

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 26.11.2019

Judgment Pronounced on : 28. 06.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.689 of 2008
and M.P.No.1 of 2008

Gunasekaran ... Appellant/Appellant / 2nd defendant

Vs

1.Duraisamy ... Respondent / Respondent / Plaintiff
2.Chellamuthu ... Respondent/Respondent/1st defendant

[R-2 Exparte before the lower Appellate Court]

Prayer :- Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree of the learned Additional District cum Sessions Judge (Fast Track Court No.III), Dharapuram in A.S.No.6 of 2006 dated 27.2.2008, confirming the judgment and decree of the learned District Munsif of Dharapuram in O.S.No.206/2004 dated 6.7.2005.

For Appellant : Mr.A.K.Kumarasamy
Senior Counsel for Mr.S.Kaithamalai Kumaran

For Respondents : Mr.S.V.Jayaraman, Senior Counsel
Assisted by Mr.S.Saravanan [for R1]
R2 - Exparte

JUDGMENT

The second defendant in a suit for specific performance, faced with successive decrees against him both before the trial Court and the first appellate Court, is the appellant herein.

2. A broad statement about the controversy may be made : The suit property belongs to the first defendant. Plaintiff claims that he and the first defendant had entered into an agreement for the sale of the suit property on 12.2.2002, and he seeks specific enforcement of this contract. The second defendant/appellant on the other hand contends that on 19.6.2002, the first defendant and the second defendant had entered into a sale agreement for the sale of the very same suit property. The issue is whether

plaintiff's case merit consideration over the second defendant's contention. The Courts below have decided this point affirmatively in favour of the plaintiff, which has now brought the second defendant with this appeal.

3. The pleading roams within a narrow space and they may be briefly stated :

a) On 12.2.2002 under Ext.A1, the first defendant had agreed to sell the suit property to the plaintiff. The total consideration is fixed at Rs.1.0 lakh, of which Rs.75,000/- has been paid as advance amount under the said agreement, and the balance to be paid is Rs.25,000/-. The time for performance of the contract is one year. The plaintiff has been ready and willing to perform his part of the contract. While so, the second defendant has laid a suit for specific performance based on an agreement in his favour. The plaintiff has been demanding the first defendant to execute the sale deed but he has been evading. Therefore, the plaintiff had issued a suit notice dated 13.12.2002 (marked Ext.A-2) to the defendants and they responded with Ext.A5 dated 21.12.2002. The second defendant has responded with his reply notice dated 05.12.2002.

b) The first defendant supported the case of the second defendant. He would plea that on 19.6.2002, he had entered into a registered sale agreement with the second defendant promising to serve the suit property for a total consideration of Rs.1.25 lakhs, and that he has received an advance of Rs.1 lakh from the second defendant. He had also left his original title deed of the suit property with the latter. Turning to the plaintiff's case, it was alleged that the plaintiff showed interest to purchase the suit property, but the first defendant opted not to sell the property to him and therefore, the plaintiff had brought into existence a fabricated sale agreement by forging the signature of the first defendant.

c) The second defendant who contested the suit, would repeat the same facts as concerning the sale agreement in his favour, and would go to plead that he issued a suit notice to the plaintiff on 05.12.2002, that since the first defendant did not show any interest to perform his part of the contract, the second defendant instituted O.S.336/2002 and this came to be decreed on 28.02.2000. Thereafter, he has laid an execution petition to execute the decree. Now to defeat the decree passed in O.S.336/2002, the first defendant had colluded with the plaintiff, and brought into existence an ante-dated unregistered sale agreement dated 12.2.2002.

4.1 Before the trial Court, the plaintiff has examined himself as P.W.1 and P.W.2, one Subramani, one of the attestors to Ext.A1 sale agreement and the scribe as P.W.3. The first and second

defendants have examined themselves respectively as D.W.1 and D.W.2.

4.2 Appreciating the evidence before it, the trial Court held in favour of the plaintiff. It has reasoned:

- The plaintiff had proved the due execution of Ext.A-1 by examining an attesting witness and the scribe. The first defendant having denied the execution Ext.A1 agreement, and having contended that his signature there was forged, was under burden to prove it, but he as D.W.1 had deposed in his evidence that since the filing of the suit, he did not even care to examine Ext.A-1 to ascertain if the signature in it was his. Nor, has he taken steps to have a hand-writing expert appointed to counter the inference drawable from the plaintiff's evidence. It then proceeded to compare the disputed signature of the first defendant with his admitted signatures in his written statement, and the affidavit by exercising its powers under Sec.73 of the Evidence Act, and proceeded to hold that Ext.A-1 is genuine.
- The fact that the first defendant has testified that he was willing to perform his part of the contract which he executed in favour of the second defendant, it is difficult to believe that he was colluding with the first defendant to defeat the right of the second defendant. Therefore, the theory of collusion between the plaintiff and the first defendant fails founded by the second defendant.
- The second defendant ought to have impleaded the plaintiff in his suit for specific performance in O.S.336/2002. And, that the very sale agreement on the basis of which the second defendant had laid the suit was not bonafide made.

4.3 The appellate Court did not deviate from the reasoning of the trial court in confirming the finding of the trial court that Ext.A-1 is genuine. It was argued before the first appellate Court that the plaintiff had not proved his readiness and willingness to prove his part of the contract, but it was rejected by the first appellate court on the ground that even before the trial Court, the defendants have chosen to contest it only on the issue if Ext.A-1 was genuine, and hence they cannot rake up an issue not raised before the trial Court. On the exparte decree obtained by the second defendant against the first defendant in O.S.336/2002 is concerned, the first appellate Court has held that it is collusively obtained to defeat the rights the plaintiff has under Ext.A-1.

5. The appeal has not been admitted and notice of admission was issued. After hearing the appellant briefly, this Court has framed the following substantial questions of law :

- a) Was not the appreciation of evidence by the Courts below is perverse?

- b) Have the Courts below fixed the burden of proof rightly?
- c) Has the plaintiff/ first respondent breached the condition in the agreement for instituting the suit?

6. The learned counsel for the appellant/second defendant argued:

- The plea of the appellant/second defendant is that Ext.A-1 was created collusively. This may contradict the pleading of the first defendant who would plead that Ext.A-1 is a fabrication. The artificiality in creating Ext.A-1 agreement has to be appreciated in the context.
- The property is in Komarapalayam village, in Dharapuram Taluk. For executing the Ext.A-1 document, stamp paper was purchased at Kodumudi. Second, while 12-02-2002, the date on which Ext.A-1 was alleged to have been executed is a Tuesday, P.W.2, one of the attesting witnesses to Ext.A-1 has deposed that the sale agreement was made on a Sunday.
- Ext.A-1 stipulates that if the first defendant was in breach of his promise to perform his part of the contractual obligations under Ext.A-1, then the plaintiff ought to deposit the balance sale consideration in the Court, and institute the suit. The balance sale consideration has not been deposited. This is a violation of a material term of the contract, and will go to show that the plaintiff has not only been in breach of performance of the contract in the manner that his contract stipulates, but also he is not ready and willingness to perform his part of the contract. There is not even an averment in the plaint that the plaintiff was ready and willing to perform his part of the contract. Reliance was placed on Arunachala Mudaliyar Vs Jayalakshmi Ammal & another [2003(1)CTC 355 (DB)] and R. Rajaram Vs T.R.Maheswaran [2010(2)MLJ 253].
- The Courts below fixed the burden wrongly both on the first defendant and the second defendant/appellant when they reasoned that the first defendant ought to have proved that Ext.A-1 was not a fabrication and that the second defendant was not a bonafide purchaser.

7. Per contra, the learned counsel for the plaintiff/first respondent argued:

- When the plaintiff has proved the due execution of Ext.A-1 by examining one of the attesting witnesses as well as the scribe, he has discharged the initial burden cast on him, and if the same is required to be rebutted, then the burden becomes the first defendant's to rebut it. He chose not to do it.

- Apart from pleading that Ext.A-1 was fabricated, the first

defendant has not pleaded any other, whereas the second defendant stopped with pleading that Ext.A-1 is a collusive document. There is no pleading disputing plaintiff's claim of readiness and willingness to perform his part of the contract.

- Ext.A-1 has provided one year time for performing the contract. This would expire only on 12-02-2003. However, even before the expiry of the stipulated time, the plaintiff had conveyed his readiness and willingness to perform his part of the contract when he issued the suit notice on 13-12-2002 Vide Ext.A-2 notice.
- Turning to the alleged breach in instituting the suit without depositing the balance sale consideration, Ext.A-1 does not stipulate that suit can be laid only after the balance sale consideration is deposited.

8. The first defendant is the central character to this dispute. But he appears to run with the hare and hunt with the hounds. He claims that his sale agreement with the second defendant was true, but still would not execute the sale deed. D.W.2 in his deposition would say that he not only had laid O.S.336/2002 against the first defendant for specific performance, but also had filed E.P.34/2004. (The copy of the E.P. is Ext.B2).

9. The issue is not whether the agreement on the basis of which the second defendant had obtained a decree in O.S.336/2002 was bonafide made, but if Ext.A-1 was executed on 12.02.2002, as claimed by the plaintiff. Curiously enough the first defendant claims that it was a forged document, but the second defendant claims that it was collusively made. In other words while the second defendant has taken up a position that the purported signature of the first defendant in Ext.A-1 is genuine, the first defendant says it was forged. This would imply that unless it was proved that (a) that the signature of the first defendant Ext.A-1 is a forgery, or, (b) that Ext.A-1 was a product of collusion, the second defendant/appellant cannot succeed in this appeal.

10. On the point of execution and proof in aid of genuineness of Ext.A-1, both the courts have concurrently held that it is genuine. In fact the trial Court has spared its efforts to compare the impugned signature of the first defendant with his admitted signatures within the powers available to it under Sec.73 of the Evidence Act, before upholding the genuineness of Ext.A-1. Essentially this finding on fact has become final, and this court too has ventured to compare the disputed signature of the first defendant with his admitted signature, though the exercise is not required. And, this Court does find that the effort of the trial court in comparing the signature has not produced any perverse results.

11. Turning to the pleading of the second defendant, Ext.A-1 is an ante-dated collusive document made after the second defendant had issued suit notice dated 05-12-2002 on the first defendant. As stated earlier, since he has admitted the signature of the first defendant in Ext.A-1, it is now required to be ascertained from evidence, if it was deliberately ante dated to defeat his right under his agreement. On evidence available in this 15 year long litigation, there is hardly anything to discredit the evidence of P.W.1 to P.W.3 as to the timing of its execution.

12. The argument of the learned counsel for the appellant about the place from where the stamp paper was purchased etc., may not be adequate to prove that the stamp paper was ante dated. The minimum effort he should have then spared was to summon the stamp vendor with his register and to examine the latter as a witness, to create a probability about his case. It is not done.

13. Turning to the last point on the breach of condition in Ext.A-1 in plaintiff in not depositing the balance sale consideration, the same, notwithstanding the ratio in the authorities cited by the learned counsel for the second defendant, fails on facts: First, there is no alternate pleading in the written statement; (b) Even the construction put on the document is doubtful since there is no expression in Ext.A-1 that suit could be laid only after depositing the balance sale price;

14. In conclusion, this appeal fails and the judgment and decree of the learned Additional District cum Sessions Judge (Fast Track Court No.III), Dharapuram in A.S.No.6 of 2006 dated 27.2.2008, confirming the judgment and decree of the learned District Munsif of Dharapuram in O.S.No.206/2004 dated 6.7.2005 is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

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Assistant Registrar (CS-IV)

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Sub Assistant Registrar

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To:

1. The Additional District cum Sessions Judge
(Fast Track Court No.III),
Dharapuram.

2. The District Munsif Court,
Dharapuram.

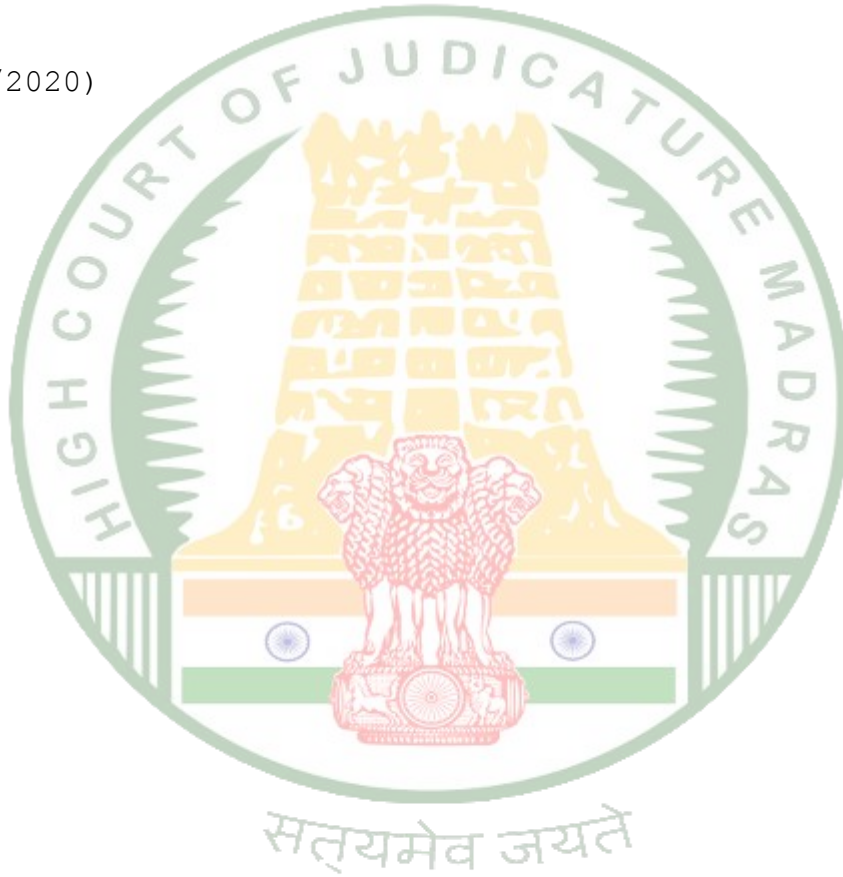
3.The Section Officer
VR Section, High Court, Madras.

+lcc to Mr.A.K.Kumarasamy, Advocate SR.No.53947

+lcc to Mr.S.Saravanan, Advocate SR.No.54194

S.A.No.689 of 2008

NRL (CO)
GMY (05/03/2020)



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