

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.06.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.305 of 2018

Subramani

.. Appellant/Plaintiff

Vs.

Vengittu

... Respondent/Defendant

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 30.10.2017 made in A.S.No.10 of 2015 on the file of the Sub Court, Uthangarai, confirming the judgment and decree dated 22.12.2014 made in O.S.No.181 of 2010 on the file of the District Munsif cum Judicial Magistrate, Uthangarai.

For Appellant : Mr.S.Sathish Rajan

J U D G M E N T

Second Appeal is filed against the judgment and decree dated 30.10.2017 made in A.S.No.10 of 2015 on the file of the Sub Court, Uthangarai, confirming the judgment and decree dated 22.12.2014 made in O.S.No.181 of 2010 on the file of the District Munsif cum Judicial Magistrate, Uthangarai.

2.The appellant is the plaintiff and respondent is the defendant in O.S.No.181 of 2010 on the file of the District Munsif cum Judicial Magistrate, Uthangarai. The appellant filed the said suit for specific performance of agreement of sale dated 26.08.2009, possession of the property and for permanent injunction restraining the respondent from creating any encumbrance or alienating the suit property in favour of the third party. According to the appellant, the appellant and the respondent entered into an agreement of sale dated 26.08.2009 for a total sale consideration of Rs.75,000/-. The appellant paid a sum of Rs.70,000/- as advance and agreement of sale was registered as Document No.3337/2009. One year time was granted for payment of the balance amount of Rs.5,000/-. The appellant was always ready and willing to pay the balance sale consideration. The respondent was evading from execution of sale deed inspite of repeated demands by the appellant. The appellant issued notice dated 20.09.2010 and filed suit for the relief stated above.

3.The respondent filed written statement and denied the fact that he agreed to sell the property for a sum of Rs.75,000/-. He contended that he borrowed a sum of Rs.50,000/- from appellant on 29.09.2008 and agreed to pay a same together with interest. At the insistence of appellant, the respondent entered into an agreement of sale with appellant on 29.08.2009, which was registered as Document No.3486/2008. The said agreement is only a security document for the loan transaction and the same is not an agreement of sale. Subsequently, the respondent borrowed another sum of Rs.20,000/- from the appellant and paid the said amount in two installments of Rs.10,000/-. In view of the borrowal of Rs.70,000/-, earlier agreement dated 29.09.2008 was canceled on 29.08.2009 and suit agreement of sale was executed on the day as security for the amount borrowed. The respondent is not the absolute owner of the suit property. The property originally belonged to his father Manickam, who died intestate, leaving the respondent and his five daughters as his legal heirs. The respondent is willing to repay the sum of Rs.70,000/- together with interest and prayed for dismissal of the suit.

4.Based on the pleadings, the learned Trial Judge framed necessary issues. Before the learned Trial Judge, the appellant examined himself as P.W.1 and examined P.W.s 2 to 4 as his witnesses and marked three documents as Exs.A1 to A3. The respondent examined himself as D.W.1 and marked six documents as Exs.B1 to B6. The learned Trial Judge considering the pleadings, oral and documentary evidence, partly decreed the suit, dismissing the relief of specific performance and directed the respondent to pay the principal amount of Rs.70,000/- together with interest at the rate of 12% p.a from the date of execution of Ex.A1, sale agreement till the date of filing of the suit and thereafter at the rate of 6% p.a till realization of the amounts and also granted permanent injunction restraining the respondent from alienating the suit property to any person till the realization of the money due by the respondent to the appellant.

5.Against the said judgment and decree dated 22.12.2014 made in O.S.No.181 of 2010, the appellant filed A.S.No.10 of 2015. The learned I Appellate Judge framed point for consideration. The learned I Appellate Judge considering the materials on record, judgment of the Trial Court and arguments of the counsel for the parties, partly allowed the appeal, confirming the decree of Trial Court dismissing the relief of specific performance of recovery of money. The learned I Appellate Judge set aside the decree of permanent injunction granted by the learned Trial Judge and modified the said decree as to permitting the appellant to recover the advance amount of Rs.70,000/- along with interest as prayed for by him from the respondent alone.

6. Against the said judgment and decree dated 30.10.2017 made in A.S.No.10 of 2015, the appellant has come out with the present Second Appeal.

7. The learned counsel for the appellant contended that the Courts below failed to appreciate the facts and circumstances of the case and oral and documentary evidence properly. The appellant has established the execution of agreement of sale, Ex.A1 and respondent admitted the said document; but has taken erroneous defense that said document is executed only as a security for the loan amount said to have been borrowed by him. Ex.A1, agreement of sale is a registered document containing specific clauses for sale of the property with stipulation of specific time for execution of the sale deed. Even though the suit property belongs to the father of the respondent, after his death only, the respondent was dealing with the said property and he is the absolute owner of the said property.

7(a). The Courts below failed to see that Ex.B1, earlier sale agreement dated 29.09.2008 and Ex.B2, cancellation of said agreement has no relevance to the suit agreement of sale and not mentioning the earlier agreement is not fatal to the claim of the appellant. The Courts below erred in taking into account a portion of the evidence of the appellant in the cross examination which he has deposed due to emotional outburst. The learned I Appellate Court erred in setting aside the relief of permanent injunction granted by the Trial Court without there being any appeal or cross appeal by the appellant.

8. Heard the learned counsel for the appellant and perused the materials available on record.

9. The claim of the appellant for specific performance is based on the agreement of sale dated 26.08.2009, marked as Ex.A1. According to the appellant, the respondent agreed to sell the property for a total sale consideration of Rs.75,000/- and received a sum of Rs.70,000/- as advance and time for settling the balance sale consideration was fixed as one year. According to the respondent, the said document is only a security document for repayment of Rs.70,000/- borrowed by him from the appellant. The respondent has stated that he borrowed a sum of Rs.50,000/- on 29.09.2008 and at the insistence of the appellant, executed an agreement of sale, mentioning the sale consideration of Rs.55,000/- and advance amount of Rs.50,000/-. Subsequently, he borrowed a further sum of Rs.20,000/-, which the appellant paid in two installments of Rs.10,000/- each, canceling the earlier agreement of sale on 26.08.2009 and executed the present agreement of sale as a security for the repayment of the said amount. He marked earlier agreement of sale as Ex.B1 and Cancellation Deed as Ex.B2.

9(a).The Courts below taking into account Exs.B1 and B2, held that the suit agreement is only a security document for repayment of the amount borrowed by the respondent. The respondent also proved that he is not the absolute owner of the suit property and his five sisters have equal share in the suit property as the suit property originally belonged to his father, Manickam. The respondent marked sale deed in favour of his father as Ex.B3, death certificate of his father as Ex.B5 and legal heirship certificate as Ex.B6. The appellant has admitted that the property belonged to the father of the respondent and contended that after death of his father, the respondent has become absolute owner. The appellant has not produced any document to show that five sisters of the respondent do not have any share and that they released their share in favour of the respondent.

9(b).According to the appellant, as per Ex.A1 dated 26.08.2009, the appellant has to pay the balance sale consideration of Rs.5,000/- within one year from the date of said agreement. According to the appellant, he was always ready and willing to pay the balance sale consideration of Rs.5,000/- to get the sale deed executed in his favour. Only the respondent is delaying the execution of the sale deed despite the appellant's demand to the respondent to execute the same in his favour. The appellant has not produced any acceptable evidence to substantiate his contention that he was always ready and willing to perform his part of the contract. The appellant has issued notice through his Advocate only on 20.09.2010, after the expiry of time limit fixed in the agreement of sale. The Courts below have considered all these facts, oral and documentary evidence and judgments relied on by the counsel for the parties and held that appellant is not entitled to decree of specific performance and he is entitled only for recovery of money.

9(c).As far as the contention of the learned counsel for the appellant that the learned I Appellate Judge erred in setting aside the decree of permanent injunction granted by the Trial Court without there being any Appeal or Cross Appeal. The said contention is without merit. As per Order XLI Rule 33 of C.P.C, the I Appellate Court has power to pass any decree and to make any order which ought to have been passed as the case require. In the present case, admittedly five sisters of the respondent have 1/6 share each in the suit property and Trial Court has granted permanent injunction restraining the respondent alone from dealing with the entire suit property while he has only 1/6th share. Decree of permanent injunction granted by the Trial Court without sisters of the respondent being party to the suit and without hearing the sisters of respondent is invalid. The I Appellate Court has rightly set aside the decree of permanent

injunction by exercising its power under Order XLI Rule 33 of C.P.C and permitted the appellant to recover the amounts as per the decree granted.

10.Considering the judgment and the decree of the Courts below in entirety, there is no error of law warranting interference by this Court. No question of law much less than the substantial question of law has arose in this Second Appeal.

11.In the result, this Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

gsa

To

- 1.The District Munsif cum Judicial Magistrate, Uthangarai.
- 2.The Subordinate Judge, Uthangarai.

+1cc to Mr.S.Sathish Rajan, Advocate sr.no.35684

S.A.No.305 of 2018

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