

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.04.2019

CORAM:

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

S.A.No.1411 of 2011

M,P.No.1 of 2011

M.P.No.1 , 2 of 2012

M.P.No.1 of 2013

1. K.Sakthivel
2. Kandayee
3. Dhanabakkiam
4. Rathi
5. Rathinam

.... Appellants /Defendants

Vs.

1. T.Ranganathan
2. T.Muthu
3. Indira
4. Poonkodi

R3 and R4 impleaded as parties vide order dated 29.08.2012 made in M.P.No.3 /2012 in S.A.No.1411 of 2011. Respondents /Plaintiffs

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 13.02.2006 passed in A.S.No.6 of 2005 by the Subordinate Judge, Sankari, Salam confirming the decree and judgement dated 21.09.2005 passed in O.S.No.133 of 2004 by the District Munsif, Sankari, Salem.

For Appellants : Mr.V.Raghupathi

For Respondents No.2 : Mr.V.N.Mohanraj

For Respondents 3 and 4 : Mr.N.Manokaran

For Respondents No.1 : No appearance

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JUDGEMENT

Aggrieved over the concurrent findings of the courts below, the second appeal has been filed.

2. The parties are referred to as per their original rank in the suit.

3. The first defendant has entered into an sale agreement on 05.11.1987 with the plaintiffs, in respect of his ancestral property, wherein his minor son was also made as E.O. nominee party, for a sale consideration of Rs.75,000/- and a sum of Rs.50,000/- was paid on the same date, as advance. Three years time was fixed to pay the remaining sale consideration. The above agreement was subsequently registered on 02.02.1988. On the date of agreement, the possession of the property was also handed over to the plaintiffs. The plaintiffs were always ready and willing to pay the remaining sale consideration, whereas, the first defendant adopted delaying tactics in executing the sale deed. Hence, the plaintiffs sent a legal notice dated 22.10.1990 and filed a suit in O.S.No.150 of 1991 on 18.04.1991.

4. The first defendant filed his written statement denying the execution of sale agreement. It is his contention that since he was suffering from leprosy, he was unable to cultivate the land and hence, he requested the plaintiff to take possession of the property on lease and cultivate the same, on condition that 1/3 share of the proceeds in the land to be paid to the first defendant, in terms of the lease agreement. His further contention is that, the lease period was three years and the plaintiff also agreed to give vacant possession of the suit property, after expiry of three years from 1990. Only on the above understanding, the plaintiffs were put in possession of the suit property and the first defendant never agreed to sell his land. The first defendant requested the plaintiffs to vacate and hand over the possession of the property in the month of November 1990. But the plaintiffs had not handed over the possession, but created the sale agreement, and filed the suit.

5. The trial court framed four issues. On the side of the plaintiffs, 4 witnesses were examined as PW1 to PW4 and Ex.A1 to Ex.A24 were marked. On the side of the defendants, two witnesses were examined as DW1 and DW2 and Ex.B1 to Ex.B5 were marked. After analysing the evidence on record, the trial court decreed the suit for specific performance in favour of the plaintiff. The first appellate court has also confirmed the decree and judgment of the trial court and dismissed the appeal. Against which the second appeal has been filed by the defendants.

6. At the time of admitting the second appeal, the following substantial questions of law were framed.

1. Whether the non inclusion of the minor legal heirs in the sale agreement are subsequently brought on record only as the legal heirs of deceased Kandasamy Gounder, failed to raise the issue that the said sale agreement is not binding on them, by construing the same as law of waiver, though the

said act of the appellants hit by the law of waiver, since the right of succession to the hereditary property is inherent as per Hindu Succession Act?

2. Whether the law of waiver can override the rights vested in the statute of Hindu Succession Act?

3. Whether the non-joinder of minor legal heirs of late Kandasamy Gounder to the schedule mentioned hereditary property in the sale agreement, which has been subsequently decreed, can bind on them because the same is not in the interest and welfare of the minors?

4. Whether the alleged sale agreement and the subsequent execution of sale deed by the trial court with incorrect facts by hastily allowing the REP No.57/2005 without waiting for this court's decision, knowing fully well that the same is subjudice, in so far as it relates to appellant's share, who were minors then, since admittedly no permission has been obtained from the Civil Court under Guardian and Wardship Act, which is mandatory for selling their shares by father/ natural guardian?

7. Pending second appeal, the 3 and 4th respondent filed an impleading petition to implead themselves as party to the second appeal, on the ground that, after the execution of the decree, they purchased the suit property from the decree holder, however, this second appeal has been filed with a delay of 6 years. That petition was allowed and they were impleaded as 3rd and 4th respondents in the second appeal, vide order dated 29.08.2012.

8. The learned counsel appearing for the appellants would contend that the sale agreement was not intended for sale and admittedly, the first defendant was suffering from leprosy and hence, he could not sign the document and the evidence of PW2 to PW4 also clearly indicated that the executant was suffering from leprosy. That being the position, the sale agreement is highly doubtful and the agreement was intended only for lease and not for sale, but the trial court has not considered these facts. His further contention is that the plaintiffs have not proved as to why, they had not deposited the remaining sale consideration, within a period of three years and only during the pendency of the suit, they paid the balance sale consideration. Hence he prayed to set aside the decree and judgment of the courts below.

9. Whereas, the learned counsel appearing for the respondents would submit that the evidence of PW1 to PW4 clearly proved the fact that the sale agreement had been registered and

PW3 also in his evidence clearly spoken about the manner in which the registration was effected and the document was presented by the executant. Absolutely, there is no whisper in the written statement denying the manner in which the sale agreement was presented for registration. The contention of the first defendant is that the agreement was not intended for sale, but only for lease, however, no materials available on record to prove this contention. After passing of decree, through execution proceedings, the plaintiffs obtained sale deed in their favour and thereafter, a partition suit was filed by the plaintiffs and the suit property was allotted to the 2nd plaintiff and thereafter, the second plaintiff sold the property to the third parties (3rd and 4th respondent herein). However, the second appeal has been filed after 6 years, only to harass the plaintiffs and hence the same is liable to be dismissed.

10. I have perused the trial court's judgment as well as the first appellate court's judgment. The suit had been filed to enforce the Ex.A1 sale agreement. The Ex.A1 was came into effect on 05.11.1987, wherein, the first defendant as a kartha of the family, made his minor son as E.O. nominee party and agreed to sell the property to the plaintiffs. The PW1 and PW2 clearly spoken about the manner in which the Ex.A1 sale agreement was executed on 05.11.1987. It is the specific case of the plaintiffs that though the document was executed on 05.11.1987, it was presented for registration only on 02.02.1987 and registered. The PW2 in his evidence also admitted that the first defendant was suffering from leprosy. However, he put his thump impression on the date of execution. The specific case of the plaintiffs is that the document was presented for registration and got registered. Except evasive denial of facts, the factum of registering the document before the Sub Registrar is not specifically denied by the first defendant in his written statement. It is to be noted that PW3, an officer from the Sub Registrar office clearly spoken about the manner in which the document was presented and got registered. He has also clearly stated in his evidence that an endorsement was made by the Sub Registrar and the thumb impression of the first defendant was not obtained, since he was suffering from leprosy.

11. In this regard, it is to be noted that Rule 62 of the Registration Act clearly stated that Thumb-impression shall be dispensed with in the case of a person suffering from leprosy or contagious disease. In such cases a note should be entered in the register of thumb-impressions explaining the circumstances under which it has not been obtained. PW3 clearly spoken about this aspect. When the evidence of PW1 and PW2 clearly proved the execution of Ex.A1 and its registration, the burden of proof is entirely shifted on the defendants to show that the document was not intended for sale of property but only for lease, and the possession of the property was given to the

plaintiff only on the basis of the lease agreement between the parties. In the absence of any materials, now, the defendants cannot take a contrary view. The versions found in the Ex.A1 was duly proved as per law. Handing over of possession to the plaintiffs has not been disputed by the defendants. Without any materials, the contention of the defendants that the first defendant never intended to sell the property to the plaintiffs, cannot be inferred and such contention is not admissible contrary to the written contract. Though the oral evidence also admissible to explain about the nature of the contract, absolutely there is no evidence to prove the contention of the defendants.

12. It is further to be noted that the agreement entered into was not only by the first defendant but also by his minor son, who was arrayed as 2nd defendant as E.O.nominee party. The property is ancestral property. The first defendant was being the Kartha of his minor son, entered into a sale agreement with the plaintiffs, in order to discharge his family debts. The recitals of the agreement also clearly indicates that, to clear all the dues under the promissory notes, it came to be executed. The property is not the individual property of the minor, so as to get permission of the court to deal with the minor property. But property is ancestral property. Section 8 of the Hindu Minority and Guardianship Act, 1956 deals with separate property of the minor, which mandates to get permission of the court to deal with the minors property. In the case on hand, the first defendant as a kartha of the family, dealt the property for the benefit of clearing debts. Such being the position, now, it cannot be contended by the defendants that without getting permission from the civil court, the property would not have been sold.

13. It is also to be noted that, after the death of the first defendant, the 2nd defendant after attaining majority, defended the suit. Even after dismissal of the appeal by the first appellate court, he filed the second appeal with a delay of 6 years. Infact the defendants have not challenged the agreement, except denying that their father was not intended to sell the property but entered into agreement only for lease. In the absence of any materials to establish their contention, the defence fails. Considering every aspect, the plaintiffs are entitled to a decree and judgment for specific performance.

14. It is also to be noted that the conduct of the parties assumes significance. After dismissal of the appeal by the first appellate court, the second appeal has been filed with a delay of 6 years. In the intervening period, decree was put into execution and execution court executed a sale deed in favour of the plaintiff. Thereafter, it appears that the decree

holders filed a partition suit to divide the property and in the partition, the property was allotted to the 2nd plaintiff. Subsequently, it was purchased by the 3rd and 4th respondents herein. When the agreement clearly proved that it was entered into between the parties to sell the property, and the ready and willingness of the plaintiffs has also not denied by the first defendant neither in the written statement nor in his evidence, and the plaintiff has also in his evidence spoken about his ready and willingness to pay the remaining sale consideration, it is too late for the appellants to contend that the suit agreement is not capable for enforcement for specific performance. Accordingly, the substantial questions of law are answered against the appellants.

15. In the result,

(i) The second appeal is dismissed. The connected civil miscellaneous petitions are closed. No costs.

(ii) The decree and judgment of the first appellate court is confirmed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Subordinate Judge, Sankari, Salam.
2. The District Munsif, Sankari, Salem.

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

- +1 cc to M/s.N.Manokaran Advocate sr36063
+1 cc to M/s.V.Raghupathi Advocate sr36187
+1 cc to M/s.N.Ishtiq Advocate sr35747

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