

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:27.11.2018

Delivered on:31.01.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.Nos.878 and 879 of 2010

A.S.No.878 of 2010

1.Santhamani

2.S.Venkatachalam ...Appellants/Defendants 1 and 2

Vs

1.Malliga

2.T.Arumugham Respondents/Plaintiff/3rd Defendant

A.S.No.879 of 2010

Santhamani

...Appellant/Plaintiff

Vs

Mallika

... Respondent/Defendant

Prayer in A.S.No.878 of 2010: Appeal suit is filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree dated 11.06.2010 made in O.S.No.193 of 2004 on the file of the Additional District Judge - Fast Track Court No.1, Salem.

Prayer in A.S.No.879 of 2010: Appeal suit is filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree dated 11.06.2010 made in O.S.No.51 of 2005 on the file of the Additional District Judge - Fast Track Court No.1, Salem.

For Appellant in : Mr.T.Murugamanickam
both AS Senior Counsel
for Mrs.Zeenath Begum

For Respondent : Mr.Sriram
for Mr.Babu Muthu Meeran
in AS 878/10 and Sole
Respondent in AS 879/10

Respondent 2 : Given Up
in AS 878/10

JUDGMENT

Considering the fact that the above two First Appeals filed under Section 96 of the Code of Civil Procedure involves a common set of facts and a common Judgment has been given by the learned Additional District Judge - Fast Track Court No.1, Salem, this Court is also pronouncing a common Judgment.

2.The details of two First Appeals are as follows:

2.1.A.S.No.879 of 2010 arises against the Judgment and Decree passed by the learned Additional District Judge in O.S.No.51 of 2005 which was originally numbered as O.S.No.449 of 1997 on the file of the Subordinate Court, Salem. This suit is filed for a specific performance of the agreement dated 25.11.1996 entered into by the plaintiff with defendant.

2.2.A.S.No.878 of 2010 arises against the Judgment and Decree in O.S.No.193 of 2004 which is a suit filed by the defendant in O.S.No.51 of 2005 against the plaintiff therein, her husband and one T.Arumugham for recovery of possession. This suit was originally filed as a indigent person in POP.No.6 of 1998. On the application being allowed the suit was numbered as O.S.No.165 of 1998 on the file of the Subordinate Court, Salem. The parties are referred to in the same array as in the suit O.S.No.51 of 2005. सत्यमेव जयते

3.Details of O.S.No.51 of 2005:

i)Plaintiff's Case:

a)The plaintiff had filed the above suit for specific performance inter alia contending that under a compromise decree in a partition suit in O.S.No.394 of 1996 the suit property was allotted to the defendant. On 25.11.1996 the defendant had entered into an agreement of sale with the plaintiff and the total sale consideration was fixed at sum of Rs.2,50,000/- and advance of Rs.2,00,000/- was paid and possession was said to be handed over on the date of the agreement. The parties had agreed that the balance sale consideration would be paid on or before 16.08.1997.

b)The plaintiff after taking possession of the property from the defendant had leased out the godowns situated therein to one T.Arumugham (who is arrayed as 3rd defendant in the suit O.S.No.193 of 2004) for a period of eleven months for manufacturing Papadum. The plaintiff's case is that she had been orally expressing her readiness and willingness to go ahead with the sale deed. However, the defendant had not come forward to execute the sale deed thereby constraining the plaintiff to issue legal notice dated 25.07.1997. In the said notice the plaintiff had informed the defendant that she would wait at the Dadagapet Sub Registrar Office on 04.08.1997. However there was no response from the defendant, therefore, the plaintiff was left with no other alternative except to file the suit for the relief stated supra.

ii)Written statement of the defendant:

a)The defendant had resisted the above suit inter alia contending that she had not executed the agreement of sale nor she had received any sale consideration from the plaintiff. It was her case that all the properties originally belonged to her father Subu Gounder. The plaintiff's husband had filed a suit O.S.No.394 of 1996 against his father and siblings and on 26.09.1996 a compromise decree was passed by the learned Additional Subordinate Judge, Salem. The suit property fell to the share of the defendant. After the decree the defendant had spent over sum of Rs.3,00,000/- and constructed two Godowns. The plaintiff's husband, that is the defendant's brother, had an eye on this property and he was not very happy that the property was allotted to the share of the defendant. He therefore took advantage of the fact that the defendant was residing 15 Kilometres away from the suit property at Arasambalayam and together with the plaintiff had forged and fabricated the agreement of sale. Not only was the agreement of sale fabricated but the signature of the defendant's husband who has been shown as an attesting witness has also been forged.

b)The true fact was that in December 1996 the plaintiff and her husband had trespassed into the suit property and despite the defendant calling upon them to vacate the premises they did not do so and several rounds of mediation had taken place asking the defendant and her husband to vacate the premises. The plaintiff along with her husband had fabricated the sale agreement. The lease deed in favour of the said T.Arumugham is unlawful and invalid. The defendant is the one who is paying the current consumption charges. The fabrication of this agreement of sale came to the knowledge of the defendant only when she receive the notice dated 25.07.1997, from the plaintiff to which she had sent a reply dated 08.08.1997, demanding copy of the alleged agreement however, the same was not given to the defendant.

4.Details of O.S.No.193 of 2004:

i)Plaintiff's case (Defendant in O.S.No.51 of 2005)

a)The above suit was filed as an indigent person by the defendants in POP.No.6 of 1998 which upon the application being ordered was numbered as O.S.No.165 of 1998 on the file of the Subordinate Court, Salem, thereafter the same was transferred to the file of the Additional District Judge - Fast Track Court No.1, Salem, and numbered as O.S.No.193 of 2004. The case of the defendant was that this suit was filed against the plaintiff in O.S.No.51 of 2005, who is arrayed as 1st defendant, her husband Venkatachalam and third party one T.Arumugham for recovery of possession of the suit property.

b)The defendant would contend that the 2nd defendant had filed a suit O.S.No.394 of 1996 on the file of the Additional Subordinate Judge, Salem, against his father and sisters. The defendant was arrayed as the 3rd defendant in that suit. On 26.09.1996 the compromise decree was passed and the suit property was allotted to the share of the defendant. The defendant was placed in separate possession of the suit property on the very same date.

c)It is the case of the defendant that she was residing at Arasambalayam. As stated in the written statement in O.S.No.51 of 2005, the 2nd defendant and his wife the plaintiff in O.S.No.51 of 2005 had fabricated the agreement of sale deed dated 25.11.1996. The defendant would contend that despite calling upon the plaintiff to give a copy of the sale agreement the same was not given and therefore the defendant had applied for a Xerox copy of the sale agreement in the suit O.S.No.449 of 1997 and on a perusal of the document the defendant had confirmed her suspicion that the agreement of sale was rank forgery. The defendant also came to learn from the legal notice dated 25.07.1997 issued by the plaintiff that the suit property had been unlawfully leased out to the 3rd defendant. The defendant had therefore filed a suit for the reliefs stated supra.

ii)Defendant's Case:

The plaintiff had filed a written statement which was adopted by her husband 2nd defendant. In the written statement the plaintiff had come forward with a contention that after a compromise decree in O.S.No.394 of 1996 the defendant had, on account of her poverty, not wanted to take possession of the property and she expressed her willingness to sell the suit property in favour of her brother the 2nd defendant. The plaintiff who is the wife of the 2nd defendant agreed to purchase the same and the plaintiff has reiterated the contentions raised by her in the plaint in O.S.No.51 of 2005 as a written statement in the suit.

5. Trial Court:

i) Issues in O.S.No.51 of 2005 are as follows:

The trial Court had originally framed issues and thereafter during the time of argument the 1st issue was recast and additional issues were framed which were as follows:

1) Whether the sale agreement dt.25.11.1996 is true and valid?

Additional issues:

1) Whether the plaintiff had capacity to pay the advance sale price of Rs,2,00,000/- as claimed by her?

2) Whether the plaintiff has capacity to pay the balance sale price of Rs.50,000/- as pleaded by her?

ii) Issues in O.S.No.193 of 2004 are as follows:

1) Whether the 'B' Schedule properties are described properly and correctly?

2) Whether the plaintiff is entitled to recover vacant possession of 'B' Schedule properties?

3) Whether the plaintiff is entitled to past and future mesne profits as prayed for?

4) To what other relief the plaintiff is entitled?

iii) The parties had gone to trial on the above issues. The recording of evidence has been done in the suit O.S.No.51 of 2005. The plaintiff had deposed as P.W.1 and had examined one Eeswaramoorthy as P.W.2. Interestingly, the plaintiff has not sought to examine her husband or her lessee as witnesses in the above suit. Five documents have been marked on her side and Ex.A.1 is the sale agreement between the plaintiff and the defendant. This agreement of sale is denied by the defendant who would contend that the said document is a fabricated document.

iv) The defendant on her part had examined herself as D.W.1 and her husband as D.W.2 and two other witness as D.W.3 and D.W.4. She had marked Ex.B.1 to Ex.B.20 to prove her case. Ultimately, the learned District Judge - Fast Track Court No.1, Salem, dismissed the suit O.S.No.51 of 2005 and decreed the suit O.S.No.193 of 2004. Challenging these two Judgments the plaintiff is before this Court.

6. Points for Consideration:

i) On a conspectus of the pleading and the evidence both oral and documentary the following points for consideration arise in the two appeals and the points are common to both the appeals.

a) Whether Ex.A.1 has been proved beyond doubt by the plaintiff?

b) Whether the plaintiff is in lawful possession of the suit property?

c) Whether the defendant is entitled to recovery of

possession?

d)Whether in the event of this Court coming to the conclusion that Ex.A.1 agreement of sale is valid agreement, the plaintiff had proved continuous readiness and willingness to proceed further with the suit?

7.Submissions:

I.Heard, Mr.T.Murugamanickam, learned Senior Counsel for Ms.Zeenath Begum, learned counsel appearing for the appellant/plaintiff and Mr.Sriram, learned counsel for Mr.Babu Muthu Meeran for the respondent/defendant in A.S.No.878 of 2010. The learned senior counsel appearing on behalf of the appellant/plaintiff would contend that the Judgment of the Court below is erroneous, since the Court below has failed to consider the fact that the plaintiff has proved the execution of the agreement of sale with the defendant and that the plaintiff was always ready and willing to proceed further and have the sale deed executed but for the reluctance of the defendant. He would further contend that the following would also prove the execution of the agreement of sale:-

i)That the possession of the property was with the plaintiff which would clearly prove the execution of agreement of sale

II.Mr.Sriram, learned counsel appearing on behalf of the respondent would on the other hand argue that the agreement of sale dated 25.11.1996 is a forged and fabricated document and has not been signed at any point of time by the plaintiff. He would further argue that once the execution of the agreement as well the receipt of consideration was denied the onus was upon the plaintiff to prove the veracity of Ex.A.1 agreement of sale. The counsel would argue that this duty has not been fulfilled by the plaintiff and therefore adverse inference has been drawn against the plaintiff.

8.Discussion:

i)Heard the counsels on either side and perused the records. The plaintiff had come forward with a suit for specific performance on the basis of the agreement of sale dated 25.11.1996 which has been marked as Ex.A.1. The execution of Ex.A.1 has been denied by the plaintiff who would contend that within two months of a compromise decree in O.S.No.394 1996 there was no necessity for her to sell the property.

ii)It is also to be taken note of that the plaintiff was not in position to explain as to how she is unable to give any details about the negotiations preceeding the sale agreement, the price at which it was purchased etc. In her cross examination as P.W.1 she has stated that she does not know about the partition in the suit O.S.No.394 of 1996.

iii)She would also depose that she is not aware about the details of the lessee whom she claims is in possession of the suit property. She has also not been able to produce the original Pass Book, though she had claim that the payments which have been made by her to the defendant is reflected in the Pass Book. The Court therefore is constrained to draw adverse inference since, the plaintiff has kept the best evidence away from the scrutiny of this Court.

iv)The second witness who has been examined as P.W.2, who stated to be attesting witness is totally unaware about the negotiations etc., in respect of the suit property. It is seen that though the plaintiff had denied execution of the document and the plaintiff has not taken any steps to get the signature examined by an expert. The defendant on the other hand has sent the disputed signature for verification with the admitted signature and a detailed report has been filed as Ex.B.20, where the expert has opined that the disputed signature and admitted signature do not tally.

v)Another factum which has to be noted is that when a compromise decree came to be passed in O.S.No.394 of 1996 on 26.06.1996 the property which is allotted to the defendant and which has been described as D-Schedule property therein is described as a vacant land. Thereafter under Ex.B.4 it is seen that the defendant has made an application to the Electricity Department stating that she should be given a new service connection with reference to the new shed that she has put up in the suit property (Ex.B.3). The application has been filed, dated 14.11.1996 and there is Village Administrative Officer's certificate dated 23.11.1996 which has been marked as Ex.B.3.

vi)However, a reading of the schedule in Ex.A.1 would show that there is a godown in the schedule property. The application for new service connection is made only on 14.11.1996, the Village Administrative Officer's certificate is dated 23.11.1996 and the application is dated 25.11.1996. Therefore it is clear that the agreement of sale has come into existence much later. The report, Ex.B.20 of the expert would clearly show that the signature in the agreement of sale does belong to the defendant and no steps have been taken to prove its execution. The plaintiff as P.W.1 would depose that the defendant had agreed to sell the property to her only on account of the fact that she was unable to take care of the property as she was residing far away from the suit property.

Vii)In the counter to the indigent Original Petition the plaintiff would contend that the defendant cannot be permitted to sue as indigent person since, she is possessed of considerable property. Whereas, in the written statement in the suit O.S.No.193 of 2004 the plaintiff would contend that on account of the poverty the defendant expressed her inability to take possession of the property and therefore executed a sale in favour of the plaintiff.

viii)Therefore at each stage, the plaintiff had taken different reasons for the defendant executing the agreement of sale and that too within a two months of getting her share in the compromise. The Court below has held that possession is not with the plaintiff. Even according to her in the written statement filed as a counter to the suit O.S.No.193 of 2004 the plaintiff would contend that the defendant had agreed to sell the property to the plaintiff since "she did not want to take possession". Whereas in Ex.A.1 it is stated that possession was handed over by the defendant to the plaintiff.

9.It is also to be noted that the plaintiff did not possess the wherewithal to purchase the suit property. The plaintiff as P.W.1 would contend that the payments were made by her through bank but, however, she has not produced any document to show that she had a necessary wherewithal to proceed further with the sale deed.

10.On a conspectus of the above discussions, it is clear that Ex.A.1 is a fabricated document and the plaintiff is in illegal possession of the suit property. Therefore the defendant is entitled to recovery of possession. The plaintiff has not only failed to prove Ex.A.1 but also failed to show that she has sufficient funds to purchase the suit property.

Therefore point Nos.A, B and D are answered against the plaintiff and point No.C is answered in favour of the defendant. Consequently the appeals A.S.Nos.878 and 879 of 2010 are dismissed and the Judgment and Decree in O.S.No.193 of 2004 and O.S.No.51 of 2005 respectively stands confirmed. However there shall be no order as to cost.

Sd/-

Assistant Registrar (CS-IV)

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Sub Assistant Registrar

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To,

1.The Additional District Judge, Salem.

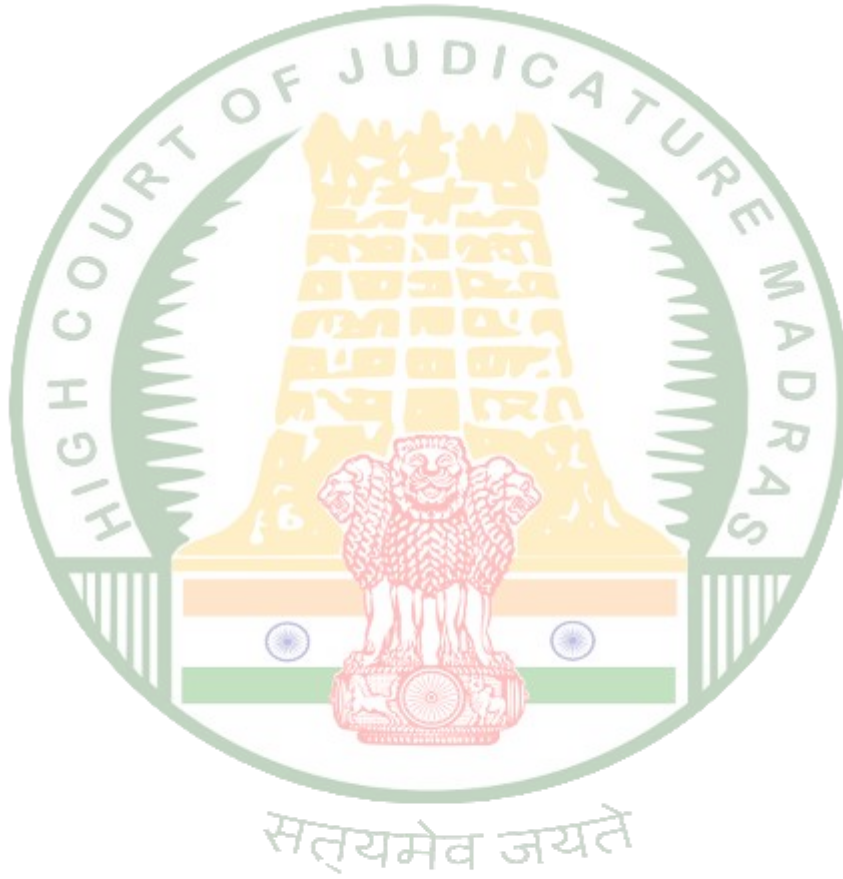
2. The Section Officer, VR Section, High Corut, Madras.

+1cc to M/s.Zeenath Begum, Advocate SR.No.8148

+2ccs to Mr.Babu Muthumeeran, Advocate SR.No.7882,7883

A.S.Nos.878 and 879 of 2010

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