



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.08.2022

Coram

The Hon'ble Mr. Justice **C.V.KARTHIKEYAN**

S.A.No.621 of 2012

&

C.M.P.No.5330 of 2022

T.A.Thanigaimalai

...Appellant

Vs.

N.Ekambaram

... Respondent

The Second Appeal filed under Section 100 of CPC, against the judgment and decree dated 19.12.2011 in A.S.No.4 of 2011 on the file of the learned District Judge No.2, Kancheepuram confirming the judgment and decree in O.S.No.25/2004 dated 19.11.2010 on the file of the learned Subordinate Judge at Kancheepuram.

For Appellant : Mr.B.Gopalakrishnan

For Respondent : Mr.R.Mubarak Basha

JUDGMENT

The defendant in O.S.No.25 of 2004 on the file of Sub Court at Kancheepuram is the appellant herein.

2. The said suit in O.S.No.25 of 2004 was filed by the respondent N.Ekambaram against the present appellant



T.A.Thanigaimalai seeking specific performance of an agreement dated 30.01.2004 and directing the defendant therein / appellant herein to specifically perform the agreement of sale, namely to execute the sale deed with respect to suit schedule property and also for recovery of possession of the suit schedule property consequent to such execution of sale deed and also for costs of suit.

3. The suit came up for consideration before the Sub Court at Kancheepuram. The learned Sub Judge also had on the file of said Court O.S.No.219 of 2009 which was a suit seeking partition and separate possession of the very same suit property filed by the sons of the appellant herein against their father and the respondent herein as defendants. The trial in both the suits were conducted jointly. By a common judgment dated 19.11.2010, O.S.No.25 of 2004, which was the suit for specific performance from which the present Second Appeal has emanated was decreed and the other suit in O.S.No.219 of 2009 which was the suit seeking partition and separate possession was dismissed.

4. Questioning such common judgment, the appellant herein filed A.S.No.4 of 2011. His sons who were the plaintiffs in O.S.No.219



of 2009 filed A.S.No.12 of 2011. Both the Appeal Suits came up for consideration before the District Court II, Kancheepuram. By a common judgment dated 19.12.2011, both the appeals were dismissed.

5. No further Second Appeal had been filed questioning the dismissal of A.S.No.12 of 2011. However, questioning the dismissal of A.S.No.4 of 2011, the defendant in O.S.No.25 of 2004, has filed the present Second Appeal.

6. The Second Appeal had been meandering around this Court without being admitted and only on 26.07.2022, the following three substantial questions of law have been framed;

"(i) What is the nature of proof required to adjudicate that a particular person was mentally, unsound at the time entering into an agreement when he was later able to understand the nature of evidence required and the nature of defence, which can be put up in such a case?

(ii) Whether a coposite agreement of sale for land and building can be specifically enforced when there is an assertion that the land is Government Poramboke Land?

(iii) Whether a single Second Appeal is maintainable, when common judgment had been passed in two appeal suits and common judgment had been passed in two



Original Suits?"

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7. The respondent / plaintiff in the suit had also filed C.M.P.No.5330 of 2022, under Order 41 Rule 27 of Code of Civil Procedure seeking to produce two additional documents namely a registered settlement deed dated 04.10.2010 which was a settlement executed by the appellant herein of the very same suit property in favour of his wife and his 2 sons and also a report dated 04.07.2019 issued by the Sub Inspector (Land Measurement) Kancheepuram again with respect to the suit property.

8. Heard arguments advanced in both the Second Appeal and in the C.M.P.

9. The suit in O.S.No.25/2004 is only under consideration since no appeal has been filed questioning the judgment dismissing A.S.No.12/2011, even though, a common judgment had been filed in A.S.No.4 of 2011 and A.S.No.12 of 2011.

10. O.S.No.25 of 2004 had been filed by the respondent herein, seeking specific performance of an agreement dated 30.01.2004. In the plaint, it had been stated that appellant herein / defendant had



offered to sell the suit property at No.31 - E, (Sy.No.56), Vellaikulam Street, 4th Block in Kancheepuram for a total consideration of Rs.1,80,000/-. It was stated that the respondent had agreed to purchase the said property. He had also agreed to sell his house under an agreement of sale dated 28.01.2004 for total sale consideration of Rs.1,26,000/- and received an advance amount of Rs.75,000/-. It is stated that an advance amount of Rs.80,000/- had been paid by the respondent in his capacity as plaintiff in O.S.No.25/2004 to the appellant herein. The terms of agreement stated that the agreement should be performed within a period of 3 months.

11. The specific case of the respondent was that he had approached the appellant with the balance sale consideration on 05.03.2004 and had demanded execution of the sale deed. However, the appellant was not willing to perform his part of the agreement. Under those circumstances, apprehending that the appellant might dispose of the property, the suit had been filed seeking specific performance.

12. A written statement was filed by the appellant denying and disputing the contentions raised in the plaint. The appellant stated that



he had never executed any agreement of sale in favour of the respondent herein as stated in the plaint. He also denied that he received Rs.80,000/- towards advance of the sale consideration. He stated that he was mentally ill for 2 months from the second week of December 2003 till the second week of February, 2004 and he was taking treatment as an out patient at Christian Medical College at Vellore and therefore he was not able to recollect as to what had happened during such period. He further claimed that he had never executed any sale deed. He also stated that he had never met the respondent herein. He also denied his signatures in the agreement of sale. He urged that the Court should dismiss the suit.

13. Even before the trial of the suit would commence, the sons of the appellant herein, namely Sathish, Logesh (Minor) who was represented by his mother, instituted a suit in O.S.No.219 of 2009 before the very same Court against the appellant herein / their father seeking partition and separate possession. They had also impleaded the present respondent as defendant in the suit consequent to the fact that respondent herein had entered into an agreement of sale with the appellant / their father.



14. It would only be appropriate that the pleadings in that particular suit, are also reduced in brief for better appreciation.

15. In the said suit, the plaintiffs claimed that their father and they constituted a joint Hindu family and that the property was a joint Hindu family property. They further claimed that the appellant herein had sold some ancestral properties and with that amount, had purchased the suit schedule property. They very specifically stated that the appellant herein was not doing any work and was roaming without work and to meet his expenses, he had entered into an agreement to sell the suit schedule property to the respondent herein who was shown as the 2nd defendant. They claimed that he had no right to sell the entire suit schedule property. They also claimed that they are entitled for 2/3 undivided share in the said suit schedule property. Since, according to them the appellant insisted on selling the suit schedule property, having no other alternative, they filed the suit for partition and separate possession.

16. The appellant herein / father was set exparte in the suit and did not contest the claim. It is not necessary on the part of this Court to examine the written statement filed by the respondent.



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17. The facts pleaded in the plaint are that the appellant herein had entered into an agreement to sell the suit schedule property and that the appellant was vehement in trying to sell the suit schedule property to the respondent herein. This fact, leads to the only conclusion that the agreement of sale is admitted.

18. Both the suits were taken up for trial together. With respect to the suit in O.S.No.25 of 2004 / specific performance suit, the primary issue framed was whether the appellant herein had executed the suit sale agreement in favour of the respondent and had received a sum of Rs.80,000/- towards sale consideration and whether the agreement was valid and whether the respondent was entitled for a decree of specific performance.

19. During the course of the trial, the plaintiff in O.S.No.25/2004, Ekambaram was examined as P.W.1 and another witness was examined as P.W.2. The defendant in the suit was examined as D.W.1 and Dr.P.Rangaraj, a Doctor was examined as D.W.2.



20. The agreement of sale dated 30.01.2004 had been marked as Ex.A.1 and the Agreement of Sale which the respondent had entered into for sale of his own house dated 28.01.2004 was marked as Ex.A.2. On the side of the defendants Exs.B.1 to B.5 were marked B.1, B.3 to B.5 were the prescriptions issued and Ex.B.2 was an outpatient chit issued by C.M.C., Vellore to the appellant herein.

21. On consideration of the oral and documentary evidence and more particularly the pleadings, the learned Sub Judge at Kancheepuram, had very specifically found that D.W.2 had stated that the appellant was not suffering from any condition of insanity so as not to know what is happening around him. He also stated that he was capable of understanding the things he was doing. However he may not be knowing whether the same is good or bad. The witness also stated that the appellant was at the peak of his disease only twice or thrice. It was also found that the specific case of the appellant was that he was ill only for 2 months i.e., from 2nd week of December, 2003 till the 2nd week of February, 2004. It was specifically found that the agreement had been entered into lawfully and that the appellant had knowledge of the same and therefore, holding the other issues in favour of respondent, the suit was decreed.



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22. With respect to the suit for partition and separate possession, it was found that the suit had been instituted only to avoid a decree of specific performance of the suit schedule property and there was no bonafide in the said suit. It was very specifically found that the appellant herein had remained exparte, while on the other hand, he contested and also tendered evidence in the parallel suit namely O.S.No.25/2004. It was also found that no evidence had been let in that the property was ancestral property and that the appellant had no right to enter into an agreement to sell the entire property. It was also very specifically found that the sons have not stated that the appellant herein was suffering from mental illness and was thereby incapacitated. Holding that the suit was not filed with bonafide intention, O.S.No.219 of 2009 was dismissed. On the other hand the suit for specific performance in O.S.No.25 of 2004 was decreed with costs.

23. Questioning the common judgment delivered, two separate Appeal Suits had been filed. The appellant herein filed A.S.No.4 of 2011 questioning the grant of specific performance and his sons filed A.S.No.12 of 2011 questioning the denial of partition and separate



possession.

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24. Both the appeal suits came up for consideration before the District Court II, Kancheepuram. By judgment dated 19.12.2011, the learned District Judge once again re-appreciated the entire evidence. It was stated before the First Appellate Court that the land was porumboke land and an issue was raised whether a agreement to sell such land could be entered into. The First Appellate Court also meandered around the issue of pre-suit notice. The First Appellate Court however confirmed the findings of the trial Court with respect to the agreement entered into by the appellant on 30.01.2004 with respect to suit schedule property and stated that the evidence of D.W.2 was not sufficient to hold that the appellant was mentally incapacitated when the agreement was entered into and therefore, directed specific performance and dismissed the suit for partition and separate possession. In effect, the judgment and decree of the trial Court was upheld.

25. No appeal had been filed against the findings in A.S.No.12 of 2011. However, as against the findings in A.S.No.4 of 2011, the present Second Appeal had been filed.



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26. Heard the learned counsels on both sides.

27. It is the contention of the learned counsel for the appellant that the appellant herein, was mentally incapacitated to enter into any agreement of sale either on 30.01.2004 or on any other surrounding date. It was stated that the appellant did not know the contentions of the said agreement of sale. It was also contended that the property is a Government poramboke land and therefore, the appellant could not have entered into such an agreement of sale. It was also contended that both the Courts below had misconstrued the evidence and had not properly appreciated the fact that necessary evidence had been adduced by D.W.2 the Doctor who had treated appellant and the prescriptions issued by D.W.2 was not properly appreciated by both the Courts.

28. On the other hand, the learned counsel for the respondent insisted that the judgments by the Court below should be upheld. The learned counsel stated that the filing of one Second Appeal as against a common judgment is not maintainable. It was also contended that in O.S.No.219 of 2009 filed by the sons against the appellant herein,



the sons had not stated that their father was suffering from mental illness. One of the reasons for instituting the suit for partition and separate possession was the fact that the appellant had entered into an agreement of sale. It was also contended that they had stated that the property is partitionable and did not claim that it was not partitionable or that it could not be dealt with owing to the fact that the land was Government Poramboke land.

29. The first substantial question of law is with respect to the proof required to adjudicate a particular person as mentally unsound at the time of entering into an agreement.

30. Order XXXII of CPC deals with suits by or against minors and persons of unsound mind, wherein it is provided that the procedure with respect to minors will have to be adopted with respect to suits against persons with unsound mind.

31. In the first place, the plaintiff must be aware that the defendant is a person of unsound mind. If he is not, and if such a defense is put up by the defendant, then the defendant should be represented by his next friend who should be the guardian. If the



defendant had not put up any such defense, and later claims that at the time when he entered into the agreement he was a person of unsound mind, then to establish that fact, the best evidence in the first instance would be his family members. They would know about his mental condition at the time when he entered into the agreement. He cannot by himself state that he had entered into a particular agreement on a particular date and that on that particular date he was a person of unsound mind. Such evidence would defy logic and be extremely illogical and can be straight away rejected by this Court. A person who has capacity to say that he was mentally unsound on a particular date, has to be informed as a person who is capable of understanding his mental condition on a particular date. His statement cannot be relied since it would be self serving. That particular statement has to be spoken up by those who witnessed him being under such state. He cannot be a witness of his own mental condition.

32. In this connection, the appellant herein had relied only on the evidence of D.W.2. There is no preliminary evidence necessitating examination of a medical professional. The evidence of D.W.2 has to be read in entirety.



33. D.W.2 has produced Exs.B.1 to B.6. Except for Ex.B.2, the other documents are prescriptions issued by D.W.2. Ex.B.1 is a prescription and is dated 17.09.1996. Ex.B.3 is yet another prescription dated 23.01.2002. Ex.B.4 is dated 06.01.2004 for 3 tablets in which the 3rd tablet is a repetition of the 1st tablet prescribed in Ex.B.3. Ex.B.5 is yet another prescription dated 02.10.2004 for 3 tablets and they are repetitions of the tablets given in Ex.B.4.

34. D.W.2 in his evidence has not spoken as to what are the medical compositions of these tablets and for what purpose they had been prescribed. He had not so spoken though he was a medical Practitioner as to why these tablets had been prescribed and who was the patient for whom such tablets was prescribed and the conditions under which these tablets are to be prescribed and what is the dosage under which these tablets are to be taken and the time period for which such tablets have to be taken. None of these facts have been given in his evidence. He has also admitted that he is not having the case sheet, which would reflect the condition of the appellant herein.

35. Placing reliance on a few intermittent prescriptions, would be inappropriate on the part of this Court to brand person as being



mentally unsound. This Court has to draw a presumption that every individual is mentally sound till proved otherwise. Such proof is lacking in this case. The evidence of D.W.2 will not help the case of the appellant herein.

36. Even, the sons of the appellant herein have not stated that their own father / the appellant was suffering from any mental illness. On the other hand, they stated that he had entered into the agreement of sale with the intention to sell the property. Therefore, the fact that the appellant wanted to sell the property has been established by the sons and verified as true and correct to their knowledge in their plaint. Very strangely the appellant had remained exparte in that particular suit and had not answered the averment in that plaint that he was not roaming around, that he was not stable, that he had not entered into an agreement of sale and that, the property is partitionable and that it is available for partition. He consciously took a decision to remain exparte.

37. Therefore, to prove a person who was of unsound mind, the procedure under Order XXXII of Civil Procedure Code will have to be followed and that will have to be followed when necessary evidence is



produced and when preliminary examination is made of the said individual by the Court. The appellant herein had not subjected himself to be tested by any Medical Board or by any competent authority during the course of the trial. It is for him to have subjected himself for such examination. It is not necessary for the respondent, to put the appellant to test. The fact that appellant was mentally unsound on that particular date is a knowledge exclusive to the appellant herein and his family members or to the Doctor who treated him. None of them have come forward to offer evidence on the state of mind of the appellant on the date when he entered into agreement of sale. In fact, he deliberately and consciously has taken a decision to remain exparte in the said suit.

38. I would commend the Sub Judge, Chengalpet in having examined the merits of the case and dismiss the suit. Therefore, with respect to the first substantial question of law, I hold sufficient evidence has not been produced that on the date of the agreement of sale the appellant herein was incapacitated to execute the agreement of sale.



39. The second substantial question of law is a point which had been made and insisted upon only during the course of the hearing of this Second Appeal, namely that the land is Government Poramboke land. During the course of hearing, my predecessor had called upon a report by the Special Tahsildar, Kancheepuram with respect to the suit property. In the report it had been stated that the land in Sy.No.56 which is the suit property, had been subdivided as 56/1 and 56/2. The suit property lies in Sy.No.56/1 namely Road No.31 - E, Vellaikulam Street, Kancheepuram.

40. This is the property which is the subject matter of the agreement. The title of the appellant had been affirmed not only by the appellant in his agreement of sale but also by his own sons who filed a suit for partition and separate possession. Having entered into an agreement of sale, and having partition and separate possession, this stand that the land is a Government Poramboke land is not also substantiated by records produced by the Government officials who also stated that the sub divided property in Sy.No.56/1 is at No.31 - E, Vellaikulam street, Kancheepuram. Therefore, the stand taken by the appellant that the property is Government Poramboke land, can never be countenanced by this Court at this particular stage.



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41. In this connection, learned counsel for the appellant also relied on the judgment of a learned Single Judge of this Court in the case of ***Mrs.Bimabi Vs. Subramanian*** in ***S.A.No.943 of 2006*** reported in ***2015 SCC OnLine Mad 2164*** wherein, the learned Single Judge had rejected such a stand and had actually held that these issues are unconnected to the primary issue in the appeal and on that ground had refused to examine that particular aspect.

42. The learned counsel also relied on the observation of a Division Bench of this Court in the case of ***Kuppuswami Odayar & another Vs. The Panchayat Narthangudi*** reported in ***1984 LW 120*** wherein Division Bench has observed as follows;

".....It has been repeatedly held that the mere fact that in the Re-settlement Register, a particular place of land has been described as poromboke will not by itself establish title to of the Government to the land in question....."

43. Therefore, I would answer the second substantial question of law that the agreement under question can be put to specific performance and enforced and if at all anybody is to object to such specific performance then it can only be the Government and not the



appellant herein and such stand by the appellant does not merit any question.

44. The third substantial question of law is with respect to the maintainability of this appeal. The learned counsel for the appellant however justified filing one second appeal stating that O.S.No.219 of 2009 had been filed by his sons who had suffered an order of dismissal and that appeal was also dismissed and that the appellant has succeeded and therefore it would not be necessary for him to file an appeal. Unfortunately learned counsel also should keep in mind that with respect to pleadings in the said suit, it had been very clearly stated that the property is an ancestral property, capable of being partitioned and that particular issue, was binding so far as the claim of the property being capable of specifically performed is concerned. The second aspect would again the pleadings in the plaint in O.S.No.219 of 2009 wherein the sons have stated that the appellant had insisted on the execution of the agreement of sale and had not pleaded about his mental condition. To that extent the appellant herein or his sons should have questioned the dismissal of A.S.No.12 of 2011. The Second Appeal itself is therefore not maintainable.



45. In the result, I would confirm the judgment and decree of the Trial Court and the First Appellate Court. Accordingly, the Second Appeal stands dismissed. With costs.

10.08.2022

Index:Yes/No
Internet:Yes/No
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To

1. District Judge No.2, Kancheepuram.
2. Subordinate Judge at Kancheepuram.
- 3.The Section Officer, VR Section, Madras High Court.



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C.V.KARTHIKEYAN,J.

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