule 10 of CPC to implead the legal heirs but it was dismissed by the trial Court and it was also affirmed by this Court in the Civil Revision Petition (PD) No. 4058 of 2014 filed by the appellants herein. Notwithstanding the order passed by this Court in the Civil Revision Petition, the decree passed by the trial Court in the suit filed by the respondents/plaintiffs will not bind the legal heirs of Dilli Mudaliar in any manner and that the plaintiffs are not entitled for a decree for specific performance in respect of item Nos. 8 to 20 of the plaint. In this context, the learned Senior counsel for the appellants would rely upon the Full Bench decision of the Honourable Supreme Court in the case of (Smt. Surasaibalini Debi vs. Phanindra Mohan Majumdar) reported in AIR 1965 Supreme Court 1964 to contend that where a contract or transaction is ex-facie illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of the nature of the contract of transaction and mould it's relief according to the circumstances.

12. By placing reliance on the above decision, the learned Senior counsel for the appellants would contend that even though the written statement is silent as to the date of death of Dilli Mudaliar and the consequential unenforceability of the agreement of sale in respect of item Nos. 8 to 20 thereof, the failure on the part of the defendants 1 to 4 to make such a defence will not render their defence invalid and the trial Court ought to have seen that the agreement of sale dated 03.02.2007 was signed by the second appellant only in his capacity as power of attorney agent of Dilli Mudaliar. Therefore, it is contended by the learned Senior counsel for the appellants that the judgment and decree passed by the trial Court is vitiated for non-joinder of legal heirs of Dilli Mudaliar and consequently the decree and Judgment passed by the trial Court will not bind the legal heirs of late. Dilli Mudaliar in any manner and prayed for allowing the appeal.

13. Per contra, the learned Senior counsel for respondents 1 to 6/plaintiffs would vehemently contend that the agreement of sale dated 03.02.2007, Ex.A1 was entered into between the plaintiffs 1 and 2 and the defendants 1 to 4 with respect to the



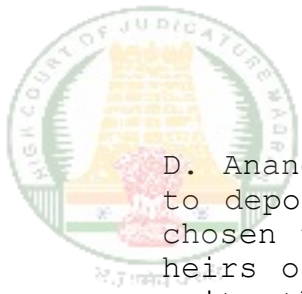
plaint described properties. In the agreement of sale dated 03.02.2007, the defendants 1 to 4 have categorically asserted that they are the absolute owners of the properties covered in the agreement of sale and are in enjoyment of the same as absolute owners thereof. Even in the agreement of sale dated 03.02.2007, it was clearly stated that the defendants 1 to 4 derived title to some of the properties described in the agreement of sale from Mrs. Bhavani Ammal, who is the wife of first defendant and mother of the defendants 2 to 4 and the said Bhavani Ammal has purchased the property from one Manickammal by means of a registered sale deed dated 19.10.1977. Further reference was also made in the agreement of sale that yet another piece of property covered in the agreement of sale was purchased by means of a sale deed dated 15.10.1993 by the second defendant out of his self-earned funds. A further reference was also made to a sale deed dated 10.07.1997 executed in the name of the second defendant and one M. Vasudeva Naidu. Of course, the agreement of sale also refers to the power of attorney deed dated 30.09.2003 executed in favour of the second defendant by Dilli Mudaliar. According to the learned Senior counsel for the respondents/plaintiffs, at the time of execution of the agreement of sale dated 02.03.2007, Dilli Mudaliyar was alive and it was also admitted by the defendants 1 and 2 in their deposition. Therefore, it is contended that the defendants 1 to 4 have saleable and assertable right over the properties in question and the agreement of sale executed by them is valid and proper.

14. According to the learned Senior counsel for respondents/plaintiffs, at the time of execution of the agreement of sale, the defendants 1 to 4 received Rs.30 lakhs from the plaintiffs i.e., Rs.25 lakhs by way of cash and Rs.5 lakhs vide Cheque No. 246651 dated 03.02.2007 drawn on City Union Bank, Vellore. Subsequently, on 28.02.2007, the defendants 1 to 4 received further sum of Rs.20,00,000/- and on receipt of the same, they have also made an endorsement on the reverse of the agreement of sale dated 03.02.2007 in the presence of two witnesses. Thereafter, on 25.04.2008, the plaintiffs paid a further sum of Rs.3 lakhs as sale advance which was acknowledged by the defendants 1 to 4 by executing a receipt dated 25.04.2008, marked as Ex.A3. Further, to prove the execution of the agreement of sale, Ex.A1 dated 03.02.2007, the plaintiffs have also examined the attesting witness as PW2, who has categorically stated that he attested the agreement of sale along with another attesting witness Anand Velan. Even though a major portion of the sale amount was received by the defendants 1 to 4 as advance, in the written statement, the first defendant has denied the receipt of any amount as sale advance and further alleged that the agreement of sale dated 03.02.2007 itself is a fictitious document. However, in the



cross-examination, the first and second defendants, as DW1 and DW2, have admitted the receipt of the advance sale consideration. Therefore, the learned Senior counsel for respondents would contend that the respondents/plaintiffs have duly proved that the defendants 1 to 4 are owners of the properties described in the plaint and received a major portion of the sale amount as advance. Further, after the suit was decreed, the plaintiffs also deposited the remaining sale consideration to the credit of the suit.

15. The learned Senior counsel for the respondents would contend that the main defence projected by the defendants 1 to 4 in the suit is that item Nos. 8 to 20 of the plaint schedule belongs to one Dilli Mudaliyar, brother-in-law of the first defendant, who has given a power of attorney deed dated 30.09.2003 in favour of the second defendant and the second defendant has executed the agreement of sale dated 03.02.2007, Ex.A1 in favour of the plaintiffs in his capacity as power of attorney agent of Dilli Mudaliyar and not in his individual capacity. It is their further defence that on 24.09.2008, Dilli Mudaliyar died and on his death, the power of attorney executed by him in favour of the second appellant/second defendant shall stand cancelled automatically and therefore, the plaintiff cannot seek for the relief of specific performance. Assailing the said defence, the learned Senior counsel for the respondents/plaintiffs would contend that on careful perusal of the agreement of sale, Ex.A1 dated 03.02.2007, it would show that the same was executed by the defendants 1 to 4 in their individual capacity and not as power of attorney agent of Dilli Mudaliyar, as such, the question of impleading the legal heirs of Dilli Mudaliyar does not arise. Therefore, according to the learned Senior counsel for the respondents, non-impleading the legal heirs of Dilli Mudaliyar has no significance in granting a decree for specific performance in respect of item Nos. 8 to 20 as well. Further, the first defendant has not indicated in his written statement about the death of Dilli Mudaliyar and therefore, the respondents/plaintiffs cannot be expected to implead the deceased Dilli Mudaliyar as a party to the suit. Even otherwise, the attempt made by the defendants 1 to 4 to implead the legal heirs of deceased Dilli Mudaliyar by filing I.A. No. 13 of 2014 was negatived by the trial Court on the ground that the defendants 1 to 4 have entered into the agreement of sale, Ex.A1 in their individual capacity and therefore, the legal heirs of deceased Dilli Mudaliyar are not proper and necessary parties. The said conclusion arrived at by the trial Court was also affirmed by this Court in the order dated 07.11.2014 passed in CRP (PD) No. 4058 of 2014. Therefore, the defendants 1 to 4 are estopped from raising the defence as to the non-joinder of legal heirs of Dilli Mudaliyar in the suit. Even otherwise, the defendants 1 to 4 have taken summons to one



D. Ananda Padmanabhan, one of the legal heirs of Dilli Mudaliar to depose before the trial court on their side, but he has not chosen to appear before the trial Court. When one of the legal heirs of Dilli Mudaliar himself is not interested to defend the suit, the trial court is right in passing a decree for specific performance.

16. Above all, the learned Senior counsel for the respondents/plaintiffs brought to the notice of this Court that pursuant to the decree and judgment passed by the trial Court, the plaintiffs have deposited the balance sale consideration of Rs.55,21,150/- to the credit of the suit and thereby they have proved their bonafides to get the sale deed executed in their favour. This would also show that the respondents/plaintiffs are in possession of ready money to perform their part of the contract. Even during the course of trial, the respondents/plaintiffs have also filed Exs. A4, Certificate issued by City Union Bank, Vellore stating that the first plaintiff is holding an account in their bank and he is presently enjoying cash credit limit upto Rs.50 lakhs. Thus, Ex.A-4 would prove the wherewithal of the plaintiffs to perform their part of the contract by paying the balance sale consideration. Further, the first plaintiff has also filed his income tax statements for the assessment year 2007-2008 and 2008-2009 under Ex.A8 and A-7 respectively. Having regard to all the above documentary evidence, the trial Court has come to a correct conclusion that the plaintiffs are entitled to a decree for specific performance and such a conclusion arrived at by the trial court does not call for any interference by this Court and therefore learned Senior counsel prayed for dismissal of the appeal.

17. Keeping the above submissions of the counsel for both sides, the following points arise for consideration:-

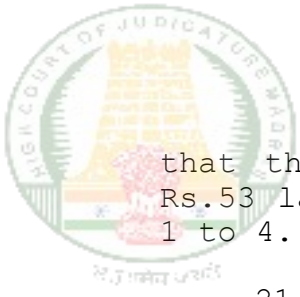
- (i) Whether the suit filed by the respondents/plaintiffs is liable to be dismissed on the ground of non-joinder of Dilli Mudaliyar
- (ii) Whether the decree and judgment passed by the trial Court will not bind the legal heirs of the deceased Dilli Mudaliyar in respect of item Nos. 8 to 20 of the properties covered in the plaint schedule?
- (iii) Whether the respondents/plaintiffs are entitled to a decree for specific performance, as prayed for.

18. As we have dealt with the factual matrix of the averments in the plaint filed by the respondents/plaintiffs as well as the written statement filed by the defendants 1 to 4 in detail, we deem it unnecessary to once again deal with the same



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20. As regards the advance sale consideration, the first and second defendants, as DW1 and DW2 respectively, in their cross-examination, have admitted having received the advance sale consideration from the plaintiffs. Even otherwise, the defendants 1 to 4 have signed the reverse of the agreement of sale, marked as Ex.A2, acknowledging the receipt of the sum of Rs.20 lakhs from the plaintiffs. The further sum of Rs.3,00,000/- paid by the plaintiff has also been acknowledged by the defendants 1 to 4 under Ex.A-3, receipt. Therefore, the plaintiffs, by examining DWs 1 and 2 and by marking Exs. A-1 to A-3, have clearly proved the execution of agreement of sale, Ex.A-1, receipt of the advance sale amount by the defendants 1 to 4 to the tune of Rs.53,00,000/- on various dates. Therefore, we hold that the plaintiffs have substantiated that pursuant to execution of Ex.A-1, agreement of sale dated 03.02.2007, they have paid a sum of Rs.53,00,000/- which was also received and acknowledged by the defendants 1 to 4 towards advance sale consideration for sale of the properties owned by the defendants 1 to 4. In fact, by utilising the advance sale amount, the defendants 1 to 4 have settled the outstanding amount payable to the fifth defendant/Bank. Therefore, we hold



that the plaintiffs have proved that they have paid a sum of Rs.53 lakhs towards advance sale consideration to the defendants 1 to 4.

21. On perusal of the agreement of sale, Ex.A-1 dated 03.02.2007, it is abundantly clear that while making reference as to how the properties came to be acquired by the sellers namely the defendants 1 to 4, it was stated thereunder that some of the properties are owned by one Dilli Mudaliar who is represented by the second defendant as his power agent. In other words, on behalf of Dilli Mudaliar, whose properties are also covered under the agreement of sale, the second defendant had entered into the agreement of sale, Ex.A-1. The specific recitals in Ex.A1, agreement of sale to that effect reads as under:-

"எங்களில் 2லக்கமிட்டவர் பெயருக்கு 30.09.2003ந் தேதியில் ஜிடிஸி
அவர்கள் எழுதிக் கொடுத்த பொது அதிகார ஆவணமானவது ஆற்காடு சார்பதிவாளர்
அலுவலகத்தில் 187/2003/4பத்தகம் எண்ணாக பதிவாகியுள்ளது."

22. Thus, it is clearly indicated in the recitals of the agreement of sale, Ex.A-1 that the second defendant namely Mahesh entered into the agreement of sale by virtue of the power of attorney conferred in his favour by one Mr. Dilli Mudaliar and the power of attorney deed was also registered as document No. 187/2003 in Book IV on the file of Sub-Registrar, Arcot. This recital in Ex.A1 would only indicate that the second defendant is not the absolute owner of the properties which are covered in the Power of attorney deed dated 30.09.2003 executed in his favour and he is representing the principle Mr. Dilli Mudaliar as his power of attorney agent. This would only indicate that the defendants 1 to 4 have not signed the agreement of sale, Ex.A1 in their individual capacity. The fact remains that the defendants 1 to 4 are not the owners of item Nos. 8 to 20 of the plaint schedule and it was admittedly owned by Dilli Mudaliyar. Therefore, at any stretch of imagination, the defendants 1 to 4 cannot assert a right, interest or title to convey the suit property in favour of the plaintiffs. Therefore, the findings rendered by the trial Court as if the second defendant entered into the agreement of sale in his individual capacity cannot be countenanced. Moreover, as mentioned above, in the sale agreement, Ex.A-1, a reference was made to the power of attorney deed executed by Dilli Mudaliyar in favour of the second defendant. Further, the fact remains that the second defendant, along with his father, the first defendant, has got ownership with respect to item Nos. 1 to 7 of the plaint schedule, but the ownership in respect of item Nos. 8 to 20 of the plaint schedule vests with the said Dilli Mudaliar who has given a power of attorney deed in favour of the second defendant. The defendants have also marked Ex.B5, registered power of attorney deed executed by Dilli Mudaliar in favour of



the second defendant herein.

23. The Plaintiffs have filed the suit for specific performance of the agreement of sale, Ex.A1 dated 03.02.2007. While seeking such relief, for the reasons best known, the plaintiffs did not implead Mr. Dilli Mudaliar, who owns item Nos. 8 to 20 of the plaint schedule. Even the cause title in the suit does not indicate that the second defendant is representing his principle Dilli Mudaliar as his power agent, but the second defendant was impleaded in his personal capacity. When the recitals in Ex.A-1 clearly indicates that the second defendant entered into such agreement of sale, Ex.A-1, as power of attorney agent of Dilli Mudaliar, the suit, as framed by the plaintiffs, cannot be accepted. It was pleaded by the plaintiffs that Dilli Mudaliar was alive at the time of execution of agreement of sale, Ex.A1 dated 03.02.2007 and his power agent namely the the second defendant is impleaded as a party to the suit and therefore, the suit is properly filed. It is no doubt true that Dilli Mudaliar was alive at the time of entering into the agreement of sale, Ex.A1 dated 03.02.2007. However, at the time of filing the suit, Dilli Mudaliar was not alive and he died on 24.09.2008. The suit was filed on 04.02.2009 before the Principal District Court, Vellore and at the time of filing the suit, Dilli Mudaliar was not alive. According to the defendants 1 to 4, the death of Dilli Mudaliar was known to the plaintiffs even prior to the filing of the suit. In this regard, it is worthwhile to refer the deposition of PW1 and PW2 in their cross-examination. During the cross-examination, a specific question was put to the first plaintiff, PW1 as to whether he knows that Dilli Mudaliar was residing in Avalkaara Street and he died on 24.09.2008, however, PW1 deposed that he was not aware as to who Dilli Mudaliar was. A further question was put to PW1 as to whether his son Ganesan, PW2 attended the funeral of Dilli Mudaliar, for which also he replied that he does not know about his son attending the funeral of Dilli Mudaliar. Similarly, PW2 in his cross-examination has stated that he does not know as to who Dilli Mudaliar was and he did not attend the funeral of Dilli Mudaliar. In any event, when it is brought to the notice of the plaintiffs as regards the death of Dilli Mudaliar, atleast after filing the suit, the plaintiffs ought to have impleaded the legal heirs of Dilli Mudaliar, who is the owner of item Nos. 8 to 20 of the plaint schedule. This is more so that after the death of Dilli Mudaliar, the power of attorney, Ex.B5 executed in favour of the second defendant shall stand automatically cancelled and the ownership of the property vests with the legal heirs of Dilli Mudaliar. In such circumstances, when the defendants have no absolute title, right or interest over the properties mentioned in item Nos. 8 to 20 of the plaint schedule, the plaintiffs ought to have impleaded the legal heirs



of Dilli Mudaliar to get a decree for specific performance in their favour. At any stretch of imagination, the second defendant or the other defendants have no right, title or interest over the properties covered in item Nos. 8 to 20 of the plaint schedule and therefore, a decree for specific performance cannot be granted in favour of the plaintiffs in respect of item Nos. 8 to 20 of the plaint schedule. Even though the defendants 1 to 4 have made an attempt to implead the legal heirs of Dilli Mudaliar as parties to the suit by filing an application in I.A. No. 13 of 2014, the said application was dismissed by the trial Court and it was also affirmed by this Court in the order dated 07.11.2014 passed in C.R.P. (PD) No. 4058 of 2014. Notwithstanding the order passed by this Court in CRP (PD) No. 4058 of 2014, we are of the view that such an attempt to implead the legal heirs of the deceased Dilli Mudaliar ought to have been taken by the plaintiffs. The plaintiffs who have come to the Court for grant of a decree for specific performance, ought to have impleaded the true and proper owner of the property to which a decree for specific performance was sought for. As per Section 20 of the Specific Relief Act, the Court is not bound to grant the relief of specific performance merely because it is lawful to do so. While exercising the power conferred under Section 20 of The Specific Relief Act, a discretionary power is vested in the Court for decreeing a suit for specific performance but such power should not be exercised in an arbitrary manner, but based on sound and strong reasonings, guided by judicial principles and capable of correction by a Court of appeal. Having regard to the above legal principles, we hold that the legal heirs of the deceased Dilli Mudaliar was a proper and necessary party to the suit and the failure on the part of the plaintiffs to implead the legal heirs of Dilli Mudaliar will disentitle them to get a decree for specific performance in respect of item Nos. 8 to 20 of the plaint schedule. Accordingly, we answer point Nos. 1 and 2 in this appeal against the plaintiffs and in favour of defendants 1 to 4.

24. We have noticed from the judgment passed by the trial Court that the trial court had lost sight of the fact that the defendants 1 to 4 are not the absolute owner of item Nos. 8 to 20 of the plaint described property and it was owned by Dilli Mudaliar. As mentioned above, even in the agreement of sale, reference was made to the power of attorney executed by Dilli Mudaliar, Ex.B5, in favour of the second defendant. While so, the trial Court ought to have examined as to whether the defendants 1 to 4 have got right of ownership to convey or alienate the properties mentioned in item Nos. 8 to 20 of the plaint schedule in favour of the plaintiffs. In other words, the defendants 1 to 4 have no assertable or saleable right over item Nos. 8 to 20 of the plaint schedule. The trial Court, without examining the above said fact has granted a decree for



specific performance in respect of all the properties mentioned in the plaint schedule, which cannot be sustained and that the decree passed by the trial Court has to be set aside in so far as it relates to item Nos. 8 to 20 of the plaint schedule. Therefore, we hold that the plaintiffs are entitled to a decree for specific performance of the plaint schedule mentioned properties, except item Nos. 8 to 20 mentioned therein. In other words, the respondents/plaintiffs are only entitled for a decree for specific performance in respect of item Nos. 1 to 7 of the properties described in the schedule of the plaint. Accordingly, we answer the point No.3 framed in this appeal against the plaintiffs and in favour of the defendants 1 to 4.

25. In the result, the Judgment and Decree dated 30.04.2015 passed in O.S. No. 14 of 2010 on the file of the II Additional District and Sessions Judge, Vellore @ Ranipet, Vellore District is set aside in so far as it relates to the decree for specific performance in respect of item Nos. 8 to 20 of the plaint schedule. Consequently, the suit filed by the plaintiffs is decreed in so far as it relates to item Nos. 1 to 7 of the plaint schedule and the suit is dismissed in so far as it pertains to item Nos. 8 to 20 of the plaint schedule. Resultantly, the Appeal Suit is partly allowed to the extent indicated above.No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

rsh

To

1. II Additional District and Sessions Judge
Vellore @ Ranipet, Vellore District
2. The Section Officer,
VR Section, High Court,
Madras-104 (2 Copies)

+1cc to Mr.V.P.Sengottuvel , Advocate, S.R.No.70348
+1cc to Mr.K.Govindan, Advocate, S.R.No.70330

A.S. No. 1121 of 2015

KJI (CO)
CS/27/11/2018