

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.11.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.167 of 2014,
M.P.Nos.1 and 2 of 2014
and
C.M.P.No.20700 of 2019

M.Sivaprakasam ..Appellant/Plaintiff

Vs.

1.Chinnathambi
2.Sivan

..Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree passed in A.S.No.3 of 2009 dated 09.01.2012 on the file of the Additional Subordinate Judge, Dharmapuri confirming the judgment and decree passed in O.S.No.230 of 2007 dated 25.11.2008 on the file of the District Munsif Court, Dharmapuri.

For Appellant : Mr.B.Vijay

For Respondents: Mr.R.Rajaraman

J U D G M E N T

The plaintiff in O.S.No.230 of 2007 whose suit for specific performance was dismissed by the trial court on its affirmation by the lower appellate court has come up with this Second Appeal.

2. According to the plaintiff, the 1st defendant was the owner of the property. He had agreed to sell the same for a total consideration of Rs.68,850/- and the terms of agreement were reduced into writing on 04.06.2007. An advance of Rs.5,000/- was paid on the date of the agreement and a period of three months was fixed for performance of the contract.

3. Since the 1st defendant did not come forward to execute the sale deed as agreed to, the plaintiff issued notice on 29.06.2007 calling upon the defendants to execute the sale deed.

The receipt of notice was acknowledged on 02.07.2007. Since there was no reply, the plaintiff laid the suit on 23.07.2007 seeking specific performance against the defendants 1 and 2. The plaintiff would aver that the 1st defendant sold the property to the 2nd defendant on 21.06.2007.

4. The 1st defendant would resist the suit contending that the sale agreement is not true. He had also claimed that he is not the absolute owner of the suit property and his mother and brothers have also a right over the suit property.

5. The 2nd defendant filed a written statement stating that the 1st defendant has no exclusive right over the property and the 1st defendant along with his mother, brothers and their children have sold the property to one Sumathy on 16.07.2007, therefore the said Sumathy is the absolute owner of the property as on the date of the suit. On the above pleadings, the defendants sought for dismissal of the suit.

6. The courts below concluded that the agreement is true and valid. The trial court however held that the subsequent purchaser viz., Sumathy is necessary party to the suit and in the absence of her being made a party to the suit and in the absence of prayer against the 2nd defendant for execution of the sale deed, the suit for specific performance cannot be decreed.

7. Aggrieved the plaintiff preferred an appeal before the lower appellate court in A.S.No.3 of 2009. The lower appellate court went into the question of title to the property and concluded that the 1st defendant is the absolute owner of the property and since the 1st defendant had sold the property to the 2nd defendant on 21.06.2007, the sale by the 1st defendant, his mother, brothers and brothers' children in favour of Sumathy on 16.07.2007 will not confer title on her. Therefore, the lower appellate court concluded that the purchaser under the sale deed dated 16.07.2007 viz., Sumathy is not a necessary party to the suit.

8. The lower appellate court however confirmed the dismissal of the suit on the ground that in the absence of prayer against the 2nd defendant for execution of the sale deed, the suit cannot be decreed. Aggrieved the plaintiff is on appeal.

9. The following question of law was framed for determination :-

Whether the courts below were right in dismissing the suit filed for specific performance on the sole ground that the prayer for execution of sale deed was not

sought for against the 2nd defendant, who is the subsequent purchaser, eventhough the plaintiff has added the 2nd defendant as party to the suit?

10. The respondents have preferred a Petition under Order XLI Rule 27 of the Code of Civil Procedure seeking to produce the deed of cancellation dated 27.06.2008 executed by the defendants 1 and 2 cancelling the sale deed dated 21.06.2007 executed by the 1st defendant in favour of the 2nd defendant. In fact the 2nd defendant who has been examined as DW3 had spoken about the said cancellation in his cross-examination and he has however deposed that he has not produced the document of cancellation.

11. Though the Petition is opposed by the counsel for the appellant on various grounds, finding the reasons assigned in the affidavit filed in support of the application satisfy the requirements under Order XLI Rule 27 of the Code of Civil Procedure and the document being a registered instrument is received in evidence on the side of the defendants and is marked as Ex.B1.

12. I find that no further evidence is necessary on the document since the parties to the document have been examined and the purchaser viz., the 2nd defendant had deposed as DW3. He has also stated about the cancellation of the sale deed dated 21.06.2007. The effect of the cancellation is that the 2nd defendant loses title to the property.

13. As already pointed out the 1st defendant along with his mother, brothers and brothers' children has sold the property to one Sumathy under a registered sale deed dated 16.07.2007. The sale deed dated 16.07.2007 is prior to the suit. Therefore, the title actually vests in the purchaser under the sale deed dated 16.07.2007. Though a plea was taken in the written statement filed by the 2nd defendant to the effect that the 1st defendant along with his mother, brothers and brothers' children has sold the property to one Sumathy on 16.07.2007 and she is in possession of the property as a rightful owner, the plaintiff has not taken any steps to implead the said Sumathy.

14. I find that the lower appellate court was in error in going into the question of title of Sumathy or the 1st defendant in a suit for specific performance particularly in the absence of Sumathy as party to the suit. Therefore, the finding of the lower appellate court that Sumathy was not necessary party is erroneous. The lower appellate court should not have pronounced on the validity of the sale deed dated 16.07.2007 in the absence of Sumathy, the purchaser under the said instrument.

15. Despite knowledge of the sale in favour of Sumathy, the plaintiff has not chosen to implead Sumathy as a party to the suit and seek relief against her. The Hon'ble Supreme Court in Durga Prasad and another Vs. Deep Chand and others reported in AIR 1954 (SC) 75 has pronounced on the course to be adopted by the courts in granting decree for specific performance in a suit where there is a sale of property after agreement.

16. The Hon'ble Supreme Court has pointed out that the sale deed executed by the agreement vendor after the agreement will be perfectly valid and results in transfer of property in favour of the purchaser. Therefore, the Hon'ble Supreme Court has held that the subsequent purchaser should be made a party to the suit and he or she should be made to join in the execution of the sale deed to transfer the title that resides in him or her by execution of sale deed in his or her favour. This dictum of the Hon'ble Supreme Court has been followed by the Hon'ble Supreme Court in Vijay A. Mittal and others v. Kulwant Rai (dead) through Legal Representatives and another, reported in 2019 (3) SCC 520.

17. I have also had an occasion to consider the question relating to the execution of the sale deed by the agreement vendor, the form of decree in the suit for specific performance where there is a sale of property subsequent to the agreement, but prior to the filing of the suit in S.A.No.1030 of 2019.

18. The effect of the sale deed dated 16.07.2007 is that the title in the property stands transferred to Sumathy. Unless Sumathy is made a party and a decree is passed against her directing her to execute the sale deed in favour of the plaintiff, the plaintiff will not get absolute title. As already pointed out, despite knowledge of alienation, the plaintiff has not chosen to implead the said Sumathy and seek any relief against her.

19. I therefore find that the courts below were right in dismissing the suit though the reasons given by them may not be legally sustainable. Though the substantial question of law has to be answered in favour of the appellant to the effect that the courts below were not right in dismissing the suit on the ground that there is no prayer for execution of the sale deed by the 2nd defendant.

20. In view of the facts that have been proved, the result of the appeal will not depend on the answer to the question of law. Once it is found that the property stands transferred to Sumathy and Sumathy is title holder, the suit for specific performance in the absence of Sumathy, who has purchased the property prior to the suit, is not maintainable. Hence, the dismissal of the suit is upheld though on different grounds.

21. This Second Appeal is therefore dismissed. There will be no order as to costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-V)

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Sub Assistant Registrar

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To

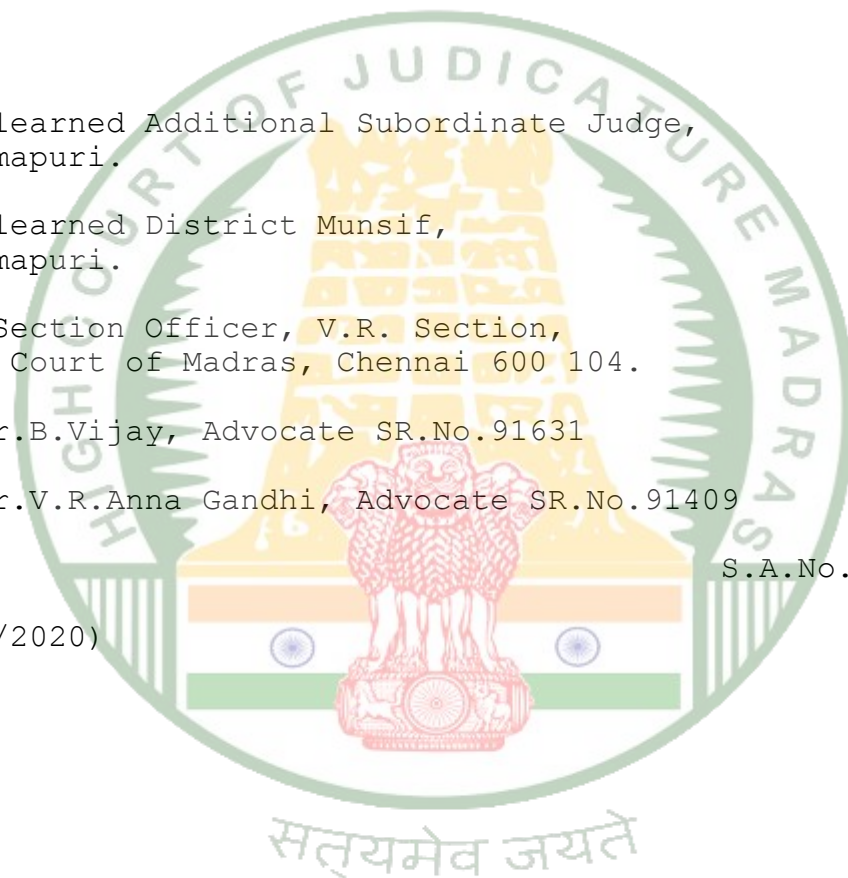
1. The learned Additional Subordinate Judge,
Dharmapuri.
2. The learned District Munsif,
Dharmapuri.
3. The Section Officer, V.R. Section,
High Court of Madras, Chennai 600 104.

+1cc to Mr.B.Vijay, Advocate SR.No.91631

+1cc to Mr.V.R.Anna Gandhi, Advocate SR.No.91409

S.A.No.167 of 2014

VG II (CO)
GMY (21/05/2020)



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