

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.01.2019

Coram

The Honourable Ms. Justice P.T.ASHA

S.A.No.808 of 2018
and
C.M.P.No.22528 of 2018

G. Selvi ... Appellant/Appellant
/ 2nd Defendant

Versus

1. V. Latha ... Respondent/1st Respondent
/ plaintiff

2. M.R. Balakrishnan ... Respondent/2nd Respondent
/ 1st Defendant

PRAYER: This Second Appeal is filed under Section 100 of the Code of Civil Procedure-1908, against the Judgment and Decree in A.S.No.22 of 2012 dated 21.11.2017, on the file of the District Judge, Nagapattinam, confirming the decree and judgment in O.S.No.63 of 2011, dated 14.03.2012, on the file of the Principal Subordinate Judge, Mayiladuthurai.

For Appellant : Mr. R. Shivakumar
for M/s.K.M.Vijayan Associates

JUDGMENT

This Second Appeal is filed, by the 2nd Defendant, challenging the Judgment and Decree, made in AS.No.22 of 2012, dated 21.11.2017, on the file of the District Judge, Nagapattinam, confirming the decree and judgment made in O.S.No.63 of 2011, dated 14.03.2012, on the file of the Principal Subordinate Judge, Mayiladuthurai.

2. The above suit was filed by the 1st Respondent herein for a declaration that the Sale Deed dated 02.02.2010 executed in favour of the 2nd defendant /appellant herein by the 1st defendant is null and void and not binding on the plaintiff. The said suit has been decreed as prayed for by this Court and the appeal filed as against the same in A.S.No.22 of 2012 by the 2nd defendant had ended in a dismissal, confirming the judgement

and decree granted by the Trial Court. Challenging the said concurrent Judgments and Decree of the courts below , the 2nd defendant is before this Court, by way of this Second Appeal.

3. For the sake of convenience, the parties hereinafter shall be referred to as they were arrayed in the suit.

4. The plaintiff had earlier filed a suit in O.S.No.5 of 2010 for specific performance against the 1st defendant on the basis that by agreement, dated 12.07.2009, the 1st defendant had agreed to sell the suit property to the plaintiff for a total sale consideration of Rs.2,25,000/- and an advance amount of Rs.5,000/- was also paid on the same day. The time for performance of the agreement was fixed at six months. Since the defendant did not come forward to execute the sale deed, the Plaintiff had issued a legal notice on 06.01.2010. Since there was no response, the plaintiff has filed the suit in O.S.No.5 of 2010, seeking specific performance.

5. After the filing the suit, the plaintiff came to know that the 1st defendant had sold the property to the 2nd defendant under a sale deed dated 02.02.2010 just to defeat the rights of the plaintiff. Therefore, the plaintiff filed another suit in O.S.No.23 of 2010 on the file of the Principal District Munsif, Mayiladuthurai and renumbered as O.S.No.63 of 2011, which is the subject matter of the Second Appeal, which has been detailed supra.

6. The defence to the said suit by the 1st defendant was that he had entered into an agreement with the plaintiff in respect of suit property, which is jointly held by her and Govindarajan. The said Govindarajan was no more and thereafter, the misunderstanding arose between the 1st defendant and the legal heirs of the said Govindarajan in respect of partitioning the joint family properties. While talks of settlement was going on, the 1st defendant was under the impression that at the end of mediation, he would be allotted of 0.47 Cents, in the suit Survey No.367/4. There was also another partition in Survey No.367/3 measuring an extent of 0.05 Cents. This was his separate property, which was lying on the Western side of the suit survey Number 367/4. On 04.07.2009, he had entered into an agreement with the 2nd defendant to sell the entire extent of 0.05 Cents in Survey No.367/3 together with an extent of 0.03 1/3 Cents in Survey No.367/4 (Second item of the suit property). Thereafter, on 12.07.2009, he had entered into an agreement of sale with the plaintiff to sell an extent of 0.15 Cents in the Survey No.367/4. All of these were done under the strong belief that he would be allotted 0.23 ½ Cents towards his half share in the suit Survey No.367/4. Ultimately, at the end of the mediation, he was allotted 0.15 cents toward his share in suit

Survey No.367/4. As per the agreement dated 04.07.2009, the 1st defendant had already executed the sale deed in respect of 0.3 1/3 Cents in the suit Survey Number along with 0.05 Cents in the adjacent Survey Number which is not part of the suit schedule. Therefore, the agreement executed in favour of the plaintiff by the 1st Defendant had become incapable of performance. Hence, the 1st Defendant could convey only an extent of 0.11 2/3 Cents in the suit Survey No.367/4. In such circumstances, the suit is liable to be dismissed.

7. The 2nd defendant had filed a separate written statement, inter alia contending that the property measuring an extent of 0.3 1/3 Cents in Survey No.367/4 along with another 0.05 cents in the adjacent survey No.367/3 had been purchased by him from the 1st defendant under a sale deed dated 02.02.2010 and the 2nd defendant had already started construction in the said property. The mutation of records had also been effected in favour of the 2nd Defendant. In such circumstances, the 2nd defendant sought for dismissal of the suit.

8. The parties had gone to trial and the trial court, by judgment and decree dated 14.03.2012, had decreed both the suits in O.S.No.5/2010 and O.S.No.63/2011 as prayed for. Challenging the said Judgement and Decree, the 2nd defendant had filed A.S.No.22/2012. The lower appellate court had also confirmed the judgment and decree of the Trial Court. The Trial Court had held that the agreement of Sale dated 04.07.2009 (Ex.B3) had been created only after the execution of the sale deed dated 23.10.2009 under Ex.B5. Challenging the said findings, the 2nd defendant is before this court.

9. This Court heard Mr. R. Shivakumar, learned counsel for the appellant. He would contend that there is ambiguity with reference to the description of the suit property and therefore, the same is not executable and incapable of performance. However he would further argue that the sale agreement in favour of the respondent/plaintiff was executed after the agreement in favour of the 2nd defendant and therefore, no right will flow to the plaintiff. He would further argue that after the allotment of the various portions, in the survey numbers to the legal heirs of the Govindarajan, 1st defendant was not in possession of sufficient lands to fulfil his obligation under the sale agreement, dated 04.07.2009 executed by him in favour of the plaintiff.

10. Heard the counsel and perused the documents.

11. In this second appeal, the arguments relating to the ambiguity in the description of the suit property is raised for the first time in the appeal and does not feature in the

written statement filed by the defendant before the trial court. The court below has clearly rendered a finding that the agreement in favour of the 2nd defendant by the 1st defendant was only to defeat the claim of the plaintiff. If the properties, which were sold to the 2nd defendant are made available, the 1st defendant can very well comply with his obligations under the agreement of sale dated 12.07.2009 and it is this extent which has been described in the suit second item of properties. I do not find any infirmity or illegality in the judgement and decree of the courts below. Further, I do not find any question of law, much less a substantial question of law involved in this second appeal. Accordingly, this second appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

jrs

To

1.The District Judge,
Nagapattinam

2.The Principal Subordinate Judge,
Mayiladuthurai.

+lcc to Mr. K.M.Vijayan Associates, Advocate, S.R.No.5010

S.A.No.808 of 2018

SV(CO)
GN(25/04/2019)

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