

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 17.09.2018

DELIVERED ON: 26.09.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA
S.A.No.1153 of 2000

Abdul Jalil

... Appellant/ plaintiff

Vs.

1. Mahaboob Jan
2. Mohammed Yusuf Alias Baba
3. Mohamad Yunus
4. Mohammad Ismail
5. Syed Nasir

... Respondents/ Defendants 1 to 5

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 26.10.1999 passed by the I Additional District Judge cum Chief Judicial Magistrate, Krishnagiri in A.S.No.40 of 1997 reversing the decree and judgment dated 21.02.1997 passed by the Subordinate Judge, Hosur in O.S.No.318 of 1996.

For Appellants : Mr.M.V.Krishnan

For Respondents 1 to 4 : M/s M.N.S.Mohamed Habeeb Raja

JUDGMENT

This second appeal arises against the decree and judgment in A.S.No.40 of 1997 on the file of the I Additional District Judge cum Chief Judicial Magistrate, Krishnagiri reversing the decree and judgment in O.S.No.318 of 1996 on the file of the Subordinate Judge, Hosur.

2. For the sake of convenience, all parties are called by their respective status in the original suit.

3. The plaintiff had filed the suit in O.S.No.318 of 1996 on the file of the Sub Court, Hosur for specific performance and for delivery of possession of the suit property against the five defendants, the first four being the legal heirs of the deceased Yakub and the fifth being the tenant.

4. Briefly the facts of the case are summarised below. On 12.06.1994, one Yakub Saheb entered into an agreement (Ex.A1) to sell the suit property to the plaintiff for Rs.85,000/-. The said agreement was executed by the second defendant also, who is the eldest son of Yakub Saheb.

An advance amount of Rs.30,000/- was paid and time of 6 months for executing the sale deed was given, when the remaining Rs.55,000/- will be paid. The said Yakub died on 13.07.1994. After his death, the plaintiff issued a notice on 27.11.1994 (Ex.A3), for which the first defendant replied on 3.12.1994 (Ex.A5) denying the very existence of such an agreement. Hence, the suit for specific performance.

5. The defendants on their side had relied on the partition deed dated 14.05.1981 (Ex.B1) in which the deceased Yakub was given the suit property with no right of alienation, as he had three minor sons. The contention of the defendants 1 to 4 was that in such circumstances, the possibility of alienating the suit property through this sale agreement was non-existent and that the sale agreement itself was fabricated. Besides, they have stated that the suit property was let out to the 5th defendant on 06.10.1993, who in turn had sublet the property to the plaintiff, consequent upon which a legal notice dated 15.11.1994 (Ex.B2) was issued to both the plaintiff and the 5th defendant and the reply notice was received only from the 5th defendant making false statements. The defendants' contentions were regarding the restricted right of the deceased Yakub, the age of the defendants 2 to 4 (being minors) and the veracity of the sale agreement and also regarding the readiness and willingness of the plaintiff to perform his part of the contract.

6. In the trial court, Ex.A1 to Ex.A5 were marked as exhibits on the plaintiff's side and PW1 to PW3 were examined, while the defendants had marked Ex.B1 to Ex.B3 and examined DW1 to DW3.

7. The trial court had decreed the suit stating that the execution of the sale agreement cannot be doubted, as the stamp papers were in the name of Yakub and that the deposition of PW2 and PW3 were corroborative. Further, the trial court Judge had a revelation to make about the 2nd defendant. According to him, the 2nd defendant in his deposition as DW2 signed as 'Hussain' in English, affixed his thumb impression on the vakalat, while in the acknowledgement of the summons has signed as 'Baba'. More over, the signatures as Baba on the summons and on the sale agreement are similar. The trial court had hence concluded that when the 2nd defendant's signature is there on the sale agreement, the genuineness of the sale agreement cannot be doubted.

8. However, the trial court had also declared that the readiness and willingness of the plaintiff to perform his part of the contract need not be given importance. The case was therefore decreed in favour of the plaintiff.

9. The first appellate court had a different opinion. It was concluded that the sale agreement was not binding on the defendants 2 to 4, as they were minors at the time of

the said agreement and that since the system of undivided family and joint property system are not existing in the Mohammedan Law, the deceased Yakub had no right to even act on behalf of his minor sons. It was also mentioned in the sale agreement that the court order was required before the execution of such a sale deed.

10. It was also concluded that the deposition of Pw3 and plaintiff are not acceptable and convincing. Accordingly, the first appellate court decided that the plaintiff had not satisfactorily substantiated the genuineness of the sale agreement Ex.A1, though the onus purely lies on him to do so. The first appellate court also found that the trial court erred on the aspect of readiness and willingness on the part of the plaintiff, though it was an important aspect in a suit for specific performance. The first appellate court has also declared that it was an essential ingredient of any suit for specific performance and also found that the plaintiff had not made any attempt to prove his readiness and willingness. The first appellate court, therefore, set aside the trial court's decree and judgment.

11. Thereafter, the second appeal filed by the appellant was allowed by this court on 31.07.2009, as against which, civil appeal No.2125 of 2010 was filed before the Supreme Court. The Honourable Supreme Court set aside the judgement of this court and remitted the case for considering the issue whether the sale agreement was proved to have been executed.

12. Now the points to be decided in the second appeal are

- a] Whether the sale agreement is a genuine one or a fabricated one as claimed by the defendants.
- b] Whether the plaintiff was ready and willing to perform his part of the contract.

13. Heard Mr.M.V.Krishnan, learned counsel appearing for the appellant and Mr.M.N.S.Mohamed Habeeb Raja, learned counsel appearing for the respondents 1 to 4.

14. At the time of admission of the second appeal, the following substantial questions of law arose for consideration.

1. Whether the learned District Judge has substantially erred in law in reversing the well considered judgment of the learned subordinate judge decreeing the suit for specific performance?

2. Whether the lower appellate court has erred in holding that the vendor Yakub Saheb had

no right to alienate the suit property?

3. Whether under Mohamdan Law, the natural guardian of the minors had the right to alienate the share of the minors when the sale is necessary for the minors' maintenance?

4. Whether the lower appellate court has failed to see that in any event Ex.A1 was valid and binding on the share of Yakub Saheb?

15. This court has already held in the judgment dated 31.07.2009 passed in this second appeal that Yakub Saheb had no right to enter into an agreement of sale. In fact, it observed as follows.

" On a careful consideration of the materials available on record and the submissions made by the counsel, it could be seen that by Ex.A1 sale agreement dated 12.06.1994, one Yakub Saheb, who is the husband of the first respondent and the father of the respondents 2 to 4 and the second respondent/second defendant entered into an agreement with the appellant/plaintiff for the sale of the suit property for a sum of Rs.85,000/-. On the date of agreement, the said Yakub Saheb and the second respondent received a sum of Rs.30,000/- as advance. The time for the execution of the sale deed was fixed as 6 months.

As per the said agreement, the said Yakub Saheb and the second respondent should execute the sale deed on receipt of the balance sale consideration of Rs.55,000/- within 6 months time. Subsequently, the said Yakub Saheb died and his legal heirs are the respondents 1 to 4. Ex.A2 is the partition deed dated 14.05.1981 entered into between the family members of the respondents 1 to 4. In Ex.A2, the partition deed, it has been recited that Yakub Saheb shall have life interest of his share in the property till his sons attain majority and after his sons attained majority, he shall have right to alienate the property absolutely. Further, it is also recited that, when the sons of the Yakub Saheb are minors, if any alienation is done during their minority, the said alienation will be invalid.

The learned counsel for the respondents contended that Yakub Saheb did not have right to enter into a sale agreement on behalf of the minors. From the reading of Ex.A2 partition deed, it could be seen that the 'G' schedule property was allotted to Yakub Saheb and his sons. It is an admitted fact that Yakub Saheb died in a few months time after the execution of Ex.A1 sale agreement. He was also bed ridden

for about 2 months prior to his death. The case of the appellant was that the property was sought to be sold for meeting the medical expenses of the said Yakub Saheb and for maintaining his minor children, Further, the said Yakub Saheb did not have any other property except the suit property. Therefore, he entered into Ex.A1 sale agreement with the appellant for medical expenses and for maintaining the minor children. In support of the said submission, he relied on Section 362 of the Mohamedan Law, which reads as follows.

"362. Alienation of immovable property by legal guardian:

A legal guardian of the property of a minor (S.359) has no power to sell the immovable property of the minor except in the following cases,namely.

(1) Where he can obtain double its value;

(2) Where the minor has no other property and the same is necessary for his maintenance;

(3) Where there are debts of the deceased and no other means of paying them;

(4) Where there are legacies to be paid, and no other means of paying them;

(5) Where the expenses exceed the income of the property;

(6) Where the property is falling into decay; and

(7) When the property has been usurped and the guardian has reason to fear that there is no chance of fair restitution."

From the above section, it is clear that in the circumstances mentioned in the section, the guardian have right to sell the properties allotted to the minors. Since Yakub Saheb, who entered into (A1) Sale Agreement was bed ridden for some time before the execution of the agreement, it is probable that he could have entered into the agreement for meeting his medical expenses and for maintaining his minor children. Since the said Yakub Saheb entered into a sale agreement for the medical expenses and for maintaining the minor children, under Section 362 of Mohamedan Law, he had right to entered into sale agreement with the appellant.

Therefore, this court is of the view that the sale agreement has been substantiated satisfactorily.

16. The first appellate court had presumed that Yakub Saheb would not have gone over to the Registrar Office as he was bed-ridden on the date of the sale agreement Ex.A1. The first appellate court had also gone to the extent of observing that in Ex.A1 sale agreement, the plaintiff's thumb impression is not specifically stated that it belongs to the plaintiff, especially the plaintiff has filed the suit for specific performance of contract based on Ex.A1. The scribe of Ex.A1 was examined as DW3 on the side of the defendants. The first appellate court's observation that the attester of the sale agreement Ex.A1 was not able to say precisely as to whether the second defendant affixed his thumb impression or subscribed his signature in Ex.A1 and therefore, the Ex.A1 cannot be held to be proved is not acceptable, because, it is not the case of the defendant that his signature in Ex.A1 was forged. It is also pertinent to point out that the stamp papers on which the sale agreement (Ex.A1) was executed were purchased in the name of Yakub Saheb and the deposition of Pw2 and Pw3 are corroborated the execution of Ex.A1 sale agreement by Yakub Saheb.

17. The matter of the denial of the sale agreement has been elaborately dealt with by the trial court. The 2nd defendant as Dw3 has claimed that he is an illiterate and does not know to read or write. The sale agreement has a signature in the style Baba in English. The same signature was found on the vakalat too. That the 2nd defendant was a part of the sale agreement is substantiated and therefore, the trial court has not erred in concluding that the sale agreement cannot be doubted. It is not the case of the defendants that his signature was forged. If it was so, it could have been referred to a hand-writing expert.

18. Next is the readiness and willingness on the part of the plaintiff. In a suit for specific performance, the readiness and willingness of both parties is as important as the time factor. In the instant case, the plaintiff, who has claimed the relief specific performance of contract, has not proved his bonafides. He ought to have substantiated that he was always ready and willing to perform his part of the contract. He has also not adduced any evidence to show that he was having the amount of Rs.55,000/- with him and that he was willing to pay it immediately. In the instant case, he has only averred his readiness and willingness in the plaint, but not proved that he was ready and willing to perform his part. The trial court has proceeded on a wrong premise that the readiness and willingness was not important. On this sole ground, the suit ought to have been dismissed. In such circumstances, this court confirms the decision of the first appellate court and hence, the second appeal is liable to be dismissed.

19. In the result, the second appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS II)
//True Copy//

Sub Assistant Registrar

mst

To

1. The I Additional District Judge cum Chief Judicial Magistrate,

Krishnagiri.

2.The Subordinate Judge, Hosur.

3. The section officer,

VR Section,

High court

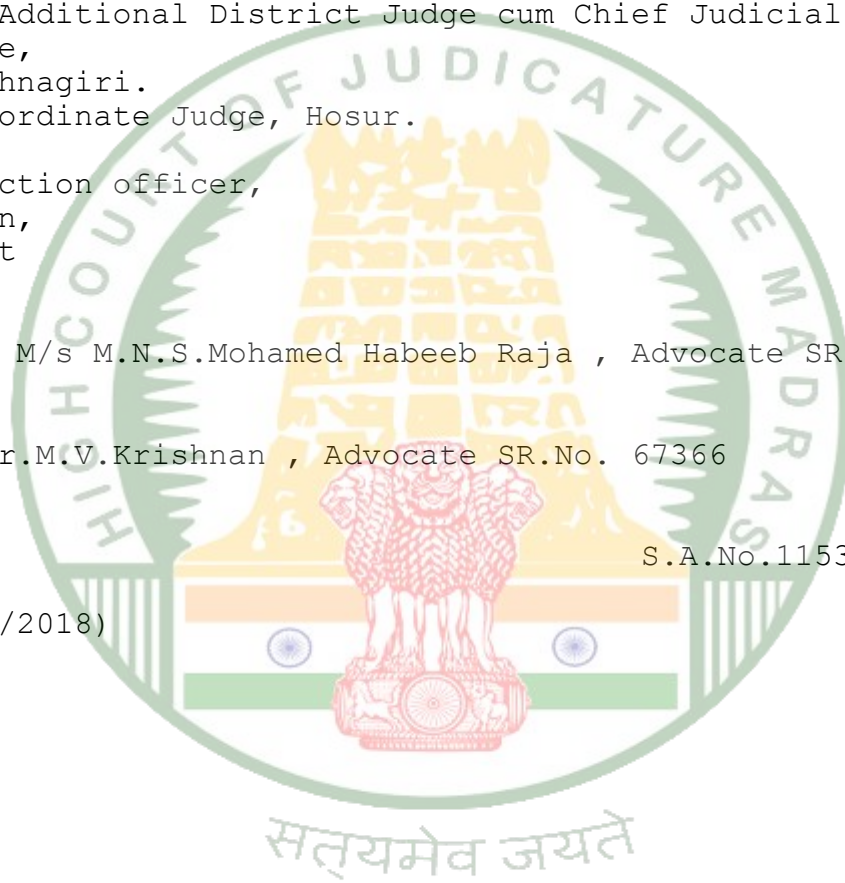
Madras

+2ccs to M/s M.N.S.Mohamed Habeeb Raja , Advocate SR.No. 66498

+1cc to Mr.M.V.Krishnan , Advocate SR.No. 67366

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ASK(08/11/2018)



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