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IN THE HIGH COURT OF JUDICATURE AT MADRAS

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06~03~2019	02~04~2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

S.A.No.114 of 2012
and M.P.No.1 of 2012

1. Anjalai
2. Minor.Nithiya
3. Minor.Vinod kumar
4. Minor.Dinesh kumar ... Appellants/Appellants/
3 to 6 Defendants

Versus

1. C. Ganesan ... 1st Respondent/
1st Respondent/Plaintiff
2. Perumayee ... 2nd Respondent/
2nd Respondent/2nd Defendant

Second Appeal filed under Section 100 C.P.C. against the judgment and decree of Principal Sub Court, Salem in A.S.No.59 of 2009 dated 24.11.2009 confirming the Judgment and Decree of Principal District Munsif, Salem in O.S.No.295 of 2004 dated 29.04.2009.

For Appellants .. Mr.R.Nalliyappan

For Respondents .. Mr.P. Jagadeesan [for R1]
R2 [given up]

JUDGMENT

Aggrieved over the concurrent findings of the trial Court and First Appellate Court decreeing the suit for specific performance the present Second Appeal came to be filed.

2. The brief facts leading to file this Second Appeal is as under:

2.a The First Defendant agreed to sell the suit property for a total sale consideration of Rs.76,500/- and executed an agreement on 19.12.2003 and received a sum of Rs.40,000/- as



advance and the time is stipulated in the agreement and on the same date the Defendants handed over the original sale deed. The Plaintiff has expressed his willingness on 4.2.2004 to pay the balance sale consideration, but the 1st defendant evaded the same, he sent legal notice on 16.2.2004 and informed that he will wait in the Sub-Registrar office on 23.03.2004. On that date he was waiting in the Sub-Registrar Office, Suramangalam but the defendant did not come to the Sub-Registrar Office. Hence he filed suit for specific performance. During the pendency of the suit the First Defendant died on 12.3.2004, his legal heirs were impleaded as Defendants 2 to 6.

3. In the written statement filed by Defendants 3 to 6 they have denied the allegations. It is their contention that the First Defendant has not executed any sale agreement. Sale agreement is false and fabricated to cheat the 1st defendant. These Defendants are wife and children of the First Defendant. In fact, First Defendant died due to HIV. Third Defendant also infected through her husband. It is further contended that the 1st Defendant has settled the suit property to the 3rd Defendant on 12.03.2004. The suit agreement is fabricated one. Hence, prayed for dismissal of the suit.

4. The trial Court has framed the following two issues:

1. Whether the Sale Agreement dated 19.12.2003 is true and genuine one?

2. Whether the Plaintiff is ready and willing to perform the sale agreement?

3. Whether the plaintiff is entitled for the claim as prayed for?

4. Such other relief if any?

5. In the trial P.Ws.1 and 2 were examined and Exs.A.1 to A.4 marked. On the side of the Defendants D.Ws.1 to 3 were examined and Exs.B1 to B3 were marked. On the basis of the evidence and materials the trial Court decreed the Suit. The First Appellate Court also confirmed the same, as against which the present Second Appeal has been filed.

6. After hearing the parties this Court has framed the following substantial questions of law at the time of argument:

1. Whether the Courts below are right in decreeing the suit for specific performance without deciding the hardship that may be caused to the Defendants?



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2. Whether the Courts below are right in granting specific performance of the agreement dated 19.12.2003?
3. Whether the Courts below are right in granting specific performance without going to the issue of enforceability of such contract?

7. The learned counsel appearing for the Appellant vehemently contended that the First Defendant is affected with AIDS and he was bed ridden for more than 8 months prior to his death. He died in the month of April 2004. The evidence of P.Ws 1 and 2 itself clearly indicate that the agreement is not intended for sale and obtained by coercion by the many people. Further, the evidence of P.W.2 the so called scribe of the document clearly show that the agreement was not executed by the First Defendant. Further, it is the contention of the learned counsel that the 1st Defendant died due to HIV and his wife also affected HIV and other defendants are minors. The Courts below have not even considered the circumstances on which the agreement was obtained and not exercised discretion judicially. Hence, submitted that the judgment of the trial Court is liable to be interfered.

8. Learned counsel appearing for the Respondent would submit that the First Defendant has executed the agreement which has been spoken by P.W.2. Apart from that the mother of the First Defendant put her thumb impression in the document as attesting witness. She has remained exparte. P.W.2 evidence clearly indicate that the document was executed by the First Defendant and he received Rs.40,000/- on the same day. Three months time agreed in the agreement by the first defendant to execute sale deed. Thereby the plaintiff has issued legal notice on 16.02.2004 itself expressed his intention to register the document on 23.03.2004. The above fact clearly indicate that the Plaintiff was ready and willing and balance sale consideration was also deposited. The contention of the Defendants that the agreement fabricated is found to be false by the courts below. Therefore, submitted that the decree and judgment of the trial court and appellate court do not require any interference.

9. The suit has been laid on the basis of Ex.A.1 sale agreement dated 19.12.2003 executed by the First Defendant, the husband of 3rd Defendant, son of the 2nd Defendant and father of other Defendants. It is the case of the Plaintiff that the suit agreement was executed by the first Defendant on 19.12.2003 for sale of the suit property for a total sale consideration of Rs.76,500/- and agreed to execute the sale deed within three months. On the date of agreement itself Rs.40,000/- was



received as advance sale consideration. Whereas the contention of the Defendants that the agreement is fabricated one. The First Defendant could not have executed the document, because he was affected by HIV. Though P.W.1 and P.W.2 examined before the Court to substantiate the execution of the agreement, on perusal of the entire evidence of P.W.1 and P.W.2, this Court found that there are lot of contradiction in their evidence with regard to the execution of agreement. The evidence of P.W.1 that Ex.A.1 was executed in Solampallam border and stamp paper was purchased by the one Perumal Gounder in the name of the First Defendant.

10. It is to be noted the execution has to be proved by the Plaintiff. Though he has examined as P.W.2, this court found that there are lot of discrepancies in his evidence. Particularly, it is the specific case of the defendants that First Defendant was bedridden for more than eight months prior to death, could not able to move out of the place. D.Ws.1 to 3 in their evidence have spoken that First Defendant infected by HIV and he was bedridden for more than eight months. Their evidence in chief examination that the First Defendant was all along bedridden for more than eight months not even denied by the Plaintiff. Therefore, when the person already suffering infirmity and affected by serious disease of HIV and bedridden and any person wants to establish the contract, the burden is heavy on the person to establish the contract with free will of the person. On a careful perusal of the evidence of P.W.1 as stated above, he has spoken to the fact that the agreement was executed at the Solampallam border. Further P.W.2 in his evidence categorically admitted first defendant died out of HIV and he was bedridden for eight months. He has also clearly admitted that the agreement was executed in door No.159 of Solampallam New Road, whereas P.W.1 did not speak about the place where the agreement was executed. It is curious to note that Door No.159 spoken by P.W.2 is none other than his own house. P.W.2 in his evidence also stated that only at his direction and others direction they prepared agreement. He never spoke anything about the scribe was present at the relevant point of time. Whereas on a bare perusal of Ex.A.1 shows that the scribe name has been incorporated later.

11. It is further curious to note that five people signed as attesting witnesses. It is also against normal human conduct. In agreements normally only two or maximum three witnesses sign as attesting witnesses. But in Ex.A.1 five witnesses have signed. It is also to be noted why it assumes significant is for the simple reason that the evidence of P.W.2 indicate that they convened a Panchayat from the morning to afternoon, thereafter only they obtained Ex.A.1. If really the First Defendant was intended to sell the property there was no



need whatsoever for people gathering and obtained the document. Similarly, it is also the evidence of P.W.2 that there are police complaint also given against him. It is further to be noted that it is the specific cross examination D.W.1 by the plaintiff to the effect that in order to repair the house, First Defendant has borrowed loan amount from the Plaintiff. The above specific suggestion was put to D.W.1 by the Plaintiff. This specific stand taken by way of suggestion about the loan advanced by the First Defendant coupled with the fact, P.W.2 evidence clearly indicate that there was panchayat held from the morning to afternoon. Thereafter Ex.A.1 came to be obtained. The same clearly indicate that Ex.A.1 is the result of some pressure and not out of free will of the First Defendant.

12. Further, it is also established the fact that first Defendant was suffering from serious ailment and he was bedridden till his death. Therefore, First Defendant executing Ex.A.1 out of free will is highly doubtful in this case. Be that as it may. Now, as discussed above, whether the above agreement merely because its execution said to have been proved could be enforceable when there is a doubt very much in existence with regard to free will of the executor. The circumstances leading to execution of Ex.A.1 clearly show that there were earlier loan transaction between the parties as discussed above. Admittedly within one month from the date of filing of the suit, First Defendant died due to HIV. Therefore, when the person bedridden and suffering serious infirmities the burden is heavily on the party seeking enforcement of any contract said to have been executed by such person. The circumstances clearly indicate that the contract is not out of free will of the First Defendant. Therefore, the discretion relief cannot be granted even execution of Ex.A.1 taken as such contract for sale.

13. The circumstances which narrated above clearly indicate that the First Defendant was seriously ill and bedridden at the relevant point of time and Ex.A.1 came to be executed by exerting pressure by many people. P.W.2 evidence clearly indicate that there was a panchayat from the morning to lunch hours and Ex.A.1 came to be obtained. Therefore, taking note of the circumstances in which the contract was entered, the First Defendant was in fact counting his days, Third Defendant is also infected by HIV, the children are only minors and suit property is only a small plot of measuring 900 sq.ft., the performance of contract certainly cause much hardship to the defendants. The Third Defendant has already infected by HIV and other defendants were minors at the relevant point of time. On the other hand no such hardship would be on the Plaintiff if the amount paid by him under Ex.A.1 is returned with reasonable interest. Accordingly, this Court answered the substantial questions of law in favour of the Appellants



14. In the result, the appeal is allowed and the judgment and decree of the courts below granting specific performance is hereby set aside. However, for alternative relief the suit is decreed for a sum of Rs.40,000/-, advance paid by the plaintiff under Ex.A.1 with interest at the rate of 7.5% from the date of agreement till the date of realisation. The remaining amount of sale consideration deposited by the respondent before the Court is ordered to be returned to him. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

ggs.

To

1.The Principal Sub Judge, Salem

2.The Principal District Munsif, Salem.

Copy To

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

+1cc to Mr.R.Nalliyappan, Advocate SR.No.32081

+1cc to Mr.P. Jagadeesan, Advocate SR.No.32177

S.A.No.114 of 2012

RR(CO)

GMV(09/10/2019)