

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.01.2019

CORAM :

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

S.A.Nos.780 and 781 of 2016
and
C.M.P.Nos.14760 and 14761 of 2016
and
C.M.P.No.20153 of 2018

Singaram

... Appellant in both appeals/ Appellant / Plaintiff

Vs.

P.Selvaperumal (died)

1. A.Gunasekaran

... 1st Respondent in both appeals/ Respondent/ defendant

2. Sellapangi Ammal

3. Kalarani

4. Rajaram

5. Subramanian

6. Dharmalingam

7. Valarmathi

8. Venkatesan

9. Kannan

... Respondents/ Respondents/Defendant in S.A.No.780 of 2016

Common Prayer: Second Appeals filed under Section 100 of the Code of Civil Procedure against the judgment and decree of the learned Subordinate Judge, Panruti made in A.S.Nos.4 and 5 of 2012 respectively dated 12.04.2016 confirming the judgment and decree of the learned District Munsif of Panruti made in O.S.Nos.302 of 2004 and 108 of 2006 dated 30.01.2012.

For Appellant : Mr.S.Parthasarathy, Sr.Counsel
for Mr. P.Dinesh Kumar

For Respondents : Mr.N.Suresh [for R1]

COMMON JUDGMENT

These twin appeals arise out of a common judgment of the First Appellate Court in A.S.Nos.4 and 5 of 2012.

2. The appellant herein has filed a suit in O.S.No.302 of 2004 for specific performance of an agreement dated 05.05.2000. This agreement was marked before the trial court as Ext.A1. The total consideration payable under the agreement is Rs.1,00,000/-, out of which, the appellant claims to have paid an advance of Rs.90,000/-. Time for performance is fixed as two years and the suit was laid on 10.07.2002. The property involved are described as two items and they have combined to an extent of 101.5 acres.

3. The 1st defendant denied the alleged sale agreement in Ext.A1 as a piece of fabrication. After he filed the written statement on 03.11.2004 and before the commencement of trial on 01.06.2005, the 1st defendant had filed a petition before the trial court to examine himself as he was too old and apprehended his ultimate end. A copy of this petition was served on the plaintiff, wherein the plaintiff has endorsed that he had objection wherein after on 06.06.2005, the trial court returned the said application for maintainability. A couple of months thereafter, on 18.10.2005 to be precise the 1st defendant died. In the meantime, under Ext.B3 dated 17.05.2001, the 1st defendant sold the suit property to the 2nd defendant. Subsequently, the present appellant has laid O.S.No.108 of 2006 for bare injunction against the 2nd defendant in the earlier suit for specific performance.

4.1 Both the suits were tried together. Before the trial court, the plaintiff has examined himself as P.W.1 and both the attestors to Ext.A1 were examined P.W.2 and P.W.3. For the defendants, the 2nd defendant was examined as D.W.1 and as the 1st defendant was dead by then, his son was examined as D.W.2.

4.2. On appreciating the evidence before it, the trial court dismissed both the suits, challenging which, the plaintiff / appellant herein has moved the First Appellate Court which as said earlier has confirmed the decrees of the trial court.

5. These appeals were admitted on the following substantial questions of law :

'a) Whether the judgment and decree of the Courts below are correct in holding that the appellant/plaintiff failed to prove Ext.A1 suit

sale agreement is true and valid, when the appellant/plaintiff examined both the attestors of Ext.A1 sale agreement as P.W.2 and P.W.3?

b) Whether the Courts below are correct in law by comparing the signature of the 1st defendant in Ex.A1 Sale agreement with Vakalat and suit summons admittedly both have come into existence after Ext.A1?

c) Whether the Courts below are correct in holding that the appellant/plaintiff is not in possession of the suit property when the 1st respondent himself categorically admitted that the appellant/plaintiff is in possession of the suit property?''

6. The learned counsel for the appellant argued that the Courts below have gone wrong in comparing the signature of the 1st defendant in Ext.A1 with his vakalat and Ext.B3 which are not contemporaneous with the suit agreement dated 05.05.2000. He added that the plaintiff has put up a hut, and was in possession of the suit property, and both the attestors were categorical in their oral testimony that they have seen the 1st defendant signing the agreement, and the courts below have not given any valid reasons as to why it opted to reject the evidence of P.W.2 and P.W.3.

7.1 Per contra, the learned counsel for the respondent would argue that when the alleged executant of the document has denied his signature in Ext.B1, the burden is cast on the plaintiff to prove that the signature in Ext.A1 is that of the 1st defendant. This burden the plaintiff has chosen not to discharge. Learned counsel for the respondent also cited the judgment of this Court in the case of P.Stanley Buck v. D.Govindaraj [(2009) 7 MLJ 908].

7.2 In a scenario such as this, the plaintiff ought to have taken steps to prove the disputed signature of the 1st defendant in Ext.A1 with that of his other admitted signature. In fact, due to his falling health, the 1st defendant himself volunteered to enter the witness box to testify earlier with an application. It is a sheer misfortune that the trial court did not appreciate the same and decided to return the said application. Notwithstanding what the trial court has done vis-a-viz the said application, what is significant is that the appellant's counsel before the trial court has contributed to it when he sought time to file his objection. So, the best evidence which the 1st defendant himself could have volunteered to

provide to the Court was denied firstly by the appellant himself. It is hence, the trial court was strained to compare the signatures of the 1st defendant available in Ext.B3 sale deed which he had executed in favour of the 2nd defendant, the summons served on him, the vakalat signed by him. The 7th defendant, the son of the 1st defendant was examined as D.W.2, who entered the box and denied the signature of the 1st defendant. Here, it is necessary to emphasis that Ext.B3 sale deed is not vastly distanced from Ext.A1 sale agreement and they are separated by a bare six months period. The suit itself was laid in 2002 and therefore, the signature of the 1st defendant in the suit summons as well as in the vakalat cannot be considered as inconsequential.

7.3 On the factum of execution, the appellant's evidence as P.W.1 was ambivalent and oscillating, as he would say that he could not recognise the signature of the 1st defendant, still would seek to justify it with his further assertion that he was illiterate, but would go to admit that he was a drama artist and a stage performer. This goes to show that at least he ought to know to read, but he is seen keen to conceal it. This conduct of the P.W.1 can not be ignored especially in a case where the suit is laid for specific performance.

8. On appreciating rival contention, this Court finds substantial merit in the submissions of the learned counsel for the appellant over that his counter part. When an execution of a document is disputed the burden is cast only on he who affirms the execution, and accordingly, in the context of the present case it is on the appellant/plaintiff. He not only did not take steps to appoint an expert to compare the signature of the 1st defendant with his admitted signature, he also appears to have opposed the very attempt of the 1st defendant to examine himself early, and besides proceeding to make a false statement before the court that he does not know to read. The plaint shows that he can sign at least and in which case where the burden is on him, he is under a duty to explain that he knew only to sign and that he could not read otherwise. Given the totality of the facts and evidence, it appears that the plaintiff is not given to speak true before the Court.

9. Now, it is not only that the plaintiff has not discharged the burden in the manner known to law to prove the signature of the 1st defendant in Ext.A1, but he also complicates his case further by making a statement in this Court which this Court does not believe.

10. The evidence would further show that the suit property and the properties of a certain Kamsala, the wife of the plaintiff, originally belonged to one Krishna Chettiyar who had sold a portion to Kamsala, and the rest to the 1st defendant. The respondent however says the 1st defendant himself has sold about 15 cents to Kamsala and this portion is in the corner of the suit property and that the appellant is residing there. This is shown even in the boundary description of the suit property.

11. To conclude that this Court finds no merit in any of the two appeals, and hence both the appeals are dismissed and the judgment and decree of the courts below are confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

ssn

To

1. The Subordinate Judge,
Panruti.

2. The District Munsif,
Panruti.

3. The Section Officer,
V.R.Section,
High Court, Madras.

+2ccs to Mr. P.Dinesh Kumar, Advocate SR.No. 4079

+1cc to Mr.N.Suresh , Advocate SR.No. 4723

S.A.Nos.780 and 781 of 2016
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A.SK(25/06/2019)