IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2023

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

A.S.No.257 of 2017
and
C.M.P.No.10059 of 2022

Latha Kasthuri @ Gayathri ... Appellant

Vs.

R.Rukumani ... Respondent

Prayer: Appeal Suit is filed under Section 96 read with Order XLI Rule 1 of the Civil Procedure Code, to set aside the judgement and decree dated 25.10.2016 in O.S.No.21 of 2011 on the file of II Additional District Judge, Salem.

For Appellant : Mr.R.Nalliyappan

For Respondent : Mr.L.Rajendran

J U D G M E N T

The Appeal Suit on hand instituted against the judgment and decree dated 25.10.2016 passed in O.S.No.21 of 2011.

2. The defendant is the appellant and the respondent instituted a Suit for specific performance. The plaint averments state that on 02.08.2010, one Late Mr.R.Subramaniam, husband of the defendant had entered into a contract of sale with the plaintiff in respect of the Suit Property and executed an agreement of sale in favour of the plaintiff. The sale consideration was fixed at Rs.10,00,000/- and an advance of Rs.7,00,000/- was paid on the same day. Time for execution was fixed as six months. The plaintiff was ready and willing to perform her part of contract and she has got the balance amount ready with her. The plaintiff made several demands and the Late Mr.R.Subramaniam husband of the defendant had not executed the sale deed in favour of the plaintiff. Meanwhile, he expired on 26.09.2010. The defendant is a widow of Late Mr.R.Subramaniam. When the plaintiff approached the defendant to execute the sale deed in her capacity as the sole legal heir of Late Mr.R.Subramaniam, she had refused

to execute the sale deed and thus, the plaintiff issued a notice and thereafter, instituted a Suit for specific performance.

3. The defendants denied the avernments in the plaint by filing a written statement, which state that the Suit was instituted based on the fabricated agreement for sale, which was allegedly executed by the deceased husband of the defendant on 02.08.2010. There is no agreement entered into between the defendant's husband and the plaintiff and there was no necessity for the family of the defendant to sell the property during the relevant point of time. The husband of the defendant died on 26.09.2010. All other averments in the plaint were specifically denied by the defendant in the written statement. It is further stated in the written statement that the Suit Schedule Property was worth more than Rs.30,00,000/- and there was no necessity for the deceased husband of the defendant to enter into an agreement for a meagre sum of Rs.10,00,000/- to the sell the Suit Schedule Property. The Signature contained in the agreement is not that of the husband of the defendant. The notice issued by the plaintiff was properly replied. The defendant is having no issue, hence with an idea to cheat the defendant and to grab the property the agreement has been created by the

plaintiff. The plaintiff is none other than the sister of the defendant's husband. Thus, the plaintiff is not entitled for the relief of specific performance.

4. Based on the pleadings, the Trial Court formulated the following issues:

1. *Whether the defendants' husband late.R.Subramaniam had entered into a sale agreement with the plaintiff on 02.08.2010 in respect of the suit property?*
2. *Whether the sale agreement dated 02.08.2010 is a forged documents?*
3. *Whether the plaintiff is entitled for the relief of specific performance or return of advance amount as prayed for?*
4. *Whether the plaintiff is entitled for the relief of permanent injunction as prayed for?*
5. *To what other relief if any the plaintiff is entitled?*

5. On the side of the plaintiff, PW1 to PW4 were examined and Ex.A1 to Ex.A11 were marked. On the side of the defendants, DW1 and Dw2 were examined and Ex.B1 to Ex.B9 were marked.

6. With reference to the issue Nos.1 and 2, the Trial Court considered the agreement on sale i.e., Ex.A1 document and further considered the fact that the husband of the defendant, who executed the sale agreement died on 26.09.2010. However, the Trial Court found that the defendant had not examined the suit sale agreement and had taken a stand that the sale agreement was not executed by her husband Late Mr.R.Subramaniam. In view of the defence taken by the defendant that the Suit sale agreement was not executed by her husband, the Trial Court examined PW1 and one S.K.Venkatachalapathy R.Sampath Kumar, attestors of the suit sale agreement as PW2 and PW3. PW4 was an Advocate, who prepared the suit sale agreement. Considering the deposition of the PW1 to PW4, the Trial Court formed an opinion that the suit sale agreement Ex.A1 was executed by the plaintiff and the husband of the defendant Late Mr.R.Subramaniam. Even though the suit sale agreement was written in a plain paper without affixing stamp duty, the plaintiff after obtaining permission from the Court affixed a stamp duty of Rs.20/- and paid a sum of Rs.200/- as penalty. Permission was granted by the Court to pay the stamp duty under the provisions of the Indian Stamp Act.

7. The finding of the Trial Court with issue Nos.1 and 2 reveals that the deceased Mr.R.Subramaniam had executed the 'Will' in favour of the defendant and if he really intended to sell the property to the plaintiff, he would have not executed the 'Will' in favour of his wife. In this context, the defendant had produced the 'Will' dated 03.02.2010 executed by the deceased Mr.R.Subramaniam. In this regard, the Trial Court drew an inference by stating that mere execution of 'Will' by the husband of the defendant cannot be held as a bar for executing suit sale agreement and there is no provision to do so and thus, the suit sale agreement is to be taken into consideration for the purpose of deciding the issues. Accordingly, the Trial Court formed an opinion that the suit sale agreement Ex.A1 document is true and proved by the plaintiff.

8. The learned counsel for the appellant contended that nowhere in the findings of the Trial Court nor in the deposition of the PW1 to PW3, there is a whisper of passing of the sale consideration to the husband of the defendant Late Mr.R.Subramaniam. The mode of payment of consideration was also not proved by the plaintiff before the Trial Court. More so, all the attestors in the suit sale agreement are the close relatives of the plaintiff and

the alleged sale agreement was executed in the house of the plaintiff and no way the defendant had knowledge about the execution of the sale agreement by her husband Late Mr.R.Subramaniam.

9. PW1 to PW3 deposed before the Trial Court that the suit sale agreement was executed in a stamp paper in written form. However, the marked document Ex.A1 is a typed document in a white paper.

10. The deposition of the PW4 reveals that he is an Advocate, who prepared the suit sale agreement, but no reason has been stated why the suit sale agreement was typed in a white paper without affixing any stamp. If at all a suit sale agreement is prepared by the lawyer, normally it would have been prepared in stamp paper. In the present case the suit sale agreement admittedly was written in a white paper without stamp duty, which was paid subsequently before the Trial Court after getting permission. Therefore, a doubt arises whether the suit sale agreement was properly prepared by the lawyer, who deposed before the Trial Court as PW4.

11. That apart, the deposition of PW1 to PW3 reveals that the suit sale agreement was prepared in a stamp paper in the residence of the

plaintiff. More specifically the witnesses deposed that the stamp paper was purchased in the name of PW1 plaintiff and thereafter, it was prepared. Thus, the deposition of the PW1 to PW3 and PW4 are contradictory, which would establish that the suit sale agreement was not genuinely prepared.

12. The learned counsel for the appellant brought to the notice of this Court that the Trial Court passed an order to send the Ex.A1 document for forensic examination in I.A.No.111 of 2013. However, the plaintiff has not taken any steps to send the document for forensic examination. This would also reveal that the plaintiff had prepared the suit sale agreement for the purpose of grabbing the property belonging to her own brother, who died and further with an intention to deprive the defendant from possessing the property.

13. The Trial Court has failed to consider the self contradictions in the statements of PW1 to PW3 and PW4, which all are vital. If at all, the suit sale agreement was prepared as per the deposition of PW1 to PW3, then question arises, why Ex.P1 document is in plain paper without stamp. PW4 states that he prepared the suit sale agreement in a typing centre and in such

circumstances it is not stated why the lawyer has not typed the suit sale agreement in a stamp paper. All these contradictions would show that the plaintiff has not established the suit sale agreement to the satisfaction of the Trial Court for the purpose of granting the relief of specific performance.

14. The Trial Court omitted to consider the contradictions in the statement of witnesses and further failed to consider the omission of the plaintiff in not sending the Ex.A1 document / suit sale agreement for forensic examination. Therefore, this Court is of the considered opinion that the findings recorded by the Trial Court for issue one and two are perverse and not in consonance with the documents and deposition of the witnesses, more specifically, PW1 to PW4. Thus, issue Nos.1 and 2 are answered against the plaintiff.

15. With reference to issue No.3 regarding entitlement of the plaintiff for the relief of specific performance or return of advance amount, the Trial Court again relying on the deposition of the witnesses arrived at a conclusion that the agreement was held proved. But the plaintiff is entitled for the alternate relief of return of the advance amount with interest.

However, the Trial Court declined to grant the relief of specific performance on the ground that the defendant has no other property except the suit property and it is the only asset for her livelihood. There is no document to show the present market value of the suit property. However, the Trial Court drew an inference that the market value of the suit property would be considerably increased on account of efflux of time and therefore, the relief of specific performance was denied and the alternate relief to refund the advance amount with an interest of 6% per annum was granted.

16. In a Suit for specific performance, the plaintiff has to primarily prove that the suit sale agreement was validly executed for consideration. In the event of failure to establish sale agreement to the satisfaction of the Court, then no relief can be granted. In the present case, the deposition of the witnesses PW1 to PW4 would reveal that there is no whisper about passing on the sale consideration to the husband of the defendant Late.Mr.R.Subramaniam. It would be insufficient, if the genuinity of the agreement alone is proved but the sale consideration passed on to the seller also to be established for the relief of specific performance. The payment details or the mode of payment are neither deposed by the witnesses nor

proved through any other documents. In the absence of establishing passing of consideration, the Trial Court ought not to have arrived at a conclusion that the suit sale agreement was executed properly and thus, the plaintiff is entitled for the alternate relief for refund of advance.

17. In a contract, it is not only the offer and acceptance, to be established. Consideration paid is also to be proved beyond any pale of doubt. If any one of the ingredients are missing then the plaintiff is not entitled for the relief of specific performance. In the present case, the attestors are interested witnesses as far as the plaintiff is concerned. The defendant is the wife of the plaintiff's deceased brother and therefore, there is every reason to believe that the plaintiff would have made an attempt to take away their family property, which was originally allotted to the husband of the defendant Late. Mr.R.Subramaniam. In view of the nature of relationship between the deceased Mr.R.Subramanian and the plaintiff and the attestors, this Court has to form an opinion in the absence of proving the suit sale agreement and the payment of consideration beyond any pale of doubt, the Trial Court ought not to have granted the alternate relief for refund of the advance amount with interest. More specifically, when the

passing on consideration had not been proved, there is no reason to grant the relief to refund the advance amount. Thus, the plaintiff is not entitled for any relief.

18. That apart, even at the time of filing of written statement, the defendant has stated that the value of the property was about Rs.30,00,000/- and the suit sale agreement was executed for Rs.10,00,000/-. The plaintiffs have not rebutted the said contention by producing any evidence regarding the market value of the suit property. Therefore, the Trial Court has rightly considered that the plaintiff is not entitled for the relief of specific performance, but failed to consider the fact that passing on the sale consideration to the husband of the defendant Late Mr.R.Subramaniam was not proved. Therefore, granting of the alternate relief for refund of the advance amount is perverse and not based on any evidence available on record.

19. In view of the facts and circumstances, the appellant is entitled to succeed. Accordingly, the judgement and decree dated 25.10.2016 passed in O.S.No.21 of 2011 is set aside and consequently, the Appeal Suit in A.S.No.257 of 2017 stands allowed. No costs. Connected Miscellaneous Petition is closed.

13.02.2023

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Index : Yes
Speaking order
Neutral Citation : Yes

To

The Judge,
II Additional District Court,
Salem.

S.M.SUBRAMANIAM, J.

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