IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.03.2021	Pronounced on : 08.04.2021

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

A.S.No.989 of 2020
& C.M.P.No.14476 of 2020

1. Thangammal,
2. Suresh,
3. Pradeesh,
4. Kumaran, ... Appellants/D.1,3,4 & 5

/versus/

1. Malathi, ...1st Respondent/Plaintiff
2. Latha, ... 2nd Respondent/2nd Defendant

Prayer: First Appeal is filed under Section 96 Civil Procedure Code, against the judgment and decree in O.S.No.64 of 2014 on the file of the Sessions (Fast Track Mahila) Court, Namakkal, dated 29.07.2020.

For Appellants : Mr.S.Parthasarathy, Sr.Counsel
for Mr.C.Jagadish

For R1 :Mrs.Nalini Chidambaram, Sr.Counsel
for Mrs.C.Uma

For R2 : No appearance

J U D G M E N T

The Appeal is filed by the defendants Nos.1, 3, 4 and 5 against the judgment and decree passed in the suit for specific performance of the agreement to sale and declaration the sale deed in favour of 5th defendant, registered subsequent to the suit sale agreement as null and void.

2. The facts leading to the Appeal:

The suit schedule property is 1.50 acres out of 3.00 acres undivided share of one Ponnusamy. On 31.03.2012 he agreed to sell his share to one Malathi for a price of Rs.9,00,000/- and received advance of Rs.2,25,000/-. Agreement for sale was entered between Ponnusamy and Malathi with covenant that the balance to be paid in part or in full by 30.09.2012. On such payment, the vendor shall execute the sale deed in favour of the purchaser or her nominee. In case, the vendor fails to execute the sale deed, the purchaser is entitled to enforce the contract through Court after depositing the balance sale consideration. If the purchaser fail to pay the balance sale consideration within the time fixed, he will forfeit the advance money. In the sale agreement the purchaser. Signed and the vendor affixed his LTI. One of the witness to the agreement is the son of the vendor. He both signed and affixed his left thumb impression and right thumb impression. The other witness Muthusamy affixed his signature and Left thumb impression. The sale agreement was written by Nandakumar the husband of the plaintiff. Before the time fixed for execution of the sale deed, the vendor Ponnusamy died intestate on 19.06.2012.

3. Malathi filed suit against the wife, sons and daughters of Late Ponnusamy and one Kumaran, alleging that, she was ready and willing to pay the balance sale consideration and get the sale deed registered. Before she could get the deed registered Ponnusamy fell sick and died. So she met the legal heirs of Ponnusamy and expressed her readiness and willingness to pay the balance sale consideration and get the sale deed registered. Initially, they took time saying they want to get the dead certificate and legal heir certificate for patta transfer. After the transfer of patta in their name, they will execute the sale deed. Believing their words she waited. Later realising the legal heirs of Ponnusamy are causing delay without reason, she caused notice on 03.04.2014 calling upon them to receive the balance sale consideration and execute the sale deed. The legal heirs of Ponnusamy did not reply. Suspecting foul play, she applied for encumbrance certificate, she found that the wife and children of Ponnusamy (defendants 1 to 4) had registered a sale deed on 11.04.2014 in favour of one Kumaran (5^{th} defendant), with ulterior intention to defeat the lawful right of the agreement holder. The said transaction is not genuine. The 5^{th} defendant is not a bonafide purchaser for valuable consideration. Therefore, the said sale deed dated 11.04.2014 has to be declared as illegal and void. The 5^{th} defendant must be restrained from creating any encumbrance upon the suit property. Court shall issue direction to the defendants 1 to 4 , to receive the balance sale consideration of Rs.6,75,000/- and execute the sale deed as per the agreement.

4. In the written statement jointly filed by defendants Nos.1, 3 and 4 they denied the execution of sale agreement by Ponnusamy and his intention to sell the property. The 3^{rd} defendant/Suresh to buy a JCB machine along with his friend Mohammed Ishan, approached the husband of the plaintiff for financial assistance. The 3^{rd} defendant and his father

Ponnusamy borrowed Rs.2,25,000/- from the plaintiff's husband. As security for the said loan, signatures and thumb impressions were obtained from Ponnusamy and the 3rd defendant. For interest, the share of Ponnusamy in the suit land was given in possession to the plaintiff's husband. It was agreed by the parties, that after repayment of the loan amount, the possession should be given back to Ponnusamy. After the demise of Ponnusamy, the defendants returned the loan amount Rs.2,25,000/- to the plaintiff's husband during the month of February 2014 in the presence of Muthusamy who was one of the witness in the sale agreement and got back the possession of the suit property. Thereafter, on 11.04.2014, they sold the suit property to the 5th defendant for valuable consideration.

5. Alleged that, the sale agreement is a document forged by misusing the signature and thumb impressions fixed on the blank papers while borrowing loan from the plaintiff's husband. The suit agreement is not executed with intention to sell the property. The plaintiff cannot dispute the sale deed in favour of 5th defendant who is a bonafide purchaser for valuable consideration. The suit property was inherited by Ponnusamy and his brother Thangaraj jointly. There is no partition effected between them in respect of the suit property. Ponnusamy have no right to sell the undivided family property. When the defendants went to clear the debts, the plaintiff asked to sell the property to him. The 3rd defendant refused to sell the property to the plaintiff. On refusal, the plaintiff got disgruntled and had fabricated the sale agreement by misusing the signed papers given while availing loan from the plaintiff's husband.

6. The 5th defendant, in his written statement, denying any knowledge or notice about the prior agreement, pleaded that, he is a bonafide purchaser for valuable consideration. Out of 3 acres of land jointly held by Ponnusamy and Thangaraj, without formal partition, they were enjoying their respective shares. From son of Thangaraj, the defendant on 08.04.2014 purchased the 1 ½ acres of land held by Thangaraj as his share. The remaining 1 ½ acres of land, the share of Ponnusamy was purchased by him on 11.04.2014 without any notice or objection.

7. Referring the boundaries in the suit agreement, for the undivided 1½ acres of land itself a proof for creating fabricated document. Based on the fabricated sale agreement the plaintiff is not entitled for the relief of specific performance. As per the information gathered by this defendant, the sale agreement is a fabricated document created on the blank signed papers obtained from Ponnusamy and his son Suresh while advancing loan of Rs.2,25,000/. Therefore, the relief to declare the sale deed in favour of the 5th defendant and injunction to

restrain the 5th defendant from creating any encumbrance or alienation is not maintainable.

8. Based on these pleadings, the trial court framed the following issues:-

(i). Whether it is true that the sale agreement is forgery not supported by consideration?

(ii). Whether it is true that late Ponnusamy agreed to sell the suit property to plaintiff and executed the sale agreement on 31.03.2012 by receiving advance amount of Rs.2,25,000/-

(iii). Whether the plaintiff is always ready and willing to perform her part of contract by paying balance sale consideration?

(iv). Whether it is true that 5th defendant is a bonafide purchaser and the sale deed is valid and binding on the plaintiff?

(v). Whether it is true that the sale agreement is executed as security for the loan amount borrowed by late Ponnusamy?

(vi). Whether the plaintiff is entitled to the relief of specific performance?

(vii). Whether the plaintiff is entitled to the relief of declaration?

(viii). To what other relief the plaintiff is entitled to?

9. Before the Trial Court, the husband of the plaintiff was examined as P.W-1. Ex.A-1 to Ex.A-8 were marked in support of the plaintiff's case. On behalf of the defendants two witnesses were examined.

10. The Trial Court, after considering the evidence, held in favour of the plaintiff and allowed the suit. Declared the sale deed dated 11.04.2014 executed in favour of the 5th defendant as not valid. The 5th defendant restrained from creating encumbrance over the suit property. Directed the plaintiff to deposit the balance sale consideration within two months from the date of judgment and directed the defendants Nos.1 to 4 to execute the sale deed in favour of the plaintiff, within two months from the date of deposit.

11. The Learned Senior Counsel appearing for the appellants assailed the Trial Court judgment on the ground that,

the Court below failed to consider the overwriting on the thumb impression and difference in line space palpably seen in the alleged sale agreement Ex.A-1 which clearly proves that the document is fabricated after obtaining the signatures. The father of the appellant Ponnusamy is a illiterate person. Using his ignorance, thumb impression were obtained while lending money as security. The Court below failed to see the entire transaction was only a loan transaction between the parties. The appellants repaid the loan. The plaintiff's husband promised to return the signed papers on a later date but misused it to file the suit with intention to make unlawful gain. The 5th defendant is a bonafide purchaser for value and the Trial Court failed to appreciate the evidence properly. Further, the plaintiff has not proved her readiness and willingness, which is very essential requirement for any suit filed for specific performance. As per the agreement, the plaintiff should have tendered the balance sale consideration on or before 30.09.2012. There is no evidence placed by the plaintiff to show she tendered the balance sales money before this date.

12. The Learned Senior Counsel appearing for the 1st respondent submitted that, the 3rd defendant, who is one of the witness to the suit sale agreement admits the signature and thumb impressions found in Ex.A-1 as his signature and thumb impression. He also admits that the thumb impression found in the sale agreement is his father's Ponnusamy thumb impression and it was affixed in his presence. The second witness to the sale agreement, Muthusamy examined as D.W-2 had not supported the case of the defendants.

13. The Trial Court, after physically examining the sale agreement marked as Ex.A-1 had opined that the thumb impression is obtained only after the writings found in page No.1. The thumb impression made on the writing and not otherwise.

14. The defendants, to substantiate their theory that the signature and thumb impression was obtained while availing loan to buy JCB and the loan amount was discharged later, had not produced any proof that from the money borrowed JCB was purchased on such and such date. Also not produced evidence to prove that the loan amount was repaid to the plaintiff. The 5th defendant is not a bonafide purchaser without notice and neither the said transaction is for valuable consideration. The pre-suit notice Ex.A-3 intimating them that the plaintiff is ready and willing to pay the balance sale consideration of Rs.6,75,000/- was issued to defendants Nos.1 to 4 on 03.04.2014. The defendants Nos.1, 2 and 3 received it. After receiving the pre-

suit notice they have sold the suit property to the 5th defendant on 11.04.2014 for just Rs.1,50,000/-. The Trial Court, after considering all these facts had allowed the suit for specific performance. In compliance to the decree, the plaintiff had already deposited the balance sale consideration within the time fixed. Therefore, the contention of the appellants that the plaintiff never proved his ready and willingness is incorrect.

15. Heard the submissions made by the respective counsels and records perused.

16. The Point for determination is whether the Trial Court finding that the sale deed Ex.A-8 is void document and the sale agreement Ex.A-1 is liable to be specifically enforceable is legally sustainable.

17. The contentious point in the instant case is whether Ex.A-1 is an enforceable sale agreement and whether the sale deed Ex.A-8 is not a bonafide transaction for valuable consideration.

18. As rightly pointed out by the Learned Senior Counsel for the first respondent/plaintiff, the genuineness of the sale agreement is prima facie proved by the plaintiff by examining P.W-1 and by the own admission of the D.W-1 who is the 3rd defendant and one of the witness to the sale agreement. He admits, his signature and thumb impression found in Ex.A-1. He also admits the thumb impressions of his father found in the document. Therefore, the plea of forgery falls to ground.

19. To prove that the sale agreement is a fabricated document, it is contented that the document was prepared after they affixed signature and thumb impressions. To create doubt about the genuineness, the line space and over writings are highlighted. One cannot lose sight of the fact that in a manually hand written document, overwriting and small variations in line space is natural. D.W-2 is the neutral witness to the said document Ex.A-1. He was brought to give evidence by the 3rd defendant. In the cross examination, this witness had disowned his own signature found in Ex.A-1. He denies his prior acquaintance with the plaintiff or her husband. He even denies the signature found in his own affidavit sworn in lieu of chief examination. This witness in fact had demolished the case of the defendant that Muthusamy who was present when they borrowed money from plaintiff's husband was also present when the money was repaid during the month of February 2014.

20. Regarding readiness, the Learned Counsel for the Appellants contented that, even assuming the sale agreement is true and genuine, the relief of specific performance is a equitable relief. When the time to complete the contract was fixed as 30.09.2012, the pre-suit notice was issued only on 03.04.2014 after two years from the date of agreement and 18 months after the time fixed for completion of contract. The plaintiff had not produced any evidence that she was ready and willing to complete the contract paying the balance sale consideration of Rs.6,75,000/-. Therefore, the relief of specific performance cannot be granted.

21. The reason for waiting till 03.04.2014 is well explained in the plaint itself and also proved through evidence. It is admitted fact by all parties the Ponnusamy the owner of the suit property died three months after the suit agreement. Thereafter, the legal heirs of the Ponnusamy who have inherited the property are bound to honour his contract. There is no reason to disbelieve the plaintiff's case that she waited on the request of the land owners to get legal heir certificate and patta transfer. The limitation to seek specific performance of a contract in respect of immovable property is three years from the date fixed or from the date of refusal to perform. In this case, the suit is filed within the period prescribed under the law. The suit after 2 years from the date of agreement, is due to the demise of the vendor before expiry of the period fixed for completing the contract.

22. The equitable relief of specific performance is granted based on the readiness and willingness, time agreed to complete the contract, the sale price fixed and the amount paid as advance, transfer of possession as part performance and other covenants in the agreement. The intention of the parties and their conduct are the factors which guide the court to decide which side the equity lie.

23. Strangely in this case, the appellants in their written statement admit that the possession of the suit property was given to the plaintiff's husband for the interest on the loan amount availed. On repayment of the loan amount, during the month of February 2014 in the presence of Muthusamy (D.W-2) the possession was handed over to them. While in the written statement it is pleaded that, the loan was repaid during the month of February 2014 in the presence of Muthusamy. Contrarily, in the grounds of appeal, the appellants had stated the loan was repaid by their father Ponnusamy during his lifetime. The statement found in the written statement or in the grounds of

appeal not proved through any evidence oral or documentary. If the possession was given to the agreement holder, then the 5th defendant ought to had prior notice of the agreement and the possession of the property with the plaintiff by virtue of the agreement. To cap it all, the falsity and the destructive plea of the defendants/appellants totally exposed in the cross examination of Muthusamy (D.W-2).

24. The conduct of the appellants to hurriedly create a sale deed in favour of the 5th defendant for a consideration of Rs.1,50,000/- when the offer by the plaintiffs was for Rs.9,00,000/- out of which Rs.2,25,000/- already paid and balance Rs.6,75,000/- ready to pay is a relevant factor to hold that the subsequent transaction is not for valuable consideration.

25. For the reasons stated above, this Court dismiss the appeal. The judgment and decree passed by the Trial Court is confirmed. No order as to cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

bsm

To,

1.The Sessions (Fast Track Mahila) Court, Namakkal.

Copy To

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

+1cc to Mrs.C.Uma, Advocate SR.No.22296

+1cc to Mr.C.Jagadish, Advocate SR.No.22276

A.S.No.989 of 2020
& C.M.P.No.14476 of 2020

PPA(CO)
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