



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.08.2023

Delivered on : 19.10.2023

CORAM

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

S.A.No.453 of 2023
and
C.M.P.No.13622 of 2023

1. M.A.Jeganathan
2. M.A.Somasundaram

Appellants

vs.

D.Mani

Respondent

Second Appeal filed under Section 100 of CPC against the Judgment and Decree dated 11.3.2021 passed in A.S.No.31 of 2019 on the file of the III Additional District and Sessions Judge, Erode at Gobichettipalayam confirming the Judgment and decree dated 18.2.2019 passed in O.S.No.87 of 2014 on the file of the Subordinate Court, Gobichettipalayam, Erode District.

For Appellants : Mr.C.Munusamy

For Respondent : Mr.N.Manoharan

JUDGMENT

Defendants, who suffer a decree of specific performance granted by the Trial Court and affirmed by the first appellate Court, have come up with the present Second Appeal.



WEB COPY 2. The case of the plaintiff is as under:-

i) The suit property was originally belonged to the father of the defendants Appaiya Gounder by virtue of sale deed dated 12.03.1962. After the demise of the said Appaiya Gounder, the defendants acquired the suit property absolutely and enjoyed the same.

ii) The defendants entered into a registered sale agreement with the plaintiff on 06.04.2011 to sell the suit property for the consideration of Rs.1,30,000/- and received an advance of Rs.85,000/- on the date of sale agreement. The time for completion of sale was fixed for 3 years. The defendants handed over the parent deed to the plaintiff. Since, the defendants are residing out station, they handed over the possession of the property to the plaintiff on the date of sale agreement itself. From the date of agreement of sale, the plaintiff has been residing in the suit property and also enjoying the same by paying electricity charges.

iii) Whiles, on 15.3.2012, the defendants received a further sum of Rs.25,000/- from the plaintiff. The plaintiff was ready and willing to pay the balance of Rs.20,000/- and get the sale deed executed. The plaintiff asked the defendants to execute the sale deed.



But the defendants prolonged the matter.

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iv) The plaintiff issued notice the defendants requesting the defendants to appear before the Gobichettipalayam Joint Sub Registrar No.2 on 12.03.2014 between 10.00 a.m. to 2.00 p.m. and execute the sale deed after receiving the balance sale consideration of Rs.20,000/-. Though the defendants received the legal notice issued by the plaintiff, they neither executed the sale deed nor gave any reply to the notice. Hence, the suit.

3. The crux of the written statement filed by the 2nd defendant and adopted by the 1st defendant is as under:-

i) The suit property is separate property of A.S.Appaiya Gounder, the father of defendants and their sister Gandhimathi. The said Appaiya Gounder died intestate on 21.06.1980 leaving behind him his two sons viz, the defendants and a daughter by name Gandhimathi as his legal heirs.

ii) The plaintiff is a money lender in the local village. He is a close friend of defendants. The defendants approached the plaintiff seeking a loan of Rs.1,00,000/- for medical treatment of 1st defendant's wife. The plaintiff agreed to advance Rs.85,000/- as loan,



but, insisted the defendants to execute a document styled as agreement of sale. Owing to the circumstances and for medical treatment, the defendants agreed to execute the deed as security. The plaintiff promised that he would not enforce the same if interest is paid at Rs.2/- per hundred per month without fail. Since it was only a loan transaction and not intended to be acted upon as an agreement of sale, the duration for executing the sale deed was fixed as three years.

iii) Based on reliance, the defendants executed the document styled as agreement of sale on 07.04.2011 valuing the suit property as Rs.1,30,000/-. The plaintiff paid Rs.85,000/- alone on 07.04.2011. Subsequently, the plaintiff got the plaint 2nd document as if he paid Rs.25,000/- on 15.03.2012 without actually paying such an amount. The plaint document dated 15.03.2012 is not supported by consideration.

iv) As soon as the defendants received legal notice, they approached the plaintiff. The plaintiff replied that only to strike fear in the minds of the defendants to repay the said sum Rs.85,000/-, the suit notice was issued and he would not proceed with the same and trusting the words of plaintiff, the defendants did not issue any reply.

v) The suit has not been valued properly and it is liable to be



dismissed with cost.

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4. On the basis of the above pleadings of the parties, the following issues have been framed for trial.

i) Whether the suit sale agreement 6.4.2011 is true and genuine?

ii) Whether the suit sale agreement was executed for the purpose of loan transaction as alleged by the defendant?

iii) Whether the suit agreement dated 15.3.2012 is true and genuine?

iv) Whether the plaintiff is ready and willing to perform his part of contract?

v) Whether the defendants have right to sell the entire suit property?

vi) Whether the plaintiff is entitled to the relief of specific performance as prayed for?

vii) Whether the plaintiff is entitled to the alternative relief of refund of advance amount as prayed for?

viii) To what other relief?



5. During the trial, the plaintiff examined himself as PW1 while examine two more witnesses as P.Ws.2 and 3 and marked Exhibits A1 to A7. On the side of the defendants, the second defendant was examined as DW1 while another witness was examined as DW2 and one document was marked as Ex.B1.

6. On analysing the oral and documentary evidence, the Trial Court had decreed the suit for specific performance, however, restricting it to the properties excluding the property covered by Ex.B1. On appeal by the defendants, the first appellate court had, not only confirmed the judgment and decree of the Trial Court, but also, decreed the suit in its entirety including the portion covered under Ex.B1. Aggrieved against the same, the present Second Appeal has been filed by the defendants.

7. The grounds taken by the appellants in the Second Appeal are as under:-

i) The transaction between the plaintiff and the defendants was only a loan transaction and the agreement of sale, Ex.A1 was executed only as a security for the same and not intended to act upon the same,



but, the plaintiff had filed the suit claiming the relief of specific performance and the courts below have erred in granting the relief without properly considering the oral and documentary evidence.

ii) The courts below have erred in ignoring the fact that the defendants have got a sister, who has a share in the suit property and thus, the defendants cannot sell the same on their own without the consent of their sister.

iii) The first appellate court failed to consider in proper perspective the fact that a portion of the suit property was sold to a third party on 13.7.1984 vide Ex.B1, long prior to the alleged agreement of sale and thus the alleged suit agreement of sale, Ex.A1 dated 6.4.2011 is not valid in the eye of law, before granting the decree in respect of the portion covered under Ex.B1 also.

8. Heard Mr.C.Munusamy, learned counsel appearing for the appellants/defendants and Mr.N.Manoharan, learned counsel appearing for the respondent/plaintiff on the above aspects.

9. Having heard the learned counsel appearing for the parties on the issues and perused the materials available on record, this court is



able to see the following aspects:-

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i) An agreement of sale, Ex.A1 had been entered into between the plaintiff and the defendants.

ii) A considerable amount had been paid by the plaintiff to the defendants.

iii) The plaintiff had been put in possession of the suit property.

iv) The defendants have got a sister, who, originally, sought to get impleaded in the suit, however, later she had not evinced any interest and left matter to be decided in her absence.

v) A portion of the suit property was already sold to a third party vide Ex.B1 dated 13.7.1984, however, the agreement of sale, Ex.A1 dated 6.4.2011 had been entered into between the parties for the entire suit property.

vi) The suit was decreed for specific performance excluding the portion covered by Ex.B1 and such exclusion has been removed by the first appellate court while concurring with the findings of the Trial Court in other aspects.

10. Sofar as the agreement of sale, Ex.A1 is concerned, the submission made by the learned counsel for the plaintiff is that it was



intended to be acted upon and it was entered on paying an advance sale consideration and thereupon, the plaintiff was put in possession of the suit property, whereas, the learned counsel appearing for the defendants would contend that it was only a loan transaction and such a document was to be executed at the instance and compulsion of the plaintiff as the defendants were in dire necessity of money for some medical expenses and the plaintiff was occupying the suit property only as a tenant.

11. The above aspects have been well considered by the courts below elaborately taking into consideration the oral and documentary evidence adduced by the parties of either side. The courts below have considered that the signatures found in the sale agreement had been duly admitted by DW1 as having been affixed after reading and understanding the contents and DW1 also admitted that defendants do not have enmity with the plaintiff or the attesting witnesses to the sale agreement. Moreover, it appears that the defendants are educated while the plaintiff is an illiterate person, which aspect has also been taken into consideration by the courts below while disbelieving the version of the defendants that it was only a loan transaction and the



document was executed only as a security. Sofar as possession of the suit property being with the plaintiff, the courts below have rightly disbelieved the version of the defendants that the plaintiff was in possession as a tenant, as an afterthought as such a stand was never taken by the defendants except in the oral evidence.

12. Coming to the aspect that the defendants have got a sister having right over the suit property and the voidability of the agreement of sale executed by the defendants without adding their sister as a party to it, it is seen that the courts below have found that the defendants had already sold a portion of their family property to some other party, of course, without adding the said sister as a party to such document, however, she had not questioned the said sale and even in respect of the present transaction, though she originally wanted to get impleaded as a party to the suit, later she had not shown any interest in prosecuting the matter which probabalises that she might have been sought to be impleaded only at the instance of the defendants to evade the interest of the plaintiff over the suit property. Therefore, this court is of the view that the non-joinder of their sister as a party to the document has been taken as a ground by the



defendants as a dilly-dallying practice and the courts below have rightly rejected the plea of the defendants in this regard.

13. Further, the learned counsel appearing for the defendants would take a feeble stand that a portion of suit property was sold by the defendants much prior in point of time to a third party vide Ex.B1 sale deed and thus intention of the parties in executing the present agreement of sale, Ex.A1 covering the entire suit property is not at all to sell the same and thus, it is not valid in the eye of law.

14. The courts below have appreciated the fact that the plaintiff is an illiterate person while the defendants are educated ones. Whiles, the negligence on the part of the plaintiff while entering into the agreement of sale, Ex.A1 in respect of the entire suit property without following the encumbrance with regard to a portion of the suit property does not writ large. In such circumstances, the Trial Court, having rightly observed that Ex.B1 dated 13.7.1984 evidences the sale of a portion of the suit property already effected by the defendants in favour of a third party, who is the father of DW2, which is much earlier in point of time when compared to Ex.A1 agreement of sale and thus



rightly restricted the decree of specific performance excluding the said portion from the suit property.

15. Further, the learned counsel appearing for the plaintiff would submit that the plaintiff had moved Execution Petition in respect of the suit property excluding the portion covered under Ex.B1 and has not filed any cross appeal in respect of the excluded portion covered under Ex.B1. Such being the case, this court is of the view that without there being any challenge for the said sale by the plaintiff, the excluded portion cannot be considered for granting the relief of specific performance and thereby this court does not find any error in the reasoning given by the Trial Court to arrive at such a conclusion in this aspect. Despite there being a sale deed, Ex.B1 much prior in point of time than the agreement of sale, Ex.A1, the appellate court has erred in decreeing the suit in its entirety including the portion covered under Ex.A1, which is liable to be set aside.

16. Having considered the entire issues in the Second Appeal, this court is of the view that the substantial question of law that arises for consideration is



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"Whether on the facts and in the circumstances of the case, the lower appellate court was right in holding that the plaintiff is entitled to specific performance of the contract including the property covered under Ex.B1?"

and it is answered in favour of the appellant.

17. In the result, the second appeal is allowed in part modifying the judgment and decree of the first appellate court by excluding the portion covered under Ex.B1 from the decree and thereby restoring the judgment and decree of the Trial Court. No costs. The connected Miscellaneous Petition is closed.

19.10.2023.

Index: Yes/No.
Internet: Yes/No.
ssk.

To

1. III Additional District and Sessions Judge,
Erode, Gobichettipalayam.
2. Sub Judge,
Gobichettipalayam, Erode District.
3. The Section Officer,
V.R. Section, High Court, Madras.



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A.D.JAGADISH CHANDIRA, J.

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P.D. JUDGMENT IN
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