



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.07.2021

CORAM:

THE HONOURABLE MS.JUSTICE P.T.ASHA

S.A.No.466 of 2008

&

M.P.No.1 of 2008

G. Bhoopathy ...Appellant/3rd Defendant Trial Court

versus

1.A. Sundaramoorthy ..1st Respondent/Plaintiff in Trial Court

2.Sherifa Bivi ..2nd Respondent/1st Respondent
in Trial Court

3.K.Bagaram

Prayer: Second Appeal filed under 100 of CPC to set aside the judgment and decree made in A.S.No.236 of 2005 dated 22.08.2007 on the file of the Additional District Judge (II Fast Tract Court Judge) at Chennai, confirming the judgment and decree in O.S.No.1748 of 2000 dated 12.11.2003 on the file of the XII Assistant Judge, City Civil Court at Chennai, to be set aside and the Appeal be allowed.

For Appellant	:	Mr. A.S. Narasimhan
For Respondents	:	Mr. A.E. Ravichandran
		for R1
		R2- No appearance
		R3- Not ready in notice

JUDGMENT

The above Second Appeal is filed by the third defendant in the suit O.S.No.1748 of 2000 challenging the Judgment and decree in A.S.No.236 of 2005 dated 22.08.2007 on the file of the Additional District Judge (Fast Tract Court No.II, Chennai) in and by which the judgment and decree of XII Assistant City Civil Court, Chennai in O.S.No.1748 of 2000 had been confirmed.

2. The parties are referred to in the same array as in the suit. The suit in O.S.No.1748 of 2000 was filed by the plaintiffs for a specific performance directing the defendants to execute a sale deed in favour of the plaintiff at the plaintiff's expense in respect of vacant land bearing Plot No.180, Block No.8, Mogappair Village, Annanagar (West), Chennai measuring 4065 Square feet.



Plaintiffs' case:

3. The case of the plaintiff was that the suit property was originally allotted to the first defendant by the Tamil Nadu Housing Board (TNHB) vide its order dated 08.10.1986. On 12.12.1991, the first defendant had executed an agreement of sale in favour of the plaintiff in respect of the said property. As per the said agreement, the first defendant had received a sum of Rs.30,000/- and the agreement provided that the balance amount payable to the Tamil Nadu Housing Board would be paid by the plaintiff. After these dues are settled to the Tamil Nadu Housing Board and the Tamil Nadu Housing Board executes a sale deed in favour of the first defendant, the first defendant had in turn agreed to execute a sale deed in favour of the plaintiff without insisting for any future payment.

4. It is also the case of the plaintiff that along with the agreement of sale, a Power of Attorney of the same date was also executed in favour of the plaintiff, so as to enable the plaintiff to take possession of the plot and to construct thereupon after getting permission from the concerned authority. The first defendant had also given a declaration to the Tamil Nadu Housing Board that all installments and the final cost of the EMD payment would be paid by the plaintiff in her name.

5. The plaintiff would submit that in keeping with the terms of the agreement, he had been making payments to the Tamil Nadu Housing Board on behalf of the first defendant. However, the plaintiff came to learn that behind his back, the first defendant had also clandestinely paid the balance amount to the Housing Board in the month of July 1999 and got a sale deed executed in her favour. Despite the plaintiff's best efforts to get in touch with the first defendant, he was not able to do so. Therefore, the plaintiff had issued a legal notice dated 20.12.1999 calling upon the first defendant to execute a sale deed in his favour. Though the notice was received on 22.12.1999 by the first defendant, she did not care to send any reply to the said notice. Therefore, the plaintiff was constrained to institute the suit.

6. Originally the suit was filed only against the first defendant. After the filing of the written statement by the 1st defendant, the second and third defendants were impleaded as party defendants.

Written Statement of the First Defendant:

7. The first defendant had filed her written statement in which she had mentioned about the sale in favour of the second defendant who in turn had sold the suit property to the third defendant. The first defendant in her written statement would deny all the allegations including the execution of the agreement of sale as well as receipt of the sum of Rs.30,000/-.



The payment made to the Housing Board was also denied.

Additional Written Statement of the First Defendant:

8. An additional written statement was filed by the first defendant on 20.03.2003 after the plaint was amended in which she had come forward with a contention that she had borrowed a sum of Rs.15,000/- from one Gopu of Mogaperu, who had obtained her signatures in a blank stamp papers and blank green papers, which has been utilized to create the agreement of sale. She would deny that she had executed a Power of Attorney in his favour. She would submit that after receiving a sum of Rs.15,000, the said Gopu who had taken her to the Registrar's office, obtained her signature by saying that he was creating a document in the form of power of Attorney for the said amount. It was the said Gopu who had sold the property to the second defendant as she could not repay the sum of Rs.15,000/-.

9. The third defendant filed a written statement contending that the alleged agreement dated 12.12.1991 is void ab initio and the said agreement is not valid in the eye of law. Therefore, he strongly denied that the plaintiff had been put in the possession of the suit property as early as 1991 and the said statement lacks truth.

10. He would further submit that he is a bona fide purchaser for value under a sale deed dated 22.11.1999. The plaintiff has filed the suit only with an intention to harass the third defendant and based on the agreement dated 12.12.1991, the plaintiff is not entitled for any relief under the Specific Relief Act.

11. The third defendant had also filed a suit O.S.No.4297 of 2002 for a permanent injunction restraining the plaintiff in O.S.No.1748 of 2000 from interfering with his peaceful possession and enjoyment of the suit property.

Trial Court

12. The plaintiff had examined himself as P.W.1 and had marked Exs.A1 to A10 in support of his case. The first defendant examined herself as D.W.1 and the third defendant had examined himself as D.W.2 and Exs. B.1 to B.11 were marked on the side of the defendants.

13. The Learned XII Assistant City Civil Judge had framed the following issues:

"1. Whether the suit is barred by limitation

2. Whether the plaintiff is entitled to the relief of specific performance as prayed for ?



3. To what other reliefs the plaintiff is entitled to ?

14. The learned Judge on considering the evidence on record, decreed the suit as prayed for. The learned Judge dismissed the suit OS.No.4297 of 2002 filed by the third defendant.

Appellate Court

15. Challenging the judgment and decree in O.S.No.1748 of 2000, the third defendant alone had filed an appeal in A.S.No.236 of 2005. However, no appeal was filed against the judgment and decree against the suit O.S.No.4297 of 2002.

16. The learned District Judge II Fast Tract Court, Chennai confirmed the judgment and decree of the Trial Court. Aggrieved by the same, the above Second Appeal has been filed once again only by the 3rd defendant.

17. The Second Appeal was admitted on the following substantial question of law:

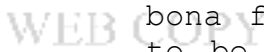
"When the Ex.A.3 is Registrable document under Section 17 (1) (b) of the Registration Act, contrary to Section 47 can Ex.A.3 be received in evidence and looked into for the purpose of passing decree in the suit?"

18. Pending the arguments the following substantial question of law was framed by the Court on perusing the evidence on record and the counsels have addressed their arguments on the same.

"Whether in the light of the specific clause in the Ex.A.3 agreement of sale that in the event of the non-execution of the sale deed, the plaintiff purchaser would be entitled to refund of the advance amount with interest and cost of construction / improvements made on the suit property with penalty is the suit for specific performance maintainable?"

Submissions:

19. Mr. A.S.Narasimhan, learned counsel appearing on behalf of the appellant would base his arguments on the sole contention that Ex.A.3 was a sale deed, though it has been styled as an agreement of sale and therefore it requires to be registered under Section 17 (1)(b) and since the same has not been registered it cannot be received in evidence nor considered. This argument has been advanced for the first time before this Court. He would invite the attention of the Court to the recitals in the agreement of sale and submit that the recital would show that the sale consideration was a sum of Rs.30,000/-



20. He would further submit that the third defendant is a bona fide purchaser for value and therefore his possession has to be protected. It is his contention that the plaintiff had not proved his readiness and willingness.

22. He would further submit that the present contention of the learned counsel for the appellant cannot be entertained since the document in question viz; Ex.A.3, has been received without any objection and has been marked. He would submit that neither in the written statement nor in the grounds of appeal before the Appellate Court had this ground been raisedd by the appellant.

24. Heard the counsel and perused the documents.

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payable to the Housing Board as also any other payments that was to be made to the Board. The Agreement of sale is also accompanied by a Power of Attorney Ex.A.7, which has been executed by the first defendant in favour of the plaintiff for interacting with the Housing Board. On the completion of the period of lease and on the execution of the sale deed by the Board in favour of the first defendant, she has undertaken to execute the sale deed in favour of the plaintiff. Therefore on the date of the agreement the 1st defendant could not execute the sale deed as the further amounts were payable to the TNHB.

26. Only after these payments were cleared the sale deed would be executed by the Housing Board in favour of the 1st defendant who in turn was required to execute the sale deed in favour of the plaintiff. The 1st defendant had therefore authorized the plaintiff to pay the dues on her behalf to the TNHB which fact was also detailed in Ex.A.4 declaration. Therefore, Ex.A.3 can only be treated as an agreement of sale. That apart, this plea has not been raised either before the Trial Court or before the Appellate Court. Therefore, substantial question of law no.1 is answered against the 3rd defendant / appellant.

27. As regards the second question of law the counsel for the appellant / 3rd defendant had not made any submissions. This question of law has been framed taking into consideration Section 23 (1) of the Specific Relief Act, 1963 which reads as follows:

"Liquidation of damages not a bar to specific performance.—

(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance."

28. The learned counsel for the plaintiff has relied on the Judgement of the Hon'ble Supreme Court reported in 2019 (11) SCC 432 - Kamal Kant Jain Vs. Surinder Singh (dead) through Legal Representatives. The Bench had held that where specified damages was provided in the agreement to secure performance of the contract the same would not be a bar to grant the relief of specific performance. However, when damages are in the nature of paying money in lieu of specific performance then the same would act as a bar to granting the relief of specific performance. Though the language of the penultimate clause in the agreement of sale Ex.A.3 could be so construed, however,



since this defense has not been urged either before the Courts below or canvassed in right earnest by the appellant before this Court, this substantial question of law is also answered against the appellant.

29. The Judgements relied on by the learned counsel for the appellant reported in 2019 (4) LW 512 - P.M.Thangavel Vs. M.Ramamoorthy and others is distinguishable on facts. In the instant case a declaration had been given by the 1st defendant permitting the plaintiff to pay the installments to the TNHB and the plaintiff was so paying the installments to the knowledge of the TNHB.

30. In fine, the Second Appeal is dismissed. Consequently, connected Miscellaneous Petition is also closed. However, there shall be no order as to costs.

s/d-
Assistant Registrar

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Sub-Assistant Registrar

mrn/kan

To

1. The Additional District Judge
(II Fast Tract Court Judge) Chennai

2. The XII Assistant Judge,
City Civil Court at Chennai

+1 CC to Mr.A.E. Ravichandran, Advocate sr 34133.

S.A.No.466 of 2008

KG(CO)
SP(02/11/2021)