



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.03.2022

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

A.S.(MD)No.164 of 2019 and
CMP(MD) No.8430 of 2019

WEB COPY

1.Sesily
2.A.Sobila

Appellants/Defendants 1 & 3

Vs.

1.Somu
2.Soundarajan

Respondents/Plaintiff &
Second Defendant

PRAYER: Appeal Suit is filed under Section 96 of the Civil Procedure Code, to set aside the judgment and decree, dated 28.03.2019, in O.S.No.28 of 2015, on the file of the Additional District Court, Ramanathapuram.

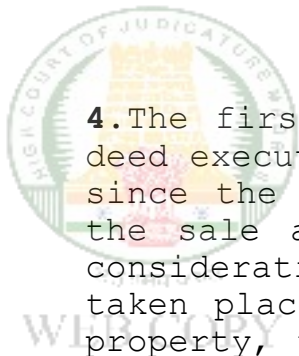
For Appellants	: Mr.P.Senthur Pandian
For R1	: Mr.PT.S.Narendravasan
For R2	: No appearance

J U D G M E N T

This Appeal Suit has been preferred challenging the judgment of the learned Additional District Judge, Ramanathapuram, dated 28.03.2019, made in O.S.No.28 of 2015.

2.The appellants are the defendants 1 & 3 in the suit. The respondents are the plaintiff and the second defendant. The suit has been filed by the plaintiff for the relief of specific performance and for permanent injunction, in respect of the suit property.

3.The case of the plaintiff is that the suit property belonged to the first defendant by virtue of a partition deed, dated 28.12.2011; the first defendant executed a power deed in favour of the second defendant on 07.05.2015; the second defendant entered into a sale agreement with the plaintiff, in respect of the suit property on 08.05.2015, for a sale consideration of Rs.14,00,000/-; on the date of sale agreement itself, the second defendant received Rs.10,00,000/- as advance; the balance sale consideration of Rs.4,00,000/- should be paid within a period of three months and the sale deed should be executed; the first defendant refused to execute the sale deed, despite the plaintiff was ready and willing to pay the balance sale consideration and even before that the first defendant cancelled the power deed executed in favour of the second defendant; hence, the plaintiff has filed the suit for specific performance and other reliefs.



4.The first defendant contested the suit by stating that the power deed executed by her in favour of the second defendant was cancelled since the second defendant colluded with the plaintiff and created the sale agreement; the first defendant did not receive any sale consideration from her power agent; in fact, no sale agreement was taken place on 08.05.2015; just with an intention to grab the suit property, the second defendant and the plaintiff colluded with each other and filed the suit.

5.The third defendant is the daughter of the first defendant and she has filed her written statement by stating that on 10.06.2015, the first defendant registered a settlement deed in her favour, in respect of the suit property and handed over the possession; even though the suit was instituted on 07.06.2015, there was no order for injunction restraining any alienation; the third defendant is an unnecessary party to the suit.

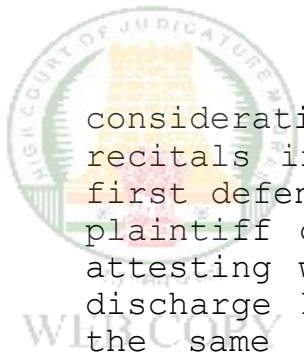
6.On the basis of the above pleadings, the learned trial judge framed the following issues:-

- i.Whether the plaintiff is entitled to a decree of specific performance?
- ii.Whether the defendants are to be restrained by permanent injunction from selling the property?
- iii.Whether the power of attorney deed executed by D1 to D2 is valid?
- iv.To what other relief?

7.During the trial, on the side of the plaintiff, the plaintiff himself was examined as PW 1 and five documents were marked as Ex.A1 to Ex.A5. On the side of the defendants, the first defendant herself was examined as DW1 and six documents were marked as Ex.B1 to Ex.B6.

8.While considering the evidence on record, the learned trial judge was pleased to grant the relief for specific performance. Aggrieved over the same, the defendants 1 & 3 have filed the present Appeal Suit.

9.The learned counsel appearing for the appellant submitted that the second defendant colluded with the plaintiff and caused the sale agreement, for which, the first defendant is no way responsible. Even during the examination of PW 1, she has stated that she did not peruse the original title deeds of the suit property or take encumbrance certificate; she did not get the power document from the second defendant, despite the sale agreement was executed through the power agent; after coming to know about the execution of the sale agreement, the first defendant had issued a legal notice to the second defendant under Ex.B3, for which, the second defendant sent a reply notice under Ex.B5; while giving power vide Ex.B.1, no



consideration was received by either of the parties; there are recitals in the power document itself to that effect; despite the first defendant denied the genuineness of Ex.A1, sale agreement, the plaintiff did not prove the same by examining the scribe or other attesting witnesses; the plaintiff who had filed the suit, did not discharge his burden of proof; the learned trial judge overlooked the same and wrongly fixed the burden on the appellant/first defendant; the learned trial judge had observed that non-examination of the second defendant to support the contention of the first defendant cannot be accepted, for the sole reason that the second defendant colluded with the plaintiff; since Ex.A1 sale agreement was fraudulently created and deceived the interest of the first defendant, the learned trial judge ought to have dismissed the suit; since the learned trial judge did not appreciate the evidence in a proper and perspective, the judgment and decree of the learned trial judge has to be set aside.

10.The learned counsel for the respondents submitted that the plaintiff has filed the suit and produced Ex.A1 sale agreement in proof of sale agreement; the executant of sale agreement is none other than the power agent of the first defendant and the sale agreement was executed at the time when the power was in force; the second defendant is none other than the sister husband of the first defendant; but the first defendant had denied her very relationship with the second defendant; the second defendant had colluded with the first defendant and deceived the interest of the plaintiff; the plaintiff cannot be expected to call upon the opposite party i.e the second defendant to examine as his witnesses; on the other hand, it is the duty of the first defendant to summon the second defendant and prove about her alleged non-involvement in the execution of Ex.A1, sale agreement; the learned trial judge after appreciating the evidence on record had rendered his findings correctly; hence, the judgment of the learned trial judge does not require any interference.

11.On the basis of the rival submissions made by either side counsel, I feel that the following points for consideration are relevant for deciding this Appeal Suit.

- i. Whether the findings of the learned trial judge as to the execution and genuineness of Ex.A.1, sale agreement is correct?
- ii. Whether the judgment and the decree of the learned trial judge in granting the relief of specific performance is fair and proper?

12.The fact that the suit property belonged to the first defendant is not in dispute. The further fact that the first defendant had executed the power deed in favour of the second defendant on 07.05.2015 was also not disputed. It is also not in dispute that Ex.A1, sale agreement is said to have been executed on 08.05.2015

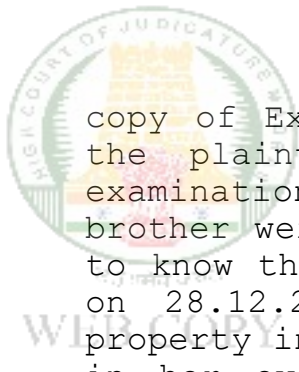


through the second defendant in his capacity as power agent for the first defendant in favour of the plaintiff. The contention of the first appellant/the first defendant is that even before getting the registered power deed from the Sub Registrar Office, the sale agreement in favour of the plaintiff has been executed and that itself would cause doubt about the genuineness of the same and on coming to know about the fraudulent act of the second defendant, she had cancelled the power deed on 11.05.2015.

13.It is to be noted that the first defendant did not disclose anywhere in her pleadings that the second defendant is none other than her sister's husband. Though she had chosen to send legal notice to the second defendant by objecting his action of executing the sale agreement in favour of the plaintiff on 14.05.2015 and thereafter cancelled the power deed, she has not taken any legal action against the power agent. Since Ex.A1 sale agreement was a written contract and the power given to the second defendant was in force at the time when Ex.A2 was executed, the first defendant would certainly know its implication. Despite she had not taken any legal action against the second defendant. Neither had she examined the second defendant as a witness in order to speak about Ex.A1 Sale agreement. In the reply notice sent by the second defendant, vide Ex.B4 also, he was silent about the execution of Ex.A1, sale agreement. On perusal of Ex.B3, it is seen that it was issued on 11.05.2015 and on which date, she had cancelled the power deed given to the second defendant. In Ex.B3 legal notice, even the first defendant was also silent about the execution of the sale agreement.

14.The very contention of the first defendant is that she preferred to cancel the power given in favour of the second defendant, because he went against her interest in collusion with the plaintiff and executed Ex.A1, sale agreement in his favour. In that case, in Ex.B3 legal notice, she would have mentioned about the execution of the sale agreement Ex.A1 and that it was without her authority. Under such circumstances, silence about Ex.A1, sale agreement and Ex.B3 legal notice seems to be wanton and evasive. In the same passion, the second defendant also sent his reply notice Ex.B4, in which, he also did not mention anything about Ex.A1 sale agreement. So, this conduct on the part of the defendants 1 & 2 would show that they intended to Ex.A1 sale agreement at the very initial stage and in continuation thereof, the first defendant has taken a convenient stand that the second defendant was acting in collusion with the plaintiff.

15.During the cross examination of PW 1, she has stated that she was not serious enough to verify the original title deeds and other documents of the suit properties, like encumbrance certificate, in respect of the suit property and that was because of the earlier sale transactions she had with the first defendant. In order to fortify the above fact, the plaintiff has produced the certified

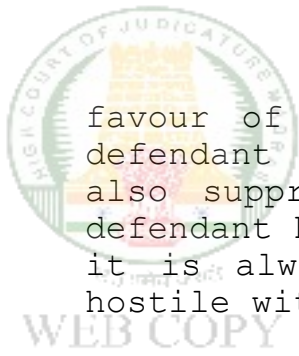


copy of Ex.A5 Sale deed. But, the first defendant has stated that the plaintiff is a total stranger to her. During the cross examination of DW 1, she has stated in Ex.A5, her sisters and brother were alone parties and hence, she did not have any occasion to know the plaintiff. However, she had categorically admitted that on 28.12.2011, herself and her sister jointly sold some other property in favour of the plaintiff. So, the above statement of DW 1 in her evidence would show that the plaintiff was known to the defendant, even before the execution of the sale agreement.

16.As per Section 91 of Indian Evidence Act, whenever the terms of contract are reduced into writing, the very production of the document alone should be admissible in evidence in proof of the same. It is not in dispute that the sale agreement is a written one. The signature of the second defendant in the sale deed and his capacity as power agent for the first defendant, on the date of Ex.A1 was also not denied. If the first defendant opted to claim that the sale agreement has not been executed for the purpose stated therein or without her knowledge or it was executed with an intention to defraud her interest, then the burden would shift upon her to prove the contrary. Since the appellant/first defendant claimed that the second defendant went in collusion with the plaintiff, the best person through whom the first defendant could rebut the presumption in favour of the plaintiff would be the second defendant.

17.It is the earnest submission of the learned counsel for the appellant that the property was situated at Thangatchimadam and the defendants 1 & 3 are the residents of Trichy and the second defendant is the resident of Thangatchimadam. But the stamp papers, in which, Ex.A1 was executed seems to have been purchased from Madurai and hence, this would raise doubt about the genuineness of Ex.A2. On perusal of Ex.A1, it is seen that the stamp papers have been purchased from Madurai in the name of the second defendant. Had the stamp papers been purchased by the plaintiff from Madurai, there is a reason to suspect the genuineness and conduct on the part of the plaintiff. It is the power agent of the first defendant who had opted to purchase the stamp papers from Madurai and hence best explanation for that can be offered only by the second defendant. It has been already stated that the first defendant has not opted to summon the second defendant as a witness. Under such circumstances, no significance can be given for the fact of purchasing the stamp papers from Madurai. This is especially so when other facts confirm the genuineness and execution of Ex.A1. On the other hand, adverse presumption can be drawn against the defendants for withholding the examination of the second defendant.

18.However, it is submitted by the learned counsel for the appellant that the second defendant was acting against the interest of the first defendant and hence he cannot be expected to give evidence in



favour of the first defendant. The fact remains that the second defendant is a close relative of the first defendant and that was also suppressed. Even for the sake of arguments, if the second defendant had intended to give evidence against the first defendant, it is always open to the first defendant by treating him as a hostile witness and then cross examine him.

19.The conduct of the defendants and the evidence on record would reveal that the first defendant had suppressed the real facts. Immediately after filing the suit she hurriedly executed the settlement deed, in favour of her daughter/the third defendant. But, she did not challenge the action of the second defendant by taking any legal action against him. The learned trial judge has rightly appreciated the facts, evidence and the conduct of the parties and granted the relief of specific performance. **Thus, the points are answered against the appellants.** In my considered view, the judgment of the learned Additional District Judge, Ramanathapuram does not suffer from any illegality or infirmity.

20. In the result, this Appeal Suit is dismissed and the judgment of the Additional District Judge, Ramanathapuram made in O.S.No.28 of 2015, dated 28.03.2019 is hereby confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

Vrn
To

1.The Additional District Judge, Ramanathapuram

2.The Record Keeper, Vernacular Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.P.SENTHUR PANDIAN, Advocate (SR-11312[F] dated 10/03/2022)

+1 CC to M/s.PT.S.NARENDRAVASAN, Advocate (SR-11232[F] dated 10/03/2022)

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