



S.A.No.396 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:03.07.2023

Delivered on: 14.07.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.No.396 of 2007

1.Pulliammal (died)

2.Ponnusamy
(Appellant 2 and
respondent 3
bought on record as
LR's of the deceased
1st appellant viz.,
Pulliammal vide order of Court
dated 01.03.2021 made in
C.M.P.No.1 of 2009 in
S.A.No.396 of 2007)

... Appellants

Vs.

1.S.Savitha

2.T.K.Iyyannan

3.Rajammal

... Respondents

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PRAYER: Second Appeal filed under Section 100 of C.P.C against the judgment and decree passed dated 02.09.2006 passed in A.S.No.42 of 2006 on the file of Principal District Court, Salem in confirming the judgment and decree dated 17.04.2006 passed in O.S.No.60 of 2004 on the file of the Sub-Court, Mettur.

For Appellants : Mr.P.Mani

For Respondents : Mr.A.K.Sriram, Senior Counsel
for
Mr.A.Sundaravadhanam for R1

No Appearance for R2 and 3

JUDGMENT

The unsuccessful 1st defendant in a suit for Specific Performance of an agreement of sale is the appellant.

2. The 1st respondent as plaintiff, filed a suit for Specific performance of the agreement of sale dated 02.09.2004. It is the case of the plaintiff that the 1st defendant is the owner of the suit property and that she had executed a Power of Attorney in favour of the plaintiff's father-in-law i.e, the 2nd defendant on 01.09.2004 and that in pursuance of the said Power of Attorney,



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the 2nd defendant, representing the 1st defendant, executed a registered sale agreement in favour of the plaintiff. The sale consideration for the suit property was fixed at Rs.1,50,000/- and according to the plaintiff, even on the date of the agreement a sum of Rs.1,00,000/- was paid. The balance sale consideration of Rs.50,000/- was agreed to be paid within a period of 3 years. The plaintiff paid the balance sum of Rs.50,000 on 04.09.2004 for which the 2nd defendant also issued a receipt on the same day. It was agreed that the 2nd defendant would execute the sale deed on 14.09.2004, being a new moon day. The 2nd defendant also handed over the receipt issued by the 1st defendant for the entire sale consideration of Rs.1,50,000/-, evidencing the fact that the entire sale consideration was paid to the 1st defendant by the 2nd defendant. Subsequently, the plaintiff met the 1st defendant in person and called upon her to come for registration on 14.09.2004 and according to the plaintiff, the 1st defendant also confirmed the fact that she had received the sale consideration from the 2nd defendant in full and agreed to come to the registrar's office. However, since the 1st defendant did not turn up as promised, the plaintiff was constrained to issue a notice to the defendants on



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17.09.2004. On receipt of the said notice, the 1st defendant issued a telegram to the plaintiff's counsel on 22.09.2004 stating that she had already cancelled the Power of Attorney and therefore she would not be in a position to comply with the plaintiff's demand. The plaintiff has approached the court seeking Specific performance, immediately thereafter, by instituting the suit which is the subject matter of the Second Appeal.

3. The 1st defendant filed a written statement stating that the 1st defendant was not the sole owner of the suit property which was ancestral in nature and consequently her son and daughter also have a right in the same. The 1st defendant denied the execution of Power of Attorney in favour of the 2nd defendant, authorising the 2nd defendant to deal with the suit property. The 1st defendant had specifically pleaded that she approached the 2nd defendant for a loan and while borrowing a sum of Rs.5,000/-, her thumb impression was obtained at the Sub-Registrar's Office and she executed the alleged agreement of sale without knowing the contents of the document. The 1st defendant also stated that the Power of Attorney was itself obtained by the 2nd



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1. *Whether the suit sale agreement was true?*

2. *Whether the plaintiff was ready and willing to perform his obligations under the agreement of sale?*

3. *Whether the plaintiff is entitled to relief of Specific performance?*

An additional issue was subsequently framed as to whether that the power of attorney was true document?

6. Before the Trial Court, the plaintiff examined herself as PW1 and one Chithan as PW2 and exhibits Ex.A1 to A9. On the side of the defendants, the 1st defendant examined herself as DW1 besides examining Ponnusamy and Ganesan as DW2 and DW3 respectively. The 2nd defendant examined himself as DW4. On the side of defendants, Ex.B1 to Ex.B28 were marked. The Trial Court after considering the oral and documentary evidence available on record held that the suit agreement was true and genuine and that the plaintiff was entitled to the relief of specific performance besides also holding that the Power of Attorney was also a valid document.



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7. The 1st defendant challenged the said judgment and decree in AS.No.42 of 2006 before the Principal District Judge,Salem. The First Appellate Court confirmed the findings of the Trial Court and dismissed the appeal.

8. Aggrieved by the concurrent findings rendered by the Courts below, the 1st defendant has preferred the above Second Appeal. At the time of admission of the second appeal, the following substantial questions of law have been framed:-

“1.Whether the present suit for specific performance of Ex.A2 sale agreement as instituted is maintainable without impleading the subsequent transferees/settles who are the necessary parties and with whom the title to the suit lands is vested at present.

2. Whether the plaintiff is entitled to the discretionary relief of specific performance when Ex.A1 power of attorney deed was obtained by fraud by the second defendant who is none other than the father-in-law of the plaintiff and Ex.A2 sale agreement was also fraudulently entered into



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between the plaintiff and the second defendant who claimed to be power agent of the first defendant.

3. Whether the judgment and decree passed by the Courts below are sustainable in law when they have failed to consider and appreciate the evidence on record in their proper perspective.”

9. This Court heard Mr.P.Mani, counsel for the appellant/ 1st defendant and senior counsel Mr.A.K.Sriram appearing for Mr.Sundharavaradhan, counsel for the 1st respondent/plaintiff.

10. The counsel for the appellant would revolve his arguments around the substantial questions of law and contend that the 1st defendant had settled the property, about which the plaintiff was fully aware and therefore the suit itself was bad for non-joinder of proper necessary parties. He would also contend that the relief of specific performance is a discretionary relief and the 2nd defendant and the plaintiff have colluded to snatch the property of the 1st defendant. Admittedly, they being father-in law and daughter-in-law,



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there can be no bonafides in their claims and the agreement executed by the 2nd defendant in favour of the appellant cannot be enforced as it is a result of fraud and foul play. The counsel for appellant would also contend that the plaintiff has not come to court with clean hands and an aged 80 years old lady who was also an illiterate, the 1st defendant, has been taken for a ride and she is sought to be deprived of her valuable property. The counsel for the appellant would also point out some contradictions in the evidence adduced by the defendants. For instance the evidence of DW4, power agent who is the 2nd defendant contradicts the case of the plaintiff's evidence as PW1. He would also emphasize on the fact that the alleged transaction could only be a loan transaction because the period fixed for completion was for 3 years and any genuine transaction in the nature of a sale agreement would never contemplate such a long period of 3 years. One another aspect that the learned counsel for the appellant would point out is that under the agreement of sale, it is stated that possession of the suit property has been handed over to the plaintiff. However, in evidence the plaintiff admits that possession of the suit property was not given to her. Therefore, the counsel for the plaintiff



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would contend that, it is a clear case were the plaintiff has not approached this Court with clean hands and a loan transaction has been converted into an agreement of sale, duping the 1st defendant. The counsel would also place reliance on the judgments in *Narayana Pillai Chandrasekharan Nair V. Kunju Amma Thankamma*, reported in *AIR 1990 KERALA 177*, *Vimala Ammal V. Suseela and Others*, reported in *AIR 1991 MADRAS 209* and *A.M.AdhilBadusha Vs. Sucharitha and Another* reported in *2017 (3) MLJ 363*.

11. Per contra, the learned senior counsel for the 1st respondent/plaintiff, Mr.A.K.Sriram would contend that, the Courts below have rightly discussed the oral and documentary evidence and arrived at a concurrent finding which need not be interfered by this Court, by exercising jurisdiction under Section 100 of Civil Procedure Code 1908. The learned senior counsel would also states that the contradictions that have been pointed out by the counsel for the appellant would not have any bearing on the main issue-in-question and moreover with passage of time between the

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transaction and the parties leading evidence before the Court, such minor contradictions are bound to occur and much cannot be made out of the same.

Learned senior counsel would also state that if really the plaintiff had colluded with her father-in-law, the 2nd defendant, then there would have been no necessity for the plaintiff to even call up on the 1st defendant to execute the sale deed and based on the Power of Attorney itself the 2nd defendant would have executed the sale deed in favour of the plaintiff. Further, if really the case of fraud and foul play as alleged by the counsel for the appellant is true, then the plaintiff and the 2nd defendant would have only shown keen interest in completing the transaction at the earliest and not opting for such a long period of 3 years. In so far as possession is concerned, the senior counsel would state that though the agreement of sale does mention that possession of the suit property has been handed over to the plaintiff, the plaint is silent about the same. However, he would admit that during the evidence the plaintiff has stated that the plaintiff is not in possession of the suit property. He would also attempt to satisfy this Court with regard to the confusion relating to possession by stating that all the



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parties were residing in the very same address and therefore under such circumstances there may have been such a covenant in the agreement of sale. However, this Court is unable to find this argument acceptable for the simple reason that there is no such pleading or evidence with regard to the factum of possession, excepting for the admission of plaintiff that she is not possession of the suit property. However, this court feels that the issue of possession may not be germane to decide the suit for Specific Performance of the Agreement of Sale.

12. The Courts below have rightly considered the documents available on record especially the receipt issued by the 1st defendant confirming the receipt of entire sale consideration of Rs.1,50,000/- and also Ex.B28 which is the cancellation of power of attorney executed by the 1st defendant, revoking the power given to the 2nd defendant. This Court, on perusal of the said Ex.B28 finds that the 1st defendant has in no uncertain terms admitted the execution of Power of Attorney Ex.A1. The covenants in the said cancellation of power of attorney only clinchingly establishes that the case put forth by

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the 1st defendant by way of defence is false even to the knowledge of the 1st defendant. The very case set up by the way of defence is that the power of attorney was brought about by collusion and foul play and that the 1st defendant never executed the power of attorney. However, Ex.B28 demolishes the said case set up by the 1st defendant. One another interesting aspect is that the notice came to be issued on 17.09.2004 in EX.A5 i.e, the plaintiff calling upon the 1st defendant to come forward to execute the sale deed. However pre-empting the issue, the 1st defendant had chosen to cancel the power of attorney even earlier on 13.09.2004 stating that she had made alternate arrangements and therefore the power of attorney is being cancelled. Interestingly, on the same day the 1st defendant had executed a settlement deed in Ex.A9 in favour of her grandson. It is this settlement deed that is relied on and focused on by counsel for the appellant to contend that the said document having been marked as a plaintiff's exhibit, only goes to show that the plaintiff was fully aware of the settlement deed and therefore in the absence of the true owner, the suit for specific performance of an agreement cannot be maintained and the decree even assuming to be passed, cannot be



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validly enforced since, the person who had agreed to sell the property had already divested all her rights, title and interest in the subject suit property.

13. This Court is unable to appreciate the said arguments counsel for appellant for the following reasons:

1.The defence set up by the appellant as 1st defendant was only limited to the property not being the absolute property of the defendant and being joint family property, her children were also proper and necessary parties and only under such premise, the 1st defendant sought for dismissal of the suit on the ground of non-joinder of necessary parties.

2. The 1st defendant never set up a defence that she had settled her property on her grandson, on the same day on which she cancelled the power of attorney executed in favour of the 2nd defendant.



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3. Though the settlement deed has been marked as plaintiff's exhibit, this court on the perusal of the evidence recorded before the trial court finds that the said document has only been marked during cross examination of the plaintiff as PW1 and therefore merely because the said settlement deed has been shown as a plaintiff's exhibit, it cannot straight away lead to the inference that the plaintiff was aware of the said settlement deed at the time of filing of the, suit.

4. Even in the reply telegram the 1st defendant had not chosen to disclose the fact that she has executed a settlement deed eventhough on the said date of the telegram the said settlement deed had already been executed and registered.



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14. In suits for specific performance the law is now fairly well settled with regard to the conduct of the plaintiff. The plaintiff who seeks the equitable and discretionary relief of specific performance is bound to approach the Court with clean hands and should not be guilty of any material suppression. However, with the march of law, the Courts have now evolved the principle whereby it is not only the plaintiff who should approach the court with clean hands, but equally, the defendant who seeks to negate the relief of specific performance should also approach the court with clean hands and should not be guilty of suppression of material facts. As already discussed herein above, the appellant has willfully chosen to suppress the factum of the settlement deed right from the very inception, namely the reply telegram issued on 22.09.2004 and also subsequently when the written statement was be filed. The appellant therefore, is clearly guilty of suppressing a material fact from the court and cannot take advantage of her own wrong or conduct in doing so and to contend that the suit should be dismissed on ground of non-joinder of the settlee. Even the decisions relied on by the counsel for appellant viz., ***Narayana Pillai Chandrasekharan Nair***



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தமிழ்நாடு உயர் நீதிமன்றம்
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V. Kunju Amma Thankamma, Vimala Ammal V. Suseela and Others & A.M. Adhil Badusha Vs. Sucharitha and Another (Cited Supra) are cases where the Courts were called upon to decide the respective cases before it with reference to Section 19 of The Specific Relief Act, 1963. Here, however it is not the case of a third party or subsequent purchaser who has purchased the property is which the subject matter of the agreement of sale. To the contrary, it is a unilateral settlement deed executed by the appellant in favour of her grandson and there is every possibility that the said settlement deed was executed only to defeat the rights of the 1st respondent/plaintiff and deny him the benefit of the relief of specific performance.

15. This Court also takes note of the fact that pending the above second appeal, the appellant died and M.P.No.1 of 2009 was filed by the son of the appellant who is none other than the father of the settlee on whom the property was settled by the appellant. In M.P.No.1 of 2009 where the son of the appellant has sworn to an affidavit stating that his mother, the sole appellant died on 26.07.2008 leaving behind him i.e., on and the 3rd



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respondent i.e. daughter bringing on record himself and his sister the 3rd respondent as legal representatives of the deceased appellant in the second appeal. The said application also came to be allowed by this court on 01.03.2021. The specific case of the appellant was that she had divested herself of all her right, title and interest in the suit property and her grandson namely the settlee under the registered settlement deed was the owner of the subject property and on that score, the appellant sought for dismissal of the suit. However, referring to definition of legal representatives under Section 2(11) of the Civil Procedure Code 1908, this court finds that if really the settlement deed was true and genuine and acted upon, the said settlee, namely the grandson of the appellant would alone be the legal representative and not the legal heirs of the Appellant viz., son and daughter.

16. Section 2(11) of Civil Procedure Code 1908 is reads as follows:

2(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party



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sues or issued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

17. Thus, it can be seen that the case of the appellant, harping on the settlement deed and transfer of interest in the suit property had virtually been given a go-by, post her demise. If really the settlee had any interest in the subject property he would have been the person who would have approached this Court and sought for bringing himself on record as the legal representative. On the contrary, his father filed an application to bring himself and his sister i.e. aunt of the settlee/grandson as legal representatives of the deceased sole appellant. Therefore, this Court is unable to appreciate the arguments of the learned counsel for the appellant that the suit is bad of non-joinder of necessary parties. Further, Section 19(b) of the Specific Relief Act, 1963 would also have no application of the facts of this case. Section 19(b) of Specific Relief Act, 1963 refers only to a transferee for value which is not the case on hand. Here admittedly the sole appellant claims to have executed a settlement deed in favour of her grandson and the same was also



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not for consideration and only out of love and affection. Therefore, the decisions relied on by the counsel for the appellant cannot be pressed into service to further the case of the appellant.

18. One another submission that has been put forth by the counsel for appellant that it was unnatural to fix for a period of three years for completion of the sale transaction when only a sum of Rs.50000/-remained to be paid and therefore the case of the appellant that it is only a loan transaction ought to be accepted. Unfortunately, this Court is unable to find any force in the said submission for the simple reason that the case of the appellant was that she borrowed only a sum of Rs.5000/- and to rely on the time agreed upon in the agreement and to state that it was unnatural, cannot be accepted or justified. Moreover, it is also seen that within a matter of few days,the balance sale consideration was paid by the 1st respondent/plaintiff and therefore nothing much can be sought to be made out from the mere fact that the agreement contained a3years window period for payment of the balance sale consideration Rs.50,000/-Further the Courts below had rightly



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appreciated the receipt issued by the appellant herself confirming the receipt of entire sale consideration of Rs. 1,50,000/-.

19. This Court exercising power under Section 100 of Code of Civil Procedure, 1908 is not justified in interfering with concurrent findings of fact. The Courts below have appreciated the oral and documentary evidence available on record in a proper and judicious manner and no perversity can be attributed to the concurrent findings arrived at by the Courts below. This Court has also found that the appellant is guilty of suppression of material facts and when the defendant in a suit for specific performance is denying the plaintiff his right to have the agreement of sale enforced and thereby become the owner of the property, it is equally relevant and incumbent on the defendant in such a case to approach the court with clean hands and not be guilty of suppression of material facts. Here, surprisingly the appellant is not only guilty of suppression of the factum of settlement deed executed in favour of her grandson but also attempted to take undue advantage of the said settlement deed having been executed to deny the plaintiff of her right and



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entitlement to a decree for specific performance. Answering the substantial questions of law:

1. *In so far as maintainability of the suit, the said substantial question of law cannot be entertained for the reasons and discussions made herein above finding that the defendant had suppressed the settlement deed in favour of her grandson and not even pleaded about the same in the written statement. In such view of the matter, the said issue cannot be put forth or canvassed as a substantial question of law.*

2. *The Courts below had concurrently found that that there has been no fraud or foul play played by the plaintiff and 2nd defendant and such findings having been found to be judicious and on available oral and material documentary evidence and the said question also does not survive to be answered in favour of the appellant.*

3. *This Court has already found that the Courts below had appreciated the evidence on record in a proper perspective and arrived at concurrent findings. That being so the third substantial question of law is also answered against the appellant.*



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In the result, the Second Appeal is dismissed. However, there shall be no order as to costs.

14.07.2023.

Internet:Yes

Index:Yes/No

Neutral Citation:Yes/No

Speaking/Non-speaking order
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To

1. The Principal District Judge, Salem
2. The Sub-Judge, Mettur



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P.B.BALAJI, J.,
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Pre-delivery Judgment in
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