

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 26.02.2018

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

S.A.No.1849 of 2000

- 1.Sundari
W/o.Murugan
 - 2.Murugan (Deceased)
 - 3.M.Ravi Chandran
 - 4.Shanthi
W/o.Duraisami
- .Appellants/Defendants 5 & 6

[Appellants 3 & 4 Brought on record LR's
of the deceased 2nd appellant vide order
of this court dated 07.02.2018 made
in CMP No.532/2018 in SA No.1849/2000]
Vs.

- 1.Mrs.Pappal [deceased]
W/o.Ramasami Gounder
 - 2.G.Shanmugam
W/o.Gopuchettiar
 - 3.S.Raviraj
S/o.Shanmugam
 - 4.S.Prabhu
S/o.G.Shanmugam
 - 5.S.Muruganathan
S/o.G.Shanmugam
 - 6.K.Ramasamy Goundar
S/o.Late Karuppa Goundar
 - 7.Kannammal
W/o.Murugesan
 - 8.Saraswathi
W/o.Kalliappan
- ... Respondents/Plaintiff
& defendants 1 to 4

[RR6 to 8 brought on record as LR's of
the deceased R1 vide order of court
dated 07.02.2018 made in CMP No.535 to 537
of 2018 in SA No.1849 of 2000]
(R 3 to 5 remained exparte)

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree dated 23.03.1999 and made in A.S.No.76 of 1997 on the file of II Additional District Judge, Coimbatore, reversing the decree and judgment made in O.S.No.1077 of 1993 on the file of Principal Sub Court, Coimbatore, dated 28.02.1997.

For Appellants :Mr.A.Sasidharan

For Respondents:M/s.P.Saravana Sowmiyan(For R6 to R8)
Dismissed vide court
order dated 15.12.2009 (For R2)
R3-R5-Ex parte

JUDGMENT

The suit for specific performance. The unsuccessful subsequent purchaser, who lost the case before the Lower Appellate Court has filed the second appeal before this Court.

2.The plaintiff is the first respondent herein. The defendants 1 to 4 are the respondents 2 to 5 herein. The defendants 5 & 6 are the appellants 1 & 2 herein. During the pendency of the second appeal, the second appellant and the first respondent died. Hence, the legal heirs of the deceased second appellant are brought on record as appellants 3 & 4 and the legal heirs of the deceased first respondent are brought on record as respondents 6 to 8. For the sake of convenience and clarity, the rank of the parties will be hereinafter referred to as per their rank in the suit.

3.The sum and substance of the plaint averments are as follows:-

(i) The first defendant is the owner of the suit property. The first defendant informed the plaintiff that he wanted to sell the suit property. Accordingly, the plaintiff entered into a sale agreement dated 07.02.1990 with the first defendant for total sale consideration of Rs.1,80,000/-. The first defendant himself prepared a written agreement and showed it to the plaintiff. After satisfying with the contents of the agreement, on 07.02.1990, the plaintiff paid a sum of Rs.50,000/- to the first defendant in the presence of his wife and the first defendant received the sum of Rs.50,000/- towards advance and part of the sale consideration.

(ii) Accordingly, on 07.02.1990 the plaintiff and the first defendant executed a sale agreement wherein the plaintiff agreed to buy the suit property and the first defendant had acknowledged the receipt of a sum of Rs.50,000/- as advance. As per their understanding and agreement in writing, the agreement was to be completed on or before two months from 07.02.1990. Soon after the execution of the agreement, the plaintiff came to know that the first defendant was inducting the defendants 5 and 6 as tenants under him for the suit property. On coming to know about this, the plaintiff met the first defendant and defendants 5 and 6 and enquired them as to whether the information received by her about the tenancy was true and correct. They informed her

that it was not true.

(iii) Thereafter, at the end of February, 1990 and during the month of March 1990, the plaintiff got genuine information that the defendants 5 and 6 had been inducted as tenant and they had been given possession of the suit property. In fact the plaintiff found them staying in the suit property. The plaintiff has sent registered legal notices to the first defendant as well as to defendants 5 and 6, informing them that the tenancy was created to give troubles to her and that the first defendant had not taken any steps for delivery of possession of the suit property.

(iv) However, the first defendant evaded to receive the registered notices. The 6th defendant received the notice but he did not send any reply. The plaintiff had also made enquiries with the Revenue Officers and he was informed that the first defendant had created records as if the defendants 5 and 6 were tenants and they are in possession of the suit property. The plaintiff is always ready and willing to pay the balance sale consideration to the first defendant and to register the sale deed at her costs and expenses, for which, the first defendant did not give proper reply. When she met the first defendant in person, he replied that the price of the real property has been increased and if she pays the enhanced price, he would sell the suit property to her. The plaintiff flatly refused to pay the enhanced price but she offered to pay the agreed price at any point of time. The first defendant did not give any proper or convincing reply.

(v) During, December, 1991, the plaintiff noticed that the defendants 5 and 6 were visiting the suit property quite often and they were doing cultivation. When they were questioned by the plaintiff, they informed the plaintiff that they had purchased the suit property for a total sale consideration of Rs.75,000/-. On hearing this, the plaintiff was very much upset and she immediately contacted the first defendant and his wife. Both of them replied that they had not sold the suit property, the suit property was worth Rs.3,00,000/- and therefore, they will not sell the property for a petty price of Rs.75,000/- to the fifth defendant.

(vi) Further, the first defendant convinced the plaintiff that the sale was true and it is a benami sale executed in favour of the fifth defendant. Immediately after noticing the same, a sale deed was executed by the legal heirs of the first defendant in favour of the appellant/defendants 5 and 6.

(vii) The sale deed executed in favour of the fifth defendant is false and it is not binding upon the plaintiff. In the meantime the fourth defendant, who is the son of the first defendant filed a suit for partition in O.S.No.2086 of 1998. Thereafter, the first defendant and his legal heirs compromised themselves and they filed compromise memo in favour of the fourth defendant. Based on the compromise memo, the suit was

decreed and some of the properties were allotted in favour of the fourth defendant. However, the suit property has not been allotted in favour of the fourth defendant.

(viii) The plaintiff has been always ready and willing to pay the balance sale consideration and she has been ready to bear the costs for stamp papers to execute the sale deed and to bear the charges for registering the sale deed. The plaintiff had informed the first defendant about her readiness and expressed her willingness to pay the balance of sale consideration and to have the document got registered but the first defendant refused to perform his obligations and created encumbrance in the suit property. Therefore, except no other option within the limitation period of two years, the suit was filed for praying the relief of specific performance in her favour and directing the defendants to receive the balance sale consideration, namely Rs.1,30,000/- from the plaintiff and to execute the sale of the suit property described in the plaint schedule.

4. The sum and substance of the written statement filed by the appellant/fifth defendant are as follows:

(i) The fifth defendant is a bonafide purchaser of the suit property from the defendants 1 to 4 under the registered sale deed dated 05.12.1991. Even before purchasing the said property, these defendants were the tenants of the suit property. They took the suit property on lease in the year 1987 and since then they were in possession and enjoyment of the property as tenants. Knowing that the defendants 1 to 4 have decided to sell the property, the property was purchased by the 5th defendant. The 6th defendant is the husband of the 5th defendant. The allegation in the plaint that the 1st defendant agreed to sell the suit property to the plaintiff and that an agreement was entered into by the first defendant with the plaintiff is not correct.

(ii) The first defendant was not the absolute owner of the property. The defendants 2 to 4, who are the sons of the 1st defendant are also entitled to the suit property. It was ancestral joint family property of the 1st defendant. Knowing that the defendants 1 to 4 have rights to sell the property, the 5th defendant got the sale deed executed from the defendants 1 to 4.

(iii) The appellants 1 & 2/ defendants 5 & 6 did not know anything about the alleged agreement said to have been executed by the 1st defendant in favour of the plaintiff on 07.02.1990. The defendants 5 and 6 submitted that if they had really entered into an agreement as alleged in the plaint, the plaintiff would not have waited for a period of three years for the execution of sale deed in her favour.

(iv) The appellants denied that they were inducted as tenants in order to defeat the right of the plaintiff and the appellants

also denied that benami sale deed was executed in favour of the 5th defendant by the defendants 1 to 4. The sale deed was for a valuable sale consideration and the competent people executed the sale deed in favour of the 5th defendant. The defendants 5 and 6 submitted that they do not know anything about the dealings between the plaintiff and the other defendants.

(v) The defendants 5 and 6 understand that there was a partition suit among the defendants 1 to 4 and that there was division in status among the defendants 1 to 4. The defendants 1 to 4, submitted the first defendant could not have been the Kartha of the family on the date of the alleged agreement dated 07.02.1990.

(vi) The agreement dated 7.2.1990 is created only to defeat the rights of the defendants 5 and 6. The defendants 5 and 6 have no knowledge about the correctness or genuineness of the agreement dated 7.2.1990 and the defendants 5 and 6 prays for dismissal of the suit.

5. After perusing the entire records and after framing the issues the lower court dismissed the suit. As against the lower court order the first respondent /plaintiff filed the appeal before the lower appellate court. After perusing the entire records, materials and after framing issues the lower appellate court allowed the appeal and granted decree for specific performance. Aggrieved by the lower appellate court order the defendant/subsequent purchaser filed the second appeal before this Court.

6. While the second appeal was pending, the second appellant and first respondent died. Hence, the appellants 3 and 4 LR's of the deceased second appellant were brought on record and respondents 6 to 8/LR's of the deceased first respondent were brought on record.

7. At the time of admitting the second appeal, this Court has framed the following substantial questions of law:

(i) Has not the lower appellate court erred in accepting Ex.A8 when it is not valid in law?

(ii) Whether the suit as framed for specific performance without a prayer for setting aside the sale viz., Ex.B1 dated 05.12.1991 and payment of required court fee thereon is maintainable?

(iii) Has not the lower appellate court erred in coming to a conclusion that the sale in favour of the first appellant is sham and nominal when a valuable consideration has passed and the plea of benami as contended by the first respondent has not been proved?

8.The learned counsel appearing for the appellant / defendants 5 and 6 would submit that these appellants were inducted by the defendants 1 to 4 as tenants for cultivating their lands in the year 1987, even prior to the sale agreement dated 7.2.1990. The plaintiff /first respondent was well aware that the appellants/defendants 5 and 6 are the cultivating tenants under the first defendant, who had entered into the sale agreement in favour of the first respondent/plaintiff. However for various reasons, the sale deed could not be executed by the first defendant. Thereafter, as a tenant the appellants purchased the property from Defendants 1 to 4 for a valuable sale consideration of Rs.75,000/-. The lower Court after analysing the entire issues dismissed the suit with regard to the prayer of specific performance. However, the lower Appellate court decreed the suit in favour of the plaintiff / first respondent by reversing the well considered order passed by the lower court and it is not sustainable.

9.The learned counsel appearing for the appellants would further submit that the lower court after verifying the purchase of the suit property by the defendants 5 & 6 from first defendant dismissed the suit and it is valid in law and the lower appellate court failed to discuss with regard to the cultivating tenancy and failed to appreciate the records under Exhibit B1. Without rendering valid findings with respect to the bonafide purchase of the appellants, the lower appellate court granted decree in favour of the first respondent/plaintiff and it is unsustainable. Accordingly, he prays for allowing the appeal.

10.The learned counsel appearing for the first respondent / plaintiff would submit that the plaintiff after ascertaining the ownership of first defendant with regard to the suit property entered a sale agreement with the first defendant. Accordingly on 7.2.1990, the sale agreement was entered into between the plaintiff and the first defendant for a sale consideration of Rs.1,80,000/-. The plaintiff paid an advance amount of Rs.50,000/- in favour of the first defendant and the same was acknowledged by the first defendant.

11.At the time of sale agreement, the suit schedule property was in possession of the first defendant. After ascertaining the entire physical features, the plaintiff entered into a sale agreement with the first defendant.

12.However, after one month, when the plaintiff approached the first defendant for execution of the sale deed, she came to know that the appellants /defendants 5 and 6 are in possession of the property and the same was questioned.

13.However, the first defendant evaded to give convincing reply and the first respondent /plaintiff came to know that there was a sale deed in favour of the defendants 5 and 6 for the purpose of evading the sale agreement dated 7.2.1990 and the plaintiff also came to know that one of the legal heir of the first defendant filed a partition suit in O.S.No.2086 of 1988. In the said partition suit, the plaintiff filed an impleading petition and participated in the proceedings and the sale agreement was also marked in the partition suit. In the said suit, the defendant and other defendants confirmed the sale deed in favour of the appellants/ defendants 5 and 6. After obtaining the certified copy of the sale deed, the first respondent / plaintiff filed suit for specific performance as against the first defendant and his legal heirs.

14.It is relevant to note interestingly the first defendant also filed a suit for permanent injunction against his sons in O.S.No.1468 of 2987. In the said suit, since the defendants 2 to 4 endorsed no objection for decreeing the suit in favour of the first defendant, accordingly, the ownership of the first defendant in the suit property was confirmed. The said judgments are marked before the lower court and the same was not duly considered by the lower court. However on appeal, after considering the same the lower appellate court granted decree in favour of the first respondent /plaintiff and after perusing the sale deed executed by the defendants 1 to 4 in favour of the appellants/ defendants 5 and 6. The defendants 1 to 4 did not file any written statement supporting their case nor they had chosen to appear before the lower court or lower appellate court and they have not deposing any evidence in their favour. In the absence of any such deposition and evidence the order of the lower appellate court cannot be interfered with. The subsequent purchasers have no right to agitate the case before the lower appellate court, which is not enforceable one. Accordingly, he prayed for dismissal of the appeal.

15.On perusal of material records, that the first respondent /plaintiff entered into a Sale agreement dated 7.2.1990 (Ex.A1) and the first defendant agreed to sell the suit schedule property in favour of the plaintiff/first respondent for a sale consideration of Rs.1,80,000/-. Accordingly he received a sum of Rs.50,000/- from the plaintiff. After the agreement, the first defendant and his sons executed Ex.B1 sale deed in favour of the first appellant for a sale consideration of Rs.75,000/- and there is no explanation as to how the first defendant sold the property in favour of the fifth defendant for 40% of the amount as against Rs.1,80,000/-. The first defendant also has not filed any written statement supporting the case of the appellants nor they deposed any evidence in favour of the

appellants as to on what circumstances, the sale deed was executed in favour of the appellants.

16. Though the lower court dismissed the suit filed by the plaintiff. However, the lower court accepted the sale agreement and ordered refund of Rs.50,000/-. As against the said order, no one has preferred any appeal before the lower appellate court and that order will become final validating the Ex.A1 sale agreement dated 7.2.1990.

17. It is relevant to note that the first defendant filed a suit for permanent injunction against his sons in O.S.No.1468 of 1987 and the suit was decreed in favour of the first defendant after recording no objection. Accordingly the sons i.e., defendants 2 to 4 of 1st defendant endorsed the ownership of the 1st defendant in suit schedule property. One of the legal heir of the first defendant namely, Muruganantham who is the fourth defendant in the suit filed a partition suit in O.S.No.2086 of 1988. In the said suit some of the properties were allotted in favour of the 4th defendant Muruganantham. Further, there are averments in respect of the suit schedule property that it was allotted in favour of the first defendant and the property also stands in the name of first defendant. In the said suit the plaintiff /first respondent also participated and deposed as PW2 and the Ex.A1 sale agreement was also marked. The plaint in O.S.No.1468/1987 is marked as Ex.A3, the written statement and the judgment in O.S.No.1468 of 1987 are marked as Ex.A4 and Ex.A5 respectively.

18. Since the first defendant did not execute the sale deed in favour of the plaintiff, thereby the plaintiff sent a legal notice. The said legal notice was marked as Ex.A6 and the acknowledgment is marked as Ex.A7. Thereafter, the plaintiff sent a Legal notice to the sixth defendant who is the husband of fifth defendant and the said acknowledgment is marked as Ex.A9. On perusal of Ex.A8 the plaintiff/1st respondent clearly stated that she had entered an agreement with 1st defendant G.Shanmugam and the plaintiff also enquired about the tenancy agreement and other receipts. Though the said notice was received by the 6th defendant and the said acknowledgment is marked as Ex.A9. However, no reply was sent to the plaintiff/1st respondent. Therefore, the 5th and 6th defendants aware of the sale agreement even prior to their purchase, thereafter, they purchased the property for consideration of Rs.75,000/-.

19. On perusal of Ex A5 Judgment in O.S.No.1468/1987, there is no adverse findings against the plaintiff. But some of the property was allotted to 4th defendant Muruganathan and the suit property was excluded from the decree. It is also admitted fact that the appellant / 5th defendant purchased the property dated

05.12.1991 after 22 months of the sale agreement and no other documents were marked in order to prove that they are tenants under cultivating tenancy right or the registered cultivating tenants of the first defendant. In the present case, though the appellants/defendants 5 & 6 may be the aggrieved parties, the 1st defendant/owner has not preferred any appeal before this court. Only the appellants/subsequent purchasers have challenged the judgment rendered against the first defendant / second respondent. In the absence of any material and in the absence of any positive evidence, the Ex.A1 sale agreement dated 07.02.1990 is legally enforceable one. Accordingly the judgment and decree granted by the lower appellate court is perfectly valid and I do not find any valid reason warranting interference to set aside the judgment and decree of the lower appellate court. Accordingly the substantial questions of law are answered against the appellant.

20. In the result, the Second Appeal stands dismissed. The judgment and decree dated 23.03.1999 made in A.S.No.76 of 1997 passed by the learned II Additional District Judge, Coimbatore, is confirmed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar (CS-vi)

//True Copy//

Sub Assistant Registrar

may

To

1. II Additional District Judge,
Coimbatore.

2. The Principal Sub Court,
Coimbatore.

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

+1cc to Mr.P.SARAVANA SOWMIYAN, Advocate, S.R.No. 14431

S.A.No1849 of 2000

NM(CO)
TR(16/04/2018)