

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:18.12.2018

Delivered on:06.03.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.550 of 2008

Arulmani

...Appellant

Vs

1.M.Palani Gounder alias Palanisamy

2.Sarasu (Deceased)

3.Thangammal

4.Jayammal

5.Thanga pappa

6.Kalaiselvi

7.Ramesh

8.Minor Venkatesan

9.Valarmathi

10.Alamelu

11.Shanthi Booshan

12.Yuvaraj

13.Vanitha

14.Dhanam

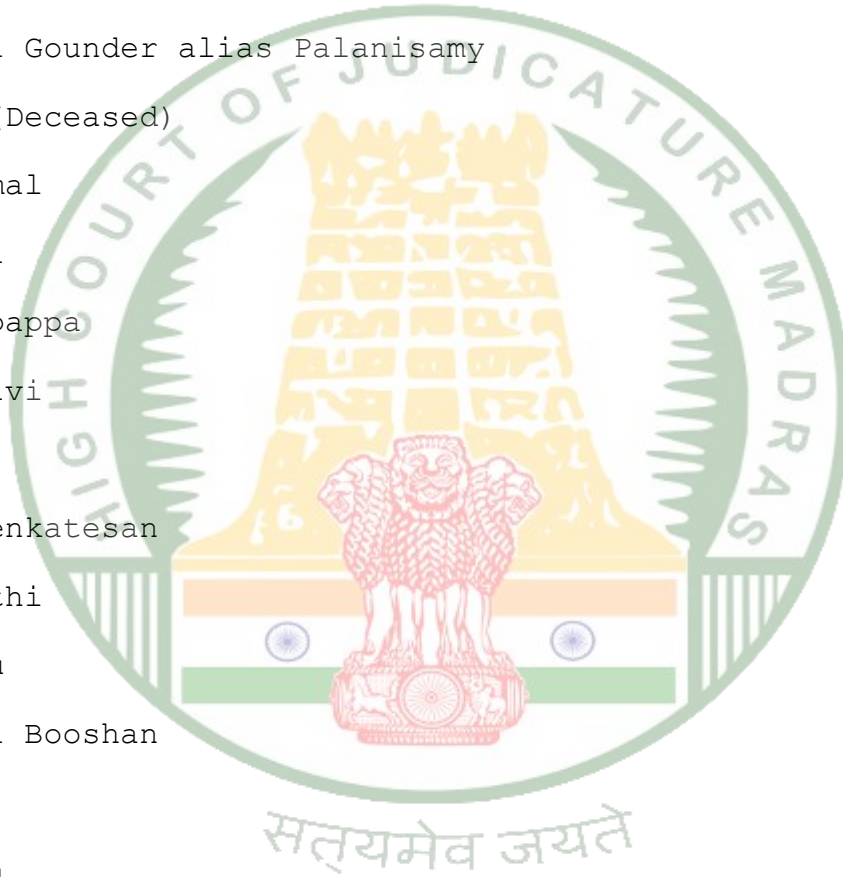
15.Kumaravel

16.R.Jayaraman

17.R.Manickam

18.Sarasu

19.Mallika



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20.Chandra

21.R.Manivannan

...

Respondents

(Respondents 16 to 21 brought on record as Legal representatives of deceased 2nd respondent vide order of Court dated 14.10.2014 made in M.P.No.1 to 3 of 2012)

PRAYER: First Appeal is filed under Section 96 of the Code of Civil Procedure against the Judgement and Decree of the learned Additional District Judge (Fast Track Court No.1), Salem in O.S.No.119 of 2002 dated 04.03.2008.

For Appellant : Mr.A.K.Kumaraswamy
Senior Counsel
for Mr.C.Victor Prasath

For Respondent 1 : Mr.T.R.Rajagopalan
Senior Counsel
for Mr.S.Kalyana Raman

For Respondent 2 : Died

For Respondent 4 : Mr.R.Swamynathan

For Respondents 5 to 8 : Mr.D.Shiva Kumaran

For Respondents 9 to 12: Mr.R.Karal Marx
No Appearance

For Respondents 3, 13
to 21 : No Appearance

JUDGMENT

The 9th defendant in a suit for specific performance is the appellant before this Court. The first appeal is filed challenging the Judgement and Decree of the Additional District Court, Salem (Fast Track Court No.1) Salem, in O.S.No.119 of 2002. The parties are referred to in the same litigative status as in the Trial Court.

2.The suit O.S.No.119 of 2002 was originally instituted on the file of the Sub Court, Salem and numbered as O.S.No.463 of 1997 by the plaintiff seeking specific performance of contract dated 25.03.1996 directing the defendants to execute the sale deed in respect of the suit property in favour of the plaintiff. The suit was filed in respect of vacant land measuring 4005

Sq.ft. together with a 30 year old house comprised in Survey No.50/2 in Meiyannur Village, Salem.

3.Plaintiff's Case:

3.1.The case of the plaintiff was that the property belonged to one Periaandi Gounder son of Lakshmanan Gounder. On 25.03.1996 the plaintiff had entered into an agreement of sale with the said Periaandi Gounder agreeing to purchase the suit property for a total sale consideration of Rs.6,50,000/- and the time for completing the sale was fixed at four months. An advance of Rs.10,000/- was paid on the date of the execution of the sale. On 28.06.1996 Periaandi Gounder had made an endorsement extending the period for the execution of sale deed and payment of sale consideration by further period of four months since his grandson, the 9th defendant had issued a legal notice and had filed a suit for partition in O.S.No.872 of 1995 on the file of the Sub Court, Salem.

3.2.Thereafter the said Periaandi Gounder received the following sums:

19.05.1996	Rs.60,000/-
14.06.1996	Rs.2,00,000/-
10.10.1996	Rs.50,000/-

3.3.Periaandi Gounder had issued separate receipts for each of this payment. The plaintiff would submit that after September 1996 Periaandi Gounder's health suffered a set back and therefore on 31.10.1996 a sale deed was executed by Periaandi Gounder. Thereafter, on 18.07.1997, Periaandi Gounder died. The sale deed could not be registered only on the account that there was an order of injunction operating.

3.4.The plaintiff would submit that he has been ready and willing right through and the entire sale consideration had been paid to Periaandi Gounder. Periaandi Gounder had two sons and four daughters and his two sons pre-deceased him. The plaintiff had approached the legal heirs of Periaandi Gounder to execute the sale deed however they were not coming forward to do the same. Further, the plaintiff had expressed his willingness to purchase the property subject to the result of the suit O.S.No.872 of 1995.

4.Defendant's Case:

4.1.The 9th defendant had filed a written statement in which he would contend that the suit agreement was a fabricated document and meant only to defraud the rightful share of the defendant. He would further contend that no consideration as stated in the plaint has passed. It is his further case that on 22.09.1995 he had issued a notice to her grand father demanding partition and it is pursuant to this notice that the agreement

of sale had been forged and created by the plaintiff. The plaintiff, according to the 9th defendant, was a land broker and it was his further case that the property in question was an ancestral one and therefore Periaandi Gounder did not have the exclusive right, title or interest to convey the entire suit property, at best it would only bind the share of Periaandi Gounder. He would further contend that he is in possession and enjoyment of the suit property.

4.2. Thereafter, the 9th defendant had filed a further additional written statement in which he would contend that the suit property is a residential house and it cannot be sold by a sharer without the consent of the others. The 9th defendant was residing there and he had made several improvements to the property. Ultimately, in the final decree proceedings he can ask for the share in the suit property in equity. He would further contend that considering the fact that Periaandi Gounder had only 1/3rd share he could not have sold the entire property.

4.3. It was also his contention that on 14.11.1994 Periaandi Gounder, his son Lakshman Gounder, his deceased son Venkatachalam Gounder and the children of Lakshman Gounder had sold a portion of the ancestral properties to one Chandran and Moorthy which clearly establishes the fact that the properties in the hand of Periaandi Gounder and his sons were ancestral in nature. A public notice was also issued by him on 23.03.1996 in the Malai Murasu warning the third parties from entering into any sale in respect of the suit property. He therefore, sought for dismissal of the suit

5. Trial Court:

5.1. The Trial Court had framed five original issues and six additional issues. Ultimately the learned District Judge, Salem had decreed the suit as prayed for. The learned Judge has held that in the agreement of sale Ex.A.1 it is not the signature but the LTI of Periaandi Gounder that is available and therefore considering the fact that the defendant had not taken steps to have Thumb impression examined by an expert, it could be safely assumed and believed that the agreement of sale Ex.A.1 was executed by the deceased Periaandi Gounder. The various endorsement which have been marked as Ex.A.2, Ex.A.4 and Ex.A.6 would once again prove that the plaintiff has been ready and willing to go ahead with the execution of the sale and only the interim order that has been obtained by the 9th defendant was the impediment.

5.2. The learned Judge has also taken note of the fact that the suit for partition filed by the 9th respondent had been

dismissed for default and no steps taken to restore it and that apart no documents had been produced by the 9th defendant to show that the property was the ancestral one.

6.Submissions:

6.1.Challenging the said Judgement and Decree the 9th defendant is before this Court. Mr.A.K.Kumaraswamy, learned Senior Counsel appeared on behalf of the Mr.S.Victor Prasath for the 9th defendant/appellant and Mr.T.R.Rajagopalan, Senior Counsel appeared on behalf of Mr.S.Kalyana Raman for the 1st respondent.

6.2.The learned senior counsel appearing on behalf of the 9th defendant made the following submissions:

The sale deed had been created when the 9th defendant had issued a legal notice demanding partition on 22.09.1995. Within six months from that demand the suit agreement had been created. According to the counsel, this was clearly an attempt to remove the property from out of reach of this defendant.

6.3.The learned counsel would further argue that the attesting witnesses were not examined on the side of the plaintiff despite the fact that the defendant had questioned the authenticity of the agreement and the execution made therein. The plaintiff ought to have taken steps to prove the LTI of late Periaandi Gounder and having failed to do so this Court should draw an adverse inference.

6.4.He would further argue that the stamp paper on which the agreement of sale has been typed out is purchased in the name of one Edapadi and not in the name of either the plaintiff or Periaandi Gounder. He would also draw the attention of the Court to Ex.A.2 endorsement wherein explanation has been given for extending the agreement till the disposal of the suit filed by the grand son; that is, the suit O.S.872 of 1995 and on the said date no payments have been made.

6.5.The learned senior counsel would also draw the Court's attention to the endorsements made extending time for performance of the contract was made by an Advocate and not by the Periaandi Gounder. The learned senior counsel would also argue that in Paragraph No.10 of the plaint the plaintiff had agreed to take the sale subject to the Judgement and Decree in O.S.No.872 of 1995 whereas reading of the sale deed Ex.A.7 clearly shows that recitals in the sale deed does not reflect this sentiment expressed in Paragraph No.10 of the plaint.

6.6.He would also argue that the plaintiff has not proved his readiness and willingness which is the sine qua non for obtaining a decree for specific performance. He would also

state that the witnesses who have signed the agreement of sale and the various endorsements are the same and they are closely associated with the plaintiff therefore their evidence has to be taken with a pinch of salt.

6.7.He would also point out that in Ex.B.19 the said Periaandi Gounder has himself admitted the property to be ancestral property where in the recitals Periaandi Gounder had referred to the suit properties as both his ancestral properties as well as his properties. Therefore on the very admission of the said Periaandi Gounder in this document it can be safely assumed that the property is ancestral and not self acquired property. Being the ancestral property the defendants are also entitled to a share in the property.

6.8.Per contra, Mr.T.R.Raja Gopalan, Senior counsel appearing on behalf of the 1st respondent/plaintiff would contend that the appellant who had filed a suit O.S.No.872 of 1995 has allowed the suit to be dismissed for default and therefore, he cannot set up a claim that he has a right to the suit property. Further, in the earlier suit, that is O.S.No.872 of 1995, the appellant who is the plaintiff therein had submitted that he was jointly entitled to a 3/9th share in the suit property along with the defendants 3 and 4 therein and defendants 1 and 2 were each entitled to a 3/9th share. He had also referred to the legal notice dated 22.09.1995 which had been issued by him as he is apprehended that the 1st defendant was making arrangements to encumber/alienate the suit properties in favour of third parties.

6.9.The learned senior counsel further drew the attention of this Court to the written statement filed by the deceased Periaandi Gounder as 1st defendant in the suit O.S.No.872 of 1995, wherein, Periaandi Gounder has clearly and categorically stated that the property is a self acquired property purchased out of his own savings and was not joint family property. That apart, in his written statement itself he had stated that he had entered into an agreement of sale with the 1st respondent herein and had received the entire sale consideration there of. He would also point out that except for the appellant the son of the said Periaandi Gounder who was arrayed as the 2nd defendant in the suit O.S.No.872 of 1995 had not questioned the exclusive right of his father Periaandi Gounder to the suit property.

7.0.The learned senior counsel would also distinguish the argument of the appellant with reference to the Ex.B.19 sale deed dated 14.11.1984 executed by Periaandi Gounder and his son Lakshmanan Gounder in favour of one Muthuswamy where the property was described as both self acquired and ancestral by purchase. This property was not comprised in the survey number

but only the suit property was comprised and therefore the properties covered under Ex.B.19 and Ex.B.20 have been described as ancestral. Whereas this even according to Periaandi Gounder has been described as the property obtained in a partition.

7.1.He would also contend that the recitals in Ex.B.19, Ex.B.20 and Ex.B.21 would not confer an ancestral status upon the suit schedule property which even according to the deceased Periaandi Gounder was a property that had been allotted to him under partition and therefore became his property. He would also point out the admissions made by the D.W.1 in his chief examination given in the form of proof affidavit. He would contend that his grandfather Periaandi Gounder had suppressed the true facts and filed a false written statement in the suit O.S.No.872 of 1995. In his cross examination, he would depose that he was not aware as to who was besides his grandfather when his grandfather died.

7.2.The learned senior Advocate would argue that, in the light of the written statement filed by the deceased Periaandi Gounder acknowledging the receipt of the entire sale consideration and also that the suit property was a self acquired property, it is clear that the property was only the self acquired property of Periaandi Gounder and that is the reason why the appellant had allowed his suit for partition to be dismissed for default and not attempted to restore it.

8.Points for Consideration:

On the above submissions the points for consideration are the following:

"a)Whether the property subject matter of the agreement of sale is the self acquired property of the deceased Periaandi Gounder or his ancestral joint family property in which the appellant also has the right?

b)Whether the deceased Periaandi Gounder had executed the agreement of sale and received the entire sale consideration?"

9.Discussion:

9.1.Heard the parties and perused the papers. The 9th defendant who is the appellant herein has challenged the Judgement and Decree in O.S.No.463 of 1997 by the Additional District Judge (Fast Track Court No.1), Salem on the ground that the 1st respondent herein was seeking to specifically enforce a deed dated 25.03.1996 executed by one Periaandi Gounder who is the grandfather of the appellant in respect of the property which was the ancestral joint family property of the said Periaandi Gounder his son Lakshman Gounder and the legal heirs of his deceased son which according to him was the ancestral joint family property of the Periaandi Gounder.

9.2.Periaandi Gounder in his written statement to the suit O.S.No.872 of 1995 filed by the 9th defendant/appellant for a partition and separate possession of the suit property has categorically stated that the property is a self acquired property he having purchased the same out of his self acquired funds. The appellant has allowed the suit to be dismissed for default and had not taken any steps whatsoever to restore the same. Therefore, the dismissal order has become final. Considering the above, the only logical conclusion that this Court can arrive at is that the suit property is the self acquired property of the deceased Periaandi Gounder. Had it been the joint family ancestral property the 9th defendant/appellant herein would have immediately taken steps to restore the suit and take the suit to its logical conclusion.

9.3.Therefore, in the light of the above the first point is to be answered in favour of the 1st respondent. It is clear that the property in question is only the self acquired property of the deceased Periaandi Gounder. As regards the second point for consideration, the appellant would contend that no consideration whatsoever has passed and further the agreement of sale was a concocted one. In the suit O.S.No.872 of 1995, the deceased Periaandi Gounder had filed a written statement in which he has clearly and categorically submitted that the property in question was the self acquired one and that he had not only entered into an agreement of sale of the suit property to the 1st respondent but he has also received the entire sale consideration. This statement coupled with the endorsement made in the rear of the agreement of sale as well as the receipts issued for the payments made would clearly prove that the entire sale consideration has been paid by the 1st respondent to the deceased Periaandi Gounder even during his life time.

9.4.Therefore, there is no question of this Court considering the readiness and willingness of the purchaser/1st respondent herein. The entire sale consideration has been paid to the deceased Periaandi Gounder himself and what remained was only the execution of the sale deed which could not be obtained as the said Periaandi Gounder had passed away pending the suit O.S.No.872 of 1995. It is also seen that P.W.2 who was examined to prove the execution of Ex.A.1 sale agreement has also deposed that the agreement was executed by Periaandi Gounder and he had received the sale consideration. The appellant who denied the signature has come forward with the suit that the agreement of sale is fabricated and has not taken any steps whatsoever to prove the LTI of his grandfather in the said document.

9.5.The points for consideration is answered in favour of the 1st respondent and this first appeal is dismissed confirming the Judgment and Decree in O.S.No.119 of 2002 passed by the

Additional District Judge (Fast Tract Court No.1), Salem. There shall be no order as to costs.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

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To,

1.The Additional District Judge (Fast Track Court No.1),
Salem.

2.The Section Officer,
VR Section, High Court,
Madras.

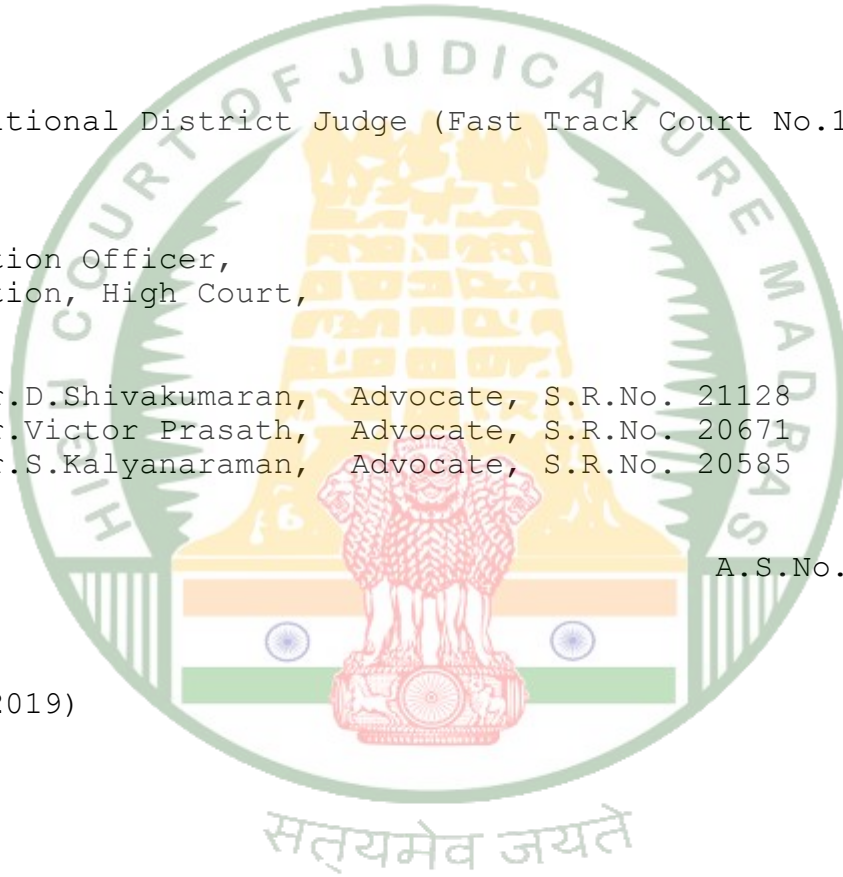
+1cc to Mr.D.Shivakumaran, Advocate, S.R.No. 21128

+1cc to Mr.Victor Prasath, Advocate, S.R.No. 20671

+1cc to Mr.S.Kalyanaraman, Advocate, S.R.No. 20585

A.S.No.550 of 2008

CNR (CO)
GN (26/03/2019)



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