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S.A.No.1255 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.06.2023

CORAM

THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

S.A.No.1255 of 2013
and M.P.No.1 of 2013

1. D.Sankarayyah (died)
2. Mrs.Hemalatha
3. Mrs.Jayamma
4. Mrs.V.S.Gayathiri
5. Mr.V.S.Teja

....Appellants

**A1died, A2 to A5 brought on record as legal heirs
of the deceased A1 vide Court Order dated 29.04.2022
made in CMP.No.7876 of 2022 in S.A.No.1255 of 2013.**

Vs.

1. P.K.Babu
2. P.K.Raghu

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the Decree and Judgement passed in A.S.No.18 of 2012, on the file of the Principal District Judge, Tiruvallur dated 20.02.2013, reversing the decree and judgement passed in O.S.No.43 of 2010 on the file of the Sub-ordinate Judge, Tiruttani, dated18.07.2011.



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For Appellants : Mr.M.A.Lakshmipathi

For Respondents : No appearance

JUDGMENT

The above second appeal arises against the Judgement and Decree passed by the Principal District Judge, Tiruvallur, in A.S.No.18 of 2012, dated 20.02.2013, reversing the Judgement and Decree passed by the Sub-Ordinate Judge, Tiruttani, in O.S.No.43 of 2010, dated 18.07.2011.

2. The first appellant herein is the plaintiff and the respondents herein are the defendants in the above suit. The 1st appellant herein is the plaintiff in the suit in O.S.No.43 of 2010 on the file of the Sub Court, Tiruttani, filed against the defendants for the relief of specific performance, directing them to execute the sale deed in respect of the suit properties as per sale agreement dated 19.11.2005.

3. The brief case of the plaintiff is as follows:-

(i) According to the plaintiff, the schedule mentioned properties belonged to defendants. The defendants joined together agreed to sell the



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schedule mentioned properties to the plaintiff in order to meet out their family need and also to discharge some debts. The defendants agreed to sell the schedule mentioned to the plaintiff for a total sale consideration of Rs.4,13,950/- and entered into an agreement of sale on 19.11.2005 and the defendants received a sum of Rs.10,000/- as advance from the plaintiff and agreed to receive the balance of Rs.4,03,950/- from the plaintiff within four months time and to execute the sale deed in favour of the plaintiff. The time mentioned in the agreement of sale is not the essence of contract. The plaintiff even otherwise was always ready and willing to perform his part of the contract and approached the defendants on several occasions to receive the balance sale consideration and to have the sale deed executed in his favour. But ,it is only the defendants who were evasive in their reply and postponed the fulfillment of the terms of agreement of sale.

(ii) Therefore, the plaintiff has issued a notice through his counsel on 13.03.2006 to the defendants asking them to fulfill the terms of the agreement of sale and also to clear the loans outstanding over the schedule mentioned properties. The defendants received the notice and the 2nd defendant alone has chosen to issue a reply through his counsel dated



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18.03.2006 denying the very execution of the sale agreement itself. The 2nd defendant further contended that the suit schedule properties are worth more than Rs.6,00,000/- which clearly reveals that the intention of the defendants in not forthcoming to fulfill the terms of the agreement of sale. The reason for the non-fulfillment of the agreement of sale is nothing but expectation of more amount.

4. The brief case of the defendants is as follows”

According to the 2nd defendants, the 2nd defendant further contended that the suit schedule properties are worth more than Rs.6,00,000/- The contention of the 2nd defendant that he availed a sum of Rs.10,000/- as cultivating expenses from the plaintiff and that he had no intention to sell the suit properties. The plaintiff is even not ready to deposit the balance sale consideration amount of Rs.4,03,950/- Further, they never executed any sale agreement in favour of the plaintiff and there is no necessity for them to execute any sale agreement in favour of the plaintiff. The plaintiff seems to have forged and created a sale agreement in his favour, fraudulently and unjustly. Further, the 2nd defendant was not owner of the property on the date of sale agreement. Hence, the sale agreement is invalid in law.



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5. Before the trial Court, on the side of the plaintiff PW1 to PW5 were examined and Ex.A1 to Ex.A7 were marked . On the defendants side DW1 and DW2 were examined and Ex.B1 to Ex.B3 were marked.

6. The trial Court, after taking consideration the oral and documentary evidence of both sides, decreed the suit in favour of the plaintiff. Aggrieved over the Judgement and Decree of the trial Court. the defendants have preferred an appeal in A.S.No.18 of 2012, wherein, the lower Appellate Court holding that Ex.A1 sale agreement is not enforceable against the defendants and agreement is also suspicious and the evidence of PW4 and PW5 clearly proves that the 2nd defendant is not owner of the property at the time of alleged sale agreement. Thereby, set aside the findings of the trial Court and directed the defendants to return a sum of Rs.10,000/- to the plaintiff with interest. Challenging the said findings of the lower Appellate Court, this appeal filed by the legal heirs of the original plaintiff deceased Sankaraiyyah.

7. Heard the learned counsel for the appellants. No representation for



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the respondents.

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8. The appellant has raised the following substantial questions of law in the Second Appeal:

- 1. Whether the Agreement of Sale executed by the Respondents/Defendants in favour of the Appellant/Plaintiff has to be specifically enforced or not.*
- 2. Whether the land belonging to the Appellant and Respondents are mingled or not.*
- 3. Whether the Plaintiff was ready and willing to perform his part of the Contract.*
- 4. Whether the Plaintiff was ready with the balance Sale consideration or not.*

9. The learned counsel for the appellants submitted that the suit properties belonged to the defendants and jointly agreed to sell the property for a sum of Rs.4,13,950/- and received a sum of Rs.10,000/- as advance within 4 months time to execute the sale deed in favour of the plaintiff and the said sale agreement was marked as Ex.A1. Further, the plaintiff is also ready and willing to perform his part of the contract but the defendants have evasive and not execute the sale deed as per the sale agreement dated 19.11.2005. Therefore, the plaintiff issued a legal notice to the defendants 13.03.2006 and reply notice was given on 18.03.2006, the 2nd defendant



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contended that they were never agreed to sell the property lower sale consideration and they have no intention to sell the property. The defendants never signed together. After getting the signature of the 1st defendant on some wrong premises the plaintiff has gooded this defendant to sign it. There were no witnesses at the time of signing and also contended that the 2nd defendant was not owner of the property at that time of the sale agreement and the sale agreement is fraudulently created by the plaintiff and the plaintiff bound to prove his case by relying his own evidence.

10. On a careful consideration of the materials available on record and the submissions made by the plaintiff (since deceased) before the trial Court, it is seen that the sale agreement was marked as Ex.A1. On a perusal of the records, it reveals that pages 1 and 2 of the sale agreement do not contain the signature of 2nd defendant/Raghu and only at 3rd page he has signed. There is no reason offered on the side of the plaintiff, for such non-signing. The defendants have taken the defence that signatures were forcibly obtained on different occasions and they never jointly signed together in the sale agreement.



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11. Furthermore, another objection of the defendants is that on the date of sale agreement, the 2nd defendant was not the owner of the properties and the same is proved through Exs.A5 and A6 which stand in the name of one Nagendran, who is the son of the 1st defendant. Admittedly, the 2nd defendant has not signed on the alleged sale agreement/Ex.A1 but the plaintiff contended that the properties are joint family properties which belong to the defendants and as co-share stands in the name of the said Nagendran. Even though he has not signed, he is also bound by the agreement signed by his father, but the defendants denied that the properties are not joint family properties and they are separate properties of the said Nagendran in respect of items 1,3,4,5,6 and 10. Hence, the plaintiff is bound to establish that the properties are the joint family properties of the defendants.

12. According to the plaintiff, about 20 years back, the grand father of PW5 orally sold the properties to the 2nd defendant and about 2 year, back, at the request of the 2nd defendant, PW5 had executed the sale deed in favour of the 2nd defendant under Ex.A6. The alleged oral sale also has not



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been proved by the plaintiff through any other independent witness under

Section 17 of Registration Act. It is settled law that in respect of more than Rs.100/- value of immovable properties, the same can be conveyed only by engrossing on the requisite non-judicial stamp paper and the registration is compulsory. Hence, the alleged oral sale contended by the plaintiff, is invalid under law.

13. Furthermore, PWs4 and 5 also proposed that, based upon the oral sale given by the grand-father, they executed the sale deed in favour of the 1st defendant's son Nagendran. On a perusal of the recital of sale deeds Ex.A5 and Ex.A6, it is clear that there is no mention of the earlier alleged oral sale. As per the legal heirs of Sankarayyah, they were enjoying the property and they were sold to the 1st defendant's son Nagendran for valuable consideration.

14. As discussed above, the alleged oral sale pleaded by the plaintiff, has not been proved through valuable material evidence. That apart, there is no pleading in the plaint with regard to the alleged oral sale and without such pleading, the plaintiff is not entitled to adduce oral evidence. All these



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facts are rightly appreciated by the learned lower Appellate Judge.

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15. Hence, in respect of items 1,3,4, 5, 6 and 10, the son of the 1st defendant is the owner of the properties but he has not signed the sale agreement/Ex.A1. So, it cannot be enforced against the defendants.

16. With regard to the first defendant, there is no proof on the side of the plaintiff that the first defendant is having right over the suit properties. Moreover, as per the recitals of the document, the first defendant had not agreed to sell the properties to the plaintiff. Even, the plaintiff also contended that the second defendant agreed to sell the properties. As stated above, the second defendant was not the owner of the properties on the date of the sale agreement/Ex.A1. Hence, the sale agreement could not be enforced in respect of the first defendant. Therefore, based on Ex.A4/sale deed , the plaintiff contended that some of the properties belongs to the second defendant and as per the boundary description in the plaint, the second defendant owned 1.29 acres in Survey Number 4/2F, but in the plaint schedule the extent of properties is totally different and not properly described.



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17. Therefore, the second defendant is not the owner of the properties on the date of sale agreement/Ex.A1. Hence, it cannot be enforced against the second defendant. The plaintiff failed to establish that the properties are the joint family properties of the defendants. Hence, the sale agreement/Ex.A1 is not enforceable against the defendants and the learned lower Appellate Judge rightly analysed the evidence and concluded those aspects with costs, which needs no interference. Accordingly, substantial question of law 1 and 2 are answered.

18. As the agreement itself, is not enforceable in law, there is no need to discuss about the encroachment and the readiness and willingness on the part of the plaintiff to execute the document. Even otherwise, still the plaintiff has not deposited the balance sale consideration into the Court. Furthermore, the conduct of the plaintiff and nature of Ex.A1, clearly reveals that it was fraudulently created by the plaintiff. Hence, all the facts are rightly discussed by the learned lower Appellate Judge which needs no interference by this Court. Accordingly, the substantial question of law 3 and 4 are answered,



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WEB COPY 19. The following authorities are relied by the learned counsel for the appellants:-

(i) *Silla Chandra Sekharam vs Ramachandra Sahu AIR 1964*

SC1789 wherein paragraph 22 and 23 has held as follows:-

"22.It has also been urged for the respondent that clause (a) of Section 18 of the Act applies only when the person contracting to sell or let has imperfect title to the property and not when he is not entitled to the property as is the case in this suit, as Ramchandra had no title to half the house. We do not consider it necessary to decide this question as we are of opinion that it cannot be said that Ramchandra had no interest in half the house. He had interest in the entire house and so had his mother, though in case of actual partition the interest of each would have been fixed at half. If Ramchandra was not competent to pass title with respect to the entire house during the life time of his mother, he can be said to have imperfect title to it.

23.We are therefore, of opinion that on the death of the mother, Ramchandra obtained title to and interest in the portion of the house which on a private partition subsequent to the contract to sell had taken place between Ramchandra and his mother and that therefore he has to make good his contract out of the property he acquired subsequent to the contract to sell."

(ii) *Kasthuri vs R.Hemalatha in 2022(2) CTC 246:-*

Registration Act, 1908 (16 of 1908), Section 17 & 49 [as amended by Central Amendment Act 48 of 2001 and Tamil Nadu Amendment Act 29 of 2012] ---- Specific Performance of unregistered Sale Agreement ---- Receipt of unregistered Agreement in evidence ---- Whether maintainable --- Held, maintainable ---- under proviso to Section 49, as it now stands, unregistered document affecting immovable property which is compulsorily registrable, can be received: (i) as evidence of Contract in Suit for Specific Performance; and (ii) as evidence of collateral transaction which is not required to be effected by registered instrument --- All Agreement of Sale now compulsorily registrable under Section



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17(1)(g) --- But unregistered Sale Agreement can be received in evidence in Suit for Specific Performance as provided under Proviso to Section 49 --- Civil Revision Petition allowed --- Document shall be received in evidence in Suit for Specific Performance, which falls within 1st Exception carved out in Proviso to Section 49.

. (iii) ***In Mir Abdul Hakeem Khan vs Abdul Mannan Khadri (AIR***

1972 ANDHRA PRADESH 178 where paragraphs 8, 10, 13 and 16 has

held as follows:-

"8. In our view, it is unnecessary to go into these questions.

10. The reason for the absence of or had defective title is obvious. It is settled law that if a person executes an agreement to sell property, the vendor is not entitled to put forward, in a suit for specific performance by the purchaser the defence that the vendor had no title. It is open to the purchaser to set up a defence that the vendor had no title or has defective title in a suit for specific performance by the vendor. But the vendor cannot set up defective in his own title as a defence in a suit for specific performance by the purchaser. In [Balushami Aiyar v. Lakshmana Aiyar, ILR 1921 Mad 172 \(FB\)](#) it was observed:

"Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out to the agreement there is no necessity to determine the question of the vendor's title and the fact that the title which the purchaser may acquire might be defensible by a third party is no ground for refusing specific performance if the purchaser is willing to take such title as the vendor has. But where a party seeking specific performance seeks to bind the interests of persons not parties to the contract alleging grounds which under Hindu law would bind their interests and enable the vendor to give a good title as against them and makes them parties, it is difficult to see how the question as to the right of the contracting party to convey any interest except his own can be avoided and a decree passed, the effect of which will merely be to create a multiplicity of suits."

In this case there is no question of the plaintiff attempting to bind the interest of persons not parties to the contract and making them parties, the only party in this case being the defendant. The observations of the Full Bench were followed in [Muni Samappa v. Gurunanjappa](#), . In that case, in



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a suit on foot of an agreement to sell a house imploding only the two executants, it was held that there was no necessity to determine the question of the vendor's title and the fact that the title which the purchaser may acquire might be defeasible by the sons of defendant was no ground for refusing specific performance if the purchaser was willing to take such title as the vendors had. In the same manner it is unnecessary in this suit which is filed only against the defendant who has executed the agreement and in whose name the patta of the lands stand, to go into the question whether his title is defective or whether the property belongs only to the partnership of which he is a partner.

13. We are therefore, of the view that the question whether the property belonged to the partnership and not to the defendant ought not to have been gone into and the trial court below was wrong in refusing specific performance to the purchaser on the ground that the vendor's title was defective.

16. *In Silla Chandra v. Ramachandra Sahu*. (AIR 1964 SC 1989) the Supreme Court had to consider a case where the manager of a family consisting of himself and his mother agree to sell certain property and further agreed that he and his mother would execute a sale-deed in favour of the purchaser within a period of one year. On his failing to do so the purchaser filed a suit for specific performance. The Trial Court held that the sale was not for legal necessity and therefore decreed the suit in part and directed the vendor to execute the sale deed in respect of his interest. The purchaser preferred an appeal to the High Court and during the pendency of the appeal the mother died. It was held by the Supreme Court that the purchaser had interest in the house along with his mother and on the death of the mother, the purchaser obtained title to and interest also in that portion of the house which. on a private partition, partition subsequent to the contract to sell has taken place between him and his mother and therefore under [section 18](#) (a) he had to make good his contract out of the property he acquired subsequent to the contract to sell. They also held that the expression "subsequently to the sale or lease" means 'subsequently to the contract to sell.'

In view of these decisions of the Supreme Court we are of the view that [Section 18](#) (a) applies to the facts of the case and the plaintiff is entitled to specific performance of the suit agreement on this ground also."

The above Judgements are not applicable to the facts of the present case.



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20. Accordingly, the second appeal is dismissed as devoid of merits, confirming the Judgment and Decree dated 20.02.2013 passed by the lower Appellate Court in A.S.No.18 of 2012 and the Judgement and Decree dated 18.07.2011 passed by the trial Court in O.S.No.43 of 2011 is set aside, accordingly, suit is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

21.06.2023

Index :Yes/No

Speaking Order : Yes/No

Neutral Citation : Yes/No

msrm

To

1. The Principal District Judge, Tiruvallur.
2. The Sub-ordinate Judge, Tiruttani,
3. The Section Officer,
V.R,Section



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T.V.THAMILSELVI, J.

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