

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.01.2020

Date of Verdict : 12.02.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.230 of 1999

1. Abithambal (Died) ...1st Appellant/3rd Respondent/
3rd Defendant
2. Annathurai
3. Radhakrishnan
4. Subramanian
5. Arumugham
6. Shanmugham
(Appellants 2 to 6
brought on record as
legal heirs of the deceased
sole appellant vide order
of the Court dated 03.02.2012
made in C.M.P.No.1769 of
2010 in S.A.No.230 of 1999) ...2 to 6 Appellants/LRS of
the 1st Appellant
- Vs.
1. Namasivaya Naicker (Died) ...1st Respondent/Appellant/Plaintiff
2. Unnamalaiyammal
3. Pachiyammal ...2 & 3 Respondents/1 & 2 Respondents
/1 & 2 Defendants
4. Pannir
5. Saitu
6. Saker
7. Sangivi
8. Krishna Murthy
(Respondents 4 to 8
brought on record as
legal heirs of the deceased
first respondent vide order
of the Court dated 07.06.2017
made in C.M.P.Nos. 6397,
6398, 6399 and 6400 of 2017 in
S.A.No.230 of 1999) ...4 to 8 Respondents/
LRS of the 1st Respondent

Prayer :- This Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 20.11.1998, in A.S.No.67 of 1995 on the file of the Additional District Court, Tiruvannamalai, reversing the judgment and decree dated 28.04.1995 in O.S.No.136 of 1986 on the file of the District Munsif Court, Tiruvannamalai.

For Appellants : Mr.S.T.Bharath Gowtham
For Mr.T.R.Rajaraman

For Respondents

R1 : Died
R2 to R3 : Dismissed vide Court order
dated 04.12.2009
R4 to R8 : No appearance

JUDGMENT

This second appeal is directed as against the judgment and decree, dated 20.11.1998, in A.S.No.67 of 1995 on the file of the Additional District Court, Tiruvannamalai, reversing the judgment and decree dated 28.04.1995 in O.S.No.136 of 1986 on the file of the District Munsif Court, Tiruvannamalai.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The case of the plaintiff in brief is as follows :-

3.1. The suit is filed for specific performance. The suit property originally belonged to the plaintiff's brother viz., Rayar Naicker and he married the second defendant. Since the second defendant is impotent, he filed divorce petition under Section 12(1)(a) of the Hindu Marriage Act in O.P.No.21 of 1974 before the Sub Court, Tiruvannamalai, and the same was allowed by the judgment and decree dated 10.09.1974 and declared that the second defendant is not the wife of the said Rayar Naicker. Thereafter, he married the first defendant in accordance with law. The second defendant filed maintenance case in M.C.No.91 of 1980 under Section 125 of Cr.P.C., against the said Rayar Naicker, and the same was dismissed.

3.2. While being so, on 23.03.1985, the first defendant entered into a sale agreement with the plaintiff, in which the first defendant agreed to sell the suit property for the total sale consideration of Rs.10,000/- and received a sum of Rs.2,500/- as advance from the plaintiff. Again the second defendant filed a suit in O.S.No.356 of 1985 as against the

plaintiff and the first defendant and it was dismissed as not pressed. The defendants 1 and 2 had executed the sale deed in favour of the third defendant on 28.10.1985 and the said sale deed is not binding upon the plaintiff. In this regard, the plaintiff caused notice to the defendants on 10.11.1985. When the plaintiff is always ready and willing to perform his part of contract, the first defendant failed to execute the sale deed. Hence the suit.

4. Resisting the same, the first defendant filed written statement and stating that originally the suit property belonged to one Rayar Naicker and the defendants 1 & 2 and Rayar Naicker were lived together. Rayar Naicker had executed a settlement deed in favour of the second defendant on 21.07.1973 and thereafter, he also executed a Will in favour of the second defendant on 14.08.1983. The second defendant filed maintenance case in M.C.No.91 of 1980 with collusion of the said Rayar Naicker. The first defendant also denied the allegation that she entered into agreement for sale on 23.03.1985 and agreed to sell the suit property to the plaintiff. The first and second defendant has sold out the suit property to the third defendant by a registered sale deed dated 28.10.1985 and therefore prayed for dismissal of the suit.

5. The third defendant filed separate written statement stating that there is no animosity between the husband of the third defendant and the plaintiff and due to which, the third defendant had purchased the suit property from the defendants 1 & 2. The third defendant had purchased the suit property for the valid sale consideration of Rs.15,500/- as such the third defendant is a bonafide purchaser without notice to the said agreement. Therefore, prayed for dismissal of the suit.

6. On the side of the plaintiff, he examined P.W.1 to P.W.4 and were marked Ex.A.1 to Ex.A.13. On the side of the defendants, they examined D.W.1 to D.W.4 and were marked Ex.B.1 to Ex.B.4. On perusal of the documents on record and on considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court dismissed the suit for the relief of specific performance and decreed the suit in respect of return of advance amount of Rs.2,500/-. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal suit in A.S.No.67 of 1995 and the first appellate allowed the appeal in respect of 1/4th share of the suit property alone and directed the defendants 1 and 3 to execute the sale deed in favour of the plaintiff. Aggrieved by the same, the third defendant preferred this second appeal.

7. At the time of admission of the second appeal on 01.03.1999, the following substantial questions of law were formulated by this Court for consideration :-

"a) Is the learned Additional District Judge correct in decreeing the suit based on Ex.A.3 when the same cannot be specifically enforced against the minor and consequentially it was not enforceable against the appellant?

b) Is the learned Additional District Judge correct in decreeing the suit for specific performance without considering the genuineness of Ex.A.3 Sale agreement based on which the suit is filed?"

8. The learned counsel appearing for the appellant/third defendant submitted that the first defendant has absolutely no title over the suit property to enter into the agreement of sale with the plaintiff, since already the suit property settled in favour of the second defendant by her husband Rayar Naicker, which was marked as Ex.B.4. Further a Will was also executed in favour of the second defendant by her husband dated 14.08.1983, which was marked as Ex.B.2. Therefore, the first defendant absolutely has no power to enter into the sale agreement with the plaintiff. To support of his contention, he relied upon the following judgments :-

1. AIR 1969 Ker 316 - Kurian Chacko Vs. Varkey Ouseph
2. (2008) 10 SCC 497 - Jagdish Singh Vs. Madhurai Devi
3. (2001) 4 SCC 756 - Madhukar and ors Vs. Sangram and Ors.
4. (2019) 2 SCC 727 - Jamila Begum (died) through LRs. Vs. Shami Mohd (died) through LRs & anr.

8.1. He further submitted that admittedly the first and second defendant executed sale deed in favour of the third defendant and without challenging the said sale deed, the suit itself is not maintainable. In fact, the plaintiff also failed to prove his readiness and willingness to perform his part of contract. Though the first defendant is the second wife of the said Rayar Naicker, without the consent of the second defendant, the first defendant alone cannot execute the sale agreement with the plaintiff. Therefore, he prayed for dismissal of the suit filed by the plaintiff.

9. Heard Mr.S.T.Bharath Gowtham, learned counsel appearing for the appellants/third defendant. Though notices served, no one appeared on behalf of the respondents/plaintiff, defendants 1 & 2.

10. The suit is filed for specific performance, on the strength of the agreement of sale entered into between the first defendant and the plaintiff, which was marked as Ex.A.3 dated 23.03.1985. According to the plaintiff, he entered into agreement with the first defendant to purchase the suit property for the total sale consideration of Rs.10,000/- in which he paid a sum of Rs.2,500/- as advance. Thereafter, the first and second defendants executed sale deed in favour of the third defendant by the registered sale deed dated 28.10.1985, which was marked as Ex.B.5. When the plaintiff was ready and willing to perform his part of contract, the first defendant failed to execute the sale deed as per the agreement for sale dated 23.03.1985.

11. According to the third defendant, she is a bonafide purchaser for valid sale consideration of Rs.15,500/- and the suit property was purchased from the defendants 1 & 2 by the registered sale deed dated 28.10.1985. The third defendant contended that originally the suit property belonged to one Rayar Naicker and he executed settlement deed in favour of the second defendant in respect of the suit property by a settlement deed dated 21.07.1973. Thereafter, he also executed Will in favour of the second defendant on 14.08.1983. The third defendant further contended that the first defendant never entered into the sale agreement with the plaintiff to sell the suit property for the sale consideration of Rs.10,000/-. The first and second defendants jointly sold out the suit property in favour of the third defendant and the third defendant is the bonafide purchaser of the suit property.

12. Admittedly, one Rayar Naicker got married with second defendant thereafter, he filed divorce petition in O.P.No.21 of 1974 and the same was decreed in his favour by decree dated 10.09.1974, which was marked as Ex.A.1. Thereafter, the second defendant filed maintenance case in M.C.No.91 of 1980. Even before the maintenance case, the said Rayar Naicker executed settlement deed in favour of the second defendant dated 27.07.1973. Though the settlement deed was executed in favour of the second defendant, she filed maintenance case in M.C.No.91 of 1980 and the same was dismissed. Even according to D.W.1, the first and second defendants along with the said Rayar Naicker lived together happily. Thereafter, the said Rayar Naicker also executed Will in favour of the second defendant on 14.08.1983 and the same was marked as Ex.B.2. It is also proved by the evidence of D.W.3.

13. Thereafter, the said Rayar Naicker got married with the first defendant. Since the second defendant lost her right as legally wedded wife of Rayar Naicker, the first defendant entered into an agreement for sale in respect of the suit

property with the plaintiff. Therefore, the second defendant filed suit for declaration and possession in respect of the very same suit property as against the first defendant as well as the plaintiff in O.S.No.356 of 1985 before the District Munsif Court, Tiruvannamalai. While pending the said suit, the first defendant executed agreement for sale with the plaintiff and fixed 90 days time for execution of sale deed.

14. Further the first defendant gave birth to one son through the said Rayar Naicker. After death of the said Rayar Naicker, the first defendant got married with another person and gave birth to another son. Therefore, she cannot claim any right over the suit property on the strength of wife of the said Rayar Naicker, since already the property was settled in favour of the second defendant. At the same time, the agreement for sale also true. But the first defendant had absolutely no title over the suit property to enter into the agreement for sale with the plaintiff. Though the first defendant had no right over the property her son born through Rayar Naicker has 3/4 the share over the suit property. Therefore, on behalf of the said minor, the first defendant and the second defendant executed sale deed in favour of the third defendant. In this regard the learned counsel appearing for the appellant/third defendant relied upon above said judgments and the principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the case on hand.

15. Further, the plaintiff, the defendants 1 & 2 and their husband Rayar Naicker are all relatives. The third defendant is being the adjacent owner to the suit property, he purchased the suit property from the defendants 1 & 2 for valid sale consideration. Therefore, the entire suit has been foisted by the plaintiff only to nullify the said sale deed dated 28.10.1985, executed in favour of the third defendant. As such, the trial Court rightly dismissed the suit insofar as the relief of specific performance concerned and decreed the suit insofar as the advance amount paid by the plaintiff and he is entitled to receive the same from the first defendant. But unfortunately, the first appellate Court without considering the Will and settlement deed executed in favour of the second defendant by the said Rayar Naicker, decreed the suit in favour of the plaintiff that too insofar as the 1/4th share of the suit property, as such this Court has necessarily to interfere with the judgment decree passed by the first appellate Court and the same is perverse and against the evidence on records.

16. In view of the above discussion, this Court finds valid reason to interfere with the reasonings and findings rendered by the first appellate Court. Accordingly, all the substantial

question of law formulated by this Court are answered in favour of the third defendant and as against the plaintiff. However the plaintiff is entitled for the advance amount payable by the first defendant

17. In fine, the second appeal stands allowed and the judgment and decree dated 20.11.1998, made in A.S.No.67 of 1995 by the learned Additional District Judge, Tiruvannamalai, is hereby set aside and consequently, the judgment and decree dated 28.04.1995 made in O.S.No.136 of 1986 by the learned District Munsif, Tiruvannamalai, is restored. There is no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Additional District Judge,
Tiruvannamalai.
2. The District Munsif,
Tiruvannamalai.

Copy to

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

सत्यमेव जयते

WEB COPY

S.A.No.230 of 1999

ssd[col]
srg 15/12/2020