

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
27~02~2019	15~03~2019

CORAM :
THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

S.A.Nos.418 and 419 of 2008
and M.P.No.1 of 2008

S.A.No.418 of 2008
Saraswathi

... Appellant/Plaintiff

Versus

1. Vasantha
2. Minor Sasikala
- 3.Minor Soundararajan

... Respondents1to3/Defendants2to4

(Minor Respondents 2 and 3
Represented by R1 Vasantha mother)

4. Rangaswami
5. Subramaniam
6. Karuppa Gounder
7. Karuppuswami

... Respondents4to7/
Defendants1, 5to7

(Since the respondents 6 and 7 remained
Exparte before the Courts below they are given up
in the Second Appeal)

S.A.No.419 of 2008
Saraswathi

...

Appellant/Respondent1/Plaintiff

Versus

1. Karuppasami
- ... Respondents/
Defendant7

2. Rangasamy
3. Vasantha
4. Minor Sakila
5. Minor Soundararajan
(Minor Respondents 4 and 5
Represented by R3 Vasantha (mother)
6. Subramaniam

7. Karuppa Gounder
- ...Respondents4to7/Defendants 1 to 6

(Since the respondents 6 and 7 remained
Exparte before the Courts below they are given up
in the Second Appeal)

Second Appeal No.418 of 2008 filed under Section 100 C.P.C.
against the judgment and decree passed by the Principal Sub
Court, Gobichettipalayam dated 24.10.2007 made in
A.S.No.45 of 2006 reversing the Judgment and Decree of
District Munsif, Sathyamangalam dated 29.09.2006 made in
O.S.No.72 of 2005.

Second Appeal No.419 of 2008 filed under Section 100 C.P.C.
against the judgment and decree passed by the Principal Sub
Court, Gobichettipalayam dated 24.10.2007 made in
A.S.No.37 of 2006 reversing the Judgment and Decree of
District Munsif, Sathyamangalam dated 29.09.2006 made in
O.S.No.72 of 2005.

For Appellants .. Mr.M. Narayanasamy

For Respondents... Mr.R. Babu
for M/s.P.Deenadayalan [for R7]
No Appearance [for R1 to R3]

COMMON JUDGMENT

Aggrieved over the First Appellate Court Judgment
setting aside the Decree and Judgment granted specific
performance, the present Second Appeal came to be filed by
the Appellant/Plaintiff. Two second appeals were filed
against the same judgment. Since the First Appellate Court
by a common judgment has disposed of the appeals filed by
two sets of Defendants against Decree and Judgment passed
in O.S.No.72 of 2005. A.S.No.37 of 2006 filed by 7th
Defendant, whereas A.S.No.45 of 2006 filed by Defendants 2
to 4 as against the Decree and Judgment passed in O.S.No.72
of 2005. Since both the appeals were allowed by the First
Appellate Court these two second appeals are filed by the
Plaintiff. Since both the appeals challenging the Decree
the Judgement in O.S.No.72 of 2005, this Court is inclined
to dispose of the same by a Common Judgment. For the sake
of convenience the parties are arrayed as per their own
rankings in the original suit.

2. The brief facts leading to file these Second Appeals
are as under:

2(a) The Defendants 1, 5 and 6 and one Nanjappan husband of the Second Defendant and father of the Defendants 3 and 4 agreed to sell the suit property to the Plaintiff for a sum of Rs.3,50,000/- and executed an agreement dated 22.01.1999 and received an advance of Rs.31,000/- and agreed to complete the sale within six months. Thereafter, said Nanjappan died. After his death, the Plaintiff came to know that Defendants 1 to 6 have executed sale deed in favour of the 7th Defendant in order to defeat the agreement and the same is not binding on the plaintiff. Despite the Plaintiff was ready and willing to pay balance sale consideration, the defendants did not execute the sale deed. Hence he sent legal notice on 26.07.1999 and also waited in the Sub-Registrar's office on 27.9.99. However, the defendants have not come forward to execute the sale deed hence the suit.

3. Defendants 2 to 4 are denying the agreement stated that Defendants 1, 5 and 6 colluding with each other and created sale agreement in order to defeat the sale deed executed in favour of the 7th Defendant by the husband of the 2nd defendant and father of 3rd and 4th defendants along with 6th Defendant the father of the 2nd Defendant. It is the contention of the Defendant 2 to 4 that the Plaintiff is none other than the wife of the First Defendant. 5th Defendant is the brother of the 1st Defendant and 6th Defendant is the father of the 2nd Defendant. All colluded together and created the sale agreement. Since her husband has sold the property of 0.30 cents to 7th Defendant to meet out the medical expenses. 7th Defendant has already filed O.S.No.156 of 1999 for injunction. After such suit the plaintiff and defendants created the sale agreement. Hence, prayed for dismissal.

4. 7th Defendant is also stated that he has purchased 0.30 cents from one Nanjappan on 16.9.1999. He is the bona fide purchaser as per law. Ever since the date of purchase he was in possession of the suit property. He has also filed O.S.No.156 of 1999 on the file of District Munsif, Sathiyamangalam. On the counter blast the present suit has been field.

5. The trial Court has framed the following issues:

1. Whether the Plaintiff is entitled to the relief of Specific Performance as prayed for?
2. Whether is it correct to state that the Plaintiff has no right to file this suit ?

3. To what other reliefs the Plaintiff is entitled to?

6. Before the trial Court P.W.1 to P.W.3 were examined and Ex.A1 to A10 were marked. On the side of the Defendants D.W.1 and D.W.2 were examined and Ex.B.1 to Ex.B.3 were marked. The trial Court decreed the suit on the ground that the agreement was proved by the evidence of P.W.2 and P.W.3. However, the First Appellate Court allowed the Appeals holding that the agreement is not enforceable as the same was not signed by the Plaintiff and the agreement is sham and nominal. Aggrieved over the same, the present Second Appeals have been filed by the Plaintiff.

7. Learned counsel for the appellant would submit that the First Appellate Court has non-suited the agreement only on the ground that signature of the purchaser has not found in the agreement. Therefore, such agreement is not enforceable in law. It is the contention of the learned counsel that such finding of the First Appellate Court is not based on law. The law is well settled that even in the absence of signature of the purchaser in agreement, when the agreement executed by the vendors, such agreement is capable of enforcement. Hence submitted that the First Appellate Court judgment is not correct. In support of his contention the learned counsel relied upon the Judgment of the Honourable Supreme Court in Aloka Rose v. Parmatma Devi and Others [(2002) 2 SCC 582].

8. Further, it is the contention of the learned counsel that the evidence of P.W.2 and P.W.3 clearly established the execution of the agreement. Hence, fabrication and forgery pleaded by the Defendants 2 to 4 not been established. Therefore, submitted that when the Plaintiff has paid substantial sale consideration she is entitled to specific performance.

9. Learned counsel for the Respondents submitted that the agreement is fabricated one and the Plaintiff is none other than the wife of the First Defendant. The same has been suppressed in the plaint. They are all residing in the same address. Therefore, sending the legal notice to the same address, thereafter seeking enforcement of contract is highly improbable. The very contract itself doubtful. The same has been created only to defeat the right of the 7th Defendant who has purchased the property from the husband of the Second Defendant and father of the 3rd and 4th Defendants along with 6th Defendant. The properties were actually in possession and enjoyment of the

co-owners on the basis of oral partition. Hence, submitted that the First Appellate Court has considered the entire aspect and allowed the appeals.

10. While admitting these second appeals, the following substantial questions of law have been framed :

1. Whether the Lower Appellate Court is incorrect in reversing the well considered judgment and decree of the trial Court on the ground that the Ex.A.1 sale agreement was not signed by the plaintiff/applicant when it was not raised by both the parties?

2. Whether the Lower Appellate Court is correct in coming to the conclusion that the Ex.A.1 sale agreement is invalid since it was not signed by the purchaser?

3. Whether the lower Appellate Court is correct in reversing the Judgment and decree of the trial Court when the defendants 2 to 4 and D7 failed to prove their case of oral partition?

4. Whether the Lower Appellate Court is correct in reversing the Judgment and Decree of the trial Court when there was no recital in Ex.B.1 sale deed with regard to the oral partition?

5. Whether the Lower Appellate Court is correct in reversing the judgment and decree of the trial court in a suit for specific performance, when the plaintiff proves her case in all means?

11. In respect of the First substantial question of law, the First appellate Court in Point No.1 has held that since the agreement has not been signed by the purchaser, the above agreement is not capable of enforcement. Such finding of the First Appellate Court in my view is not correct. The Honorable Apex Court in Aloka Bose's case (supra) has held that the agreement of sale signed by the vendor alone and delivered to purchaser and accepted by purchaser has always been considered to be a valid contract and the same can be specifically enforced by purchaser. Therefore, unilateral contract executed by the vendors in

favour of the purchaser such agreement is capable of enforcement. Merely because the purchaser has not signed the agreement, it cannot be said such agreement is not enforceable. Therefore, the finding of the First Appellate court in issue No.1 is not correct. Accordingly, the finding of the First Appellate Court in that aspect is not acceptable.

12. Now in the above back ground, I proceed to other aspect to see whether the plaintiff is entitled to seek for specific performance. From the facts it could be seen that the Plaintiff is none other than the wife of the First Defendant and 5th Defendant is another brother of the First Defendant; 6th Defendant is the father of the 1st and 5th Defendants. This fact is not in dispute. The entire plaint proceeds as if the plaintiff is no way connected with the defendants except by agreement. She has not even pleaded in the plaint to the effect that she is the wife of the 1st Defendant. The above conduct of the Plaintiff suppressing the factum of the relationship with the first defendant makes it very clear that she has not come to the court with clean hands. It is the specific case of the Plaintiff that having received substantial sale consideration of Rs.31,000/-, the defendants protracted in executing the sale deed in her favour, despite her repeated request and demand. Therefore, she went to the Sub-Registrar office and waited there for the defendant to come and execute the document. Such contention in my view is highly improbable. The Plaintiff all along living with her husband and other family members also living in same village. Therefore, the plaintiff going to the Sub-Registrar office and waiting for his own husband and brother in laws for registration of the document is highly improbable and against the normal human conduct.

13. It is further to be noted having not pleaded anything about her husband in the plaint, first time in her evidence she has stated that she is living in her father's house, which itself shows that such evidence pressed into service only in order to get over the sale legally made in favour of the 7th defendant by one of her brother in law the deceased Nanjappan. It is curious to note that though in her evidence she has stated that she was living separately from her husband, her evidence clearly indicate that her statement is not true. The ration card and school entries clearly indicate that her husband is living with the plaintiff.

14. It is further curious to note that all the defendants are living in the same village. It is the

specific case of the defendants 2 to 4 the legal heirs of the deceased Nanjappan. The deceased Nanjappan was suffering from cancer for many years and he was admitted in the hospital at Coimbatore and died. The plaintiff admittedly resides in the same village, in her evidence she has totally shown ignorance of the death of the deceased Nanjappan, which also clearly indicate that the Plaintiff has not come to the Court with clean hands. P.W.3 one of the witnesses examined on the side of the Plaintiff is none other than the 5th Defendant. He is brother of the Second Defendant's husband. He has also shown ignorance of the death of his own brother due to cancer. Such conduct of the parties clearly probabalise the defence set up by D.W.2 to D.W.4 to the effect that the parties were enjoying their respective shares as per the oral partition of the family. Only in order to meet out the medical expenses of Mr.Nanjappan the property viz., 30 cents has been sold to the 7th defendant. In fact, the conduct of the parties probabalise the defence theory, the agreement has been created among the family members only to non-suit the sale made in favour of the 7th defendant.

15. The evidence of P.W.1 is also indicate that all the co-owners are in enjoyment of specific portion for many years which fact, in fact, probabalise the defence that there is oral partition. Therefore, merely because P.W.3 who is 5th defendant in the suit is also brother of the deceased Nanjappan has spoken about the execution of the agreement and P.W.2 said to be one of the attesting witnesses of the agreement is also highly connected to the Plaintiff and other defendants. Their evidence itself is not sufficient to hold that Ex.P.1 is genuine sale agreement. It is further to be noted that the 7th Defendant is none other than the father in law of the P.W.3. His evidence clearly established one fact that P.W.3 has married the daughter of the 7th defendant who died unfortunately. There arose some difference of opinion between P.W.3 and P.W.7. The above facts clearly shows that there is a motive against D7 by P.W.3. Therefore, his evidence also cannot be given any importance. It is further to be noted the family members viz., D.Ws.1, 5, 6 and Plaintiff are residing in the same village. Merely because they admitted the execution of agreement and merely because one of the witnesses also testified to prove execution, genuineness of the sale agreement cannot be inferred in the facts and circumstances of the case.

16. Admittedly, the 7th Defendant has already filed

suit in O.S.No. 156 of 1999 for bare injunction and obtained interim orders as could be seen from the admission of P.W.1 and 3. Therefore, possibility of creating the suit agreement by all the family members to defeat the rights of the 7th Defendant cannot be ruled out in this case. The evidence of P.W.1 also clearly indicate that he did not have entire knowledge of Ex.A.1 at first instance. All these facts clearly show that Ex.A.1 is the result of concoction and fabrication. When Ex.A.1 suffers from serious infirmity and genuineness itself is doubtful such contract cannot be enforced in the eye of law. The Plaintiff has gone to the extent of suppressing the marital status of the first defendant in the plaint she has not come to the court with clean hands to seek equitable relief of specific performance when the court entertained the doubt about the genuineness of the agreement the doubt even may be slightest one, the discretion cannot be exercised in favour of the parties who seek to enforce such a contract. The entire pleadings and evidence of P.W.1 to P.W.3 and pleadings in the plaint attached with artificiality and against the normal human conduct. Therefore, I am of the view that certainly the Plaintiff is not entitled to specific performance. In fact the first appellant court though non-suited the agreement on the ground that purchaser has not signed in the agreement the Appellate Court also considered the other aspects i.e., conduct of parties in issue Nos.2 and 3 and held that the plaintiff is not entitled to specific performance. Therefore, the contention of the learned counsel for the appellant that the Appellate Court non-suited the plaintiff only on the ground that plaintiff not signed the agreement alone cannot be countenanced.

17. In view of the above discussions, I am of the view that certainly the Plaintiff is not entitled to specific performance enforced on the agreement Ex.A1. Further, it is contended that she is always ready and willing she went to the Sub-Registrar office and waiting for her husband and brother in law particularly when she was residing in the same house is against the normal human conduct. Therefore, I am of the view that the judgment and decree passed by the First Appellate Court does not require any interference. The Substantial questions of law are answered against the Appellant. Accordingly, the Second Appeals are dismissed.

18. In the result, Second Appeals are dismissed. No

costs. Consequently connected M.P.is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

ggs.

To

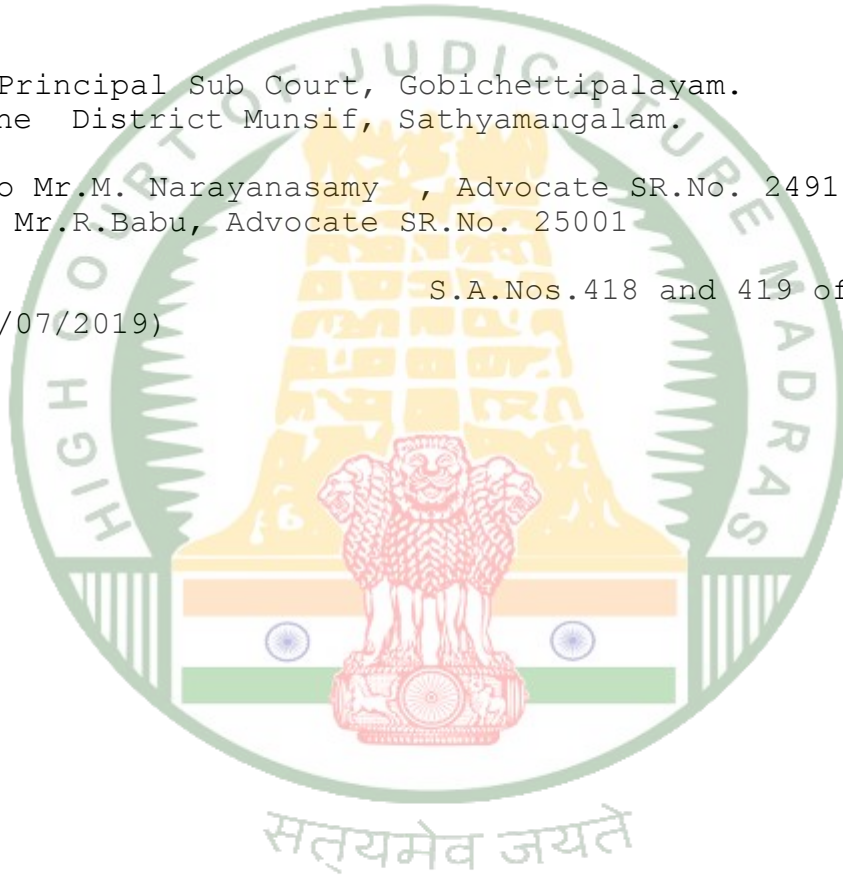
1. The Principal Sub Court, Gobichettipalayam.
- 2.The District Munsif, Sathyamangalam.

+2ccs to Mr.M. Narayanasamy , Advocate SR.No. 24916

+1cc to Mr.R.Babu, Advocate SR.No. 25001

S.A.Nos.418 and 419 of 2008

A.SK(15/07/2019)



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