IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT PRONOUNCED ON : 01.11.2019

CORAM

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

S.A.NO.231 OF 2010

P.Valliammal .. Appellant/Appellant/Plaintiff

Vs

1. G.Saraswathi

2. R.M.Ganapathy

3. Dravidian Benefit Fund Ltd.,
   Rep by its President
   No.52, EVK Sampath Road
   Chennai - 600 007.

4. Murugesh Babu
5. Swathi Ratna

... Respondents/Respondents/Defendants

[Respondents 4 & 5 impleaded as per order of the Court dated 17.3.2017 made in MP.No.1 of 2014 in SA.No.231 of 2010]

Prayer :

Second Appeal filed under Section 100 of CPC against the judgment and decree dated 29.11.2005 made in A.S.No.23 of 2004 on the file of the learned II Fast Track, Additional District Judge at Chennai, confirming the judgment and decree dated 28.7.2003 made in O.S.No.3113 of 1999 on the file of learned XIII Assistant Judge, City Civil Court, Chennai.

For Appellant	:	Mr.S.Subbiah, Senior Counsel Assisted by Ms.G.Sumitra
For Respondents	:	Mr.G.Devadoss [R1 & R2] Mr.V.Raghavachari Assisted by Mr.Avinash Wadhwani [for R4 & R5] Mr.D.Veerasekaran [R3]

JUDGMENT

The plaintiff who has lost her suit for specific performance of a sale agreement said to have been executed by the first defendant, and to declare a mortgage deed executed by the first defendant to the third defendant post the sale agreement, successively before the Courts below, has preferred this appeal. Parties would be referred to by their rank before the trial Court.

Pleadings:

A. Plaint

2.1 The dispute is over a plot measuring 1,500sq.ft allotted by the Tamil Nadu Housing Board to the first defendant. The plaint alleges:

- The suit property was allotted to the first defendant by the Housing Board on 12-02-1982, and there was an obligation on the first defendant to pay the sale consideration in monthly installments. The first defendant struggled for finances to pay the monthly installments.

- The plaintiff is a relative of the first defendant. To save the property from the peril of cancellation of allotment, in the eventuality of the first defendant failing to pay the monthly dues, it was agreed that the first defendant would sell the suit property to the plaintiff, for a total sale consideration of Rs.7,000/-. A sale deed too was executed on 13-01-1984. One of the attestors to the sale deed was the 2^{nd} defendant, the husband of the first defendant. The sale deed however, could not be registered, as it was executed beyond the office hours of the Sub Registry. Possession of the suit property however, was handed over to the plaintiff. Ever since, she has been in possession of the suit property. After the execution of the sale deed that was awaiting registration, the plaintiff began paying the monthly installments payable to the Housing Board. It was agreed to between the parties that a regular sale deed would be executed immediately after the payment of last instalment.

- Be that as it may, plaintiff's husband died on 28-12-1984. Since the relationship between the parties remained cordial, the plaintiff has been merely requesting the first defendant and her husband, the second defendant to execute the sale deed.

- Even as the plaintiff was waiting for the registration of the sale deed to go through, on 09-06-1992, the first defendant had obtained a sale deed from the Housing Board. Subsequently, the defendants 1 and 2 had mortgaged the entire property with the 3rd defendant for a sum of Rs.4.0 lakhs. That was on 23-01-1998. The plaintiff came to know of these developments only when the 3rd defendant brought the property to sale. All along the plaintiff continued to be in peaceful physical possession of the property for well over 15 years (at the time of filing the suit).

- Soon, the plaintiff faced the threat of dispossession as she was required to vacate the property within a stipulated date. She therefore issued a notice dated 11-01-1999 (Ext.A7) to the first respondent, but it was not replied. This was therefore, followed by a legal notice issued through her Advocate dated 26-03-1999, (Ext.A8) to execute the sale deed free of mortgage. This was responded to by the first defendant with her reply dated 07-04-1999 (Ext.A9). It is alleged in the said reply that plaintiff's son Narayanan was a tenant in the suit property since 1985, and that the plaintiff resided along with him only as his dependent. This necessitated the plaintiff to issue Ext.A10 rejoinder dated 16-04-1999, clarifying the fact that her son did not live with her in the suit property.

- As things stood thus, the 3rd defendant, the mortgagee of the suit property, notified the sale of the suit property by public auction through its auctioneer. Since, the first defendant did not have any right to execute the mortgage deed in favour of the third defendant, the sale itself has to be stopped.

Hence, the suit for specific performance along with a prayer to declare the mortgage executed in favour of the 3rd defendant as void, is laid.

B. The Written statements:
3.1 All the three defendants have filed separate written statements. The second defendant, however, has only adopted the written statement of his wife, the first defendant.

3.2 In her written statement the first defendant takes the following defenses:

- It is true that the suit property was allotted to the first defendant by the TNHB under a lease cum sale agreement dated 18-05-1982. The total consideration payable as per the said agreement was Rs.14,815/-. In deference to the terms of the said agreement, the first defendant obtained building-plan approval, put up the residential building in the suit property, and same came to be assessed to property tax.

- At no time this defendant was in any financial difficulties, and in fact she paid the entire consideration payable to TNHB. Consequent to the payment of all the installments and construction of the building as was required to be done in terms of the first defendant's agreement with the TNHB, the latter executed a sale deed in favour of the former on 10-06-1992.

- So far as the sale agreement is concerned, plaintiff's husband and first defendant's husband (the second defendant) are brothers. Since the 2nd defendant wanted to help his brother, it was agreed that this defendant should put up a house within six months and within 3 months thereafter should obtain a sale deed from TNHB. An advance of Rs.7,000/- was received and an additional advance of Rs.30,000/- was to be paid within three months thereafter, and the sale deed was to be executed in favour of the plaintiff within three months next after the TNHB executed the sale deed in favour of the first defendant. The Power of Attorney in favour of the plaintiff's husband came to be executed as it was felt that he might be of some help during construction. The PoA was limited to granting power for obtaining plans, permit for payment of installments to TNHB and to obtain receipts, and to make arrangement for sale of the constructed house. A declaration dated 13-01-1984 too was executed by this defendant. She had also singed few non-judicial stamp papers and also on blank papers. The second defendant too had signed a few blank papers as required by his brother, the husband of the plaintiff. These were done at the insistence of plaintiff's husband.

- The alleged sale consideration as Rs.7,000/- is denied, and what was agreed was Rs.47,000/-. The consideration for the vacant plot itself is Rs.14,815/- to which must be added the value of the building, which might at the relevant time would be around Rs.50,000/-.

- But as the plaintiff could not pay the balance sale consideration, the sale agreement itself came to be cancelled, and the advance amount was repaid to the plaintiff. However, shortly thereafter, the plaintiff's husband fell sick and wanted the amount back. This was paid, and the sale agreement earlier executed was cancelled with the agreement holder making necessary endorsement on it.

- The sale agreement itself is a fabrication, which came into existence when the blank, signed stamped papers were misused to create one.

- The document dated 13-01-1984 which the plaintiff claims as a sale agreement dated 13-01-1984, is in fact a sale deed, which has not been registered in terms of Sec.17 of the Registration Act. Besides, this document is not a bi-party agreement.

- The suit is barred by limitation as it seeks to enforce a transaction said to have taken place on 13-01-1984 in 1999.

- As the rightful owner of the property, the first defendant has every right to mortgage the suit property.

- Turning to the alleged possession of the plaintiff in the manner she claimed, the first defendant had completed construction of her house in October, 1985. It was then leased to plaintiff's son Narayanan. The plaintiff is in occupation of the property, solely as Narayanan's dependent mother, and there is no jural relationship between the plaintiff and the first defendant. Once Narayanan became the tenant of the house, this defendant required him to pay the monthly installment of Rs.160/- to the TNHB, and the balance Rs.40/- to her. Since Narayanan was their nephew, neither of defendants 1 and 2 insisted their tenant to hand over the receipts issued by TNHB.

- It is true that this defendant was in receipt of the first notice. Following this, the second defendant met Narayanan and the plaintiff to enquire about the notice to which both pleaded total ignorance.

3.3 The third defendant's written statement is only about sustaining the mortgage deed executed by the first defendant.

4.1 When the dispute went to trial, the plaintiff examined herself as P.W.1 and examined two other witnesses. Given the nature of allegations in the written statement touching on the character of the plaintiff's possession, a sizable portion of it was directed against her son Narayanan, but plaintiff did not examine him. For the defendants 1 and 2, the second defendant was examined as D.W.1. They also examined the contractor, who according to them had put up the residential building in the suit property as D.W.2. Both sides produced ample documentary evidence, relevancy of most of which may not be considered significant.

4.2 During trial the plaintiff's attempt to bring on record the alleged sale agreement, and also the unregistered irrevocable Power of Attorney document, both dated 13-01-1984, but they were allowed to be marked as Ext.A-3 and A-4. However, in the appendix to the judgment, it refers to these documents as unregistered sale deed and Power of Attorney. In the judgment, it is clarified that the admissibility of these documents was deferred to be considered during the final disposal of the suit. And, when the final moment arrived to deal with the issue, the trial court finds that the said sale agreement indeed possessed the classical features of a sale deed, that it was insufficiently stamped unregistered document, and consequently, it did not allow it to be marked. As stated in the preludial statement to this judgment, the trial Court dismissed the suit and its line of reasoning is chiefly founded on its finding that the alleged sale agreement, (not marked) is not an agreement, but an unregistered sale deed.

5.In the first appeal preferred by the plaintiff, adopting the same line of reasoning of the trial court, the first appellate Court dismissed the suit. Hence, the plaintiff has preferred the present appeal.

6. The appeal is admitted to consider the following substantial questions of law:

(1)Whether Ex.A3 is liable to be registered under the provisions of Registration Act?

(2)Whether Ex.A3 would attract proviso to Section 49 of the Registration Act?

(3)Whether Section 53(A) of the TP Act would come to play for the rescue of the appellants?

7. It is now required to be stated that after the dismissal of the first appeal and before the second appeal was taken on record, the first defendant had sold the suit property to respondents 4 and 5.

8. As indicated, both the Courts below did not admit Ext.A-3. For the sake of narrative convenience the alleged sale agreement (purely from the plaintiff's stand point) dated 13-01-1984 would be referred to as Ext.A-3. In fact even the substantial questions of law framed refers it to as Ext.A-3.

The Arguments:

9. The learned Senior Counsel for the plaintiff/appellant painstakingly took this Court to convince it that Ext.A-3 only constituted an agreement of sale. He also elaborated the

background that supported it. In particular, he laid emphasis on the building approval plan, the receipts for installment-dues paid to TNHB etc., He further argued that even where a suit is laid on an unregistered sale deed, a suit for specific performance would lie for registering the said document in terms of the ratio in Kalavakurti Venkata Subbiah Vs Bala Gurappagari Guruvi Reddy [(1999)7 SCC 114]. He further argued, that an unregistered sale deed can be received as an evidence of an oral agreement of sale as declared in S.Kaladevi Vs V.R.Somasundaram & Others [(2010(5 SCC 401]. Even though, the courts below have not touched upon the defense of the defendants 1 and 2, founded on bar of limitation intervening in filing the suit, yet in the eventuality of Ext.A-3 being recognised as an agreement of sale, then this aspect has to necessarily require a consideration. However, in Tamil Nadu Small Industries Development Corporation Ltd., Vs P.Kalavathy Sukumar [(2015)3 MLJ 547], this Court has held that starting point of limitation within the meaning of Article 54 of the Limitation Act has to be proved only by the defendant, and here the denial for execution has come Vide Ext.A9, reply notice. This would imply that the suit is not barred by limitation.

10. On the contrary, the learned counsel for the defendants 1 and 2 (who chose to defend the suit for the benefit of respondents 4 and 5, who are the present owners of the property) that Ext.A-3 possessed all the characteristics of a sale deed, and inasmuch as the same is insufficiently stamped, and also unregistered, the same cannot be looked into. Reliance was placed on the ratio in K.Santhakumari Vs K.Suseela Devi [AIR 1961 AP 24], in which the Andra Pradesh High Court had relied on the authority of the Privy council in Skinner Vs Skinner [AIR 1929 PC 269]. At any rate, it does not constitute a sale agreement. Reliance was placed now on the ratio of this Court in Kaliappan Vs Kuzhandhaivelu [2011(1)CTC 807]. And as a sale deed, it should have been registered within four months of its execution as stipulated under Sec.23 of the Registration Act.

Discussion & Decision

11. The arguments on either side revolved around understanding the true import of Ext.A-3. What then are the characteristic features of an agreement of sale or a complete sale? In the case of an agreement of sale of an immovable property, there will be a personal obligation created on the contracting parties to perform the contractual obligations. Generally, it will be executory in nature. And, it does not purport to create any interest in the immovable property in presenti, nor any vesting of right in the immovable property would take place. Possession of the immovable property however, may be handed over to the purchaser under the sale agreement, and such purchaser can defend his possession not because he has title to the property

but because his possession is protected in equity under the principle of Part Performance to the extent provided in Sec.53-A of the Transfer of Property Act. The sale deed, on the other hand, if it is made after due compliance of the provisions of the Stamp Act and the Registration Act, vests title in the purchaser under the document, and the right to possession will be based on title and is not fed by equity. The critical difference between both these documents is all about the vesting of title to the immovable property. It is hence, the title once gets vested in the purchaser, even an unpaid seller's right in law is limited to creating a charge on the property for the sale price, but does not extend to upset the vested right in the purchaser.

12. It therefore, boils down to ascertaining the character of Ext.A-3 by spreading the words and phrases employed therein on the plane of such parameters which define and distinguish a sale agreement and a sale deed. The salient features that are instantly noticeable are:

- It is styled as a sale deed.
- Sale consideration is fixed at Rs.7,000/- and the entire sale consideration is paid under the document.
- The purchaser is authorised to construct with heritable rights.
- Possession of the property is handed over.
- After the TNHB had executed the sale deed in favour of the first defendant, the latter would execute such necessary documents as might be required to confirm the sale. Further the vendor (the first defedant) would do such acts as would be required for registering the sale.
- There is an indemnity-clause which could be enforced, if the vendor's title was found defective.

13. If closely read each of these clauses either individually or collectively, the document fits in with the character of a sale deed. And what was promised to be done on TNHB executing the sale deed in favour of the vendor was that the vendor would both execute such documents necessary to confirm the sale, and also do such acts for registering the sale. Both these clauses in the document cannot be read disjunctively for if so read, they may contradict each other. If read collectively it means, that the sale deed is validly executed, the act required for registering it deferred till TNHB executed the sale deed in favour of the vendor, and that the vendor would also execute documents confirming the sale. This Court therefore, holds that both the courts have decided this issue correctly. Here, one point that requires to be clarified is that in Kaladevi's case [(2010)5 SCC 401] which the plaintiff/appellant has cited, the facts are slightly different. The pleading in that case was to the effect

that there was initially an oral agreement of sale, which was followed by an unregistered sale deed. Since the unregistered sale deed could not be received in evidence, the Hon'ble Supreme Court has held that the original agreement could be relied on. Here no oral agreement as preceding Ext.A-3 was pleaded.

14. While the game should necessarily stop here, this Court tried looking at the allegations and counter allegations in the pleading of the parties from a different persepective, by presuming that Ext.A-3 constituted an agreement of sale. The total consideration as per the agreement was Rs.7,000/-. Here the first defedant would plead that the total consideration was Rs.47,000/- and supports it with the fact the plot itself would cost Rs.14,815/-. When there is no consensus ad idem as to the consideration payable, then law casts burden on the plaintiff to prove the consideration that she pleads. And, it does not stand to reason why should the first defendant decide to sell the property at half the price? This is possibly sought to be explained by another fact where the purcahser (plaintiff) under the agreement was to pay the balance sale price to the TNHB. Who paid the sale price then becomes yet another disputed fact.

15. In this scenario, given the fact that the relief of specific performance is a discretionary relief, this Court is required to presume a sequence of facts before considering if the case is fit enough for exercising its discretion in favour of grant of a decree for specific performanace. Every presumption is only suggestive of existence of a fact, and is sustained by another proven fact. Here, the plaintiff's efforts are inadequate when she did not even attempt to examine her son. With the basic fact which might have to feed presumption itself remain unstable, it will be a dangerous course to presume something, for exercising Court's discretion to grant a relief in equity.

16. Therefore, looking from every conceivable angle, this Court finds that the plaintiff has not qualified for this Court to consider exercising its discretion in her favour.

17. The appeal therefore fails, and accordingly dismissed. The judgment and decree dated 29.11.2005 made in A.S.No.23 of 2004 on the file of the learned II Fast Track Judge at Chennai, is hereby confirmed. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To:

1.The Additional District Judge,
Fast Track Court - II, Chennai.

2.The XIII Assistant Judge, City Civil Court,
Chennai.

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

+1cc to Mr.D.Veerasekaran, Advocate, S.R.No.91162
+1cc to Mr.G.Devadoss, Advocate, S.R.No.90609
+1cc to Ms.G.Sumitra, Advocate, S.R.No.90662
+1cc to Mr.Avinash Wadhwani, Advocate, S.R.No.91389

S.A.No.231 of 2010

VGII(CO)
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