



S.A(MD)Nos.715 and 867 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.08.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) Nos.715 and 867 of 2011

T.P.K.Kumara Vijaya Poochaya Naicker

... Appellant/1st Respondent/
1st Defendant in both appeals

Vs

1.Rangammal

2.M.S.Mani

3.Vayothi

...Respondents in both appeals

Prayer in S.A(MD).No.715 of 2011: Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 28.09.2010 made in A.S.No.144 of 2004 on the file of the Principal Subordinate Court, Trichy, reversing the judgment and decree dated 28.02.2003 made in O.S.No.33 of 1998 on the file of the Principal District Munsif, Manapparai.

Prayer in S.A(MD).No.867 of 2011:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 28.09.2010 made in A.S.No.150 of 2005 on the file of the Principal Subordinate Court, Trichy, partly allowing the judgment and decree dated 28.02.2003 made in O.S.No.33 of 1998 on the file of the Principal District Munsif, Manapparai.



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In both Appeals:

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For Appellants : M/s.Maria Roseline
For Respondents : Mr.V.Janakiramula for R1
R2 and R3-Expired

COMMON JUDGMENT

O.S.No.33 of 1998 is laid for specific performance of an oral agreement of sale with an alternate relief for refund of the advance amount paid under an agreement. The first defendant in this suit has laid O.S.No.354 of 1998 for bare injunction. Both the suits were tried separately and were disposed of by separate judgments.

2.1 The decree in O.S.354 of 1998 ultimately reached this court in S.A (MD) 380 of 2008 at the instance of the plaintiff, and the said appeal came is being heard separately. In this appeal this court is concerned with O.S.33 of 1998 alone since the cause of action in both the suits are different.

2.2 In O.S.33 of 1998, the trial court declined to grant the principal relief of specific performance, but granted the alternative relief for the repayment of the advance amount. This resulted in two first appeals. While the plaintiff had filed A.S.No.144 of 2004 challenging that part of the decree rejecting his/her prayer for specific performance, the defendant had filed A.S.No.150 of 2005 as against



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the decree for repayment of advance amount. Both these appeals came to be disposed of by a common judgment of the First Appellate Court as below:

- a) A.S.No.144 of 2004 was allowed and a decree for specific performance was passed;
- b) Since the decree for specific performance was passed, the cause of action for preferring A.S.No.150 of 2005 merged with it, and consequently, this also was allowed.

2.3 The defendant therefore has preferred two separate second appeals: S.A. (MD) 715 of 2011 against the decree in A.S.144 of 2004, and S.A(MD)No.867 of 2011 against the decree in A.S.(MD) 150 of 2005. *Stricto sensu* S.A(MD)No.867 of 2011 which arises out of O.S.No.150 of 2005 is redundant because the issue raised in that appeal is covered by the other Second Appeal in S.A(MD)No.715 of 2011. Parties would be referred to by their respective rank in the suit.

Pleadings:

3. The case of the plaintiff is stated as below:

- a) The dispute is over an extent of 1.07 acres in Survey No.296/2. This property is shown as two items of properties. The first item is described



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as a block of agricultural land measuring 1.22 acres and item No.2 is described as a property measuring 5 cents and this is described as a nursery. (In O.S.No.354 of 1998, the subject matter of the suit is 80 cents in Survey No.296/2. If the variance in the extent is kept aside for the present, the subject matter of both the suits relate to the same property).

- b) The suit property belongs to the first defendant. A certain Palaniyandi, the husband of the third defendant, was a cultivating tenant of the property.
- c) The Palaniyandi had a brother named Vethiyan. The plaintiff is the daughter of Vethiyan, or, in other words Palaniyandi's niece. While so sometime in 1998, Palaniyandi died, and before his death he had executed a *muchalica* or a memorandum in favour of the plaintiff. Ever since, the plaintiff has been a cultivating tenant of the suit property.
- d) The second defendant is an agent of the first defendant. While so, the second defendant on behalf of the first defendant negotiated with the plaintiff for the sale of the suit property for a total consideration of Rs.28,500/-. This amount was paid in multiple instalments. After payment of Rs.23,000/-, the second defendant had issued a hand written note dated 13.2.1996 and 08.07.1996 (marked Ext.A.2 and Ext.A.3). This was followed by a telegram dated 18.07.1992 from the plaintiff to



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the first defendant (the certified copy of which is Ext.A.4) and it was replied by the first defendant vide Ext.A.5, dated 22.09.1997.

- e) Subsequent to Ext.A.3, the plaintiff had paid the balance sale consideration of Rs.5,500/-. This apart, the plaintiff had also paid the second defendant Rs.10,000/- as commission, and in all the plaintiff had paid a sum of Rs.40,000/- to the second defendant, which, to repeat is made up of the sale consideration + the commission amount to the second defendant + the registration charges.

The sale however did not go through. It was because the first defendant came to know about the commission which the second defendant had charged. When the plaintiff's possession was threatened by the first defendant, a suit for specific performance with an alternate relief of repayment of sale consideration came to be laid.

4.1 The defendants 1 and 2 have filed their separate written statements. The contentions raised by the first defendant are:

- a) The suit property originally belonged to Marungapurai Zamin, that Palaniyandi, the paternal uncle of the plaintiff was the cultivating tenant only over an extent of 80 cents and not over 1.07 cents. After the demise of Palaniyandi, his wife, the third defendant in the suit had executed a



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muchalica dated 28.05.1995 (not filed in the suit for specific performance but has been marked as Ext.A.4 in the other suit in O.S.No. 354 of 1998) and surrendered possession of the same to the plaintiff. One of the attestors to this document is the plaintiff's father Vethiyan.

- b) So far as oral sale agreement is concerned, the second defendant, though an agent of the first defendant, has never been authorized by the latter to negotiate the sale of the suit property with the plaintiff. There never was any sale agreement, nor any amount was ever received by the first defendant towards sale consideration. This defendant did not know about the alleged payment of amounts by the plaintiff to the second defendant. At any rate the plaintiff has never been ready and willing to perform his part of the contract.

4.2 The second defendant in his written statement did not pointedly deny the receipt of the amount alleged to have been paid by the plaintiff to him nor Ext.A.2 and Ext.A.3 documents. He would merely state that the first defendant did not know anything about it.

5.1 The dispute went to trial. Before the trial court, the plaintiff examined herself as P.W.1. She also examined P.W.2 an atttestor to Ext.A.1 Muchalica



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said to have been executed by Palaniyandi in favour of the plaintiff. Besides, she also examined P.W.3 an independent witness to speak possession of the plaintiff. For the defendants, both the first and second plaintiffs examined themselves respectively as D.W.1 and D.W.2. While the plaintiff had purchased Ext.A.1 to Ext.A.12 the defendants did not file an documentary evidence.

5.2 As already indicated, the trial court chose not to grant a decree for specific performance and its line of reasoning is:

- that even though the plaintiff claims to have contracted for the purchase of 1.07 acres in two plots of 1.02 acres and another 5 cents, in her evidence, she has conceded that the extent of suit property might be 80 cents. This would imply that there is no certainty about the subject matter of contract.
- since the second defendant had admitted that he had received Rs.23,000, and inasmuch as it was agreed to by the defendants that the second defendant is an agent of the first defendant, both the defendant are liable to repay the said sum jointly and severally.

6. When the matter reached the First Appellate Court, it chose to decree the suit and granted principal prayer of specific performance. The First Appellate Court would rely on Ext.A.5-reply notice by the first defendant to arrive at a



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conclusion that there indeed was a sale agreement, and inasmuch as the sale consideration has been paid as evidenced by Ext.A.2 and Ext.A.3, had granted a decree for specific performance. Challenging those decrees passed by the First Appellate Court, the following substantial questions of law have been framed by this Court:

Sl.No.	S.A.(MD) No.944 of 2010	S.A.(MD) No.867 of 2011
1	<i>Whether the First Appellate Court is right in granting a decree for specific performance against the appellant when there is no privity of contract between the appellant and the first respondent?</i>	<i>Whether the First Appellate Court is right in granting a decree for specific performance against the appellant when there is no privity of contract between the appellant and the first respondent.</i>
2	<i>Whether the First Appellate Court is right in granting a decree for injunction in favour of the first respondent on the basis of judgment and decree in O.S.No.354 of 1998? and</i>	<i>Whether the First Appellate Court is right in granting a decree for injunction in favour of the first respondent on the basis of judgment and decree in O.S.No.354 of 1998? and</i>



3	<i>Whether the First Appellate Court is right in granting a decree for specific performance when none of the essential ingredients for a contract of a specific performance namely consensus as to the identity of the property, sale consideration, time of the contract and time period of the contract is present in the case?</i>	<i>Whether the First Appellate Court is right in granting a decree for specific performance when none of the essential ingredients for a contract of a specific performance namely consensus as to the identity of the property, sale consideration, time of the contract and time period of the contract is present in the case?</i>
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7. Heard both sides. The pivot on which the first appellate court has rested its findings as to the existence of an oral contract for sale of the suit property is Ext.A5. This is issued on behalf of the first defendant to a telegram issued by the plaintiff. In this reply notice, the first defendant first pleads that he has never met the plaintiff but concedes that the second defendant is his agent, that he has negotiated for the sale of the property with the plaintiff not for a sale consideration of Rs.28,500/- as alleged by the plaintiff, but for a consideration of Rs.85,000/-, that the plaintiff in all had paid only a sum of Rs.23,000/- and since the plaintiff did not come forward to pay the balance sale consideration of Rs.62,000/-, the sale could not be completed. In other words, notwithstanding his denial of existence of oral agreement of sale, he is seen in a mood to rectify what the second defendant as his agent has done.



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8. But is this adequate enough to grant a decree of specific performance?.

While the plaintiff contends the sale consideration is Rs.28,500/-, Ex.A5 indicates that it is Rs.85,000/-. This would imply that there is no *consensus ad idem* regarding the consideration payable. The second aspect is about the payment of sale consideration. Even according to the plaintiff, she had established the payment of only Rs.23,000/- but not the entire sale consideration. Has the plaintiff then come to the Court with clean hands, while invoking the equity jurisdiction of the Court? It is questionable. Given the scenario, this Court also cannot find that the plaintiff has been ready and willing to perform her part of the contract. Necessarily, her prayer for specific performance should fail.

9. Turning to the alternate prayer for refund of sale consideration, the trial Court has granted a decree for repayment of Rs.23,000/-, the receipt of which is admitted even in Ex.A5 reply notice. Inasmuch as the defendants have not admitted the existence of the contract, he has no justification to retain the money he has received.

10. In conclusion, this court allows S.A.(MD) 715 of 2011 but dismisses S.A.



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(MD) 867 of 1998, sets aside the decree of the first appellate court dated passed in A.S.144 of 2004 and A.S.150 of 2005, and restores the the judgment and decree of the trial court dated 28.02.2003 made in O.S.No.33 of 1998 on the file of the Principal District Munsif, Manapparai. No costs.

23.08.2022

Index : Yes/No

Internet : Yes/No

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To,

1. The Principal Subordinate Court, Trichy,
2. The Principal District Munsif, Manapparai.



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N.SESHASAYEE, J.

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