

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :04.07.2018

Pronounced on : 22.10.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.2008 of 2001

1. Periapillai @ Susila
2.Venkattammal
3.Velusamy
4.Palanisamy
5.Sellappa Gounder ... Appellants/Defendants 1 to 5

Vs.

1.Selvi
2.Muthu Gounder ...Respondents/Plaintiff & 6th Defendant
(2nd respondent given up as unnecessary party)

Prayer:- Second Appeal filed under Section 100 of C.P.C., to set aside the Judgment and decree to set aside the judgment and decree dated 19.06.2000 made in A.S.No.193 of 1999 on the file of the I Additional District Judge- cum- Chief Judicial Magistrate, Erode reversing the judgment and decree dated 19.03.1999 made in O.S.No.74 of 1996 on the file of the Subordinate Judge, Bhavani.

For Appellants : Mr.T.Murugamanickam
Senior Counsel

for Mr.D. Sivakumar

For Respondents : Mr.P.M.Duraisamy
for R1

R2 Given up.

J U D G M E N T

This second appeal has been filed by the defendants against the judgment and decree passed by the I Additional District Judge-cum-Chief Judicial Magistrate, Erode in A.S.No.190 of 1999 dated 19.06.2000 reversing the judgment and decree passed by the Sub-Judge, Bhavani in O.S.No.74 of 1996 dated 19.03.1999.

2. The first respondent herein has filed a suit in O.S.No.74 of 1996 on the file of the Sub-Judge, Bhavani, for the relief of specific performance of the sale agreement dated 06.03.1992 and to direct the defendants to execute a sale deed

after receiving the balance sale consideration of Rs.4000/- alternatively to direct the defendants to repay the amount of Rs.66,000/- which was paid by the plaintiff as advance. The learned Sub-Judge by the judgment dated 19.03.1999 has dismissed the suit in respect of specific performance. However, he decreed the suit for alternative relief and directed the defendants 1 to 5 to pay a sum of Rs.66,000/- with interest @ 9% per annum from the date of the suit till the date of decree and thereafter @ 6% per annum till the date of realisation and also directed the defendants 1 to 5 to pay costs to the plaintiff. He dismissed the suit against the sixth defendant. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.193 of 1999 on the file of the I Additional District Judge-cum-Chief Judicial Magistrate, Erode. The learned I Additional District Judge- cum-Chief Judicial Magistrate, Erode by the judgment dated 19.06.2000 has allowed the said appeal and decreed the suit for specific performance. He directed the plaintiff to deposit the balance sale consideration before the trial court on or before 31.07.2000 and on such deposit, the defendants have to execute the sale deed and deliver possession of the suit property to the plaintiff within two months thereafter, failing which, the plaintiff can get the execution of the sale deed through court. Aggrieved by the same, the defendants 1 to 5 have filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are, in brief, as follows:

The plaintiff and one Pavayee entered into a sale agreement on 06.03.1992 in respect of the suit property for Rs.70,000/-. As per the said agreement, the plaintiff has paid a sum of Rs.66,000/- towards advance on the date of agreement itself. The said agreement was reduced into writing. It was agreed that the plaintiff has to pay the balance sale consideration of Rs.4000/- within a year from the date of the said agreement and the said Pavayee has to receive the same and execute the sale deed. Though the time was not intended to be an essence of contract, the plaintiff was always ready and willing to perform her part of contract, but the said Pavayee postponed the execution of the sale deed under one pretext or other. Hence, the plaintiff had sent a lawyer's notice on 28.05.1994 calling upon the said Pavayee to receive the balance sale consideration and execute the sale deed. Though the said Pavayee had received the said notice, she did not response as he was undergoing medical treatment. Hence the plaintiff was waiting, but unfortunately, the said Pavayee died on 24.06.1994. The said Pavayee left no issues and her husband namely Ramasamy died long ago prior to her death. But the said Pavayee said to have adopted the defendants 1 to 4 who are sons and daughters of one Chellappa Gounder. Hence the plaintiff had sent a lawyer's

notice to the defendants 1 to 4 calling upon them to receive the balance sale consideration and execute the sale deed. The first defendant did not receive the said notice. However the defendants 2 to 4 had received the notice, but they did not send any reply. Since the defendants 1 to 4 claimed to be the adopted sons and daughters of the deceased Pavayee, they are bound to execute the sale deed. But after receipt of the notice, they did not come forward to execute the sale deed. Hence, the plaintiff has filed the above suit for the aforesaid reliefs. The defendants 1 to 4 in their written statement have stated that their father Chellappa Gounder had purchased the suit property as vacant site in the name of the said Pavayee and subsequently, he constructed the building. Hence the plaintiff has impleaded the said Chellappa Gounder as fifth defendant. The fifth defendant has stated in his written statement that the brother of Pavayee's husband namely one Muthu Gounder is alive. Hence the said Muthu Gounder has been impleaded as sixth defendant.

4. The averments made in the written statement filed by the first defendant and adopted by the defendants 2 to 4 are in brief as follows:

The allegation that the deceased Pavayee entered into a sale agreement with the plaintiff in respect of the suit property for Rs.70,000/- on 06.03.1992 and the plaintiff had paid a sum of Rs.66,000/- as advance and the balance amount has to be paid within one year and sale deed has to be executed are all false. The said Pavayee was the daughter of one Periyamuthu Gounder and Ammaniammal. The said Ammaniammal was the sister of the paternal grandfather of the defendants 1 to 4. While Pavayee was a child, her father Periyamuthu Gounder involved in a murder case and he was deported to Andaman before 1940. The orphan girl was brought up by Chellappa Gounder (fifth defendant) who is the father of the defendants 1 to 4. The fifth defendant performed the marriage of Pavayee, but her husband also died within a few months. Later Pavayee got employed as an Assistant in a Noon-meal scheme, but all along, she was residing with the fifth defendant. The said Pavayee adopted the defendants 1 to 4 as her child. The fifth defendant has purchased the suit property as a vacant site in the name of the said Pavayee and subsequently, he constructed the house and the said Pavayee and the defendants 1 to 5 were residing in the suit property.

b) The defendants 1 to 4 suspected that their father (fifth defendant) and the plaintiff's father while dealing with a real estate business, a misunderstanding arose between them and with a view to wreck vengeance, the suit agreement had been created. The said Pavayee never executed the suit agreement and there was no need or necessity for her to enter into a sale

agreement. The plaintiff had no capacity to pay a sum of Rs.66,000/-. The said Pavayee was not having any issues. The fifth defendant is the only nearest/closest legal heir and he has succeeded to the estate of Pavayee. Therefore, the defendants 1 to 4 prayed to dismiss the above suit.

5. The averments made in the written statement filed by the fifth defendant are, in brief, as follows:

The deceased Pavayee is the daughter of fifth defendant's aunt. The husband of the said Pavayee died within a short period from the date of marriage. Hence, she was living with the fifth defendant. She has not adopted the defendants 1 to 4 as her child. The deceased Pavayee was working as Assistant in the Noon-Meal Centre and she was earning considerably and hence, there was no necessity for her to sell her property. The fifth defendant and plaintiff's father viz., Ramasamy Gounder were doing real estate business and they had purchased 12.50 acres in Tiruchengode Taluk in the month of February, 1992. At that time, the fifth defendant borrowed a sum of Rs.15000/- from the plaintiff's father. Two months thereafter, he borrowed another sum of Rs.10,000/- So, totally he borrowed Rs.25,000/- and the said principal amount and the accrued interest has become Rs.60000/- and the said fact was mentioned in a chit and signed by the said plaintiff's father viz., Ramasamy.

c) The fifth defendant could not repay the said amount immediately. Hence, the said Ramasamy insisted the fifth defendant to give the property of the said Pavayee as security. Hence it was decided to execute a sale agreement in respect of the said Pavayee's property. Accordingly, the suit sale agreement was executed between the said Pavayee and the plaintiff. But actually the said Pavayee did not receive any amount from the plaintiff in pursuance of the said agreement. The said Pavayee retired on 31.12.1993 from her service and at that time, she received a considerable amount as retirement benefits. The said Ramasamy insisted the fifth defendant to instruct the said Pavayee to discharge his loan, but at that time, the said Pavayee was suffering from cancer and hence, the aforesaid debt not discharged. On 25.05.1994, the plaintiff has issued a lawyer's notice and the same was received by the said Pavayee. Since at that time, she was bed-ridden, she did not send reply. Thereafter the said Ramasamy has filed the above suit through her daughter (Plaintiff). The said Pavayee's husband's brother viz., Muthu Gounder is alive, but he has not been impleaded as party. So the suit is not maintainable for non-joinder of necessary parties. At the time of entering the sale agreement, the value of the suit property was Rs.1,50,000/- and only as security, the suit agreement was executed and therefore, he prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned Sub-Judge

has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as PW1 and also examined one Alagarayagounder as PW2. She has marked Exs.A1 to A9 as exhibits. On the side of the defendants, the fifth defendant was examined as DW1 and one exhibit was marked as Ex.B1.

7. The learned Sub-Judge after considering the materials placed before him found that the suit Ex.A1 agreement was executed by the deceased Pavayee after receipt of Rs.66,000/- as advance, but taking into consideration that the said agreement was entered into in the year 1992 and after seven years, it would not be proper to compel the defendants 1 to 5 to execute the sale deed as the value of the property would have been increased many times. Accordingly, he dismissed the suit in respect of the relief for specific performance. However, he directed the defendants 1 to 5 to return the advance amount of Rs.66,000/- with interest @ 9% per annum from the date of filing of the suit till the date of decree and thereafter at 6% per annum till the date of realisation. He also directed the defendants 1 to 5 to pay the costs of the suit to the plaintiff. He dismissed the suit against the sixth defendant. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.193 of 1999 on the file of the first Additional District Judge cum Chief Judicial Magistrate, Erode. The learned First Additional District Judge-cum-Chief Judicial Magistrate, Erode, has allowed the said appeal and decreed the suit for specific performance. Feeling aggrieved, the defendants 1 to 5 have filed the present the second appeal.

8. This court at the time of admitting this second appeal has formulated the following substantial questions of law:

"(A) When the trial court has exercised its discretionary power and though fit to grant the plaintiff the alternative relief of refund of advance money, whether this discretion so exercised can be interfered with by the Lower Appellate Court, in the absence of any finding that the discretion so exercised was perverse?

(B) Whether a rise in price of land value during the pendency of the proceedings cannot be treated as ground for refusing the relief of specific performance?

(c) when the plaintiff has approached the court 4 years after the agreement of sale, and that, too after the death of the vendor, whether the suit for specific performance ought to have been dismissed on the ground of laches?"

9. Heard Mr.T.Murugamanickam, learned Senior Counsel for Mr.D. Sivakumar for the appellants and Mr.P.M.Duraisamy learned counsel for the first respondent.

10. Questions A to C:-

The learned senior counsel for the appellants has submitted that the first appellate court ought to have dismissed the appeal filed by the plaintiff on the sole ground that the discretion exercised by the trial Court was justified. He further submitted that as per Ex.A1 agreement, the sale consideration was fixed at Rs.70,000/- and on the date of the agreement itself, a major portion of the amount i.e, Rs.66,000/- has been paid and for payment of meagre amount of Rs.4000/-, one year time has been fixed and the said fact itself would show that there was no intention between the deceased Pavayee and the plaintiff to enter into a sale agreement. He further submitted that the plaintiff, while examining herself as PW1 has admitted the signature found in Ex.B1 as that of her father and from the said Ex.B1, it would be clear that the fifth defendant was liable to pay the amount to the plaintiff's father viz., Ramasamy. He further submitted that the plaintiff has admitted in her evidence that on all the hearings, she was accompanied by her father, but her father was not examined to deny the averments made in the Ex.B1. He further submitted that even though PW1 has denied that her father and the fifth defendant were jointly doing real estate business, PW2 has categorically admitted in his evidence that they were jointly doing real estate business and also the fact that at the time of executing Ex.A1 sale agreement, the fifth defendant was liable to pay some amount to the plaintiff's father and all those facts would clearly establish that only for the amount liable to be paid by the fifth defendant to the plaintiff's father, Ex.A1 sale agreement was executed and therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

11. Per contra, the learned counsel for the first respondent/plaintiff has submitted that the defendants 1 to 5 have not disputed the execution of the sale agreement by the deceased Pavayee in favour of the plaintiff. In the said agreement, it is clearly stated that the total sale consideration has been fixed at Rs.70,000/- and that on the date of agreement itself, the plaintiff has paid a sum of Rs.66000/- and the balance amount of Rs.4000/- has to be paid within one year and get execution of sale deed. He further submitted that admittedly the deceased Pavayee had received lawyer's notice which was sent by the plaintiff, but she did

not send any reply and further after the death of the said Pavayee, the plaintiff has sent notice through her counsel to the defendants 1 to 4 and the said notice has been received by the defendants 2 to 4, but they also did not send any reply and that being so, it is not open to the defendants to deny the averments made in Ex.A1 sale agreement. He further submitted that admittedly the deceased Pavayee was suffering from cancer and hence, she could not come forward to execute the sale deed and further in respect of the immovable properties, time is not an essence of contract and therefore, the first appellate court has rightly decreed the suit for specific performance and therefore, he prayed to dismiss the second appeal.

12. It is an admitted fact that on 06.03.1992, the deceased Pavayee and the plaintiff entered into a sale agreement in respect of the suit property for Rs.70,000/- and on the same date, the said agreement has been reduced into writing. The said agreement has been marked as Ex.A1. It is also an admitted fact that the said Pavayee died issueless on 24.06.1994 and her husband predeceased her. It is also an admitted fact that the said deceased Pavayee was all along residing with the defendants 1 to 5 in the suit property and it is also an admitted fact that she was working as an Assistant in the Noon-Meal Centre and she was retired from her service on 31.12.1993 and thereafter, she died on 28.06.1994. It is also an admitted fact that after her death, the defendants 1 to 5 are in possession and enjoyment of the suit property as they are nearest / closest relatives to her.

13. According to the plaintiff, on the date of Ex.A1 sale agreement, the deceased Pavayee had received a sum of Rs.66000/- as advance and it was agreed that the balance amount of Rs.4000 /- has to be paid within one year from the date of said agreement and get the sale deed executed. The case of the defendants 1 to 5 is that the fifth defendant and the plaintiff's father namely Ramasamy were doing real estate business jointly and in the course of the said business, the fifth defendant had borrowed some amount from him and acknowledging the said fact, the plaintiff's father, Ramasamy had issued Ex.B1 chit. Their further case is that since the fifth defendant could not discharge the said debt, the plaintiff's father insisted the fifth defendant to give the said Pavayee's properties as security and accordingly, Ex.A1 sale agreement was executed only as security for the debt payable by the fifth defendant to the plaintiff's father.

14. In the aforesaid circumstances, it would be relevant to refer to the evidence of PW1. She has stated in her cross-examination that it was only her father Ramasamy had concluded the sale agreement and he was present at the time of executing

Ex.A1 sale agreement. She further stated that only her husband has paid the advance amount and only on his request, the sale agreement was executed in her name. Further she has stated that in respect of the sale agreement, his father, the deceased Pavayee and the fifth defendant had discussed and the said talk run for 10 days. However, she has admitted that their father had already purchased the stamp paper, but for what purpose he purchased the stamp paper in advance she does not know. She further admitted that the signature found in Ex.B1 chit is that of her father and in Ex.B1, it is mentioned as Chellakutti and the fifth defendant is having another name as Chella kutti.

15. A perusal of Ex.A1 shows that the stamp paper for executing the said document was purchased by the plaintiff's father viz., K.N.Ramasamy on 22.01.1992 itself nearly one and a half months before the date of execution of Ex.A1. If really the deceased Pavayee, the fifth defendant and the plaintiff's father have talked about the sale agreement only for ten days prior to the date of execution of Ex.A1 agreement, then there was no necessity to purchase stamp paper on 22.01.1992 itself, that too, in the name of the plaintiff's father. It is also to be pointed out that PW1 has admitted in her cross-examination that on all the hearings, she was accompanied by her father to the court, but she has not chosen to examine her father as witness. In Ex.B1, it is stated that a sum of Rs.53,000/- to be paid by the fifth defendant to the plaintiff's father viz., K.N.Ramasamy and in the said document, the plaintiff's father has signed on 25.10.1991. The plaintiff has admitted in her evidence that the signature found in the said document is that of her father. If really the said document was not issued by the plaintiff's father stating that the fifth defendant has to pay a sum of Rs.53000/-, the said Ramasamy would have examined himself as witness. Even though he came to the court on all hearings along with the plaintiff, he has not chosen to examine himself as witness.

16. It is also to be pointed out that the PW1 in her cross-examination has stated that she does not know the reason for fixing one year for executing the sale deed. Further, as already pointed out that she has stated in her evidence that only her husband has paid the advance amount but PW2 has stated in his evidence that the advance amount was paid by the plaintiff herself. He further stated that the plaintiff has handed over the amount to him and he in turn handed over the same to the deceased Pavayee. It is also to be pointed out that PW2 has admitted in his cross examination that the plaintiff's father Ramasamy and the fifth defendant had purchased 12 acres of land and on that score, there was some dispute between them. He further admitted that at the time of executing the sale

agreement, the fifth defendant was liable to pay some amount to the plaintiff's father. All the aforesaid facts would lead to an inference that on the date of execution of A1 sale agreement, the plaintiff would not have paid any amount to the deceased Pavayee. Ex.A1 sale agreement was executed only as a security for the amount to be paid by the fifth defendant to the plaintiff's father K.N. Ramasamy. As already pointed out that when the defendants have come forward with a definite case that only for the amount to be paid by the fifth defendant to the plaintiff's father, the suit agreement was executed, the plaintiff should have examined her father as witness and deny the defendants' case. Further, atleast the plaintiff's father should have come forward to examine himself as witness to deny the defendants' case and also under what circumstances he issued Ex.B1, but he has not come forward to examine himself as witness and the plaintiff also not chosen to examine himself as witness. Therefore an adverse inference has to be drawn against the plaintiff. The Courts below failed to consider the aforesaid facts. However, in view of the categorical admission of the fifth defendant in the written statement that he is liable to pay a sum of Rs.66,000/- to the plaintiff's father and only as a security for paying the said amount, suit agreement was executed by the said Pavayee in favour of the plaintiff and after death of the said Pavayee, the defendants 1 to 5 are enjoying the suit property as her legal representatives, they are liable to pay the aforesaid amount as directed by the trial court. Accordingly, the substantial questions of law are answered.

17. In the result the second appeal is allowed with costs. The judgment and decree passed by the first appellate court are set aside. The judgment and decree passed by the trial court are restored.

Sd/-

Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

Gv

To

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

2. The Subordinate Judge, Bhavani.

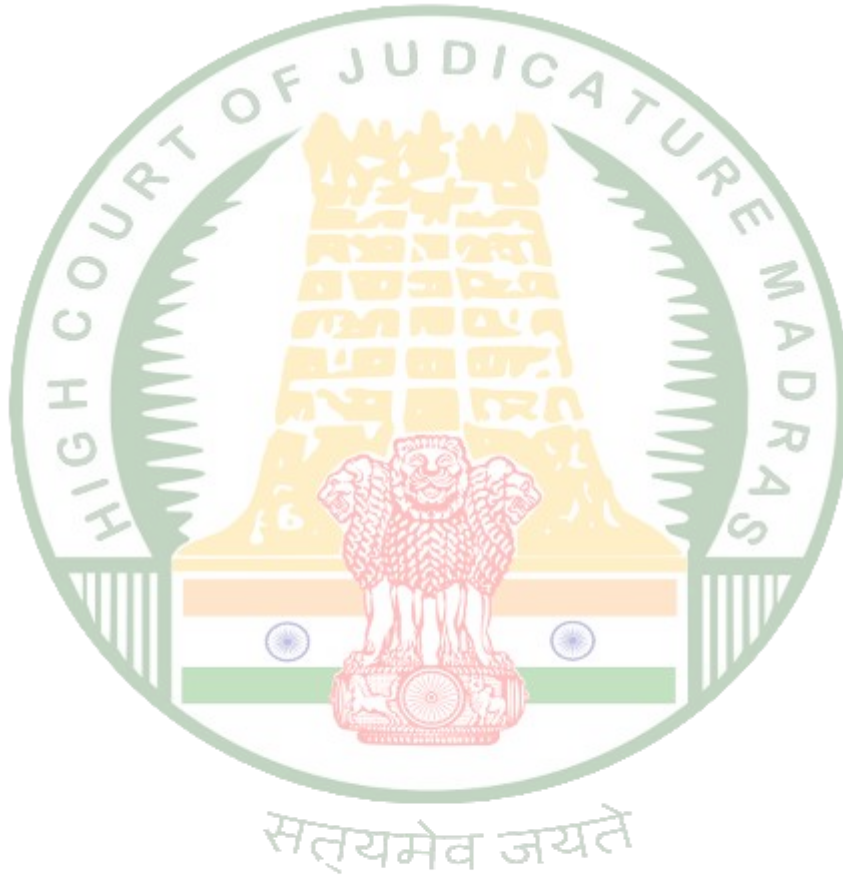
3. The Section Officer,
V.R.Section,
High Court, Madras. (2 Copies)

+1cc to Mr.D.Sivakumar, Advocate SR.No.71988

+1cc to Mr.P.M.Duraisamy, Advocate SR.No.71988

S.A.No.2008 of 2001

SR(CO)
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