

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.06.2019

CORAM:

THE HON'BLE MR.JUSTICE N.SESHASAYEE

S.A.NOS.891 OF 2004

M.Ponnuswami

... Appellant/Plaintiff

Vs.

1.K.C.Krishnaswami Gounder
Selambara Gounder(died)

2.Senniappan

3.Thangavel

4.A.Subramaniam

5.Govindammal

... Respondents/Defendants 2 to 5

6.Kannappan

7.Ramathal

(RR 6 to 8 brought on record as LR of the deceased 2nd
respondent vide order dt.27/6/03 made in CMP.No.7165
and 7166/96)

...Respondents

Prayer:-

Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 08.03.1994 passed in A.S.No.278 and 279 of 1992 on the file of the learned First Additional District Judge, Coimbatore, reversing the Judgment and Decree dated 11-8-1992 passed in O.S.No.296/1989 on the file of the learned Subordinate Judge of Tirupur.

For Appellant : Mr.S.K.Rakhunathan

For Respondents : Mr.T.R.Rajaraman for R1

WEB COPY
JUDGMENT

The plaintiff, who was successful before the trial Court in his Suit for specific performance but suffered a reversal before the first Appellate Court, has preferred this Second Appeal. The Suit is for specific performance.

2.The facts on which the plaintiff rests his cause of action for the suit may be stated briefly:

- a) The Suit property is described as an agricultural property measuring 4.97 acres.
- b) The plaintiff alleges that on 26.08.1989, the plaintiff had entered into an oral sale agreement with the first defendant, in which, the parties have fixed the sale consideration payable for the Suit property at Rs.30,000/-. The plaintiff had paid Rs.5,000/- as the advance amount and that the parties have fixed one month time for performing their respective contractual obligation.
- c) On 24.09.1989, the plaintiff alleges that he had offered the balance sale consideration, to which the first defendant had made a statement that he would receive the balance sale consideration before the Sub-Registrar on the following day (25.09.1989), believing which the plaintiff along with couple of other persons had been waiting in the Sub-Registrar office on 25.09.1989, and as the first defendant did not turn up to execute the sale deed, he waited again in the Sub-Registrar office on 26.09.1989. Since the first defendant showed little anxiety to perform his part of the contract, the plaintiff was constrained to issue a telegraphic notice on 27.09.1989, which is marked as Ex.A.3, to the first defendant requiring him to execute the sale deed. On the same day he also issued a Suit notice (copy marked as Ex.A.4), which was returned un-served. To the plaintiff's notice, the first defendant has sent his reply on 03.10.1989, denying the very oral sale agreement. On this set of facts, the plaintiff instituted the Suit for specific performance.
- d) During the pendency of the Suit, on 15.11.1989, the first defendant has sold the property to defendants 2 to 5 for valid sale consideration. Hence, they were impleaded in the party array.

3.1 In his written statement, the first defendant has denied the oral agreement and added that :

- The suit property was held in co-ownership by one Chinnasamy Gounder and few others. While so, on 25.12.1974 Vide Ext.B1, the first defendant had purchased the property from Chinnasamy Gounder. As the property was held in co-ownership, the plaintiff and others chose to partition the property and accordingly a partition deed was executed on 14.08.1975 (Ext.A1).
- One of the parties to the partition deed was one Avinasiappa Gounder, with whom the original partition deed was left. The plaintiff was related to Avinasiappa Gounder

and the partition deed in question is suspected to have changed hands from Avinasiappa Gounder to the plaintiff.

3.2 So far as the defendants 2 to 5 are concerned, though they have filed a separate written statement, in essence it echoes the defence of the first defendant which he has taken in his written statement.

4.1 Before the trial Court, the plaintiff has examined himself as P.W.1 and proceeded to examine two other witnesses. For the defendants, the first defendant and the 4th defendant have examined themselves respectively as D.W.1 and D.W.2. The plaintiff has produced 7 documents, marked as Exs.A.1 to A.7, of which thrust is on Ex.A.1 and Ex.A.2. The defendants have produced Exs.B.1 to B.3.

4.2. A careful reading of the judgment of the trial Court discloses that before the trial Court, the plaintiff has stated that his oral agreement is founded on two circumstances: (i) Ex.A.1, the original Partition Deed dated 14.08.1975 is in his possession and this had come to his hands when the first defendant handed it over to him when the sale agreement was made; and (ii) A draft sale deed has been prepared on stamp papers by the plaintiff.

4.3 The trial Court had spent considerable efforts in dealing elaborately on the point as to how Ext.A-1 partition deed might have come to the hands of the plaintiff than the issue as to whether the agreement of sale as alleged by the plaintiff was proved. Ultimately it upheld the existence of an oral agreement, based solely on the production of the partition deed by the plaintiff. To this, it added strength by relying on Ex.A.2, a draft sale deed produced by the plaintiff. Ultimately, it decreed the Suit as prayed for. This was challenged by the defendants before the first Appellate Court.

4.4 The first Appellate Court, on appreciating the evidences before it, has held that the documents relied on by the plaintiff were inadequate to prove the oral sale agreement as alleged by the plaintiff. In particular, the first Appellate Court has dealt on the aspect of Ex.A.1/Partition Deed, and has held that it dealt with several properties, of which the suit property was only a minuscule portion, and has reasoned that in the ordinary course of events, the original partition deed could not be and would not be on the hands of a purchaser from a co-sharer. And, so far as the title of the first defendant to the property goes, Ext.B-2, under which, the first defendant had purchased the property, is his title deed, and this has been produced only by him.

5. When the Second Appeal came up for admission, the following substantial questions of law were framed.

1. Whether the lower appellate Court is justified in setting aside the judgment and decree of the trial Court based on a wrong interpretation of Ex.A.1?

2. Is the lower appellate Court is right in observing that the demeanour of the witnesses are not at all germane in a case of oral agreement of sale?

3. Is not the sale deed executed in favour of defendants 2 to 5 hit by the doctrine of Lis-pendence, since the suit having been filed on 21.10.1989 and the document having been executed on 15.11.1989?

6.1 As to the last of the substantial questions of law, it has to be said that doctrine of lis pendence does not bar transfer of property, but only make such transfer to the subject to the outcome of the pending litigation. The suit is still before this Court and therefore it cannot be said that doctrine of lis pendence will impact the title of defendants 2 to 5.

6.2 Turning to the merit of the case, the two points advanced before the Courts below are again argued before this Court. The core issue in the case is, is there an oral agreement of sale, and if so, what are its terms. While at the relevant time oral agreement of sale is permissible in law, yet, when contested, the terms of the same has to be established to justify the conscience of the right thinking. Here, the plaintiff relies on two circumstances which are already indicated above.

6.3 So far as the alleged handing over of Ex.A.1 is concerned, as rightly held by the first Appellate Court, it has to be first established that the partition deed was in the possession of the first defendant. The greater probability that arise out of the execution of the partition deed is that it could only be with one of the co-sharers who share among themselves right over larger property other than the property purchased by the first defendant under Ex.B.2. For all effective purpose, Ex.B.2 is the title deed for the first defendant and it is very much in his possession. If only the allegation of the plaintiff about the existence of an oral agreement were to be trusted then, this Court would also expect the plaintiff to possess Ex.B.2, Sale Deed, which he admittedly did not possess.

If these two circumstances are kept aside, then there is hardly any material available to establish the sale agreement in question. All the substantial questions of law have failed.

7. In conclusion, this Court dismisses this appeal with costs and the judgement and decree of the learned First Additional District Judge, Coimbatore, reversing the Judgement and Decree dated 11-8-1992 passed in O.S.No.296/1989 on the file of the learned Subordinate Judge of Tirupur is hereby confirmed.

MEMORANDUM OF COSTS

Respondent (	) Costs	Rs.P.
Stamp for Vakalatnama	...	...03.00
Advocate's fee on rupees	f.c.not filed	...
Translation Printing Charges	...	... Nil

Typing		
To be paid to the Respondent (	)	-----
		03.00
by the Appellant (	)	-----

Sd/-
Assistant Registrar(CS I)

//True Copy//

Sub Assistant Registrar

tsg

To

1. The first Additional District Judge,
Coimbatore.
2. The Subordinate Judge,
Tirupur.

Copy To
The Section Officer
VR Section, High Court,
Madras.

+1cc to Mr.S.K.Rakhunathan, Advocate, S.R.No.46075
+1cc to Mr.T.R.Rajaraman, Advocate, S.R.No.46639

S.A.Nos.891 of 2004

VGI (CO)
CS/31/07/2020