

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.418 of 2018
and
CMP.No.11497 of 2018

Senthamil Selvi ... Appellant/Plaintiff

Vs.

1. Vellaisamy
2. prabha
3. Dinesh
4. Bhavithara
5. Minor Gowthaman
(Minor represented by next friend
and guardian father Mr.Vellaisamy) ... Respondents /Defendant

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 13.08.2014 passed in A.S.No.60 of 2010 on the file of the Learned ll Additional District Judge Salem reversing the Judgement and Decree dated 30.07.2007 passed in O.S.No.13 of 2005 on the file of the learned Subordinate judge, Attur.

For Appellant : Mr.J.R.K. Bhavanantham

J U D G M E N T

Second Appeal is filed against the Judgment and decree dated 13.08.2014, made in A.S.No.60 of 2010 on the file of learned ll Additional District Judge, Salem reversing the Judgement and Decree dated 30.07.2007 passed in O.S.No.13 of 2005 on the file of the Learned Subordinate Judge, Attur.

2. The Plaintiff who succeeded before the trial court and lost before the Appellate Court is the appellant.

3. The appellant is the Plaintiff and the respondents are defendants. The appellant filed suit in O.S.No. 13 of 2005, against the respondents for Specific Performance of agreement of sale.

4.. According to the appellant, the suit property belonged to the first respondent and the same being allotted to him by partition deed bearing Document Number 159/99. The first respondent agreed to sell the suit property for a total sale consideration of Rs.5,00,000/- (Rupees Five Lakhs only) on 18.11.2002. The first respondent himself and as guardian for his minor children viz., the respondents 3 to 5 and the second respondent entered into agreement of sale for a total sale consideration of Rs.5,00,000/- (Rupees five lakhs only). They have received a sum of Rs.4,50,000/- (Four Lakhs Fifty Thousand only) as advance from the appellant on the date of sale agreement dated 18.11.2002 and handed over the possession of the suit property to the appellant on the same day. The balance sale consideration of Rs.50,000/- (Rupees Fifty Thousand only) has to be paid within two years of time. The agreement of sale dated 18.11.2002 was registered on 02.12.2002. According to the appellant, she was always ready and willing to perform her part of contract by paying sale consideration and get the Sale deed executed. The respondents were evading to receive the balance sale consideration and to execute the Sale Deed. The appellant sent notice through her advocate on 01.11.2004, calling upon the respondents to execute the sale deed after receiving balance sale consideration. The respondents received said notice, but did not send any reply. The appellant also sent telegram to the first respondent on 17.11.2004 calling upon the respondents to execute the sale deed, after receiving the balance sale consideration. The appellant was waiting before the Sub Registrar Office, Thammampatty, for getting the Sale deed executed by the respondents, but the respondents did not come and execute the sale deed and have also not chosen to give reply to the notice sent by the appellant. Hence the appellant filed the suit.

5. The first respondent filed the written statement and denied all the averments made in the plaint. According to the first respondent, the agreement of sale is only a security document for the loan transaction. The first respondent did not intend to sell the suit property. The first respondent borrowed a sum of Rs.2,25,000/- (Rupees Two Lakhs and Twenty Five Thousand only) and agreed to repay the same together with interest @ 12% per annum. The appellant insisted the first respondent for execution of agreement of sale to lend money to the first respondent, as per the practice prevailing in the locality. The appellant insisted the first respondent to

execute the agreement of sale twice the amount borrowed by him. The first respondent already paid interest @12% per annum to the appellant. On receipt of notice dated 01.11.2002, the first respondent approached the appellant and requested time for repayment of the said principal amount and the appellant agreed for the same. Hence the first respondent did not give any reply. Taking advantage of non-issuance of reply, the appellant filed a suit to grab the suit property. The value of the suit property is worth Rs.25,00,000/- (Rupees Twenty Five Lakhs only). The first respondent is always ready to pay the principal amount of Rs.2,25,000 (Rupees Two Lakhs Twenty Five Thousand only) and interest @ 12 % from 01.11.2004. The first respondent is running the jewellery shop in the front portion of the suit property. The respondents 2 to 5 reside in the middle portion of the suit property and the rear portion was leased out to one Sekar, son of Chinnaiya Asari. The possession of the suit property is not with the appellant and prayed for the dismissal of the suit.

6. The court guardian appointed for respondents 3 and 5 filed separate written statements and denied all the averments in the plaint and contented that the first respondent did not take care of the respondents 3 to 5. The first respondent is not the absolute owner of the suit property. The respondents 3 to 5 have shares as the first respondent got the property by partition suit. The agreement of sale is false and fabricated one. Hence, the respondents 2 to 5 prayed for dismissal of the suit.

7. Based on the above pleadings, the learned trial Judge framed necessary issues and additional issues. Before the trial Court, the appellant examined herself as P.W.1, her sister as P.W.3. and one Kesavaramanujam as P.W.2 and marked five documents as Exs.A1 to A5. The first respondent examined himself D.W.1 and examined one Sundaram as D.W.2 and marked nine documents as Exs.B1 to B9.

8. The learned trial Judge considering the pleadings, oral and documentary evidence held that the respondents failed to prove that suit agreement of sale is only a security document for loan and decreed the suit.

9. Against the said Judgment and decree dated 30.07.2007, made in O.S.No.13 of 2005, the respondents filed Appeal in A.S.No.60 of 2010.

10. The learned I Appellate Judge framed necessary points for consideration. The learned I Appellate Judge considering the materials on record, Judgment of the Trial Court, arguments of the parties and the evidence of P.W.2, who is the sister of the

appellant, the fact that agreement of sale dated 18.11.2002 was registered only on 02.12.2002, when there was money transaction between first respondent and P.W.3 held that there is a doubt about the suit agreement of sale and appellant is not entitled for discretionary relief for specific performance and set aside the relief of specific performance and granted decree for Rs.4,50,000/- (Rupees Four Lakhs Fifty Thousand only) with interest @ 9 % per annum from the date of suit till the date of decree and thereafter 6% till the repayment in full.

11. Against the said Judgment, the present Second Appeal is filed.

12. The learned counsel appearing for the appellant contended that the first Appellate Court failed to consider that the first respondent as D.W.1 admitted the execution of agreement of sale for himself and on behalf of the respondents 3 to 5. The first respondent is not entitled to give oral evidence against the registered document as per Sections 91 and 92 of Evidence Act. The suit agreement of sale was acted upon and a sum of Rs. 4,50,000 (Rupees Four Lakhs Fifty Thousand only) was paid to the first respondent and the same has been acknowledged by agreement of sale. The appellant was always ready and willing to pay balance sale consideration and get the sale deed executed and registered at her costs, within a stipulated time. The first respondent did not send any reply to the notice and telegram sent by the appellant. The first Appellate Court erred in accepting the evidence of the first respondent that there is no reason to take two years to pay balance sale consideration of Rs.50,000/- (Rupees Fifty thousand only) which is a meagre amount. The first Appellate Court erred in holding that there is a contradiction with regard to the possession in agreement of sale and in the plaint. The first Appellate Court erred in not accepting the evidence of the appellant and accepting the evidence of the first respondent. The first Appellate Court without considering the evidence let in by the appellant, referred to the Judgement referred by the first respondent, misconstrued the evidence of P.W.3 and rejected the same as untrustworthy and held against the appellant. The first Appellate Court erred in holding that the suit property is ancestral property and agreement of sale is not binding on respondents 3 to 5.

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

14. The appellant has filed the suit for specific performance of sale. According to the appellant, the first respondent for himself and on behalf of the respondents 3 to 5 and second respondent agreed to sell the property and entered

into an agreement of sale. As per the agreement of sale, he paid a sum of Rs.4,50,000/- (Rupees Four Lakhs fifty thousand only) to the first respondent, balance of Rs.50,000/- (Rupees Fifty thousand only) is to be paid in two years, registered the agreement and possession was handed over to him on the date of agreement. On the other hand, according to the first respondent, it is only a security document for the loan transaction of Rs.2,25,000/- (Rupees Two Lakhs twenty Five thousand only) by him from the appellant. He never intended to sell the suit property but did not hand over possession of the suit property to the appellant. He is residing and carrying on business in a portion of the suit property and leased out one of the portions to one Sekar son of Chinnaya Asari. According to the respondents, the appellant failed to prove her possession of the suit property from the date of agreement of sale. On the other hand, the first respondent has produced the document to show that he is in possession of the suit property along with family members and carrying on business. The appellant having failed to prove her possession as alleged by her, the learned first Appellate Judge has rightly held that appellant has contradicted his own statement in the agreement of sale and in the plaint. Further, the agreement of sale is dated 18.11.2002 and the same was registered on 12.12.2002. The learned first Appellate Judge considered this fact that the delay in registering the agreement of sale and time of two years fixed for payment of balance sale consideration of Rs.50,000/- (Rupees Fifty thousand only) held that there is a doubt about suit agreement of sale. In view of such findings the learned first Appellate Judge held that the appellant is not entitled to discretionary relief of specific performance. The learned first Appellate Judge considered the pleadings and evidence on record and came to the conclusion that there is a doubt about the agreement of sale and the appellant is not entitled to the relief of specific performance. The First Appellate Court has given cogent and valid reason for arriving at such a conclusion. There is no error of law in such conclusion.

15. The learned counsel for the appellant submitted that the first respondent failed to give any reply to the notice sent to the appellant and adverse inference ought to have taken against the first respondent is without merits. The non sending of reply to the notice issued would not amount to admission of contents in the notice. It is pertinent to note that appellant has taken steps only at a fake end of two years of time. Even after completion of terms of agreement of sale, the appellant has also not explained the reason for two years time being fixed for payment for balance meagre amount of Rs.50,000/- (Rupees Fifty thousand only) on balance sale consideration of Rs.4,50,000/- (Four Lakhs Fifty thousand only).

16. The Courts have discretion to grant decree of specific performance or reject the same. Such discretion must be exercised judicially and not in an arbitrary manner. In the present case, the learned First Appellate Judge has exercised the discretion judicially and rejected the relief of specific performance of Agreement of sale as there is suspicion as to the Agreement of sale.

17. For the above reasons, I hold that there is no error of law in the judgement of the First Appellate Court in setting aside the judgment and decree of specific performance holding that the appellant is not entitled to discretionary relief of specific performance. The learned First Appellate Judge has granted decree for a sum of Rs.4,50,000/- (Rupees Four Lakhs Fifty thousand only) with interest @ 9% per annum. The same is valid and legal. No question of law much less than the substantial question of law has arisen in the Second Appeal.

18. In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

arr

To

1. The 11 Additional District judge at Salem

2. The Subordinate Judge, Attur

+1cc to Mr.J.R.K Bhavanantham, Advocate, S.R.No.51471

S.A.No.418 of 2018

GSP(30/10/2018)

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